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CRIMINAL LAW: FLY-BY-NIGHT LAW ENFORCEMENT:
THE MINNESOTA SUPREME COURT CONSIDERS THE
FOURTH AMENDMENT AS A SEPARATE AND
INDEPENDENT BASIS OF SUPPRESSION FOR A
STATUTORILY INVALID NIGHTTIME SEARCH IN
STATE V. JACKSON

Nathan D. Haynor†

I. INTRODUCTION ................................................................. 653
II. HISTORY .............................................................................. 654
   A. The Nighttime Search Aversion ......................................... 655
   B. Evolution of General Fourth Amendment Jurisprudence ..... 658
      1. Fourth Amendment Applicability: Katz v. United States ......................................................... 659
      2. Satisfying the Fourth Amendment: Camara v. Municipal Court ......................................................... 660
      4. The ‘Good Faith’ Exception to the Exclusionary Rule: United States v. Leon ........................................ 662
   C. Evolution of Nighttime Search Jurisprudence .................. 663
      1. Federal Case Law .......................................................... 663
      2. Minnesota Case Law ...................................................... 665
III. THE JACKSON DECISION .................................................. 666
   A. Facts ............................................................................... 666
   B. Procedural History ........................................................ 667
   C. The Jackson Majority .................................................... 668
      1. Statutory Suppression .................................................... 668
      2. Fourth Amendment Suppression ................................. 669
   D. The Jackson Dissent ........................................................ 671
      1. Statutory Suppression .................................................... 671
      2. Fourth Amendment Suppression ................................. 672
IV. ANALYSIS OF THE JACKSON DECISION .......................... 673

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A. Application of Justice Harlan’s ‘Reasonable Expectation of Privacy’ Test .......................................................... 674
B. Application of the Camara ‘Reasonableness’ Test .............. 677
C. Application of the Weeks-Mapp ‘Exclusionary Rule’ .......... 679
D. Inapplicability of the Leon ‘Good Faith’ Exception .......... 681
V. CONCLUSION .............................................................................................................. 682

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.  

I. INTRODUCTION

Referring to the exclusionary rule implicit in the Fourth Amendment, Justice Clark seemingly predicts the future Minnesota case of State v. Jackson.2 The Jackson case addresses the overarching issue of whether a statutorily invalid nighttime search implicates the Fourth Amendment which, in turn, provides a separate and independent basis of suppression apart from statutory considerations.3 Although officers found methamphetamine while searching Jackson’s home, and she was later found guilty of numerous crimes, she went free on what appears to be a technicality—the search was conducted in violation of a Minnesota statute prohibiting most nighttime searches,4 making it ‘unreasonable’ under the Fourth Amendment and requiring suppression of the seized evidence through the exclusionary rule.5

The Jackson decision is noteworthy because the United States Supreme Court has never directly decided whether a statutorily invalid nighttime search implicates the Fourth Amendment and its underlying remedies.6 Lower courts directly deciding the issue are split.7 Thus, no universal framework for analysis exists. Yet the

2. 742 N.W.2d 163 (Minn. 2007).
3. See id. at 167 (discussing Jackson’s claim that the statutorily invalid nighttime search of her home violated her Fourth Amendment rights, requiring suppression).
5. Jackson, 742 N.W.2d at 166, 176–80.
7. Compare United States ex rel. Boyance v. Myers, 398 F.2d 896, 897 (3d Cir.
Minnesota Supreme Court held that searches conducted in violation of Minnesota’s nighttime search statute may implicate the Fourth Amendment and its exclusionary rule. Although *Jackson* lets a guilty person go free, the decision is supported by history, precedent, and most importantly, the Fourth Amendment.

This case note will first explore America’s particular aversion toward nighttime searches, both before and after ratification of the Fourth Amendment. The note then discusses the Supreme Court’s development of the basic Fourth Amendment analytical framework, followed by the evolution of federal and state nighttime search jurisprudence. Next, the *Jackson* decision is discussed in detail, followed by an in-depth analysis of the decision, applying the Fourth Amendment analytical framework to highlight the main flaw in the court’s reasoning. Last, this note concludes that the Fourth Amendment can provide a separate and independent basis for suppression and therefore *Jackson* was correctly decided.

II. HISTORY

The Fourth Amendment to the United States Constitution guarantees that:

[T]he 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 search and persons or things to be seized.
Ratified in 1791, the amendment was born out of two English colonial practices—the use of general warrants and writs of assistance.\textsuperscript{16} Even so, the Fourth Amendment contains no explicit language prohibiting nighttime searches.\textsuperscript{17} Yet, history shows that Americans look upon nighttime intrusions with particular distaste.

A. The Nighttime Search Aversion

Prior to 1750, nighttime searches were astonishingly common in the American colonies.\textsuperscript{18} Although English general warrants prohibited nighttime execution, this exception was ignored in America until the mid-eighteenth century.\textsuperscript{19} Execution of writs of assistance, however, was always limited to daytime.\textsuperscript{20} In any event, by the 1780s every state but Delaware enacted statutes prohibiting nighttime searches.\textsuperscript{21}

The founding fathers also valued their nighttime in-home


\textsuperscript{17} See U.S. CONST. amend. IV.

\textsuperscript{18} Maclin, supra note 16, at 971 (citing Cuddihy, supra note 16, at 865–66).

\textsuperscript{19} See id. at 940 (citing Cuddihy, supra note 16, at 425–26) (noting the Virginia colony required execution of general warrants during daylight hours by 1745).

\textsuperscript{20} Gittins, supra note 6, at 467–68 (citing O’Rourke v. City of Norman, 875 F.2d 1465, 1473 (10th Cir. 1989)).

\textsuperscript{21} Maclin, supra note 16, at 971 (citing Cuddihy, supra note 16, at 1346 n.228).
privacy. Even the first Congress, prior to ratification of the Fourth Amendment, expressed its disapproval of nighttime intrusions by passing two acts prohibiting nighttime searches. After their enactment, “the reluctance to authorize nighttime searches except under exceptional circumstances continued as an integral part of our jurisprudence.” Much of this jurisprudence seems to focus on federal and state laws limiting execution of search warrants to daytime hours.

One such federal law was the Espionage Act of 1917, requiring government officials applying for a nighttime warrant to be positive that the property to be seized was on the premises. In 1946, certain provisions of the Act were replaced by the Federal Rules of Criminal Procedure. By 1972 and still to this day, Federal Rule of Criminal Procedure 41 requires an additional showing over and above Fourth Amendment probable cause for issuance of a valid nighttime search warrant.

In Jones v. United States, decided in 1958, the Supreme Court reaffirmed Rule 41’s additional nighttime search justification. The search in Jones was conducted around 9 p.m., after dark, with an expired daytime warrant. Unsurprisingly, the Court held the search invalid, but not before noting that nothing could be “a more severe invasion of privacy than [a] nighttime intrusion into a

22. For example, in 1774 John Adams declared: [E]very English[man] values himself exceedingly, he takes a Pride and he glories justly in that strong Protection, that sweet Security, that delightful Tranquility which the Laws have thus secured to him in his own House, especially in the night. Now to deprive a Man of this Protection, this quiet Security in the dead of Night, when himself and Family confiding in it are asleep, is treat[ing] him not like an Englishman not like a Freeman but like a Slave . . . .


23. United States ex rel. Boyance v. Myers, 398 F.2d at 898. The laws were: Act of July 31, 1789, § 24, 1 Stat. 43 and Act of March 3, 1791, § 29, 1 Stat. 206. Id. The Fourth Amendment was ratified on December 15, 1791. See U.S. CONST. amend. IV.


