

THE REMEDY OF LAST RESORT

NICOLE HAAS*

I. INTRODUCTION

The Fourth Amendment to the United States Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”¹ If evidence is seized in violation of the Fourth Amendment, a court may apply the exclusionary rule as a remedy for a defendant seeking to suppress the evidence.² This remedy prevents the government from introducing evidence obtained in violation of the Fourth Amendment into its case-in-chief.³ However, excluding evidence is not the appropriate remedy for every Fourth Amendment violation.

The exclusionary rule has long been held as a remedy of last resort. This is based on the harsh consequences that often follow its application.⁴ A major adverse consequence includes prohibiting the use of illegally obtained evidence at trial, which risks the release of dangerous criminals into society if such evidence cannot be used against them.⁵ Therefore, the exclusionary rule remedy should be used only in limited and extreme circumstances, as many courts have made clear throughout history.⁶

The exclusionary rule should not be applied in circumstances where a police officer, federal agent, or other law enforcement officer executes a valid warrant but fails to knock and announce his presence.⁷ This is evident, most importantly, by the Supreme Court’s decision in *Hudson v. Michigan*,

* Widener University Delaware Law School, J.D. 2017. The author would like to thank her family for their tremendous love and support. Special thanks to the *Widener Law Review* Executive and Editorial Boards for their help and guidance throughout this process.

¹ U.S. CONST. amend. IV.

² *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

³ *See, e.g., id.* (holding that the exclusionary rule prohibits the government from introducing illegally obtained evidence in its case-in-chief).

⁴ *See, e.g., United States v. Jefferson*, 906 F.2d 346, 352 (8th Cir. 1990) (Bowman, J., concurring) (“The ordinary law-abiding citizen, I believe, would think the officer should be commended for his fine work, and the cocaine dealers punished. Instead, because we hold . . . that a ‘seizure’ within the meaning of the Fourth Amendment occurred before the officer had formed an objectively reasonable basis for suspecting the defendants of criminal activity, the exclusionary rule requires that the evidence be suppressed. The defendants thus exit unpunished, free to continue dealing illegal drugs”).

⁵ *Hudson v. Michigan*, 547 U.S. 586, 595 (2006) (commenting that “the risk of releasing dangerous criminals into society” is a “grave adverse consequence that exclusion of relevant incriminating evidence always entails . . .”).

⁶ *See infra* Part II.B.

⁷ *See generally Hudson*, 547 U.S. at 589-90 (discussing that the Fourth Amendment requires officers to announce their presence before entering a dwelling).

which held that the suppression of evidence is not warranted where an officer fails to knock and announce his presence.⁸ Many subsequent lower courts have held that *Hudson* is controlling when analyzing all knock-and-announce violations, regardless of whether the police were executing a search or arrest warrant.⁹ However, the circuits are currently split as recently illustrated by *United States v. Weaver*, where the D.C. Circuit Court of Appeals held that *Hudson* is narrowed to situations in which an officer violates the knock-and-announce requirement while executing a search warrant, but not an arrest warrant.¹⁰

There are other remedies and disciplinary alternatives to the exclusionary rule that would be less harsh to society and the criminal justice system, and more beneficial in deterring law enforcement officers from violating the knock-and-announce requirement. The purpose of this note is to argue that *Hudson* is the controlling federal law that circuit courts should follow when analyzing violations of the knock-and-announce requirement when a search or arrest warrant is executed, and that the *Weaver* court was wrong in finding otherwise.

Part II discusses the Fourth Amendment in relation to the warrant requirement, the exclusionary rule remedy, and the knock-and-announce requirement. This section also discusses *Hudson*, as well as the Supreme Court's analysis and reasoning behind its decision that excluding evidence is not warranted when an officer violates the knock-and-announce requirement. Furthermore, this section addresses some lower court decisions and how they have interpreted the *Hudson* rule and its relation to search and arrest warrants through use of legislative history.

⁸ *Hudson*, 547 U.S. at 594.

⁹ See, e.g., *United States v. Smith*, 526 F.3d 306, 311 (6th Cir. 2008) (stating that regardless of whether there was a knock-and-announce violation in the execution of a search warrant, the exclusionary rule does not apply); *United States v. Ankeny*, 502 F.3d 829, 835-36 (9th Cir. 2007) (holding that *Hudson* should not be limited to just search warrants, stating that “[t]he Supreme Court made it clear that . . . the exclusionary rule is inapplicable to knock-and-announce violations” (internal quotation marks omitted)); *United States v. Pelletier*, 469 F.3d 194, 201 (1st Cir. 2006) (holding that the *Hudson* Court’s reasoning mandates an extension to knock-and-announce violations committed while executing an arrest warrant). See also *In re Frank S.*, 47 Cal. Rptr. 3d 320, 324 (Cal. Ct. App. 2006) (“Defendant’s contention that *Hudson* applies only where the police have a search warrant is not persuasive. *Hudson* held that a violation of the knock-and-announce rule does not justify application of the exclusionary rule. The rule turns on the nature of the constitutional violation at issue, not the nature of the police’s authority for entering the home.” (citations omitted)); *State v. Cable*, 51 So. 3d 434, 441 (Fla. 2010) (stating that in the arrest warrant context, “[u]nder *Hudson*, it is clear that the exclusionary rule does not apply to Fourth Amendment knock-and-announce violations”). But see *Berumen v. State*, 182 P.3d 635, 642 (Alaska Ct. App. 2008) (stating that in an arrest warrant case, the exclusionary rule applies to knock-and-announce violations).

¹⁰ *United States v. Weaver*, 808 F.3d 26, 45 (D.C. Cir. 2015).

