FOURTH AMENDMENT — KNOCK-AND-ANNOUNCE RULE — COMMON LAW "KNOCK-AND-ANNOUNCE" PRINCIPLE FORMS PART OF REASONABLENESS INQUIRY UNDER FOURTH AMENDMENT — *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995).

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> *In all cases where the King is party, the sheriff may break the house, either to arrest or do other execution of the King's process, if he cannot otherwise enter. But he ought first to signify the cause of his coming, and make request to open the doors.*[1]

I. INTRODUCTION

The sanctity of a person to be secure in one's home against unlawful police invasion has long been a guarded liberty in American jurisprudence.[2] Over the years, reverence for this liberty has been expressed in terms of the Fourth Amendment to the United States Constitution,[3] as well as case law.[4]

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[1]*Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603).

[2]*See* Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., plurality) ("It was firmly established long before the Bill of Rights that the fundamental liberty of the individual includes protection against unannounced police entries."); Miller v. United States, 357 U.S. 301, 306-07 (1958) ("From earliest days, the common law drastically limited the authority of officers to break the door of a house to effect an arrest. Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle.").

[3]The Fourth Amendment provides:

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

U.S. CONST. amend. IV. For a complete overview of the Fourth Amendment, see generally WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (3d ed. 1996).

In referring to the Fourth Amendment as the "Three-and-One-Half Amendment," however, some scholars have criticized conservative Supreme Court decisions over the years as not affording the proper protections under the Fourth Amendment. Marcia Coyle

This liberty, however, has repeatedly been compromised in the interests of justice.[5] For example, law enforcement officers may properly enter a home by forcible means[6] to effectuate an arrest or search and seizure if they

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& Claudia MacLachlan, *The Justices Close Ranks On 'Knock And Announce'*, NAT'L L.J., June 5, 1995, at A14.

[4]*See Ker*, 374 U.S. at 49 (Brennan, J., plurality) ("Decisions in both the federal and state courts have recognized, as did the English courts, that the requirement [of announcement prior to entry] is of the essence of the substantive protections which safeguard individual liberty."); *see also* Gouled v. United States, 255 U.S. 298, 304 (1921) (opining that the protection from unreasonable searches and seizures "is as important and as imperative as are the guarantees of other fundamental rights of the individual citizen").

As to the justifications for the judicially created knock-and-announce rule, Professor LaFave explains that the rule of announcement serves three important interests:

> (1) it reduces the potential for violence to both the police officers and the occupants of the house into which entry is sought; (2) it guards against the needless destruction of private property; and (3) it symbolizes the respect for individual privacy summarized in the adage that 'a man's house is his castle.'

3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 6.2(a), at 284 (citation omitted) [hereinafter 3 LAFAVE].

[5]*See* Charles Patrick Garcia, *The Knock And Announce Rule: A New Approach To The Destruction-Of-Evidence Exception*, 93 COLUM. L. REV. 685, 685 (1993) (arguing that the "fear of the drug menace pressures courts to abandon traditional constitutional safeguards in return for more efficient law enforcement"); Robert J. Driscoll, *Unannounced Police Entries And Destruction Of Evidence After* Wilson v. Arkansas, 29 COLUM. J.L. & SOC. PROBS. 1, 1 (1995) (noting that in reference to "no-knock" provisions authorized under the Comprehensive Drug Abuse, Prevention, and Control Act of 1970, the provision "represented a major departure from the traditional common law governing search and seizure" (citation omitted)).

[6]A question may sometimes arise as to what constitutes a "breaking" for purposes of the Fourth Amendment or other knock-and-announce statutes. 3 LAFAVE, *supra* note 4, § 6.2(b), at 285. LaFave asserts that, "[q]uite obviously, forcible entry is included," but he also notes that "[n]otice is also a usual prerequisite to entry by pass key or by opening a close but unlocked door, for only the needless destruction of property is avoided by such techniques." *Id.* (citations omitted); *see also* Sabbath v. United States, 391 U.S. 585 (1968) (holding that unannounced entry through a closed but unlocked door constitutes unlawful entry with respect to the knock-and-announce rule).