25. See infra Part II.C.1.


28. Id. at 463–64. Today’s version of Rule 41 requires a warrant applicant to provide the issuing judge “good cause” to issue a nighttime warrant otherwise the warrant must be executed during the day. See FED. R. CRIM. P. 41(c)(2)(A)(ii).


30. Id. at 498–99.

31. Id. at 495.
private home. Justice Frankfurter has even compared nighttime searches to “evil in its most obnoxious form.”

States have also shown their aversion towards nighttime searches. State common law does not expressly prohibit such searches but does look upon them unfavorably. This aversion results from revulsion at the indignity of rousing people from their beds. Moreover, the common law regards nighttime police intrusions as a great threat to privacy, destructive of home sanctity, and a danger to police and slumbering citizens. Yet Massachusetts, for example, has expressly authorized nighttime searches by statute since 1836. Upholding the statute in the 1887 decision of Commonwealth v. Hinds, the Massachusetts Supreme Judicial Court opinion still indicates an aversion towards nighttime searches.

Many other states have similar statutes. For example, Alabama enacted a statute limiting nighttime searches in 1852. Even Delaware came to its sense by 1893 when its legislature enacted a statute requiring daytime warrants unless an express nighttime provision was necessary to prevent “an escape, or

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32. Id. at 498. See also Coolidge v. New Hampshire, 403 U.S. 443, 477 (1971) (noting nighttime home entries are an “extremely serious intrusion.”).
34. See Commonwealth v. Grimshaw, 595 N.E.2d at 304 (citing Commonwealth v. Hinds, 13 N.E. 397 (Mass. 1887)) (noting a “strong hostility to nighttime searches” at common law).
35. Id. (citing Commonwealth v. DiStefano, 495 N.E.2d 328, 332 (Mass. App. Ct. 1986)).
36. Id. (citing WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.7 at 650 (4th ed. 2004) (“[A] heightened standard for nighttime searches is mandated by statute or court rule in 23 states, while 14 states explicitly authorize execution at any time, and the remaining 13 states . . . have no pertinent provision.”)).
37. Id. at 305 (citing Commonwealth v. Garcia, 501 N.E.2d 527, 528 (Mass. App. Ct. 1986)).
removal of the person, or things, to be searched for.”

Minnesota enacted its nighttime search law in 1963. Similar to other nighttime search statutes, Minnesota’s law prohibits searches between the hours of 8:00 p.m. and 7:00 a.m., absent a showing of a need to prevent the loss of evidence or to protect police or public safety. Not surprisingly, the policy of Minnesota’s law “is to protect the public from the ‘abrasiveness of official intrusions’ during the night.”

Whether the Fourth Amendment applies in these ‘exceptional circumstances,’ however, remains an anomaly in Fourth Amendment jurisprudence as the Supreme Court has never directly decided the issue. Nevertheless, if a statute limiting nighttime searches is violated and can provide its own basis of suppression, then whether the Fourth Amendment can provide a separate and independent basis of suppression requires application of an elementary Fourth Amendment analysis.

B. Evolution of General Fourth Amendment Jurisprudence

Not until 1886 did the Supreme Court decide the first important Fourth Amendment case. Ever since, “[t]he course of true law pertaining to searches and seizures . . . has not—to put it mildly—run smooth.” As such, tracking key Fourth Amendment Supreme Court decisions establishing the general Fourth Amendment jurisprudence will be helpful.
Amendment analytical framework is a necessary step to understand why statutorily invalid nighttime searches might implicate the Fourth Amendment which, in turn, can provide a separate and independent basis of suppression.

I. Fourth Amendment Applicability: Katz v. United States

As we approach an arguable Fourth Amendment problem we should always first ask whether the amendment is applicable.\(^{51}\) Since the mid-twentieth century, the Fourth Amendment has been held to protect personal privacy.\(^ {52}\) Although the word privacy appears nowhere in the Constitution, the right emanates from certain amendments, including the Fourth.\(^ {53}\) The seminal case linking the Fourth Amendment to a right of privacy and answering the applicability question was explored in 1967 in *Katz v. United States*.\(^ {54}\)

*Katz* involved the issue of whether law enforcement’s electronic tapping of a public telephone booth without a warrant constitutes a ‘search’ implicating the Fourth Amendment.\(^ {55}\) The majority concluded that a search occurred within a protected place and therefore a warrant was required.\(^ {56}\) However, the *Katz* majority failed to articulate what constitutes a ‘place’ protected by the Fourth Amendment.\(^ {57}\) Luckily, Justice Harlan, concurring in *Katz*, articulated a two-step analysis to answer this question.\(^ {58}\)

The first step in the analysis is to determine whether a person has “exhibited an actual (subjective) expectation of privacy” in the place.\(^ {59}\) The second step is to determine whether that expectation is “one that society is prepared to recognize as ‘reasonable.’”\(^ {60}\) Applying the test to the facts of *Katz*, Justice Harlan first concluded that Katz exhibited an actual expectation of privacy when he entered the public telephone booth, shut the door behind him,
and paid the toll. 61 Next, Justice Harlan concluded that society is prepared to recognize Katz’s expectation as reasonable because a public telephone booth is no longer accessible once occupied, with the door closed and toll paid. 62

Today, Justice Harlan’s Katz concurrence is “[t]he touchstone of [any] Fourth Amendment analysis.” 63 If no expectation of privacy exists, there is no ‘search’ and the Fourth Amendment is inapplicable. 64 But if such an expectation exists, then a court must next determine whether the Fourth Amendment is satisfied. 65

2. Satisfying the Fourth Amendment: Camara v. Municipal Court

Satisfaction of the Fourth Amendment requires an inquiry into whether the search was reasonable, determined by the Camara balancing test. 66 The Camara decision addressed the issue of whether the City of San Francisco’s warrantless housing code-enforcement inspections violated the Fourth Amendment’s reasonableness requirement. 67 The test articulated by the Court requires balancing the government’s need to search against the invasion which the search entails. 68

The Court held the warrantless administrative searches ‘unreasonable’ under the Fourth Amendment. 69 The Court also concluded, however, that the housing code-enforcement inspections were reasonable under the Fourth Amendment, if a

61. Id.
62. See id. (noting a public telephone booth becomes a “temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable.”).
63. California v. Ciraolo, 476 U.S. 207, 211 (quoting Katz, 389 U.S. at 360 (Harlan, J., concurring)).
64. See Illinois v. Andreas, 463 U.S. 765, 771 (1983) (stating that “[i]f the inspection by police does not intrude upon a legitimate expectation of privacy, there is no ‘search’ subject to the Warrant Clause.”).
67. Camara, 387 U.S. at 525.
68. Id. at 536–37.
69. Id. at 534.
valid administrative warrant were first obtained, for three reasons.\textsuperscript{70} First, history shows that such inspections are accepted by the courts and the public.\textsuperscript{71} Second, the public’s interest in preventing and abating dangerous housing conditions cannot be satisfied without inspecting the interior of a private structure.\textsuperscript{72} Finally, the inspections involve a limited invasion of an individual’s privacy which is “neither personal in nature nor aimed at the discovery of evidence of a crime.”\textsuperscript{73}

Thus, according to Camara, “[i]f a valid public interest justifies the intrusion contemplated,” then a judge may “issue a suitably restricted search warrant.”\textsuperscript{74} However, if governmental agents search a private dwelling without a valid warrant, they run the considerable risk of violating the reasonableness requirement of the Fourth Amendment.\textsuperscript{75} If the Fourth Amendment applies and is not satisfied, the next inquiry is whether the unreasonably-obtained evidence should be excluded from trial.\textsuperscript{76}

3. Suppression of Unreasonably Obtained Evidence: Weeks v. United States and Mapp v. Ohio

Prior to the 1914 decision of Weeks v. United States,\textsuperscript{77} any relevant evidence seized in violation of the Fourth Amendment was admissible at trial.\textsuperscript{78} However, the Weeks ‘exclusionary rule’ finally

\textsuperscript{70} Id. at 537.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 539.
\textsuperscript{76} See, e.g., Illinois v. Gates, 462 U.S. 213, 223 (1983) (stating “whether the exclusionary rule’s remedy is appropriate in a particular context has long been regarded as an issue separate from . . . whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.”).
\textsuperscript{77} 229 U.S. 383 (1914).
\textsuperscript{78} See, e.g., Adams v. New York, 192 U.S. 585, 595 (1904) (holding that common law does not bar admission of illegally seized evidence); United States v. La Jeune Eugenie, 26 F.Cas. 832 (C.C.D. Mass. 1822) (No. 15,551) (stating that how evidence is obtained does not affect admissibility); Commonwealth v. Dana,
gave the Fourth Amendment the bite to complement its bark.

