THE EVOLUTION OF THE EXCLUSIONARY RULE

FROM *WEEKS V. UNITED STATES* AND *MAPP V. OHIO* TO *HERRING V. UNITED STATES* AND *HUDSON V. MICHIGAN*

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ABSTRACT: *From a historical perspective, this piece surveys the 'wild ride' of the Exclusionary rule, from the Fourth Amendment through Weeks v. United States (1914) , the Warren Court's interpretation in Mapp v. Ohio (1961) to the present. The author takes an interesting look at current Chief Justice Robert's interactions with it, first as an associate counsel to President Reagan, and then as the head of the Court in Herring v. US and Hudson v. Michigan. The article ends open-ended, hinting that the 'Good Faith Exception' and the 'Knock and Announce Rule' have moved to a conservative rollback of the Exclusionary Rule.*

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"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."[1]

Tom C. Clark
Associate Justice of the Supreme Court of the United States (1949-1967)

In popular culture, television police dramas frequently depict police officers searching a suspect's home without a search warrant. In reality, evidence gained without a warrant is typically inadmissible at the ensuing trial, which allows defendants to escape a guilty verdict. The reason for this conclusion is the Exclusionary Rule.

The Exclusionary Rule is one of the most fiercely debated topics in modern constitutional and criminal law. Opponents of the Rule argue that it is "not grounded in the Constitution, not a deterrent to police misconduct, and not helpful in the search for truth" in criminal proceedings.[2] By contrast, its supporters contend that the Rule is necessary because, like other guarantees in the Bill of Rights, the Fourth Amendment (which guards against unreasonable search and seizure) cannot enforce itself. One such supporter was Potter Stewart, the famed 20th century Associate Justice who wrote, "The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it."[3]

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1 *Mapp v. Ohio*, 367 U.S 643, 659 (1961).

2 Timothy Lynch, "In Defense of the Exclusionary Rule," *Cato Briefing Papers* (Oct. 1998): 1.

3 *Elkins v. United States*, 364 U.S. 206, 217 (1960).

The Exclusionary Rule, while not explicitly outlined in the text of the Constitution, has evolved substantially throughout American history. Strengthened and expanded after its creation in 1914, the Rule was applied to the states in 1961 by the decidedly activist Warren Court. In the late 20th century, however, some began to advocate for the Rule's reformation or even termination. In 1983, John G. Roberts, then Associate Counsel to the President during the Reagan administration, wrote a memorandum in which he outlined his work on "the campaign to amend or abolish the exclusionary rule."[4] Additionally, when Samuel Alito was applying for a job in the Department of Justice in 1985, he wrote that his interest in the law had been motivated by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, religious freedom, and voting rights.[5] As the current Chief Justice of the United States, Roberts has led a four-member voting bloc of the Court (including Justices Alito, Antonin Scalia, and Clarence Thomas) in launching a "rollback" assault on the Exclusionary Rule in the early 21st century. All that they lack to abolish the Rule completely is a reliable fifth vote.[6]

I. Creation of the Exclusionary Rule

The Exclusionary Rule is based upon the Fourth Amend-

4 John G. Roberts, "New Study on Exclusionary Rule" 4 January 1983, available from http://www.reagan.utexas.edu/roberts/Box24JGRExclusionaryRule1.pdf (accessed 26 March 2011).

5 Adam Liptak, "Justices Step Closer to Repeal of Evidence Ruling," *The New York Times*, January 30, 2009, http://www.nytimes.com/2009/01/31/washington/31scotus.html (accessed 26 March 2011).

6 Susan Bandes, "The Roberts Court and the Future of the Exclusionary Rule," *American Constitution Society for Law and Policy* (April 2009): 1.

ment to the U.S. Constitution, which reads,

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

The Rule allows a court to exclude from trial any evidence that the government has illegally obtained. The basis for exclusion is to protect the public from government intrusion by requiring a search warrant before evidence can be taken from private property.