Part III discusses the D.C. Circuit Court opinion, *Weaver v. United States*, and how the court was wrong in deciding that *Hudson* was narrowed to search warrants. Additionally, this section discusses the district court's holding and the reasoning as to why there is tension between the district court and the D.C. Circuit Court.

Finally, Part IV explains why the *Weaver* decision was wrong, and proposes a resolution to the circuit split that will be less harsh than the exclusionary rule, more beneficial in deterring law enforcement from violating the knock-and-announce requirement, and more useful to the criminal justice system and society.

II. BACKGROUND

Part II begins by explaining the warrant requirement of the Fourth Amendment. It then describes the history of exclusionary rule jurisprudence, and the benefits and detriments of the remedy. Next, it explains the history of the knock-and-announce requirement. Lastly, this section ends with a discussion of *Hudson v. Michigan*, where the Supreme Court determined that the exclusionary rule is not the appropriate remedy for knock-and-announce violations.

A. The Warrant Requirement

Searches and seizures that are conducted without a warrant are presumed to be unreasonable unless one of the many exceptions to the warrant requirement applies.¹¹ For searches and seizures that are conducted pursuant to a warrant, “probable cause represents the threshold of proof that must be satisfied before” the search or seizure is carried out.¹² This means that the government must prove “a factually-based interest in people, places or things *before* using its power to disturb them.”¹³ Probable cause is shown by an applicant who swears to the truth of their statements and declares with specificity the objects or persons that are sought to be searched or seized.¹⁴ Additionally, a neutral observer often in the form of a magistrate judge must determine whether the probable cause and specificity requirements are met before signing the warrant.¹⁵ The probable cause standard of proof and the

¹¹ *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment,” and “are subject only to a few specifically established and well-delineated exceptions”).

¹² STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 106 (10th ed. 2014).

¹³ *Id.*

¹⁴ *Id.* at 106-07.

¹⁵ *Id.* at 107 (“This is one way in which the Amendment operates to prevent unjustified searches and seizures; the presumption is that a magistrate will make fewer errors than the

neutral magistrate both protect the public against unjustified searches and seizures.¹⁶

Rule 41(e)(2)(A) of the Federal Rules of Criminal Procedure sets forth the basic information that must be included in a warrant. This rule states that a warrant to search for and seize a person or property “must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned.”¹⁷ When looking at this rule, along with the legal definitions of arrest and search warrants, there is little distinction between them. Both warrants allow a law enforcement officer to enter a dwelling if certain requirements are met, such as the probable cause standard of proof. For example, *Black’s Law Dictionary* defines an arrest warrant as “[a] warrant issued by a disinterested magistrate after a showing of probable cause, directing a law-enforcement officer to arrest and take a person into custody.”¹⁸ By comparison, a search warrant is defined as “[a] judge’s written order authorizing a law-enforcement officer to conduct a search of a specified place and to seize evidence.”¹⁹

B. The Exclusionary Rule Remedy

For many centuries, lawsuits either for damages in a trespass action or for a return of goods in a replevin action were the only remedies available to victims of Fourth Amendment violations.²⁰ However, the Supreme Court established the exclusionary rule in *Weeks v. United States*, where it was held that evidence obtained in violation of the Fourth Amendment cannot be used at trial in federal courts.²¹ The Court reasoned that “if evidence obtained in violation of the Fourth Amendment could be used against a criminal defendant, then ‘the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value.’”²² In other words, the exclusionary rule was designed primarily to deter police misconduct. This holding, however, “was limited to cases where the illegal search was conducted by federal officers and the evidence was sought to be admitted in a federal criminal proceeding” against a defendant.²³

officer engaged in the often competitive enterprise of ferreting out crime.”) By placing a magistrate between the police and the suspect, the Fourth Amendment also “gives the neutral magistrate an opportunity to refuse a warrant . . . on the ground that a search and seizure would be unreasonable under the circumstances.” SALTZBURG & CAPRA, *supra* note 12, at 107.

¹⁶ *Id.*

¹⁷ FED. R. CRIM. P. 41(e)(2)(A).

¹⁸ *Arrest Warrant*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁹ *Search Warrant*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁰ SALTZBURG & CAPRA, *supra* note 12, at 545.

²¹ 232 U.S. 383, 398 (1914).

²² SALTZBURG & CAPRA, *supra* note 12, at 545 (quoting *Weeks*, 232 U.S. at 393).

²³ *Id.* at 545-46.

Today, the exclusionary rule applies to states. In *Mapp v. Ohio*, the Supreme Court held that “evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.”²⁴ One of the main focuses of the Court was “the imperative of judicial integrity.”²⁵ The Court reasoned that permitting the exclusionary rule to apply to states “gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.”²⁶

Generally, there are four principles that provide the foundation for the exclusionary rule: (1) it “preserves judicial integrity, by insulating the courts from tainted evidence”; (2) it “prevents the government from profiting from its own wrong”; (3) it “is not costly, because it only excludes what should never have been obtained in the first place”; and (4) it “is necessary to deter police misconduct.”²⁷ Although the exclusionary rule may be commonly used, there are a number of reasons why evidence obtained in violation of the Fourth Amendment will not be suppressed. One of those main exceptions is the good faith exception, which provides that evidence obtained in violation of the Fourth Amendment will be admissible at trial if the police had good faith reliance on a warrant later found invalid.²⁸

C. The Knock-and-Announce Requirement to the Fourth Amendment

The knock-and-announce requirement is a common-law principle that is codified in 18 U.S.C. § 3109, which requires police to knock and announce their presence before attempting to enter a home.²⁹ In *Wilson v. Arkansas*, the Supreme Court held that the knock-and-announce requirement was a “command of the Fourth Amendment.”³⁰ The Court examined the common-law history of searches and seizures and found that the reasonableness of a search of a dwelling may depend “in part on whether law enforcement officers announced their presence and authority prior to entering.”³¹

²⁴ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

²⁵ *Id.* at 659 (citation omitted). “The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.” *Id.*

²⁶ *Id.* at 660.