*Weeks* involved the issue of whether evidence seized by a federal agent during a warrantless search, in violation of the Fourth Amendment, should be excluded. The Court required exclusion, stating that “[i]f [evidence] can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.” The Court’s holding, however, applied only to the federal government. In *Mapp v. Ohio*, decided in 1961, the Court applied the *Weeks* exclusionary rule to the states through the Due Process Clause of the Fourteenth Amendment.

4. The ‘Good Faith’ Exception to the Exclusionary Rule: United States v. Leon

“[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights . . . through its deterrent effect.” As such, its application is limited to those circumstances where its remedial objectives are best served. Thus, many exceptions to the exclusionary rule exist, including the ‘good faith’ exception first articulated in *United States v. Leon*.

Simply put, evidence obtained with a search warrant later found invalid is admissible if the officers who applied for, and executed the warrant, had an objectively reasonable good faith belief in the warrant’s validity. Thus, if “the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of

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43 Mass. 329, 337 (1841) (stating that the court was not concerned with legality of seizure, only relevance of evidence).
80. *Id.* at 393.
81. *Id.* at 398.
83. *Id.* at 655–56.
85. *Id.*
88. *Id.* at 922–23.
probable cause,” then the exclusionary rule is still applicable. However, “a warrant issued by a magistrate normally suffices to establish’ that a law enforcement officer has ‘acted in good faith conducting the search.”

With the Fourth Amendment analytical framework in place, the question becomes whether any portion of it applies to statutorily invalid nighttime searches. As with the evolution of search and seizure law generally, “[t]he course of true law pertaining to [nighttime] searches and seizures . . . has not—to put it mildly—run smooth.”

C. Evolution of Nighttime Search Jurisprudence

1. Federal Case Law

A dissenting opinion is the closest the United States Supreme Court has come to answering whether a statutorily invalid nighttime search implicates the Fourth Amendment. Decided in 1974, Gooding v. United States concerned the issue of whether evidence seized during a nighttime search under a federal drug enforcement law was valid, and if not, whether suppression was required. The warrant, which allowed execution “at any time in the day or night,” was executed at 9:30 p.m. resulting in the seizure of drug contraband. The majority held the particular search was valid, and therefore suppression was not required. Oddly, the majority never mentioned the Fourth Amendment in its analysis.

Justice Marshall, however, did address the Fourth Amendment

89. Id. at 926.
90. Id. at 922 (quoting United States v. Ross, 456 U.S. 798, 823 n.32 (1982)).
92. See Gittins, supra note 6, at 468–69 (noting that Gooding v. United States, 416 U.S. 430, 431 (1974) is the closest the Supreme Court has come to addressing the issue but only Justice Marshall, in his dissent, discussed the constitutional implications of nighttime searches).
93. Gooding, 416 U.S. at 431. The federal law at issue provided: “[A] search warrant relating to offenses involving controlled substances may be served at any time of day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.” Id. at 439 n.8 (quoting 21 U.S.C. § 879(a) (1970)).
94. Id. at 442–43.
95. Id. at 458.
96. See id. at 430–59.
issues in his dissent. According to Justice Marshall, the majority analyzed the particular nighttime search statute in a “vacuum” and was “totally oblivious” to Fourth Amendment considerations. After citing *Katz* for the proposition that the purpose of the Fourth Amendment is to protect the individual’s reasonable expectations of privacy from unjustified governmental intrusion, Justice Marshall felt “there is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night.” Then, referencing *Camara*, Justice Marshall noted that reasonable nighttime searches require an additional justification above Fourth Amendment probable cause. However, as the petitioner in *Gooding* never claimed Fourth Amendment protection, Justice Marshall and the majority viewed the cases as one of statutory interpretation.

Lower federal courts have confronted similar situations, with mixed results. For example, in *United States ex rel. Boyance v. Myers*, decided six years before *Gooding*, the Third Circuit Court of Appeals concluded the time of execution may be a significant factor in determining reasonableness under the Fourth Amendment. However, in *United States v. Searp*, decided four years after *Gooding*, the Sixth Circuit Court of Appeals held the particular procedures required by nighttime search statutes are not part of the Fourth Amendment. Thus, lower federal courts are split on the issue. The states are no different.

97. *Id.* at 461–62 (Marshall, J., dissenting).
98. *Id.* at 462.
99. *Id.* at 464–65. See also, *United States v. Schoenheit*, 856 F.2d 74, 77 (8th Cir. 1988) (establishing that the time of search is relevant to whether the search is reasonable under the Fourth Amendment); *United States v. Gibbons*, 607 F.2d 1320, 1326 (10th Cir. 1979) (holding that nighttime searches are “sensitively related to the reasonableness issue.”).
100. *Gooding*, 416 U.S. at 465 (majority opinion).
101. 398 F.2d 896 (3d Cir. 1968).
102. *Id.* at 897.
103. 586 F.2d 1117 (6th Cir. 1978).
104. *Id.* at 1124.
105. See, e.g., *Commonwealth v. Grimshaw*, 595 N.E.2d 302, 304 (Mass. 1992) (noting numerous courts have rejected that nighttime search limitations have any basis in the Constitution); *State v. Garcia*, 45 P.3d 900, 904 (N.M. Ct. App. 2002) (noting jurisdictions are split on whether the execution of an invalid nighttime search warrant implicates constitutional rights).
2. Minnesota Case Law

Minnesota’s first foray into the debate began with *State v. Lien*, decided on both statutory and constitutional grounds. In September 1977, police officers obtained a nighttime search warrant which was later found invalid under Minn. Stat. section 626.14. The officers arrived at Lien’s residence at 8:50 p.m. and watched the people come and go from Lien’s apartment while preparing to execute the warrant. When Lien arrived home shortly after 9:00 p.m., the officers executed the warrant, entering through an open door. During the search, officers seized marijuana and Lien was later charged with possession of a controlled substance.

At trial, Lien moved to suppress the evidence seized during the search. The district court suppressed the evidence after concluding that the affidavit on which the warrant was based lacked a sufficient factual showing to justify a nighttime search.

The Minnesota Supreme Court reversed. The court relied considerably on Justice Marshall’s *Gooding* dissent, concluding that nighttime searches may have a constitutional dimension. Specifically, the *Lien* court noted that Justice Marshall “believed the Constitution required additional justification for a nighttime search... over and above the ordinary showing of probable cause.”