The Exclusionary Rule's course through American history began with the drafting of the Fourth Amendment. As English legal history shows, the Fourth Amendment was not drafted to protect against wrongly seized evidence but as a reaction against the English use of general warrants and writs of assistance. General warrants were the subject of a controversy in England from 1762-1790. Issued by the Secretary of State in seditious libel cases, these warrants were issued, without probable cause, to apprehend persons who presented a threat to the Crown. These warrants were easily abused because they did not name specific individuals that were to be arrested, and they were valid for the duration of the life of the monarch under whose name they were issued.[7] In 1763, for example, officials used one warrant to arrest

7 Potter Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases," *Columbia Law Review*, 83 (Oct. 1983): 1369.

forty-nine people in three days.[8]

Writs of assistance were used by English officials in the American colonies to enforce unpopular trade and navigation acts from 1761-1776. These writs were strikingly similar to the general warrants used in England, but they were used instead to locate uncustomed goods that had been smuggled into the colonies. The writs empowered officials to search houses, vessels, warehouses, etc., for uncustomed goods, and their blanket authority lasted for the life of the reigning English monarch plus six months thereafter. These writs were not confined to any particular case, and they required no evidentiary showing or description of the place to be searched.[9]

In response to worries that the government could use both general warrants and writs of assistance in the new Republic, the Fourth Amendment was ratified by the states in 1791. Its second clause makes clear the Framers' rejection of general warrants and writs of assistance, as it demands that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[10] Although the text of the Amendment also prohibits unreasonable search and seizure, it was clearly ratified as a response to the warrantless searches the colonists had endured

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8 Id.

9 Phillip A Hubbart, *Making Sense of Search and Seizure Law: A Fourth Amendment Handbook* (Durham: Carolina Academic Press, 2005), 21-22.

10 United States Constitution, Amendment IV.

under English colonial rule.[11] From the time of its ratification up to 1886, however, the Fourth Amendment was hardly mentioned in Supreme Court cases, and almost no legal principles regarding evidence suppression were developed.[12]

This trend changed rapidly in the late 1800s and early 1900s. The first Supreme Court case associated with the development of the Exclusionary Rule is an 1886 case, *Boyd v. United States*.[13] *Boyd* involved a subpoena that demanded the production of private papers as evidence. The subpoena declared that if the documents were not produced, "the allegations which it is affirmed they will prove shall be taken as confessed."[14] In writing for the Court, Justice Joseph Bradley concluded that the compulsory production of private papers served to incriminate the defendants and thus violated the Fifth Amendment's right against self-incrimination.[15] The exclusion of evidence in *Boyd* was not a remedy for the Fourth Amendment, which Bradley said had also been violated, but rather a remedy for a Fifth Amendment violation.

In 1904, another case with implications for the Exclusionary Rule appeared before the Court. *Adams v. New York* dealt

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11 E.g., *Ker v. California*, 374 U.S. 23, 51 (1963) (Brennan, J., dissenting) ("Moreover, in addition to carrying forward the protections already afforded by English law, the Framers also meant by the Fourth Amendment to eliminate once and for all the odious practice of searches under general warrants and writs of assistance against which English law had generally left them helpless.").

12 Hubbart, *supra* note 9, at 42.

13 *Boyd v. United States*, 116 U.S. 616 (1886)

14 Id. at 621.

15 Id. at 634-635.

with a man convicted of illegal gambling.[16] A warrant for illegal gambling paraphernalia had been executed by the police; however, the resulting conviction relied upon the seizure of private papers. In writing for the Court, Justice William Day argued that *Boyd* did not apply, and there was no Fourth or Fifth Amendment violation. He reasoned that *Boyd* dealt only with compulsory production of private papers, which would violate the Fourth and Fifth Amendments. By contrast, the papers seized in *Adams* were "clearly competent as tending to establish the guilt of the accused of the offense charged," and that "the weight of authority as well as reason" limits the scope of review to the competency of the evidence, regardless of the means by which it was secured.[17] Thus, in the words of Justice Potter Stewart, the Court in *Adams* "seemed to bury the exclusionary rule - even before its birth was recognized."[18]