²⁷ SALTZBURG & CAPRA, *supra* note 12, at 553 (citing Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 938, 941 (1983)).

²⁸ *United States v. Leon*, 468 U.S. 897, 921-22 (1984).

²⁹ 18 U.S.C. § 3109 (2012) (“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.”).

³⁰ 514 U.S. 927, 931 (1995) (citation omitted).

³¹ *Id.*

Therefore, in some situations, “an officer’s unannounced entry into a home might be unreasonable under the Fourth Amendment.”³² Writing for the majority, Justice Thomas pointed out that there are some circumstances where an unannounced entry would be appropriate, such as a “hot pursuit of a suspect, the risk of destruction of evidence, and the safety of officers.”³³

Many courts have also approved “no-knock warrants,” which are warrants that excuse the necessity to knock and announce.³⁴ No-knock warrants can be issued when an officer demonstrates in advance conditions at a dwelling that could excuse the knock-and-announce requirement.³⁵ However, “there is no *requirement* that an officer obtain a no-knock warrant, even if he knows that the conditions at the premises would justify such a warrant”³⁶

D. The Supreme Court Makes a Decision

In *Hudson v. Michigan*, the police had a valid warrant to search Hudson’s house for drugs and firearms.³⁷ While conducting the search, the police found large quantities of drugs, cocaine in Hudson’s pocket, and a loaded gun inside the chair in which he was sitting.³⁸ Though the police had a valid warrant, the question for the court concerned the officers’ entry into the house.³⁹ The police announced their presence and waited no more than five seconds before turning the knob to the unlocked front door and entering the home.⁴⁰ Hudson argued that this was a violation of his Fourth Amendment rights, and moved to suppress the evidence.⁴¹ The Supreme Court, in an opinion written by Justice Scalia, did not answer the questions of when the knock-and-announce rule should apply, or how long police should wait before entering a dwelling.⁴² The issue that the Court analyzed was the remedy for knock-and-announce violations.⁴³

The Court stated that the “[s]uppression of evidence . . . has always been our last resort, not our first impulse.”⁴⁴ The Court also reiterated that the

³² *Wilson*, 514 U.S. at 934.

³³ SALTZBURG & CAPRA, *supra* note 12, at 174 (citing *Weeks v. United States*, 232 U.S. 383, 396 (1914)).

³⁴ *Id.* at 178.

³⁵ *Id.* at 179. “When a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a ‘no-knock’ entry.” *Id.* (citing *United States v. Banks*, 540 U.S. 31, 36 (2003)).

³⁶ *Id.*

³⁷ 547 U.S. 586, 588 (2006).

³⁸ *Id.*

³⁹ *Id.* (“This case is before us only because of the method of entry into the house.”).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 590.

⁴³ *Hudson*, 547 U.S. at 590.

⁴⁴ *Id.* at 591.

exclusionary rule is “to be applicable only ‘where its remedial objectives are thought most efficaciously served’—that is, ‘where its deterrence benefits outweigh its substantial social costs.’”⁴⁵ The Court found that the costs associated with excluding the evidence against Hudson were considerable, in part because recognizing a “massive remedy” for knock-and-announce violations would lead to constant allegations that the rule was not observed, while claims supporting a no-knock entry would be challenged for inadequate support.⁴⁶ Furthermore, the Court found that police officers would refrain from timely entering after knocking and announcing, which would give a suspect an opportunity to destroy evidence or harm an officer.⁴⁷

The Court used a two-prong test to determine whether exclusion is appropriate when an officer violates the knock-and-announce rule. The first prong is a “but-for” causation analysis.⁴⁸ The Court found that “the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence” because “[w]hether that preliminary misstep occurred *or not*, the police would have executed the warrant . . . and would have discovered the [evidence] inside the house.”⁴⁹ Additionally, the *Hudson* Court found that the knock-and-announce violation did not expand the breadth of the search.⁵⁰ This means that the officers were still where they were lawfully permitted to be. Further, the Court stated that even if the illegal entry could be characterized as a but-for cause of finding the evidence, “we have ‘never held that evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police.’”⁵¹

The second prong of the test that the Court uses involves an attenuation analysis.⁵² The Court stated that attenuation can occur either “when the causal connection is remote,” or when “the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.”⁵³ Additionally, the Court discussed the interests protected by the knock-and-announce requirement, which do not include “the shielding of potential evidence from the government’s eyes.”⁵⁴

⁴⁵ *Hudson*, 547 U.S. at 591 (quoting *Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998); *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

⁴⁶ *Id.* at 595, 599.

⁴⁷ *Id.* at 595 (“If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others.”).

⁴⁸ *Id.* at 592 (“In other words, exclusion may not be premised on the mere fact that a constitutional violation was a ‘but-for’ cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression.”).

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *Hudson*, 547 U.S. at 592 (quoting *Segura v. United States*, 468 U.S. 796, 815 (1984)).

⁵² *Id.* at 592-93 (“Rather, but-for cause, or causation in the logical sense alone, can be too attenuated to justify exclusion.” (internal quotation marks omitted)).

⁵³ *Id.* at 593.