Thus, the court reasoned that section 626.14 requires a showing that only a nighttime search can be successful. Since the affidavit failed to state that Lien would not be home during the day, the police failed to make a sufficient showing to justify a nighttime search under section 626.14, and the warrant was therefore invalid. Even so, the court allowed the evidence.

106. 265 N.W.2d 833, 839–40 (Minn. 1978).
107. Id. at 839–40.
108. Id. at 835–36.
109. Id. at 836.
110. Id.
111. Id. at 835–36.
112. Id. at 835.
113. Id.
114. Id.
117. Id. at 840 (citing State v. Van Wert, 294 Minn. 464, 199 N.W.2d 514 (1972)).
118. Id. at 836 (describing the form completed by the officer applying for the
Suppression was unnecessary for two reasons. First, the violation of section 626.14 was technical in nature. And second, the judge’s error in granting the nighttime search warrant on the officer’s bare assertions was not of a constitutional nature. The Lien court’s reasoning seems to rest on the particular facts of the case. The statutorily invalid nighttime search warrant “was executed at a reasonable hour when most people are still awake.” Moreover, “[t]he police knew [Lien] had just returned home, was fully clothed, there was considerable activity in his apartment, and . . . [Lien’s apartment] door was partly open.” Thus, a mere technical violation of section 626.14 occurred and, as a result, the Fourth Amendment was inapplicable.

Although Lien discusses the constitutional implications of a nighttime search, the court never concluded whether the Fourth Amendment provides a separate and independent basis of suppression when a serious violation of section 626.14 occurs. In 2007, the court answered “the question left open in Lien, when does a violation of the statute also become a constitutional violation?”

III. THE JACKSON DECISION

A. Facts

At 9:25 p.m. on December 11, 2003, Itasca County police officers executed a nighttime search warrant on Susan Jackson’s home. After entering through a closed door, the officers discovered Jackson and her two children sitting at their kitchen table. The officers handcuffed Jackson, demanding that she lead them to any illegal drugs in her home. Eventually, Jackson led
Rewind three hours. At 6:30 p.m. an Itasca County police investigator conducting a narcotics investigation involving Todd Dawson and Susan Jackson executed a valid search warrant on Dawson’s car after he left Jackson’s home. The investigator discovered a large amount of methamphetamine and other drug paraphernalia. Based on this evidence and information from Dawson and a “confidential reliable informant,” the investigator applied for the warrant to search Jackson’s home. The investigator also requested a nighttime search authorization per section 626.14. The district court judge granted the authorization on the investigator’s assertion that his investigation led him “into the nighttime [sic] scope of search warrant.”

B. Procedural History

Jackson was charged with numerous crimes. Prior to trial, Jackson moved to suppress the seized evidence. She argued that the investigator’s “affidavit failed to articulate a sufficient basis to support a nighttime search” in violation of section 626.14 and both the United States and Minnesota Constitutions. The district court agreed but denied Jackson’s motion. The court ruled the nighttime search warrant violation was statutory, rather than

129. Id. at 166–167. Officers seized approximately 9.7 grams of methamphetamine and other drug paraphernalia.
130. Id. at 166.
131. Id. The investigator discovered fifty-three grams of methamphetamine, a large amount of cash, a digital gram scale, and plastic baggies. Id.
132. Id. The investigator’s affidavit indicated the confidential reliable informant saw Dawson drop-off methamphetamine at Jackson’s home and Jackson sold methamphetamine. Id. Dawson told the investigator he was staying at Jackson’s and the two were dating. Id.
133. Id.
134. Id.
135. Id. at 165, 167. Jackson was charged with two counts of second-degree controlled substance relating to the possession and sale of methamphetamine under Minnesota Statute section 152.022, subdivisions 1(1), 2(1) (2006) and two counts of child endangerment under Minnesota Statute section 609.378, subdivision 1(b) (2) (2006). Id.
136. Id.
137. Id. at 167. Jackson’s argument was based on article I, section 10 of the Minnesota Constitution and the Fourth Amendment of the United States Constitution. Id. at 174–75. Both provisions are exactly the same. Compare U.S. CONST. amend. IV, with MINN. CONST. art. I, § 10.
constitutional, and therefore suppression was unnecessary under the circumstances. At trial, Jackson was found guilty on all charges. The Minnesota Court of Appeals affirmed.

C. The Jackson Majority

1. Statutory Suppression

The Minnesota Supreme Court reversed. The court first addressed Jackson’s statutory suppression argument. Noting that only serious statutory violations “which subvert the purpose of established procedures” require suppression, the court concluded the purpose of section 626.14 is to protect an individual’s interest in being free from intrusion during a period of nighttime repose. The court further indicated that its definition of the interest protected by section 626.14 is highly fact-specific.

Here, police entered Jackson’s “Minnesota home at 9:25 p.m. on December 11 when it would have been dark for several hours.” Furthermore, the investigator’s affidavit failed to show a reasonable suspicion that a nighttime search was necessary to preserve the evidence or protect the police or public. Thus, the search amounted to a serious violation of section 626.14 and suppression was required.

139. Id.
140. Id. at 165–66, 167.
142. Jackson, 742 N.W.2d at 180.
143. Id. at 167–74 (discussing suppression under Minn. Stat. § 626.14 (2006)).
144. Id. at 168, 171 (quoting State v. Cook, 498 N.W.2d 17, 20 (Minn. 1993)).

The court based its definition of the interest protected by section 626.14 in large part on the historical aversion towards nighttime searches. Id. at 169. The court also quoted some definitions of “repose” including: “[t]he state of being at rest,” “[f]reedom from worry; peace of mind,” and “[c]almness; tranquility.” Id. at 171 (quoting THE AMERICAN HERITAGE DICTIONARY 1480 (4th ed. 2000)).

145. See id. at 171. The court explained that the right to protection under section 626.14 “will depend ‘on the imperatives of events and contemporary imponderables rather than on abstract theories of law.’” Id. (quoting Youngstown Sheet Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

146. Id. at 172.
147. Id. Meeting the nighttime authorization pursuant to section 626.14 requires that officers establish a “reasonable suspicion that a nighttime search is necessary to preserve evidence or to protect officer or public safety.” Id. at 167–68 (citing State v. Bourke, 718 N.W.2d 922, 927 (Minn. 2006)). Also, the state conceded the warrant was statutorily invalid. Id. at 167, 172.

148. Id. at 172, 174.
Although the search clearly violated section 626.14, the court still had to address State v. Lien.\(^{149}\) Distinguishing Lien on the facts, the majority noted that in Lien, unlike here, officers entered the residence through an open door and knew that Lien was not sleeping, not engaged in personal behavior he intended to keep private, and was fully clothed.\(^{150}\) Thus, officers knew Lien “had not entered the period of nighttime repose that section 626.14 was intended to protect” before entering his apartment.\(^{151}\) Conversely, the officers raiding Jackson’s home had no such information.\(^{152}\)

The majority also rejected the state’s argument that after-acquired information can form a basis to avoid suppression under section 626.14.\(^{153}\) The court held that police cannot justify a statutorily invalid nighttime search with information discovered only after they enter a home, showing the person had not yet entered a period of nighttime repose.\(^{154}\) This undermines a person’s “statutory right to be free from the ‘abrasiveness of official intrusions’ during the night.”\(^{155}\) Thus, a serious, rather than technical violation of section 626.14 occurred and suppression was required under the statute.\(^{156}\)

2. Fourth Amendment Suppression

The court could have based suppression on statutory grounds alone, but it also ruled on Jackson’s constitutional argument.\(^{157}\) The court reasoned that the dictates of history, the “Supreme Court’s recognition of the especially intrusive nature of nighttime searches,” and the “holdings of several federal courts that nighttime searches implicate the reasonableness requirement of the Fourth Amendment,” require that it take into account the time of day in determining “whether a search is reasonable under the

\(^{149}\) 265 N.W.2d 833 (Minn. 1978).