comply with the "knock-and-announce" rule.[7] Although directly at odds with the liberty interest in one's home, the rule embodies the premise that police officers may justifiably infringe upon this interest by disclosing their presence and authority prior to entry.[8]

In its theoretical application, the exclusionary rule applies to the knock-and-announce rule.[9] Where officers fail to properly announce themselves,

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[7]3 LAFAVE, *supra* note 4, § 6.2, at 282 ("Generally, it may be said that officers must give notice of their authority and purpose before entering private premises to make an arrest therein."); *see, e.g.*, Wilson v. Arkansas, 115 S. Ct. 1914 (1995); Sabbath v. United States, 391 U.S. 585 (1968); Ker v. California, 374 U.S. 23 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Miller v. United States, 357 U.S. 301 (1958).

[8]*See generally* 3 LAFAVE, *supra* note 4, § 6.2. As to what constitutes appropriate notice by officers, Professor LaFave states: "What is generally required is that a police officer, 'upon identifying himself as such an officer, demand that he be admitted to such premises for the purpose of making the arrest.' Giving notice of the official status, without also announcing the arrest purpose, is insufficient." 3 *id.* at 287-88 (citations omitted).

An often overlooked component of the knock-and-announce rule is that an officer must first be refused entry before forcefully entering. 1 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 56, at 68 (2d ed. 1982) (citations omitted) [hereinafter WRIGHT, PRACTICE AND PROCEDURE]. Professor LaFave explains that "the officer may enter only if his 'demand is not promptly complied with . . . .'" 3 LAFAVE, *supra* note 4, § 6.2(c), at 288 (citation omitted). As to the issue of what "constitutes lack of compliance," Professor LaFave notes that "the better view, notwithstanding the tendency of the courts to accept less, is that the occupant must be given a reasonable opportunity to come to the door at which entry is being sought." 3 *id.* (citation omitted). Wright, on the other hand, notes that "this does not mean that the occupant must expressly refuse to allow the officer to enter, and silence or other indications that admittance is to be refused will be enough." 1 WRIGHT, PRACTICE AND PROCEDURE, *supra*, § 56, at 68 (citations omitted).

[9]The exclusionary rule provides:

> [W]here evidence has been obtained in violation of the search and seizure protections guaranteed by the U.S. Constitution, the illegally obtained evidence cannot be used at the trial of the defendant. Under this rule evidence which is obtained by an unreasonable search and seizure is excluded from admissibility under the Fourth Amendment, and this rule has been held to be applicable to the States.

BLACK'S LAW DICTIONARY 564 (6th ed. 1990) (citation omitted).

Although the Fourth Amendment does not expressly contain mention of the exclusionary rule, the Supreme Court recognized the rule as part of Fourth Amendment jurisprudence in Boyd v. United States, 116 U.S. 616 (1886). 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 1.1(b), at 8 [hereinafter LAFAVE, SEARCH AND SEIZURE]. In Weeks v. United States, 232 U.S. 383

any arrest or subsequent search is rendered illegal.[10] In its practical application, however, courts have engaged in a continuing struggle to balance an individual's liberty interest against the competing interests of efficient law enforcement.[11] Due to the magnitude of these conflicting considerations,

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(1914), the Court held that the exclusionary rule applied to federal searches and seizures. 1 *id.* at § 1.1(c), at 9-10. "The evidence is excluded 'on the ground that the government must not be allowed to profit by its own wrong and thus encouraged in the lawless enforcement of this law.'" People v. Maddox, 294 P.2d 6, 8 (Cal. 1956) (citation omitted).

[10]Gouled v. United States, 255 U.S. 298, 305-06 (1921). The Court has long stated that a search and seizure must always be the product of a lawful arrest. *Id.* In the case of a warrantless arrest or search and seizure, the Court's initial inquiry focuses on whether probable cause existed for the arrest. *See, e.g.*, Ker v. California, 374 U.S. 23 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Miller v. United States, 357 U.S. 301 (1958). Where an arrest is defective or unlawful, evidence seized during the search cannot constitute proof against the victim of the search. Weeks v. United States, 232 U.S. 383 (1914). In addition, the Court has consistently rejected the proposition that "a search unlawful at its inception may be validated by what it turns up." United States v. Di Re, 332 U.S. 581, 595 (1948); *see* Byars v. United States, 273 U.S. 28 (1926).