⁵⁴ *Id.*

Some of the interests that the Court listed were protection from violence by a surprised resident,⁵⁵ protection of property, and the protection of “privacy and dignity that can be destroyed by a sudden entrance.”⁵⁶ The Court held that “[s]ince the interests that *were* violated in this case [had] nothing to do with the seizure of evidence, the exclusionary rule is inapplicable.”⁵⁷ Lastly, the Court stated that “ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even ‘reasonable suspicion’ of their existence, *suspend the knock-and-announce requirement anyway*.”⁵⁸

E. Lower Court Interpretations of the Hudson Rule

The First Circuit Court of Appeals in *United States v. Pelletier* followed the *Hudson* rule in the arrest warrant context.⁵⁹ There, police suspected that the defendant was dealing drugs.⁶⁰ The police obtained a no-knock warrant, which authorized them to search the defendant’s home without knocking and announcing their presence.⁶¹ Along with the search warrant, the United States Marshals had an arrest warrant to apprehend the defendant in his home, and they coordinated efforts with the local police department to execute the warrants simultaneously.⁶² After learning that the defendant was at a motel, both groups of officers arrived, knocked loudly, opened the door after eliciting no response for at least ten seconds, and found the defendant.⁶³ The defendant argued that because the officers failed to knock and announce their presence, all of the subsequently gathered evidence and statements should be excluded.⁶⁴

The First Circuit Court of Appeals rejected this argument. The court reasoned that according to blackletter law, “an arrest warrant carries with it, by implication, a limited grant of authority to enter the target’s residence so long as there is reason to believe that the target is inside,” and that such a

⁵⁵ *Hudson*, 547 U.S. at 594 (citing *McDonald v. United States*, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring)).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 596.

⁵⁹ 469 F.3d 194, 201 (1st Cir. 2006) (holding that the *Hudson* Court’s reasoning mandates an extension to knock-and-announce violations committed while executing an arrest warrant).

⁶⁰ *Id.* at 196.

⁶¹ *See id.* at 196-97.

⁶² *Id.* at 196.

⁶³ *Id.* at 197 (“An officer knocked loudly four or five times in rapid succession, eliciting no response. Approximately ten to fifteen seconds after the first knock, the officer used a passkey obtained from the maintenance man to open the door. He yelled ‘Police!’ while his comrades fanned out into the room. They found the defendant face-down on the bed.”).

⁶⁴ *Id.* at 197.

principle extends to a temporary residence like a target's hotel room.⁶⁵ The court held that *Hudson* applied with equal force in the context of an arrest warrant, and accordingly refused to order suppression based upon the officers' violation of the knock-and-announce rule.⁶⁶

Additionally, the Sixth Circuit Court of Appeals held in *United States v. Smith* that "regardless of whether there was a [knock-and-announce] violation, the Supreme Court has held that the exclusionary rule does not apply . . ." ⁶⁷ The court thus rejected the defendant's argument that *Hudson* applies only when the officers have a search warrant.⁶⁸ Similarly, in *United States v. Ankeny*, the Ninth Circuit Court of Appeals stated, "[t]he Supreme Court made it clear that, because the knock-and-announce rule protects interests that 'have nothing to do with the seizure of evidence, the exclusionary rule is inapplicable' to knock-and-announce violations."⁶⁹ As a result, the court decided not to limit *Hudson* to search warrants.⁷⁰ Lastly, in *United States v. Collins*, the Eighth Circuit Court of Appeals explained "that the exclusionary rule does not apply to every Fourth Amendment violation," and cited *Hudson* when holding that "exclusion is not the appropriate remedy for violations of the knock-and-announce rule,"⁷¹ mentioning a suit for damages as the better remedy.⁷²

III. ANALYSIS OF *WEAVER*

Part III begins with a summary of the facts from *United States v. Weaver*,⁷³ and continues with a detailed discussion of the tension between the district court and the D.C. Circuit. This discussion explains how the D.C. Circuit came to its conclusion, examines the court's analysis, and argues why its conclusion was wrong. In addition, Part III concludes with a proposal to the issue.

A. Summary of Facts

In 2008, federal agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives began a drug-related investigation of the defendant, Michael Weaver.⁷⁴ In 2009, agents executed a search warrant at Weaver's residence

⁶⁵ *Pelletier*, 469 F.3d at 199.

⁶⁶ *Id.* at 201.

⁶⁷ 526 F.3d 306, 311 (6th Cir. 2008).

⁶⁸ *Id.* ("In both settings, the interests served by the knock-and-announce rule . . . 'have nothing to do with the seizure of evidence.'" (quoting *Hudson*, 547 U.S. at 594)).

⁶⁹ 502 F.3d 829, 836 (9th Cir. 2007).

⁷⁰ *Id.* at 835-36.

⁷¹ 714 F.3d 540, 543 (7th Cir. 2013).

⁷² *Id.* (citation omitted).

⁷³ 808 F.3d 26 (D.C. Cir. 2015).

⁷⁴ *Id.* at 31. "As part of their investigation into Weaver, the agents searched through trash outside his home and found marijuana. They also learned from the target of the first

where they discovered drugs, cash, and drug packaging materials.⁷⁵ Relying on this information, agents obtained a warrant for Weaver's arrest in April 2010.⁷⁶ Weaver was not apprehended until 2012, when the agents learned the location of his new residence.⁷⁷

When officers arrived at Weaver's apartment building, they knocked twice but no one answered, even though they heard movement inside.⁷⁸ Less than a minute later, the agents announced themselves and went inside using a key that the concierge gave them.⁷⁹ As the agents attempted to open the door, someone inside was holding it closed.⁸⁰ However, the agents were able to push it open, eventually removing Weaver from the apartment.⁸¹

During the course of arresting Weaver, the officers smelled marijuana and saw, from where they were standing, bags of the drug on the kitchen counter.⁸² The officers obtained a search warrant based on their observations, and shortly thereafter found several different kinds of drugs and a large amount of cash in the apartment.⁸³ At trial, Weaver moved to suppress the evidence found during the second search of his apartment.⁸⁴ He claimed that "the warrant authorizing that search derived solely from the observations agents made while executing the arrest warrants, and that the agents were not legally authorized to be in his apartment when they made those observations because they had violated the knock-and-announce rule."⁸⁵ Additionally, Weaver argued that *Hudson* did not prevent a court from applying the exclusionary rule to his case.⁸⁶

investigation that Weaver had sold drugs for more than a year and trafficked in significant quantities of marijuana." *Weaver*, 808 F.3d at 31.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 32.