\(^{150}\) State v. Jackson, 742 N.W.2d 163, 173 (Minn. 2007) (citing Lien, 265 N.W.2d at 836, 841).

\(^{151}\) Id.

\(^{152}\) Id.

\(^{153}\) Id.

\(^{154}\) Id.

\(^{155}\) Id. (quoting State v. Stephenson, 310 Minn. 229, 233, 245 N.W.2d 621, 624 (1976)).

\(^{156}\) Id. at 174.

\(^{157}\) Id. The majority did so even though a prior Minnesota decision recommends against ruling on constitutional issues if a decision may be made on other grounds. See State v. Bourke, 718 N.W.2d 922, 926 (Minn. 2006).
Fourth Amendment.” Moreover, constitutional implications underlie section 626.14 as the statute is designed to protect individuals from unconstitutional nighttime searches.

Concluding that the Fourth Amendment was applicable, the court next determined the statutorily invalid nighttime search of Jackson’s home was ‘unreasonable.’ The court first stated that a reasonable Fourth Amendment nighttime search requires an additional justification beyond probable cause. The additional justification is codified in section 626.14 which allows nighttime searches only to prevent a loss of evidence or to protect police or public safety. Applying the Camara balancing test, the court concluded the invasion of privacy a nighttime search entails outweighed law enforcement’s need to search Jackson’s home at night. Since the investigator’s affidavit was insufficient to justify inclusion of a nighttime search provision under section 626.14, it was also insufficient to meet the Fourth Amendment’s reasonableness requirement. Thus, it was unreasonable for police to enter Jackson’s home at 9:25 p.m. without any information relating to whether Jackson had not entered a period of nighttime repose.

Last, the court held the exclusionary rule was applicable for two reasons. First, it was objectively unreasonable for police to rely on the nighttime search provision of the warrant, included only on the investigator’s “bare assertion” that a nighttime search was necessary. Second, suppression is an acceptable way to deter future police conduct of this nature. Thus, “the Fourth

158. State v. Jackson, 742 N.W.2d 163, 176–77 (Minn. 2007).
159. Id. at 174. The majority also noted the likely recurrence of the issue. Id.
160. Id. at 177.
161. Id.
162. Id.
163. Id. (citing Camara v. Mun. Court, 387 U.S. 523, 536–37 (1967)).
164. Id.
165. Id. The court also noted that it need not decide the precise time “Jackson’s constitutionally protected period of nighttime repose began and ended” as the search clearly fell within the protected period. Id.
166. Id. at 178–80.
167. Id. at 179. The majority rejected the dissent’s argument that the Leon ‘good faith’ exception should apply, noting Minnesota has specifically declined to adopt the exception. Id. at 180 n.10 (citing State v. Harris, 589 N.W.2d 782, 791 n.1 (Minn. 1999); State v. Zanter, 535 N.W.2d 624, 634 (Minn. 1995); State v. Lindsey, 473 N.W.2d 857, 864 n.4 (Minn. 1991); State v. McCloskey, 453 N.W.2d 700, 701 n.1 (Minn. 1990)).
168. Id. at 179.
Amendment provides a separate and independent basis from . . . section 626.14 that requires suppression of the evidence. . . .”

D. The Jackson Dissent

1. Statutory Suppression

Three justices dissented, relying heavily on *Lien*. According to the dissent, the similarity of the facts to *Lien* requires the conclusion that the search constituted a technical violation of section 626.14, therefore suppression is unnecessary. In *Lien*, as here, the police executed a statutorily invalid nighttime search warrant. Both *Lien* and *Jackson* were awake, fully clothed, and not in bed. Furthermore, execution took place at similar times. Thus, a “less than an hour-and-a-half technical violation” of section 626.14 does not require suppression.

Although in *Lien* officers were aware before entering the apartment that *Lien* had not yet entered a period of nighttime repose, the dissent argued this fact was immaterial. According to the dissent, the inquiry should focus on the effect of the statutorily invalid nighttime search on occupants of the home, not on whether police know, before entering, that the occupants have not entered a period of nighttime repose. Thus, whether suppression is allowed under section 626.14 does not depend on when police learned that *Jackson* was not roused from sleep, but rather if *Jackson* was in fact roused from sleep. As *Jackson* was awake, a mere technical violation of section 626.14 occurred and suppression is unnecessary.

169. *Id.* at 180.
171. *Id.* at 180–81.
172. *Id.* at 181 (citing State v. *Lien*, 265 N.W.2d 833, 836 (Minn. 1978)).
173. *Id.* at 181. (citing *Lien*, 265 N.W.2d at 841).
174. *Id.* at 181. In *Lien*, the warrant was executed “shortly after 9 p.m.” *Id.* (citing *Lien*, 265 N.W.2d at 836). In *Jackson*, the warrant was executed at 9:25 p.m. *Id.* at 181.
175. *Id.*
176. *Id.* at 172–73 (majority opinion), 181–82 (Anderson, G. Barry, J., dissenting); *see Lien*, 265 N.W.2d at 841 (referring to the police’s level of knowledge acquired before entering *Lien’s* home).
178. *Id.*
179. *Id.*
2. Fourth Amendment Suppression

The dissent also noted that the decision not to suppress the evidence in *Lien* was based on the conclusion that the error did not implicate the Constitution. Nevertheless, the dissent still addressed, and rejected, the majority's constitutional analysis.

According to the dissent, the federal courts' holdings that nighttime searches violate the Fourth Amendment “involved searches pursuant to a warrant that either prohibited a nighttime search or did not explicitly authorize such a search.” Here, the police acted pursuant to a warrant with a nighttime authorization and therefore the Fourth Amendment is inapplicable.

Even so, the dissent addressed the suppression issue. The dissent rejected suppression based on the *Leon* good faith exception, “because suppression would not deter wrongful police activity and because the officers reasonably relied on the judge’s authorization of the nighttime search.” Both the dissent and majority point out that “an officer’s reliance on a judge’s mistaken determination must be objectively reasonable,” which means “that the officer [has] ‘reasonable knowledge of what the law prohibits.’” However, the dissent believed that it was objectively reasonable for the officers to rely on the judge’s conclusion that the affidavit justified a nighttime search provision when the entire affidavit is analyzed. Because prior Minnesota cases held evidence of drug related activity in an affidavit can justify a nighttime search authorization, it was reasonable for the officers to rely on the judge’s conclusion that the affidavit justified a nighttime search provision.

180. *Id.* at 181, 182 (citing *Lien*, 265 N.W.2d at 841). The dissent also noted that Minnesota courts should avoid constitutional issues if matters can be decided otherwise. *Id.* at 183 (citing State v. Bourke, 718 N.W.2d 922, 926 (Minn. 2006); *In re Senty-Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998)).

181. *Id.* at 183.

182. *Id.* (citing O’Rourke v. City of Norman, 875 F.2d 1465 (10th Cir. 1989) (warrant did not authorize nighttime search); *United States ex rel. Boyance v. Myers*, 398 F.2d 896 (3d Cir. 1968) (warrant authorized daytime search only); *United States v. Merritt*, 293 F.2d 742 (3d Cir. 1961)).

183. *Id.*

184. *Id.* at 183–85.

185. *Id.* at 184.

186. *Id.* (quoting *Leon v. United States*, 468 U.S. 897, 919–20 n.20 (1984)).