Ten years later, the Court for the first time suppressed evidence seized without a warrant from a private home as a remedy for a Fourth Amendment violation. In the 1914 case *Weeks v. United States*, the Court unanimously ruled that the Fourth Amendment protects only against "unreasonable search and seizure" by a federal officer in federal court.[19] Previously, the Court had ruled in *Adams* that evidence seized without a warrant could be introduced in court if the defense counsel did not file for the return of the evidence before the trial began; in this case, however, such a filing

16 *Adams v. New York*, 192 U.S. 585 (1904).

17 Stewart, *supra* note 7 at 1374.

18 Id.

19 *Weeks v. United States* 232 U.S 383 (1914).

had been made by the defense.[20] Therefore, because the evidence should have been returned before trial under *Adams*, the Court held that the government violated the Fourth Amendment when it introduced the evidence at trial, which should have been excluded as a remedy for the government's Fourth Amendment violation.[21] Interestingly, Justice Day again wrote the majority opinion in *Weeks*. In this case, the Court created the Exclusionary Rule, but it only applied to cases involving the federal government.

II. The Rule Expands

While the *Weeks* opinion established the Exclusionary Rule, its power remained limited. The Rule only excluded evidence obtained by the federal government, because *Weeks* dealt with evidence seized by a U.S. Marshal. Further, under *Boyd*, exclusion of evidence was a by-product of the Fifth Amendment, not the Fourth Amendment. Thus, only testimonial evidence could be excluded, such as books, papers, etc., but contraband, such as drugs, guns, etc., could be admissible in court.[22] Also under *Weeks*, exclusion of evidence was a result of the Fourth Amendment's mandate that the government return wrongfully seized property. [23] In these cases, it seemed that *Adams* allowed the inclusion of any evidence the government obtained in violation of the Fourth Amendment unless it fell within the parameters

20 *Adams v. New York*, 192 U.S. 585 (1904).
21 *Weeks*, *supra* note 19 at 398.
22 Stewart, *supra* note 7 at 1375.
23 Id.

of either *Boyd* or *Weeks*.[24]

This began to change, however, in the early 1920s. In the 1920 case *Silverthorne Lumber Co. v. United States*, the Court ruled that simply returning illegally seized evidence, while still facing prosecution based upon that evidence, was not a viable remedy for a Fourth Amendment violation.[25] In this case, federal agents had returned illegally seized evidence after photographs of the evidence had been taken. The agents believed that they were acting within the bounds of *Boyd*, *Adams*, and *Weeks*, which they felt required only the return of illegally seized evidence rather than a prohibition on illegal searches. Justice Oliver Wendell Holmes, however, held otherwise. He reasoned that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall it not be used at all."[26] This decision created the "Fruit of the Poisonous Tree" doctrine, which bars the admission of any evidence seized as a result of other illegally seized evidence.[27]

The next year, the Court again expanded the scope of the Rule. In *Gouled v. United States*, the Court ruled that illegally seized evidence must be suppressed, despite the fact that the motion of suppression was not filed until the trial had begun.[28] In this case, government agents illegally seized several of Gouled's

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24 Id.

25 *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

26 Id. at 392.

27 Craig R. Ducat, *Constitutional Interpretation* (Boston: Wadsworth, Cengage Learning, 2009), 536.

28 *Gouled v. United States*, 255 U. S. 298 (1921).

papers without his knowledge. Because he was unaware of the seizure, Gouled did not move before trial for the return of the papers as was necessary under *Adams*. Gouled was consequently forced to seek the suppression of the papers at trial when he first learned of the seizure. It seemed as though the motion had little hope under the long-settled rule of *Adams*, but the Court held that the Fourth Amendment required the evidence to be suppressed. In the majority opinion, Justice John Clarke effectively overruled *Adams* without even citing it:[29]