[11]As early as 1852, the Supreme Court of Massachusetts in attempting to articulate the proper way to balance a person's liberty interest in his home against the interests of law enforcement, stated:

> The maxim of law that every man's house is his castle . . . has not the effect to restrain an officer of the law from breaking and entering a dwelling-house for the purpose of serving a criminal process upon the occupant. In such case the house of the party is no sanctuary for him, and the same may be forcibly entered by such officer after a proper notification of the purpose of the entry, and a demand upon the inmates to open the house, and a refusal by them to do so.

Ker, 374 U.S. at 50 (quoting Barnard v. Bartlett, 10 Cush. (Mass.) 501, 502-03 (1852)).

In Miller v. United States, 357 U.S. 301 (1958), Justice Brennan also recognized the inherent difficulty in balancing the interests of individual liberty against law enforcement interests, but opined:

> However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application.

Id. at 313.

the issue presents a complex and on-going problem in American courtrooms.[12]

The initial Supreme Court decisions concerning the knock-and-announce rule confirmed the vitality and importance of the rule, but failed to delineate the uncertainty surrounding its interpretation in two respects.[13] First, the Court never specifically articulated whether the Fourth Amendment mandates announcement, or whether the rule exists as a reflection of common law, applicable by statute only.[14] The Court's failure to address the rule in terms of the Fourth Amendment, however, was due to the fact that the Court initially interpreted only state or federal codifications of the rule.[15] In *Ker*

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[12]For examples of the consequences of unannounced entry, see Steve Cannizaro, THE NEW ORLEANS TIMES-PICAYUNE, *Drug Raid Policy Walks Fine Line Critics: 4th Amendment Eroded*, June 22, 1995, at B1 ("In August 1992, a California man was wounded when federal officers, based on wrong information that he was holding drugs, went into his house and shot him three times as he tried to defend himself. A Texas grandmother was shot to death in her bed several years ago by officers who mistakenly charged into her home."); Driscoll, *supra* note 5, at 5 (describing an event in Guthrie, Oklahoma where "federal drug enforcement agents used an axe to break down an innocent homeowner's front door, then proceeded to handcuff him in front of his family before realizing that they were at the wrong address") (citation omitted)); Jennifer M. Goddard, *The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Protection of Fourth Amendment Rights*, 75 B.U. L. REV. 449, 449 (1995) (describing a tragic incident wherein officers mistakenly entered the house of a seventy-five-year-old minister, who, "[u]nable to withstand the shock of the intrusion, . . . suffered a fatal heart attack" (citation omitted)).

[13]*See* Ker v. California, 374 U.S. 23 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Miller, 357 U.S. 301 (1958).

[14]As a result of the Supreme Court's failure to fully address this issue, lower court decisions have divided accordingly. For decisions holding that the Fourth Amendment mandates announcement, *see, e.g.*, Commonwealth v. Chambers, 598 A.2d 539 (Pa. 1991); People v. Gonzalez, 259 Cal. Rptr. 846 (Cal. Ct. App.) (1989); People v. Saechao, 544 N.E.2d 745 (Ill. 1989). In contrast, lower courts also hold that announcement is not constitutionally compelled. *See, e.g.*, Commonwealth v. Goggin, 587 N.E.2d 785 (Mass. 1992); State v. Stevens, 511 N.W.2d 591 (Wis. 1991); United States v. Nolan, 718 F.2d 589 (3d Cir. 1983).

[15]*See, e.g.*, Sabbath v. United States, 391 U.S. 585, 588-89 (1968) (evaluating the validity of a warrantless arrest under criteria identical to those in 18 U.S.C. § 3109); Ker v. California, 374 U.S. 23 (1963) (evaluating the lawfulness of a search and seizure under a California knock-and-announce statute); Miller v. United States, 357 U.S. 301, 306 (1958) (noting that the validity of the officer's entry was to "be tested by criteria identical to those embodied in 18 U.S.C. § 3109").