187. *Id.* In other words, the majority took too narrow of an approach when it reached its suppression conclusion based solely on that part of the investigator’s affidavit which stated “[t]he investigation has led your affiant into the nighttime [sic] scope of search warrant.” *Id.*

188. *Id.* (citing State v. Bourke, 718 N.W.2d 922, 928–29 (Minn. 2006); State v.
However, unable to garner enough votes for a majority, the dissent failed to stop the Minnesota Supreme Court from ruling that the search of Jackson’s home seriously violated section 626.14, implicating the Fourth Amendment and its exclusionary rule.

IV. ANALYSIS OF THE JACKSON DECISION

Holding the statutorily invalid nighttime search of Jackson’s home also implicates the Fourth Amendment, which, in turn, provides a separate and independent basis of suppression. The majority’s conclusion is correct, but its analysis is flawed in one critical respect. The seminal case determining whether the Fourth Amendment is implicated under particular facts is eerily absent from the Jackson opinion. The Jackson decision rests mainly on Justice Marshall’s Gooding dissent, yet the case contains no mention of Justice Harlan’s ‘reasonable expectation of privacy’ test.

Justice Marshall, in Gooding, indicated his approval of Justice Harlan’s two-part test when he declared “[t]he Fourth Amendment was intended to protect our reasonable expectations of privacy from unjustified governmental intrusion.” When the test is applied to Jackson’s facts, the Fourth Amendment is implicated.

Once implicated, Jackson’s facts further suggest that the nighttime search was unreasonable under the Camara balancing test. And the unreasonableness of the search requires the conclusion that the evidence be suppressed under the Weeks-Mapp exclusionary rule, without exception. This analysis also shows that the Jackson dissent is wrong, both in its conclusion and analysis.

Saver, 295 Minn. 581, 582, 295 N.W.2d 508, 508–09 (1973)).

189. Id. at 180.

190. The Minnesota Supreme Court has used the test both before and after Jackson. See, e.g., In re Welfare of B.R.K., 658 N.W.2d 565, 571 (Minn. 2003) (applying Justice Harlan’s two-part test in context of warrantless search of an underage drinking party); State v. Jordan, 742 N.W.2d 149, 156 (Minn. 2007) (decided later the same day as Jackson but applying Justice Harlan’s two-part test in nighttime search context). Thus, why the Jackson court never applied the ‘reasonable expectation of privacy’ test in its constitutional analysis is extremely odd, especially when the main point of contention between the majority and dissent is whether the Fourth Amendment even applies.


192. See infra Part IV.A.

193. See infra Part IV.B.

194. See infra Parts IV.C–IV.D.

195. See infra Parts IV.A–IV.D.
A. Application of Justice Harlan’s ‘Reasonable Expectation of Privacy’ Test

Again, the first part of Justice Harlan’s two-step test is whether a person has “exhibited an actual (subjective) expectation of privacy” in the particular place. The facts of Jackson show that Ms. Jackson exhibited an expectation of privacy in her home on December 11 at 9:25 p.m. She was inside, sitting at the kitchen table with her two children when the police entered through a closed door. If a person who occupies a public telephone booth, closing the door behind him is “entitled to assume that his conversation is not being intercepted,” then surely one who occupies their private home, closing the door behind her, is entitled to assume that the police will not barge in, absent a sufficient justification (e.g., a valid warrant).

Yet this conclusion is not automatic because the first part of Justice Harlan’s test is a question of fact. Thus, there may be rare

197. State v. Jackson, 742 N.W.2d 163, 166 (Minn. 2007).
198. Id.
200. Obviously a search of Jackson’s home took place, but the question is whether a search subject to the Fourth Amendment took place. Normally, a search of a private home is a search subject to the Fourth Amendment. See, e.g., Payton v. New York, 445 U.S. 573, 589–90 (1980) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961) (“[A]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”)). However, here section 626.14 can provide its own basis of suppression and by providing Jackson with a separate and independent basis of suppression through the Fourth Amendment, the majority risks, as the dissent warns, that the constitutional portion of the opinion may be read as dicta. Jackson, 742 N.W.2d at 183 n.2 (Anderson, G. Barry, J., dissenting). Employing Justice Harlan’s ‘reasonable expectation of privacy’ test in the context of a search conducted in violation of section 626.14 circumvents this result. In all search and seizure cases, “the person making the Fourth Amendment claim must affirmatively show that his or her protected interests as guaranteed by the Fourth Amendment have been invaded . . . .” PHILLIP A. HUBERT, MAKING SENSE OF SEARCH AND SEIZURE LAW 112 (2005). The affirmative showing is made by satisfying Justice Harlan’s test. See, e.g., United States v. Jacobsen, 466 U.S. 109, 113 (1984) (“[A] [Fourth Amendment] ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”) (emphasis added). As will be seen, if a technical violation of section 626.14 occurs, the fact-specific nature of Justice Harlan’s test will prove the Fourth Amendment inapplicable as in Lien. See infra notes 209–10 and accompanying text. But if a serious violation of section 626.14 occurs, as in Jackson, the Fourth Amendment will be applicable. See infra notes 201–03 and accompanying text. See also, infra note 199 and accompanying text.
201. United States v. Kiser, 948 F.2d 418, 423 (8th Cir. 1991) (citing United States v. Monie, 907 F.2d 793, 794 (8th Cir. 1990)).
times when a person has not exhibited a subjective expectation of privacy in their home at night. However, in the context of a serious violation of section 626.14, this is unlikely. The *Jackson* majority acknowledged this, although in a statutory context:

> [F]or example, if the police search an unlit home at 3:00 a.m. without proper nighttime authorization, they run considerable risk of violating the occupants’ interest in being free from intrusion during a nighttime period of repose. But if the police search a home at 8:30 p.m. on the summer solstice when the doors are open and a party is underway... they are much less likely to run the risk of seriously violating the occupants’ interest in being free from such intrusion.\(^{202}\)

Thus, “[b]ecause the factual circumstances of Fourth Amendment cases are so diverse, ‘no template is likely to produce sounder results than examining the totality of the circumstances in . . . .’”\(^{203}\) determining whether the amendment is implicated in the context of a nighttime search.

Police entered Jackson’s home through a closed door without any indication of activity either inside or outside the house.\(^{204}\) Presumably lights were on since Jackson and her children were sitting at the kitchen table when the police barged in, but nothing else indicates that Jackson had not yet entered a period of nighttime repose.\(^{205}\) Moreover, the police entered Jackson’s home at 9:30 p.m. on December 11, during the winter solstice, when it would have been dark for nearly four-and-a-half hours.\(^{206}\) Thus,

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202. *Jackson*, 742 N.W.2d at 171 (majority opinion). The dissent seems to agree by recognizing that:

> [i]f different facts are posited, e.g., the occupants of the home are asleep at the time the warrant is executed, the warrant does not authorize a nighttime search, or there is evidence of what the majority fears might happen—that the police are ‘play[ing] the odds’ in ignoring the statutory requirements—there is little doubt the analysis would change as well.

*Id.* at 182 (Anderson, G. Barry, J., dissenting) (emphasis added).


204. *Jackson*, 742 N.W.2d at 166 (majority opinion).

205. See *id.* (noting police discovered Jackson and her two children awake only after entering their home).

206. *Id.* According to the United States Naval Observatory, the end of civil twilight on December 11, 2003 in Grand Rapids, Minnesota (the largest city in Itasca County) was at 4:59 p.m. U.S. Naval Observatory Astronomical Applications Dept. Website, Sun and Moon Data for One Day, http://aa.usno.navy.mil/
Jackson exhibited a subjective expectation of privacy in being free from unjustified governmental intrusion on that day, at that particular time.