⁷⁸ *Id.* (noting that the officers "were not concerned that Weaver would flee out a window because the apartment was on a high floor").

⁷⁹ *Id.*

⁸⁰ *Weaver*, 808 F.3d at 32.

⁸¹ *Id.*

⁸² *Id.* ("One of the officers testified that as soon as he 'came in' and 'looked to the left' or 'turned left' toward the kitchen, he observed 'bags of marijuana' on the counter.").

⁸³ *Id.* ("[O]fficers obtained a search warrant for the apartment and found several kilograms of marijuana, two tablets of oxycodone, a bag of the drug methylenedioxymethcathinone (commonly referred to as MDMC, or bath salts), and nearly \$10,000 in cash.").

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Weaver*, 808 F.3d at 32.

B. Tension Between the District Court and the D.C. Circuit

The district court rejected Weaver's arguments, denying his motion to suppress.⁸⁷ First, the district court found that there was no knock-and-announce violation because the officers knocked, announced their presence, and waited a reasonable time before attempting to enter.⁸⁸ Alternatively, the district court recognized that even if there had been a knock-and-announce violation, the *Hudson* Court held that the exclusionary rule does not apply to knock-and-announce violations.⁸⁹ However, the D.C. Circuit found that the federal agents violated the knock-and-announce rule "by failing to announce their purpose before entering Weaver's apartment," which gave Weaver no opportunity to protect the privacy of his home.⁹⁰ Thus, the appropriate remedy for a knock-and-announce violation during the execution of an arrest warrant is exclusion.⁹¹

The D.C. Circuit started its analysis by acknowledging that *Hudson* left the question of whether the exclusionary rule applies to knock-and-announce violations while executing an arrest warrant unanswered.⁹² The court recognized "*Hudson* in determining whether the exclusionary remedy is appropriate, but did not agree with the government's position that [the] answer was controlled by *Hudson*."⁹³ The court then went into detail about the knock-and-announce requirement, stating that the "rule requires that, before officers executing a warrant enter a home, they knock on the door and announce their identity and purpose, and then wait a reasonable time before forcibly entering."⁹⁴ Additionally, the court stated, "[w]here officers armed with a search warrant have a judicially-sanctioned prerogative to invade the privacy of the home, the knock-and-announce violation does not cause the seizure of the disputed evidence."⁹⁵ Therefore, "the exclusionary remedy's significant costs outweigh its minimal privacy-shielding role, and its deterrent utility is 'not worth a lot.'"⁹⁶

The D.C. Circuit distinguished *Hudson*, however, because the officers in *Hudson* acted pursuant to a search warrant, whereas the officers in *Weaver* were armed with an arrest warrant.⁹⁷ The court felt that an arrest warrant

⁸⁷ *Weaver*, 808 F.3d at 32.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 33.

⁹¹ *Id.* at 42.

⁹² *Id.* at 35.

⁹³ *Weaver*, 808 F.3d at 35 (stating that the issue is whether "the arrest warrant context at issue here is so materially distinct that it requires a different result" than *Hudson*).

⁹⁴ *Id.* at 30.

⁹⁵ *Id.*

⁹⁶ *Id.* (quoting *Hudson v. Michigan*, 547 U.S. 586, 596 (2006)).

⁹⁷ *Id.* at 37.

provides no grounds to search the home.⁹⁸ The court stated that an arrest warrant “evidences probable cause to believe that the arrestee has committed a crime, and authorizes his arrest wherever he might be found.”⁹⁹ Accordingly, the court held that an individual subject to an arrest warrant retains a privacy interest inside the home, which is protected by the knock-and-announce requirement.¹⁰⁰ Where evidence is obtained in violation of the knock-and-announce requirement, *Hudson*’s analytical approach requires exclusion of the evidence.¹⁰¹

The D.C. Circuit’s next step was to use the same factors that the *Hudson* Court utilized in determining whether the exclusionary rule should apply.¹⁰² Under the causation analysis, the court concluded that the “knock-and-announce violation, leading to an arrest inside the home rather than at the front door, is thus the immediate cause of officers intruding further within a home than they otherwise would and obtaining evidence that they are not authorized to see.”¹⁰³ The court stated that an officer’s failure to properly knock and announce prevents the arrestee from answering the door and surrendering, which in turn gives the officer more access to the home’s interior.¹⁰⁴

Additionally, the court distinguished between the scope of an arrest warrant and the scope of a search warrant, recognizing that “officers armed solely with an arrest warrant do not have the authority to examine any papers, gather any effects, or search the various nooks and crannies of an arrestee’s home.”¹⁰⁵ Lastly, the court reasoned that the knock-and-announce rule allows the arrestee to minimize the intrusion into the home by providing the arrestee the opportunity to surrender.¹⁰⁶ As a result, “[s]uppressing evidence obtained in violation of the knock-and-announce rule thus directly serves the interests protected by the rule.”¹⁰⁷

⁹⁸ *Weaver*, 808 F.3d at 30.

⁹⁹ *Id.* (“If an arrestee is found away from home—at work, on the street, or at someone else’s home—the privacy of his home remains inviolate. So, too, if an arrestee is not at home when officers seek him there, or if he comes to the door and makes himself available for arrest, the arrest warrant does not authorize officers to enter the home.”).

¹⁰⁰ *Id.* at 31.