In *Ker*, Justice Brennan defended the Court's failure to address the constitutionality

v. California,[16] the Court specifically addressed the Fourth Amendment issue,[17] but a divided Court was unable to resolve the tension between the knock-and-announce rule and the Constitution.[18] Although the Court has acknowledged that announcement may be excused where it is a "useless gesture"[19] or in "exigent" circumstances,[20] the Court has failed to specify

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of the knock-and-announce rule in *Miller*, noting that "*Miller* is simply an instance of the usual practice of the Court not to decide constitutional questions when a nonconstitutional basis for decision is available." *Ker*, 374 U.S. at 53 (1963) (Brennan, J., pluarality).

[16]374 U.S. 23 (1963).

[17]*See* 3 LAFAVE, *supra* note 4, § 6.2(a), at 283 ("[I]t was not until *Ker v. California* that the Court had occasion to rule specifically upon the question of whether the Fourth Amendment compels such notice [of authority] ordinarily be given prior to an arrest entry.").

[18]*Ker*, 374 U.S. at 24 (Clark, J., plurality); *id.* at 44 (Harlan, J., concurring in judgment); *id.* at 46 (Brennan, J., plurality). The *Ker* Court split four to four with Justice Harlan concurring in the result, but asserting that federal searches and seizures should be evaluated under the Due Process Clause of the Fourteenth Amendment. *Id.* at 44 (Harlan, J., concurring in judgment). *See* Driscoll, *supra* note 5, at 4 ("Since *Ker*, lower courts have divided on the question of whether the Fourth Amendment mandates announcement." (citations omitted)); Goddard, *supra* note 12, at 450 ("Lower courts vary in their understanding of whether the *Ker* Court found the knock-and-announce rule required by the Fourth Amendment's reasonableness clause." (citations omitted)).

[19]*See* Miller v. United States, 357 U.S. 301, 310 (1958) (considering whether Miller's actions indicated knowledge of the purpose for the officer's presence, rendering announcement a "useless gesture"). Professor LaFave observes that, although Justice Brennan's "useless gesture" standard "is obviously a more strict standard than that applied to the emergency exceptions . . ., it is quite appropriately more demanding." 3 LAFAVE, *supra* note 4, § 6.2(e), at 293 (citation omitted). In support of the stricter standard, the professor explains that in the application of the "useless gesture" exception "there is no balancing of conflicting interests involved, but merely a recognition that the police need not do that which is unnecessary." 3 *id.*

[20]Compliance is not required "when there is a sufficient indication of some emergency making notice impracticable." 3 LAFAVE, *supra* note 4, § 6.2(d), at 289. American jurisprudence has generally recognized "exigent" circumstances in three situations. First, the "peril" or "imminent danger" exception holds that announcement will be excused where "[i]mminent danger to human life exists." Read v. Case, 4 Conn. 166, 170 (1822). Next, the "fresh pursuit" exception serves to excuse announcement where an officer is in "fresh pursuit" of a person, or the person is aware that they are being pursued. This exception, however, may be grouped under the "useless gesture" exception because the person being pursued is deemed to have knowledge of the officers' presence, rendering announcement a "useless gesture." People v. Pool, 27 Cal. Rptr. 573 (1865). The third

how and when the exceptions are to be applied.[21] Accordingly, lower court decisions have struggled to apply the exceptions to the knock-and-announce rule.[22]

Recently, the United States Supreme Court in *Wilson v. Arkansas*,[23] specifically addressed whether the knock-and-announce rule forms part of the

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and most controversial exception to the knock-and-announce rule is the "destruction of evidence" exception. This exception excuses compliance with the knock-and-announce rule where such compliance would result in the destruction of evidence. People v. Maddox, 294 P.2d. 6 (Cal. 1956).