> The objection was not too late, for, coming as it did promptly upon the first notice the defendant had that the Government was in possession of the paper[s], the rule of practice relied upon, that such an objection will not be entertained unless made before trial, was obviously inapplicable.[30]

By holding that the admission of the evidence seized in violation of the Fourth Amendment also violated the Fifth Amendment, *Gouled* overturned the decision in *Adams*.[31]

While *Silverthorne* and *Gouled* greatly expanded the rules for suppressing evidence in federal trials, the full expansion of the Rule was not yet complete. This final development came in the form of 1925's *Agnello v. United States*.[32] In this case, the federal government had illegally seized cocaine from Agnello's home. Under *Adams*, the Court only suppressed testimonial evidence,

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29 Stewart, *supra* note 7 at 1376.

30 *Gouled*, *supra* note 28 at 305.

31 Stewart, *supra* note 7 at 1376.

32 *Agnello v. United States*, 269 U.S. 20 (1925).

but it took this opportunity to conclusively overrule *Adams*. In an opinion written by Justice Pierce Butler, the Court attached no significance to the distinction between drugs and papers.[33] The Court reasoned that because Agnello maintained that the cocaine was not his, he could not have moved for its suppression without forfeiting his Fifth Amendment right against self-incrimination. Thus, the evidence must be excluded from trial because the right against self-incrimination must always prevail over the rule outlined in *Adams*. Butler stated the court's opinion:

> Where, by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized.[34]

Therefore, *Agnello* established that a defendant does not have to move to suppress contraband evidence prior to trial, finally overruling *Adams*.[35]

By 1925, it was clear that suppression of evidence required both Fourth and Fifth Amendment violations. Indeed, all of the cases mentioned cited the Fifth Amendment, not the Fourth, as the basis for exclusion, despite the fact that the defendants argued the searches themselves were illegal under the Fourth Amendment.

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33 Stewart, *supra* note 7 at 1377.

34 *Agnello*, *supra* note 32 at 34.

35 Stewart, *supra* note 7 at 1377.

According to Justice Stewart, it would take several years and many cases before courts would cease to cite the Fifth Amendment, along with the Fourth, as the basis for exclusion, but it is fair to say that by 1925, the annexation of the Exclusionary Rule to the Fourth Amendment was complete.[36] After the Rule's expansion in the early 20th century, it was still only applicable to federal trials; however, the courts soon began to apply the Exclusionary Rule to the states.

III. Incorporation of the Exclusionary Rule

The question of applying the Rule to state trials first came to the Court in 1949 in *Wolf v. Colorado*.[37] In the majority opinion, Justice Felix Frankfurter presented the issue in question:

> Does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks*...?[38]

To begin, the Court reasoned that the Fourth Amendment's prohibition on unreasonable searches and seizures was "implicit in the concept of ordered liberty"[39] and therefore enforceable against

36 Id.
37 *Wolf v. Colorado*, 338 U.S. 25 (1949).
38 Id. at 25-26.
39 Id. at 27.

the states by way of the Fourteenth Amendment.[40] This, however, amounted to nothing more than an incorporation of rhetoric, as no mechanism for enforcement of the Fourth Amendment to the states was outlined by the Court.[41] The Court argued that there were remedies other than the Exclusionary Rule available to the states to enforce the prohibition against unreasonable search and seizures:

> There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.[42]

Thus, the Court ruled that while the right against unreasonable searches and seizures was extended to the states by the Fourteenth Amendment, the Exclusionary Rule as a remedy for such a violation was not.[43]

In 1960, another case greatly influenced the reach of the Rule in the states. In *Elkins v. United States*,[44] the Court overruled the "Silver Platter Doctrine" that allowed evidence seized ille-

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40 Stewart, *supra* note 7 at 1378.

41 Ducat, *supra* note 27 at 605.

42 *Wolf*, *supra* note 37 at 32.