¹⁰¹ *Id.*

¹⁰² *Id.* (“We thus analyze the factors the Court considered in *Hudson* to determine whether the exclusionary rule applies when the knock-and-announce rule is violated in the arrest warrant context.”).

¹⁰³ *Id.* at 42 (also noting that the “clear and strong causal connection distinguishes this case from *Hudson*”).

¹⁰⁴ *Weaver*, 808 F.3d at 31 (“As officers move through a house to locate an arrestee, they are able to view more portions of its interior. If they find the arrestee in a study or bedroom, searching places within his immediate reach and protectively sweeping adjacent areas is likely to be more intrusive and revealing than it would have been had those searches occurred on a front stoop or in a foyer.”).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 42.

The court then weighed the costs of excluding evidence obtained in violation of the knock-and-announce rule against the benefits of protecting the right to privacy in one's home, finding that to exclude the incriminatory evidence against Weaver would result in "appreciable deterrence," thus determining that the benefits outweighed the social costs.¹⁰⁸ The court found that "[t]he costs of applying the exclusionary rule to this kind of constitutional violation in the arrest warrant context are similar to those described in *Hudson*"¹⁰⁹ For example, "[t]he courts will need to expend resources to resolve close claims of knock-and-announce rule violations, officers' entry might be delayed by knocking, announcing, and waiting for response, and, most importantly, relevant, incriminating evidence will be rendered unavailable at a defendant's trial."¹¹⁰ The court admits that such costs are real, but claims that "they are outweighed by a privacy interest and opportunity to deter its violation that is substantially stronger here than the negligible privacy interest and deterrence value in *Hudson*."¹¹¹

Additionally, the court stated that police are strongly incentivized to violate the knock-and-announce rule when armed with just an arrest warrant, because it increases the opportunities for officers to enter parts of a home that they would not otherwise have entered to carry out the arrest, thus giving them the additional opportunity to see evidence they otherwise would not see.¹¹² As such, the court found that "[b]y failing to knock and announce, [the officers] were able to obtain new, valuable evidence from Weaver's kitchen without a search warrant"¹¹³ Therefore, the court held that "[g]iven the strong incentives officers may have to violate the rule, the deterrence calculus is starkly different here than it was in *Hudson*."¹¹⁴

C. Where Weaver Went Wrong

The first place where the *Weaver* court went wrong was in finding that *Hudson* did not determine whether the exclusionary rule is the appropriate remedy for knock-and-announce violations in the arrest warrant context. *Hudson* clearly states that "[t]he issue here is remedy. [Past cases] specifically declined to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement. That question is squarely before us now."¹¹⁵ The Supreme Court did not mention whether the

¹⁰⁸ *Weaver*, 808 F.3d at 43.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing *Hudson v. Michigan*, 547 U.S. 586, 595 (2006)).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 44.

¹¹⁴ *Weaver*, 808 F.3d at 44 (commenting that "[i]n *Hudson*, the Court's balancing analysis was driven, in large part, by its conclusion that the incentives to violate the rule were weak and therefore that deterrence was virtually worthless").

¹¹⁵ *Hudson*, 547 U.S. at 590 (citation omitted).

question that they were resolving was limited only to a search warrant.¹¹⁶ However, the Court stated that “whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement” was the question they were answering.¹¹⁷

Additionally, the *Weaver* court repeatedly makes the distinction that arrest and search warrants carry different levels of protection for its target.¹¹⁸ For example, the court states that “[a]n arrest warrant reflects no judicial determination of grounds to search the home”¹¹⁹ Further, the court found that “if an arrestee is not at home when officers seek him there . . . the arrest warrant does not authorize officers to enter the home.”¹²⁰ However, these statements are not completely true, and the distinction between arrest and search warrants does not exist. An arrest warrant “evidences probable cause to believe that the arrestee has committed a crime, and authorizes his arrest wherever he might be found.”¹²¹ Therefore, if the police go to a suspect’s house with an arrest warrant and have a reasonable belief that he is home, they are permitted to enter the house to search for the individual in places where he may be found, but must not conduct any further searches once the suspect is located.¹²² Additionally, a dissenting judge in *Weaver* acknowledged that “[t]he rule governs *all* unauthorized entries into a residence, whether the police have a search warrant, an arrest warrant or no warrant at all.”¹²³ Case law generally conflates arrest and search warrants.¹²⁴ For example, the Supreme Court in *Miller v. United States* found that a knock-and-announce violation by an officer who executes an arrest without a warrant must be tested by criteria identical with that governing an entry by an officer who executes a search warrant.¹²⁵

If police are looking for Mr. X, and his wife answers the door and states, “he is not home,” the police do not have to turn away and leave. If this were the case, every spouse, roommate, and loved one would answer the door and tell the police that the suspect was not home. That is why an arrest warrant is necessary: to give police permission to enter a home to search for and arrest the suspect.¹²⁶ Requiring an officer to leave the premises if a loved one

¹¹⁶ See *Hudson*, 547 U.S. at 590.

¹¹⁷ *Id.*

¹¹⁸ See *Weaver*, 808 F.3d at 30.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See generally *Payton v. New York*, 445 U.S. 573, 603 (1980) (“[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.”).

¹²³ *Weaver*, 808 F.3d at 51 (Henderson, J., dissenting) (citing *Miller v. United States*, 357 U.S. 301, 306 (1958)).

¹²⁴ *Id.*

¹²⁵ *Miller*, 357 U.S. at 306.

¹²⁶ See *Payton*, 445 U.S. at 576.

answers in the negative is detrimental to the arresting process, and is also detrimental to the criminal justice system and society.