In applying the exigent exceptions to the knock-and-announce rule, controversy arises as to the two contrasting philosophies followed by the courts. Some courts follow a "blanket rule" approach, whereby it is presumed that a sufficient risk exists due to the nature of the arrest. 3 LAFAVE, *supra* note 4, § 6.2(d), at 290. For example, courts reviewing drug and narcotics cases would assume that the nature of the activity carries a presumption of inherent risk that would excuse compliance with the knock-and-announce rule. 3 *id.* Professor LaFave disagrees with the "blanket approach," however, and instead subscribes to the approach followed in People v. Rosales, 68 Cal.2d 299 (1968). 3 *id.* Referred to as the "particularized" approach, LaFave notes that the *Rosales* court required that the determination of whether announcement is excused "must be based on the facts of the particular case." 3 *id.* Thus, Professor LaFave asserts that in order to properly determine whether announcement was unnecessary in situations such as narcotics cases,

> What is needed are additional facts in the individual case, such as that a knock on the door prompted 'noises consistent with the destruction of evidence,' that the defendant is known to have taken particular precautions to facilitate evidence destruction, or that defendant is especially apprehensive about police discovery of his criminality.

3 *id.* at 290-91 (citations omitted). Professor LaFave believes that the "particularized" approach should also be utilized in regard to the other exceptions. 3 *id.* at 291.

[21] *See infra* notes 117-43 and accompanying text (discussing the Court's decision in *Ker* which resulted in two different approaches to applying the exceptions to the common law knock-and-announce rule).

[22] *See* Garcia, *supra* note 5, at 686 ("In the absence of clear direction from the Court, federal and state courts applying the Fourth Amendment announcement requirement have, somewhat predictably, produced a wide and persistent split on the issue of exceptions." (citation omitted)).

Professor LaFave notes that many decisions from both the Supreme Court and the lower courts have touched on the exceptions to the knock-and-announce rule, "but often not exclusively in Fourth Amendment terms because of the frequent availability of announcement statutes as a basis of decision." 3 LAFAVE, *supra* note 4, § 6.2(a), at 284.

[23] 115 S. Ct. 1914 (1995).

reasonableness test of the Fourth Amendment.[24] Writing for a unanimous Court, Justice Thomas asserted that whether an officer announces his authority and purpose is but one factor to be considered in evaluating the overall "reasonableness" of a search under the Fourth Amendment.[25] In cautioning against a rigid application of the rule, the Justice recognized the existence of exceptions, but explicitly refused to enunciate when such circumstances would exist.[26]

II. STATEMENT OF THE CASE

During the latter months of 1992, Sharlene Wilson engaged in a series of narcotics transactions with an Arkansas police informant.[27] In late November, the informant purchased marijuana and methamphetamine at Wilson's home, which she shared with Bryson Jacobs.[28] A month later, the informant contacted Wilson at her home to arrange another narcotics purchase.[29] At the subsequent meeting, Wilson produced a semi-automatic pistol and threatened to kill the informant if she was working for the police.[30] Wilson then sold the informant a bag of marijuana.[31]

The following day, police officers obtained warrants to search Wilson's home, and to arrest both Wilson and Jacobs.[32] In support of the warrants, the police filed affidavits which detailed Wilson's transactions with the informant, and noted Jacob's previous convictions for arson and firebombing.[33] Upon commencement of a search later in the afternoon, the

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[24]*Id.* at 1916.

[25]*Id.* at 1918.

[26]*Id.* at 1919.

[27]*Id.* at 1915.

[28]*Id.*

[29]*Id.*

[30]*Id.*

[31]*Id.*

[32]*Id.*

[33]*Id.*

police found the main door to Wilson's home open.[34] While entering the residence through an unlocked screen door, the officers identified themselves and announced their possession of a search warrant.[35] Inside, the officers' seized various narcotics, a gun, and ammunition, and discovered Wilson attempting to flush marijuana down the bathroom toilet.[36] Wilson and Jacobs were subsequently arrested and charged with various offenses for drug delivery and possession.[37]

Before trial, Wilson filed a motion to suppress the seized evidence.[38] In part, Wilson asserted that the search was invalid because of the officers failure to "knock-and-announce" prior to entering her home.[39] After the trial court summarily denied the motion, a jury convicted Wilson of all charges.[40]

On appeal, the Arkansas Supreme Court affirmed Wilson's conviction.[41] Although noting the simultaneous nature of the officers' entry and identification of themselves, the court rejected Wilson's argument that "the Fourth Amendment requires officers to knock-and-announce prior to entering the residence."[42] Concluding, the court held that neither Arkansas law nor the Fourth Amendment required suppression of the evidence.[43]

The United States Supreme Court granted *certiorari*[44] "to resolve the conflict among the lower courts as to whether the common-law knock-and-

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[34]*Id.*

[35]*Id.*

[36]*Id.* at 1915-16.