Clearly, the first part of Justice Harlan’s two-step test is highly fact-specific.\textsuperscript{207} Yet, if the first step is satisfied, the next step is whether society is prepared to recognize the individual’s subjective expectation of privacy as reasonable.\textsuperscript{208} This is a question of law.\textsuperscript{209} As the *Jackson* majority correctly points out, the Fourth Amendment must be construed in light of what was deemed unreasonable when the amendment was adopted.\textsuperscript{210}

Recalling the historical aversion towards nighttime searches indicates that American society has consistently frowned upon nighttime searches in particular.\textsuperscript{211} Since “there is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night,”\textsuperscript{212} it follows that society is prepared to recognize a person’s subjective expectation of being free from unjustified governmental intrusions at night as reasonable.

Applying Justice Harlan’s test also shows why the majority’s rejection of *Lien* is correct. Lien never exhibited a subjective expectation of privacy in his apartment when police executed the warrant.\textsuperscript{213} People were coming and going, Lien had just arrived home, and the door to Lien’s apartment was open when the police entered.\textsuperscript{214} As to the nighttime aspect, the search of Lien’s

\textsuperscript{207} See *Katz v. United States*, 389 U.S. at 347, 361 (1967) (Harlan, J., concurring) (stating that first “a person [must] have exhibited an actual (subjective) expectation of privacy.”).

\textsuperscript{208} Id.

\textsuperscript{209} United States v. Kiser, 948 F.2d 418, 423 (8th Cir. 1991) (citing United States v. Monie, 907 F.2d 793, 794 (8th Cir. 1990)).

\textsuperscript{210} *Jackson*, 742 N.W.2d at 176 (citing *Carroll v. United States*, 267 U.S. 132, 149 (1925)). See also *Boyd v. United States*, 116 U.S. 616, 624–25 (1886) (noting that “[i]n order to ascertain the nature of the proceedings intended by the [F]ourth [A]mendment . . . under the terms ‘unreasonable searches and seizures,’ it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England.”).

\textsuperscript{211} See supra Part IIA.


\textsuperscript{213} *State v. Lien*, 265 N.W.2d 833, 836 (Minn. 1978).

\textsuperscript{214} Id.
apartment began around 9:00 p.m. on September 23, when it would have been dark for only an hour-and-a-half. Since Lien’s facts show the unlikelihood of Lien exhibiting a subjective expectation of privacy on that day, at that particular time.

Thus, Lien’s facts fail the first part of Justice Harlan’s test, whether the second part of the test is satisfied is irrelevant. Therefore, the Jackson dissent is correct that the decision not to suppress the evidence in Lien was based on the “conclusion that the error was not of a constitutional nature.” But, because the facts of Jackson show that the error was of a constitutional nature, the search requires analysis under the Camara ‘reasonableness’ test.

B. Application of the Camara ‘Reasonableness’ Test

According to Camara, a search is reasonable if the government’s need to search outweighs the intrusion which the search entails. Applying the Camara balancing test to the facts of Jackson requires the conclusion that the search of Jackson’s home was ‘unreasonable’ under the Fourth Amendment.

As the Jackson majority indicates, section 626.14 articulates the ‘governmental need’ portion of the test—the government must need to search at night to prevent the loss of evidence or protect police or public safety. This need logically requires an additional justification beyond probable cause for a nighttime search warrant to be reasonable under the Fourth Amendment. Other jurisdictions have similar procedural rules or statutes conditionally permitting nighttime searches and consistently reach the same result.

215. Id. According to the United States Naval Observatory, the end of civil twilight on September 23, 1977 in Rochester, Minnesota (where Lien’s apartment was located) was at 7:34 p.m. Sun and Moon Data for One Day, supra note 206.


218. See Moylan & Sonsteng, supra note 51, at 210 (noting that when the Fourth Amendment is applicable, the next step is to determine whether the amendment is satisfied).


220. Jackson, 742 N.W.2d at 177 (majority opinion).

221. Id.

222. Catalano, supra note 40, at 171.

223. See, e.g., Fed. R. Crim. P. 41(e) (2) (A) (ii) (“good cause” required for nighttime provision in search warrant); Gooding v. United States, 416 U.S. 430,
The only evidence the warrant-issuing judge had in support of a nighttime search under section 626.14 was the investigator’s bare assertion that in his opinion, the evidence led him into the nighttime scope of a search warrant.\(^{224}\) Nowhere in the investigator’s affidavit did he state that a nighttime search was necessary to preserve evidence or protect police or public safety.\(^{225}\) Arguably, the police or public safety element of section 626.14 could have been satisfied had Jackson been manufacturing methamphetamine in her home,\(^{226}\) but this was not the case. Thus, the investigator never indicated a need to search Jackson’s home at night and the nighttime search provision was invalid.\(^{227}\)

The Jackson dissent claims that the investigator’s entire affidavit must be considered in determining warrant validity.\(^{228}\) Since prior Minnesota cases have held that a nighttime search warrant may issue when the affidavit attests to drug-related activity, the dissent argued the nighttime search warrant was valid here.\(^{229}\) The entire affidavit, however, fails to suggest that the investigator believed the methamphetamine would be gone by morning or was an imminent danger to the police or public.\(^{230}\) Moreover, the cases relied upon by the dissent are distinguishable. In the first case, the affidavit specifically stated that the defendant could destroy the evidence, thus satisfying section 626.14.\(^{231}\) In the second case, the affidavit explicitly stated that the search be conducted at night because an informant witnessed the defendant selling drugs from the trunk of his car; therefore the evidence could have been lost or removed from

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461 (1974) (Marshall, J., dissenting) (noting Congress frequently requires more stringent justifications for nighttime searches than daytime searches); Roth v. State, 735 N.W.2d 882, 890-91 (N.D. 2007) (N.D. R. Crim. P. 41(c)(1)(E) requires ‘reasonable cause’ for issuance of a nighttime warrant over and above probable cause required for daytime warrant); State v. Salley, 514 A.2d 465, 467 (Me. 1986) (same under Me. R. Crim. P. 41(c)).

224. See Jackson, 742 N.W.2d at 166, 177, 179 (discussing investigator’s search warrant affidavit).

225. See id. at 166 (quoting investigator’s affidavit).

226. See United States v. Tucker, 313 F.3d 1259, 1265 (10th Cir. 2002) (nighttime execution of search warrant upheld because of significant risk of destruction of evidence, personal injuries, and property damage due to volatile nature of chemicals and processes in manufacturing methamphetamine).

227. Jackson, 742 N.W.2d at 177. The state also conceded that the nighttime search provision was invalid. Id.

228. Id. at 184 (Anderson, G. Barry, J., dissenting).

229. Id. (citing State v. Bourke, 718 N.W.2d 922, 928–29 (Minn. 2006); State v. Saver, 295 Minn. 581, 582, 205 N.W.2d 508, 508–09 (1973)).

230. See id. at 166 (quoting investigator’s affidavit).

231. Bourke, 718 N.W.2d at 925.
the search location. In any event, as the Fourth Amendment applies under the facts of Jackson, the dissent’s argument becomes even more unpersuasive once the ‘invasion which a nighttime search entails’ weight is placed on the scale, even considering the entire affidavit.

The government’s need to search Jackson’s home at night was negligible at best. Balanced against the invasion which nighttime searches entail, the only logical conclusion is that the search was ‘unreasonable’ under the Fourth Amendment. Nighttime intrusions are among the most severe invasions of privacy. Such intrusions bear directly on the personal nature of activities that occur in the nighttime home. They violate the sanctity of the home and endanger “slumbering citizens.” These concerns are not alleviated when the person entering the home is a police officer executing a search warrant. In fact, being subject to law enforcement activity at night produces a more anxious and threatening atmosphere than during the day. Therefore, the invasion entailed in the nighttime search of Jackson’s home outweighed law enforcement’s need to search her home at night and was ‘unreasonable’ under the Fourth Amendment.