Another argument against the *Weaver* holding is that the knock-and-announce rule cannot be applied easily to every situation. In *Hudson*, the Supreme Court clearly stated that the knock-and-announce rule “is not easily applied.”¹²⁷ The Court discusses situations where it is not necessary to knock and announce, such as when there is a threat of violence, if officers have reason to believe that evidence would likely be destroyed, or if it would be “futile.”¹²⁸ The Court also states that “citizens are entitled to shield their persons, houses, papers, and effects from the government’s scrutiny” until a valid warrant has issued, and that “[t]he interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government’s eyes.”¹²⁹

Some of the interests that are protected by the knock-and-announce rule are: (1) “protection of human life and limb, because an unannounced entry may provoke violence . . .”; (2) “protection of property,” because the knock-and-announce rule provides individuals with an “opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry”; and (3) “privacy and dignity that can be destroyed by a sudden entrance,” as it gives residents an “opportunity to prepare themselves for the entry of the police.”¹³⁰ The Court further states that “[t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed,” and “assures the opportunity to collect oneself before answering the door.”¹³¹

In *Weaver*, the court claims that the main justification for exclusion is the importance of protecting the right to privacy while in a home.¹³² However, this privacy interest is not listed by the Supreme Court in *Hudson*.¹³³ As the dissent in *Weaver* points out, “[a]s a lower court, we are not free to contradict the Supreme Court’s exhaustive description of the interests protected by the knock-and-announce requirement.”¹³⁴ All of the privacy interests listed in *Hudson* were protected in *Weaver*, and since the defendant had sufficient time to go to the door and hold it closed when police tried to enter, he had

¹²⁷ *Hudson v. Michigan*, 547 U.S. 586, 589 (2006).

¹²⁸ *Id.* at 589-90 (citing *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997); *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995)).

¹²⁹ *Id.* at 593.

¹³⁰ *Id.* at 594 (internal citations and quotation marks omitted).

¹³¹ *Id.* (citation omitted).

¹³² *United States v. Weaver*, 808 F.3d 26, 43 (D.C. Cir. 2015).

¹³³ *See Hudson*, 547 U.S. at 594.

¹³⁴ *Weaver*, 808 F.3d at 55 (Henderson, J., dissenting). “Vertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary headed by one supreme Court.” *Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (internal quotation marks omitted).

time to “pull on clothes,” “get out of bed,” and “collect [himself].”¹³⁵ Additionally, in order to strengthen its position, the *Weaver* court states, “[b]y failing to knock and announce, [the officers] were able to obtain new, valuable evidence from Weaver’s kitchen without a search warrant”¹³⁶ This statement is not true. The facts show that the officers arrived, knocked twice, and opened the door while saying “police.”¹³⁷ The district court held that the officers did not fail to knock and announce.¹³⁸ When looking at the facts, the district court is most likely correct.

The facts also reflect that the defendant was holding the door closed until the police could push through and subdue him.¹³⁹ Therefore, the defendant was already at the door when the police knocked and announced their presence.¹⁴⁰ Weaver’s argument that the police would not have seen the drugs in the kitchen had they announced their presence is baseless. Even if the police were to knock, announce “police,” and declare that “they were there to arrest Weaver,” the only different outcome that may have occurred would involve Weaver running away from the door, thus causing the police to go inside the house further than they had gone. Alternatively, Weaver could have opened the door. In that circumstance, the police still may have observed the drugs in the kitchen, as well as smelled the marijuana.

Another place where the *Weaver* court went wrong was in stating, “[b]y violating the knock-and-announce rule, officers give themselves a better chance of arresting an individual inside his home, where a search or protective sweep will be more revealing than one conducted on the home’s threshold.”¹⁴¹ Although this statement might generally be true, such a contention makes little sense when applied to the facts. Regardless of whether there was a knock-and-announce violation, Weaver prevented the officers from getting in.¹⁴² Had Weaver opened the door, the officers still would have gained entry inside his house and seen the drugs in the kitchen.

The dissent in *Weaver* provides strong arguments against the holding.¹⁴³ The dissent argues that the *Hudson* Court framed the issue broadly in stating, “the issue here is . . . whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement.”¹⁴⁴ The dissent also states that “nowhere in the opinion did the *Hudson* Court leave open the possibility of a different outcome in the arrest context or draw any distinction between

¹³⁵ *Weaver*, 808 F.3d at 34 (citation omitted).

¹³⁶ *Id.* at 44.

¹³⁷ *Id.* at 32.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 44.

¹⁴¹ *Weaver*, 808 F.3d at 44.

¹⁴² *See id.* at 32.

¹⁴³ *Id.* at 45 (Henderson, J., dissenting).

¹⁴⁴ *Id.* at 50-51 (citing *Hudson v. Michigan*, 547 U.S. 586, 588 (2006)).

searches and arrests.”¹⁴⁵ Furthermore, the dissent undermines the court’s holding by noting that officers can already bypass the knock-and-announce requirement if they have a reasonable suspicion that evidence will be destroyed or that the arrestee will be violent.¹⁴⁶ Moreover, once an arrestee is apprehended, officers can search his body, the belongings on him, and the areas within his immediate control.¹⁴⁷ These searches can develop the probable cause needed to obtain a warrant to conduct a full search of the home.¹⁴⁸

D. Proposal to the Problem

The exclusionary rule is too massive and harsh a remedy to apply to knock-and-announce violations for all the above reasons. The *Weaver* decision should be reversed, and evidence should not be excluded based on police officers’ failure to knock-and-announce for many reasons. One of the most important reasons this holding should be reversed is because it is contrary to the Supreme Court’s holding in *Hudson*. As explained above, there is nothing in *Hudson* suggesting that the Court narrowed its holding to search warrants. Therefore, all circuit courts should follow *Hudson* when there is a knock-and-announce violation.