[37]*Id.* at 1916. Specifically, Wilson and Jacobs were charged with "delivery of marijuana, delivery of methamphetamine, possession of drug paraphernalia, and possession of marijuana." Id.

[38]*Id.*

[39]*Id.*

[40]*Id.* Wilson was later sentenced to 32 years in prison. *Id.*

[41]*Id.* (citing Wilson v. Arkansas, 878 S.W.2d 755 (Ark. 1994)).

[42]*Id.* (quoting *Wilson*, 878 S.W.2d at 758).

[43]*Id.* (citing *Wilson*, 878 S.W.2d at 758).

[44]115 S. Ct. 571 (1994).

announce principle forms a part of the Fourth Amendment reasonableness inquiry."[45] Writing for a unanimous Court, Justice Thomas reversed the Arkansas Supreme Court's ruling and pronounced that the common law principle constitutes an element of the Fourth Amendment's reasonableness inquiry.[46] The Court, however, declined to rule on the merits and remanded the case for further consideration.[47]

III. ORIGIN AND DEVELOPMENT OF "KNOCK-AND-ANNOUNCE" JURISPRUDENCE

A. ENGLISH COMMON LAW — THE ORIGIN OF THE KNOCK-AND-ANNOUNCE PRINCIPLE

Developed under English common law, the knock-and-announce rule originated as a means to safeguard the sanctity of a person's home against unlawful police invasion.[48] English courts reasoned that adequate notice of authority and purpose allowed citizens to distinguish between lawful entry and trespass.[49] The English common law courts applied the rule mainly in the context of arrest warrants,[50] and did not appear to recognize exceptions to the rule.[51]

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[45]*Id.* at 1918.

[46]*Id.*

[47]*Id.* at 1919.

[48]*See* Semayne's Case, 77 Eng. Rep. 194 (K.B. 1603) (requiring law authorities to demand entry and announce authority before entering a home to service a civil writ). For a thorough discussion of the common law history of the knock-and-announce rule, *see* Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949).

[49]*See* Curtis' Case, 168 Eng. Rep. 67, 68 (K.B. 1757) ("It is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority . . . .").

[50]*See* Goddard, *supra* note 12, at 455 (noting that the reason that the English courts applied the rule mainly in the context of arrest warrants "was that the issuance and execution of search warrants did not even receive judicial approval until 1765 . . . ." (citation omitted)).

[51]*See* Ker v. California, 374 U.S. 23, 54 (1963) (Brennan, J., plurality) ("I have found no English decision which clearly recognizes any exception to the requirement that the police first give notice of their authority and purpose before forcibly entering a home."). In a prior decision, however, Justice Brennan recognized that common law courts

The origin of the knock-and-announce principle is judicially accepted as arising from the sixteenth century decision in *Semayne's Case*.[52] In that case, an English court pronounced that, when serving a civil writ, a sheriff must first knock and announce his authority and purpose.[53] In promulgating the rule, the court acknowledged the sanctity of a person's home, as well as the need to protect it against undue destruction.[54]

The vitality of the rule continued as English courts later extended its application to criminal cases.[55] The court in *Curtis' Case*,[56] held that the

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permitted "breaking" when officers were apprehending a felon, but that "[t]he common-law authorities differ[ed] . . . as to the circumstances in which this was the case." Miller v. United States, 357 U.S. 301, 307 (1958).

[52]77 Eng. Rep. 194 (K.B. 1603); *see also* 3 LAFAVE, *supra* note 4, § 6.2(a), at 282 ("As early as 1603, in *Semayne's Case*, it was asserted that before an officer of the Crown could break into a home in order to make an arrest "'he ought to signify the cause of his coming, and to make request to open the doors.'" (citation omitted)); *Miller*, 357 U.S. at 308 (noting that the knock-and-announce requirement "was pronounced in 1603 in *Semayne's Case* . . . ."). Although most courts cite *Semayne's Case* as the origin of the knock-and-announce rule, Justice Thomas, in Wilson v. Arkansas, 115 S. Ct. 1914, 1917 n.2 (1995), noted that the case itself refers to a statute enacted in 1275. *Id.* (citation omitted). In addition, scholars note that the rule has roots in Biblical law and early Anglo-Saxon law. G. Robert Blakey, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U. PA. L. REV. 499, 501 (1964).