43 Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* (Durham: Carolina Academic Press, 2008), 615.

44 *Elkins v. United States*, 364 U.S. 206 (1960).

gally by state agents to be used in federal court.[45] In the majority opinion, Justice Potter Stewart wrote that the Fourteenth Amendment's limitations on state governments were coextensive with the Fourth Amendment's limitations on the federal government.[46] Thus, any search conducted by state agents that would have violated the Fourth Amendment if it had been conducted by federal agents would violate the Fourteenth Amendment.[47] Once the Fourth and Fourteenth Amendments were equated, full application of the Exclusionary Rule to the states, despite the *Wolf* precedent, was just one step away. Stewart reasoned, "[I]f the Fourth and Fourteenth Amendments created identical prohibitions, and if in federal cases the exclusion of evidence was required to enforce this ban, then exclusion should also be an integral part of the Fourteenth Amendment as well."[48]

That final application of the Rule to the states came in the 1961 landmark case of *Mapp v. Ohio.*[49] In writing for the majority, Justice Tom Clark argued that illegally seized evidence could not be used to convict a defendant under the *Weeks* rule.[50] Because the violation was so blatant, the Court could not tolerate such action by allowing the evidence to be admitted at trial.[51] Thus, the Court extended the Exclusionary Rule as outlined in

45 Clancy, *supra* note 43 at 617.
46 *Elkins*, *supra* note 44 at 215.
47 Stewart, *supra* note 7 at 1380.
48 Id.
49 *Mapp v. Ohio*, 367 U.S. 643 (1961).
50 Hubbart, *supra* note 9 at 335.
51 Id. at 336.

Weeks to the states and overruled *Wolf*.[52] After *Mapp*, the full Exclusionary Rule applied to both the federal and state governments.

IV. The Roberts "Rollback"

Conservatives have called for the modification, and even abolition of the rule in the late 20th century. Indeed, with Chief Justice John G. Roberts leading a near conservative majority on the current Supreme Court, there seems to be a modern assault on the Exclusionary Rule. Two important cases, *Herring v. United States*[53] and *Hudson v. Michigan*, demonstrate this recent trend.[54]

In *Herring*, the Court took up the issue of the objectively reasonable "Good Faith Exception" to the Exclusionary Rule, which is the most important exception to the Rule.[55] The underlying principle of this exception is that the deterrent effects of suppressing the illegally seized evidence do not outweigh the social costs of allowing the evidence to be admitted at trial. Thus, illegally seized evidence should not be suppressed if the officer has a reasonable good faith that his actions were consistent with a proper Fourth Amendment search. In the officer's mind, he has obeyed the Fourth Amendment; therefore, suppressing the evidence would not deter the officer from disobeying it in the future because he believes he has already obeyed it.

Previous case law had created and upheld the Good Faith

52 Id. at 335-336.

53 *Herring v. United States*, 555 U.S. 135 (2009).

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

55 Hubbart, *supra* note 9 at 349.

Exception, starting with its creation in *United States v. Leon* in 1984,[56] where the Court held that the Exclusionary Rule is not applicable if evidence is seized with a warrant that is ultimately found to be invalid.[57] That same year, another case extended the Good Faith Exception to cover homicide evidence seized with a narcotics warrant in *Massachusetts v. Sheppard*.[58] Eventually, the Good Faith Exception would come to cover evidence seized based upon a state law that was later found to be unconstitutional in *Illinois v. Krull*,[59] as well as evidence seized based upon a court-generated computer error in making an arrest in *Arizona v. Evans*.[60] The Good Faith Exception did not achieve expanded coverage in criminal trials, however, until *Herring* in 2009.