My proposal, which would not only deter police from violating the knock-and-announce requirement but benefit the criminal justice system and society, would be to have internal police discipline procedures established in police departments across the nation.¹⁴⁹ The Supreme Court in *Hudson* mentions this proposal as well, stating that “there have been wide-ranging reforms in the education, training, and supervision of police officers,” and that internal discipline will have a deterrent effect.¹⁵⁰ Police discipline for knock-and-announce violations would be more beneficial and more of a deterrent for officers. It would be beneficial because police will be more willing to follow the rules, and incriminating evidence can still be used against a defendant. Each officer would be more deterred from violating these rules for fear of being punished by their superiors.

¹⁴⁵ *Weaver*, 808 F.3d at 51.

¹⁴⁶ *Id.* at 57 (“Officers can already bypass the knock-and-announce requirement if they have a ‘reasonable suspicion’ that the occupant will destroy evidence or violently resist arrest.” (citing *Hudson*, 547 U.S. at 596)).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 58 (Henderson, J., dissenting) (“Likewise, we must ‘assume’ that ‘internal police discipline’ is an adequate deterrent as well.”).

¹⁵⁰ *Hudson*, 547 U.S. at 599 (“[I]t is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect.”).

Internal police discipline should take the form of reprimands, suspensions, fines, and demotions.¹⁵¹ Reprimand can be either public in that a violation of a rule could be put in a newspaper or on a website, or private in that such discipline would remain solely an internal affair.¹⁵² This form of punishment would be the least severe, whereas suspension would be more severe.¹⁵³ Depending on the severity of the violation, officers should be suspended for days or weeks without pay. Suspension without pay would be a significant incentive for police officers to follow the rules. They will not only lose money but damage their reputation. Lastly, fines and demotions would be the most severe form of discipline.¹⁵⁴ The officer would have to pay fines to the police department, and if there are continued violations, the officer should be demoted.¹⁵⁵ If the officer's reputation is at risk of being damaged, the officer will most likely be deterred from violating the knock-and-announce rule. Thus, this deterrence will benefit society as police will be less inclined to violate procedure. Subsequently, any evidence found in a violation of the rule can still be used against the defendant at trial. In other words, the defendant will not go free.

A last proposal would be that if a case were to go to trial, instead of the incriminating evidence being suppressed, the jury should be told that the officers violated the knock-and-announce rule.¹⁵⁶ If the jury is told of this information, the evidence can still be used against the defendant, and the jury can choose to use this information in weighing the evidence, making credibility determinations, and ultimately coming to a conclusion.¹⁵⁷ Jurors can also afford it weight when reaching a conviction.¹⁵⁸

¹⁵¹ See generally Christine M. D'Elia, *The Exclusionary Rule: Who Does It Punish?*, 5 SETON HALL CONST. L.J. 563, 605-06 (1995); Alicia M. Hilton, *Alternatives to the Exclusionary Rule After Hudson v. Michigan: Preventing and Remediating Police Misconduct*, 53 VILL. L. REV. 47, 49 (2008); Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241, 249 (2010).

¹⁵² Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence"*, 37 FORDHAM URB. L.J. 743, 791-92 (2010) ("What if, however, the government responded to a successful suppression motion by pointing to specific remedial steps, such as a new training program, a record-keeping program for stop-and-frisk or traffic stops, or disciplinary actions against the responsible officers such as *reprimands*, reassignments, demotions, or suspensions? In this scenario, the threat of suppression might deter at least as effectively as the executed threat." (emphasis added)).

¹⁵³ See *id.* at 796.

¹⁵⁴ *Id.* at 791-92.

¹⁵⁵ *Id.*

¹⁵⁶ See generally Todd E. Pettys, *Instrumentalizing Jurors: An Argument Against the Fourth Amendment Exclusionary Rule*, 37 FORDHAM URB. L.J. 837, 843 (2010).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

IV. CONCLUSION

The exclusionary rule is a remedy that should be used as a last resort because of its harsh effects. Not only does the exclusionary rule prevent the government from using incriminating evidence against a defendant, but it allows that defendant to go free. This is not beneficial for the criminal justice system, which has the main goal of keeping criminals off the street. Additionally, it is not beneficial to members of society, who expect law enforcement to protect them against criminals.

The *Weaver* court was wrong in deciding that *Hudson* was inapplicable, as the Supreme Court in *Hudson* held that the exclusionary rule is not the appropriate remedy when officers violate the knock-and-announce requirement, regardless of whether they are executing a search or arrest warrant.¹⁵⁹ Nothing in *Hudson* suggests that the Court was limiting its decision to search warrants. Additionally, other circuit courts follow *Hudson* when dealing with knock-and-announce violations in the arrest warrant context.¹⁶⁰ Therefore, *Weaver* should be reversed, and all federal courts should be uniform in refusing to apply the exclusionary rule to knock-and-announce violations.

When officers violate the knock-and-announce requirement, exclusion of the evidence found is not appropriate. The knock-and-announce rule was recognized to protect interests such as property, the privacy of the home, and the safety of individuals and law enforcement.¹⁶¹ However, shielding the government's eyes from incriminating evidence is not one of the protections that the knock-and-announce rule was put in place for. A knock-and-announce violation is not a but-for cause of finding the evidence, and is too attenuated to justify exclusion.

There are other remedies and more beneficial deterrents than the exclusionary rule for violations of the knock-and-announce rule. For example, internal police discipline such as public and private reprimands, suspensions, fines, and demotions would more likely deter police from violating the knock-and-announce rule.¹⁶² These types of punishments would also benefit society by permitting the use of incriminating evidence at trial, and would also protect the homeowner and police.

¹⁵⁹ See *supra* Part II.D.

¹⁶⁰ See *supra* Part II.E.

¹⁶¹ See *supra* Part III.C.

¹⁶² See *supra* Part III.D.