[53]*Semayne's Case*, 77 Eng. Rep. at 195.

[54]*Id.* at 195-96. In Wilson v. Arkansas, 115 S. Ct. 1914 (1995), Justice Thomas recognized *Semayne's* premise in preventing undue damage in the execution of judicial orders:

> [F]or the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did know of the process, of which, if he had notice, it is presumed that he would obey it . . . .

Id. at 1916-17 (quoting *Semayne's Case*, 77 Eng. Rep. at 195-96).

[55]*See* Curtis' Case, 168 Eng. Rep. 67 (K.B. 1757) (applying the rule of *Semayne's Case* to arrest warrants and criminal cases).

[56]168 Eng. Rep. 67 (K.B. 1757).

rule also applied to arrest warrants.[57] In *Curtis' Case*, the court accepted as a defense to the murder of an officer, the defendant's contention that the officer had failed to announce his purpose and authority.[58] In addressing the function of the announcement requirement, the court reasoned that it served to notify the dweller that the officer was acting under proper authority.[59]

The interpretations promulgated in these cases also found support from prominent commentators of the era.[60] Sir Matthew Hale summarized the common law practice, asserting that an officer's "breaking" was justified "if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refused to open the door."[61] Similarly, William Hawkins asserted that forcible entry was justified where the officer "first signif[ied] to those in the house the cause of his coming, and request[ed] them to give him admittance."[62]

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[57]*Id.* at 68. Justice Brennan described the decision in *Curtis' Case* as the "most emphatic confirmation" of the knock-and-announce principle. Ker v. California, 374 U.S. 23, 48 (1963) (Brennan, J., plurality).

[58]168 Eng. Rep. at 68. The *Curtis* court reiterated *Semayne's* central holding in the context of arrest warrants, stating that "peace-officers, having a legal warrant to arrest for a breach of the peace, may break open doors, after having demanded admittance and given due notice of their warrant." *Id.*

[59]*Id.* In regard to the form of the announcement, the *Curtis* court stated: "[N]o precise form of words is required in a case of this kind. It is sufficient that the party hath notice that the officer cometh not as a mere trespasser, but claiming to act under proper authority . . . ." *Id.*

[60]Wilson v. Arkansas, 115 S. Ct. 1914, 1917 (1995). For a thorough discussion of English common law commentary concerning the origins of the knock-and-announce rule, *see* Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949).

[61]1 SIR MATTHEW HALE, PLEAS OF THE CROWN 582 (1736). In *Wilson*, Justice Thomas also noted similar interpretations by William Hawkins and Sir William Blackstone. *Wilson*, 115 S. Ct. at 1917.

[62]2 WILLIAM HAWKINS, PLEAS OF THE CROWN 138 (6th ed. 1787). Toward the end of the English common law era, Chief Justice Abbot perfectly articulated the rationale behind the knock-and-announce rule, stating:

> I am clearly of the opinion that, in the case of a misdemeanor, such previous demand is requisite . . . . It is reasonable that the law should be so; for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be

B. EARLY AMERICAN JURISPRUDENCE — DEVELOPMENT OF EXCEPTIONS TO THE COMMON LAW

The knock-and-announce principle eventually found root in America as the colonies incorporated English common law into their rules of criminal procedure by means of statutes or constitutional provisions.[63] American

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justified in resisting to the utmost.

Ker v. California, 374 U.S. 23, 48-49 (1963) (quoting Launock v. Brown, 106 Eng. Rep. 482, 483 (1819)).