In his majority opinion in *Herring*, Chief Justice Roberts strengthened the Exception and cut back the Rule's reach in search and seizure cases. The Court argued that the Exclusionary Rule should be limited to "flagrant or deliberate" violations of Fourth Amendment rights.[61] In the case at hand, the court ruled that the computer error in question that led to a search and arrest was not flagrant or deliberate; thus, the evidence seized could be admitted in court. Despite precedent to the contrary, the Court argued that since *Leon*, the Court had "never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than [the

56 *United States v. Leon*, 468 U.S. 897 (1984).
57 Clancy, *supra* note 43 at 647.
58 *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).
59 *Illinois v. Krull*, 480 U.S. 340 (1987).
60 *Arizona v. Evans*, 514 U.S. 1 (1995).
61 *Herring*, *supra* note 53 at 143.

conduct involved in *Herring*]."[62] Thus, the Court said, "As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[63] Here, the Court could find no such conduct or negligence and ruled that the evidence could be admitted at trial.

According to law professor Michael Vitiello, the Court's broad language in *Herring* seems to be a wholesale expansion of police power.[64] Roberts and the majority declined to suppress the fruits of illegal searches and seizures if the police acted *negligently* rather than *flagrantly*.[65] Here, the Court based this holding on the fact that "isolated instances of negligent wrongdoing are unlikely to be deterred by exclusion..."[66]

Some argue that the *Herring* decision could arguably support a more general exception to the Rule that applies to all police conduct, including warrantless searches.[67] However, the decision simply extended the holding in *Evans* which held that errors made by a judicial clerk do not trigger the Exclusionary Rule.[68] *Herring*

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62 Id. at 144.

63 Id.

64 Michael Vitiello, "*Herring v. United States*: *Mapp*'s 'Artless' Overruling?," *Nevada Law Journal* 10 (Winter 2009): 176.

65 Susan Bandes, "The Roberts Court and the Future of the Exclusionary Rule," *American Constitution Society for Law and Policy* (April 2009): 6 (emphasis added).

66 Id.

67 Matthew A. Josephson, "To Exclude or Not to Exclude: The Future of the Exclusionary Rule After *Herring v. United States*," *Creighton Law Review* 43 (Dec. 2009): 198.

68 *Evans*, *supra* note 60.

simply extended that holding to police clerks.[69] Under its ruling, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system"[70] in order to trigger the Rule.[71] In this case, Roberts clearly seeks to clarify the Rule, if not change it altogether.

The *Herring* decision came just three years after an arguably more important Exclusionary Rule case, *Hudson v. Michigan*, which dealt with the "Knock and Announce Rule" outlined by the Court in the 1995 case of *Wilson v. Arkansas*. In *Wilson*, the Court unanimously held that an officer must announce his presence before entering a home to execute a warrant.[72] In the opinion of the Court, Justice Clarence Thomas wrote:

> At the time of the framing [of the Fourth Amendment], the common law of search and seizure recognized a law enforcement officer's authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority. In this case, we hold that this common-law "knock and announce" principle forms a part of the reasonableness inquiry under the Fourth Amendment.[73]

From this case, the Knock and Announce Rule became a concept of American law. However, the Court did point out that this was not an absolute rule but a factor to take into account when assess-

69 Josephson, *supra* note 67 at 202.

70 *Herring*, *supra* note 53 144

71 Josephson, *supra* note 67 at 202.

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

73 Id. at 929.

ing a search's reasonableness.[74] This position was reaffirmed two years later when the Court unanimously held there were no categorical exceptions to the Knock and Announce Rule in *Richards v. Wisconsin.*[75] In the *Richards* majority opinion, Justice John Paul Stevens wrote:

> We recognized in *Wilson* 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 evidence would likely be destroyed if advance notice were given."[76]

Thus, the determination whether or not to knock and announce would have to be made under a case-by-case basis.[77] Indeed, the Court found that a period 15 to 20 seconds was reasonable between announcement and entry by police into a home,[78] but has left the waiting period to be determined by the totality of the circumstances.[79] This ambiguity allowed lower federal courts to find even shorter time periods to be reasonable. Also, courts are able to issue "no-knock" warrants to police when they believe that destruction of evidence will occur or that the officers will be put in danger if they knock and announce before entry.[80]

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74 Ducat, *supra* note 27 at 633.