C. Application of the Weeks-Mapp ‘Exclusionary Rule’

Generally, the application of the exclusionary rule is limited to those times when its remedial objectives are best served. Thus, balancing the costs of suppression against the benefits determines the rule’s applicability.

232. Saver, 295 Minn. at 582, 205 N.W.2d at 508.
233. See, e.g., Jones v. United States, 357 U.S. 493, 498 (1958) (“[I]t is difficult to imagine a more severe intrusion of privacy than the nighttime intrusion into a private home.”); Coolidge v. New Hampshire, 403 U.S. 443, 477 (1971) (nighttime entries into a home are an “extremely serious intrusion.”).
237. Dix, supra note 234, at 150; Leonetti, supra note 234, at 312 n.60.
239. See id. at 349–50 (weighing the potential injury to the role and functions of a grand jury against the potential benefits of exclusion); Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (exclusionary rule only applies when its deterrence benefits outweigh its “substantial social costs” (quoting Leon v. United States, 468 U.S. 897, 907 (1984))).
The costs of excluding the evidence seized in the nighttime search of Jackson’s home are potentially great. Jackson’s home contained methamphetamine, a highly addictive and dangerous narcotic. Moreover, Jackson’s two teen-aged children were present when the police executed the warrant. Jackson risked her children becoming two of the 731,000 individuals aged twelve or older who abuse methamphetamine. Yet Jackson was never punished for possession of narcotics or child endangerment, even though a jury found her guilty of the crimes, partially because the Minnesota Supreme Court determined that suppression was necessary to protect her Fourth Amendment rights.

Although the costs of excluding the seized evidence are significant, the benefits of exclusion are greater. History shows a unique aversion towards unjustified nighttime searches, and Boyd, the first important Fourth Amendment case, strongly encourages that this history be taken into account. Moreover, and as the Jackson majority indicates, suppression is the only way to deter future violations of section 626.14. Section 626.14 codifies what the Minnesota legislature deems a reasonable nighttime search. If law enforcement is allowed to search a home at night because an affiant-officer claims section 626.14 is satisfied, then the statute should be stricken from the Minnesota Code.

Finally, both aforementioned points relate directly to the fact that if the evidence were allowed, the Minnesota Supreme Court would disregard both its own constitution and the United States Constitution. Justice Marshall’s Gooding dissent notes:}

[T]he idea of the police unnecessarily forcing their way into [a home] in the middle of the night—frequently, in narcotics cases,... —rousing the
residents out of their beds, and forcing them to stand by in indignity in their night clothes while the police rummage through their belongings does indeed smack of a “‘police state’ lacking in the respect for . . . the U.S. Constitution.”

This, according to Justice Clark in *Mapp v. Ohio*, would erode the very foundations of our government. Thus, suppression was required, unless the *Leon* ‘good faith’ exception applies.

D. **Inapplicability of the Leon ‘Good Faith’ Exception**

The *Leon* ‘good faith’ exception allows the inclusion of evidence obtained with a search warrant later found to be invalid, so long as the officers who applied for and executed the warrant had an objectively reasonable good faith belief that the warrant was valid. The *Jackson* majority rejected the dissent’s argument that *Leon* should apply as the court had specifically declined to adopt the exception. The Minnesota Supreme Court, however, has never explicitly rejected the *Leon* good faith exception. Nonetheless, even if Minnesota followed *Leon*, an exception to the exception proves the rule inapplicable under the facts of *Jackson*.

Generally, police act in good faith when executing a warrant issued by a magistrate. Yet *Leon* itself notes that a magistrate cannot issue a warrant based on the “bare conclusions of others.” Thus, the good faith exception is inapplicable when a warrant is issued “based on an affidavit that does not ‘provide the magistrate with a substantial basis for determining the existence of probable cause.’”

The investigator’s affidavit in *Jackson* was supported by

252. State v. Jackson, 742 N.W.2d 163, 180 n.10 (Minn. 2007).
253. See, e.g., State v. Harris, 589 N.W.2d 782, 791 n.1 (Minn. 1999) (declining to address state’s request to adopt ‘good faith’ exception); State v. Zanter, 535 N.W.2d 624, 634 (Minn. 1995) (declining to address applicability of a good faith exception); State v. Lindsey, 473 N.W.2d 857, 864 n.4 (Minn. 1991) (same); State v. McCloskey, 453 N.W.2d 700, 701 n.1 (Minn. 1990) (refusing to address issue whether Minnesota should follow *Leon*).
255. *Id.* at 915 (quoting Illinois v. Gates, 462 U.S. 213, 239 (1983)).
256. *Id.* (quoting Gates, 462 U.S. at 239).
probable cause for the issuance of a daytime warrant. Section 626.14, however, requires a showing of reasonable suspicion over and above probable cause for issuance of a nighttime warrant. Thus, an affiant-officer must show that the evidence may be lost or the police or public endangered if the search is not conducted at night. The investigator’s statement in his affidavit “that ‘[t]his investigation has led your affiant into the nighttime [sic] scope of search warrant’” was a “bare conclusion” that the warrant-issuing judge could not rely upon to include the nighttime provision. Therefore, the police in *Jackson*, especially the investigator who obtained the warrant, failed to act in good faith and *Leon* is inapplicable.

The foregoing analysis suggests that the Fourth Amendment can provide a separate and independent basis of evidence suppression apart from section 626.14. Therefore, the *Jackson* majority reached the correct conclusion, though missing the first, and most critical, step in the analysis—whether the Fourth Amendment is even applicable, determined by Justice Harlan’s ‘reasonable expectation of privacy’ test.

V. CONCLUSION

Although the *Jackson* dissent is a more appealing outcome, the conclusion the majority reaches is the correct one, albeit through a flawed analytical framework. Yet, one must keep in mind what is at stake. Americans place great value on in-home privacy, especially during the night. Minnesota in particular has codified this value

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257. See *State v. Jackson*, 742 N.W.2d 163, 166 (Minn. 2007) (quoting investigator’s affidavit which clearly established probable cause).

258. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). “Reasonable suspicion” is defined as “something more than an unarticulated hunch, that the officer must be able to point to something that objectively supports the suspicion at issue.” *State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000).

259. *Bourke*, 718 N.W.2d at 927 (interpreting section 626.14 to require reasonable suspicion that a nighttime search is necessary to prevent loss of evidence or protect police or public safety).

260. *Jackson*, 742 N.W.2d at 166.


262. See *supra* Part II.A.
in section 626.14. Violating this statute does not mean that suppression is required any time police conduct a nighttime search. It simply means that the police must follow the law while enforcing it. If Minnesota wants to punish people like Susan Jackson, the legislature must enact a statute allowing nighttime searches for drug-related offenses, similar to other states. Without such a statute, law enforcement must follow the dictates of section 626.14 or wait until daytime to search a private residence. Otherwise, police risk implicating the Fourth Amendment, possibly to the exclusion of the seized evidence.

A guilty person did go free, and although difficult to swallow, she went free on the basis of a two-hundred-year-old law—the Fourth Amendment to the United States Constitution. By providing Susan Jackson with this separate and independent basis of suppression, the Minnesota Supreme Court made sure not to “disregard the charter of its own existence.”

263. Jackson, 742 N.W.2d at 174.
266. Jackson, 742 N.W.2d at 184–85.