75 *Richards v. Wisconsin*, 520 U.S. 385 (1997).

76 Id. at 391.

77 Ducat, *supra* note 27 at 633.

78 *United States v. Banks*, 540 U.S. 31 (2003).

79 *United States v. Jenkins*, 175 F.3d 1381, 1213 (10 Cir. 1999) (stating the Supreme Court has no established a clear standard to determine the amount of time officers must wait to make entry).

80 E.g. *United States v. Segura-Baltazar*, 448 F.3d 1381 (11th Cir. 2006).

The validity of the Knock and Announce Rule came under attack by the Roberts Court in *Hudson.* In his majority opinion, Justice Antonin Scalia argued that a violation of the Knock and Announce Rule by police does not require the suppression of the evidence found in the search. The officer had announced his presence before entering Hudson's home but waited a mere three to five seconds before entering.[81] Because the State of Michigan had conceded a violation of the Knock and Announce Rule at trial, the Court simply had to determine "whether the exclusionary rule is [an] appropriate [remedy] for violation of the knock-and-announce requirement."[82]

In the majority opinion, Scalia argued that suppression of evidence is always the last resort of the courts, not the first impulse.[83] He argued that the Knock and Announce Rule has three uses: (1) protect human life and limb, because an unannounced entry may provoke violence in self-defense by the surprised resident; (2) allow individuals the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry; and (3) give residents the "opportunity to prepare themselves for" the police by allowing them to "pull on clothes or get out of bed."[84] However, Scalia then noted:

> What the knock-and-announce rule has never protected, however, is one's interest in preventing the government

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81 *Hudson, supra* note 54 at 588.

82 James J. Tomkovicz, "*Hudson v. Michigan* and the Future of Fourth Amendment Exclusion," *Iowa Law Review* 93 (2008): 1823.

83 Id. at 1823-1824.

84 Albert W. Alschuler, "The Exclusionary Rule and Causation: *Hudson v. Michigan* and Its Ancestors," *Iowa Law Review* 93 (2008): 1762.

> from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.[85]

Stated differently, because none of the three interests were violated in the case, the Exclusionary Rule does not apply, and the evidence can be admitted at trial. According to Scalia, the police did not violate the Fourth Amendment by entering the home just a few seconds after announcing their presence.

Hudson clearly serves as a direct attack on the Exclusionary Rule. Previously, evidence could be suppressed for nearly all Fourth Amendment violations. The Court, however, ruled in *Hudson* that a Fourth Amendment violation, in this case, a violation of the Knock and Announce Rule, does not require the suppression of evidence at trial. Indeed, after the decision was announced, some wondered if the Exclusionary Rule was now obsolete.[86] Interestingly, Justice Thomas, who outlined the Knock and Announce Rule in *Wilson*, joined Scalia's majority opinion in *Hudson*.

V. Conclusion

The Exclusionary Rule has undergone a notable evolution in American history. Its basis, the Fourth Amendment, was clearly not written to exclude evidence but rather to protect against general warrants and writs of assistance. With the creation of the Rule in *Weeks v. United States* and its application to the states in *Mapp*

85 *Hudson*, *supra* note 54 at 593.

86 Bandes, *supra* note 6 at 7.

v. Ohio, the Rule had a substantial influence on criminal trials. The Roberts Court, however, has proceeded to launch its attack on the Rule in *Herring v. United States* and *Hudson v. Michigan*. These decisions on the Good Faith Exception and the Knock and Announce Rule have called the future of the Exclusionary Rule into question. As Scalia noted in *Hudson*:

> We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.[87]

Indeed, time will tell if the Exclusionary Rule will regain its strength, or if the Roberts Court's constraints will continue to weaken its reach.

87 *Hudson*, *supra* note 54 at 597.