[63]3 LAFAVE, *supra* note 4, § 6.2, at 282. Today, a majority of the states have codified the knock-and-announce rule in some form. *See, e.g.*, ALA. CODE § 15-5-9 (1982) (search warrants; origins dating to 1852); ALASKA STAT. § 12.25.100 (1990) (arrest warrants), § 12.35.040 (1990) (search warrants); ARK. CODE ANN. § 16-81-107 (Michie 1987) (arrest warrants); CAL. PENAL CODE § 844 (West 1989) (arrest warrants; origins dating to 1872), § 1531 (West 1982) (search warrants; origins dating to 1872); D.C. CODE ANN. § 33-565(g) (1981) (search warrants for controlled substances); FLA. STAT. ANN. § 901.19(1) (West 1985) (arrest warrants; origins dating to 1939), § 933.09 (West 1985) (search warrants; origins dating to 1923); GA. CODE ANN. § 17-5-27 (1990) (search warrants; origins dating to 1863); HAW. REV. STAT. § 803-11 (1994) (arrest warrants; origins to 1869), § 803-37 (1994) (search warrants; origins dating to 1869); IDAHO CODE § 19-611 (1987) (arrest warrants; origins dating to 1864), § 19-409 (1987) (search warrants; origins dating to 1864); ILL. ANN. STAT. ch. 725, para. 5/108-8 (Smith-Hurd 1992) (search warrants); IND. CODE § 35-33-5-7(d) (1986) (search warrants); IOWA CODE § 804.15 (1994) (arrest warrants; origins dating to 1851), § 808.6 (1994) (search warrants; origins dating to 1851); KY. REV. STAT. ANN. § 70.078 (Michie/Bobbs-Merrill 1994) (arrest warrants); LA. CODE CRIM. PROC. ANN. art. 224 (West 1991) (arrest warrants; origins dating to 1928); MICH. COMP. LAWS ANN. § 764.21 (West Supp. 1994) (arrest warrants), § 780.656 (West 1982) (search warrants); MINN. STAT. § 629.34 (1983) (arrest warrants); MISS. CODE ANN. § 99-3-11 (1972) (arrest warrants; origins dating to 1857); MO. REV. STAT. § 105.240 (1986) (arrest warrants; origins dating to 1939); NEB. REV. STAT. § 29-411 (1989) (arrest and search warrants); NEV. REV. STAT. § 171.138 (1992) (arrest warrants), § 179.055 (1992) (search warrants); N.Y. CRIM. PROC. LAW § 120.80 (McKinney 1992) (arrest warrants; origins dating to 1881), § 690.50 (McKinney 1995) (search warrants; origins dating to 1881); N.C. GEN. STAT. § 15A-249 (1988) (search warrants), § 15A-401 (1988) (arrest warrants); N.D. CENT. CODE § 29-06-14 (1991) (arrest warrants; origins dating to 1877), § 29-29-08 (1991) (search warrants; origins dating to 1877); OHIO REV. CODE ANN. § 2935.12 (Anderson 1993) (arrest and search warrants); OKLA. STAT. ANN. tit. 22, § 194 (West 1992) (arrest warrants; origins dating to 1877), tit. 22, § 1228 (West Supp. 1995) (search warrants; origins dating to 1877); OR. REV. STAT. § 133.235(6) (1990) (arrest warrants), § 133.575(2) (1990) (search warrants); 42 PA. CONS. STAT. ANN. § 2007 (1989) (search warrants); S.D. CODIFIED LAWS ANN. § 23A-35-8 (1988) (search warrants; origins dating to 1877); TENN. CODE ANN. § 40-7-107 (1990) (arrest warrants; origins dating to 1858); TEX. CRIM. PROC. CODE ANN. § 15.25 (West 1977) (arrest warrants); UTAH CODE ANN. § 77-7-10 (1990) (arrest

courts, however, extended the original purview of the rule to include the execution of search warrants.[64] More importantly, the courts departed from the traditional common law approach by recognizing exceptions to the announcement requirement of the rule.[65]

As early as 1822, American courts acknowledged a "peril" exception to the rule.[66] In *Read v. Case*,[67] Read's "bail" physically permitted law authorities to enter Read's home without proper notice and arrest him.[68]

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warrants), § 77-23-210 (1990) (search warrants); WASH. REV. CODE § 10.31.040 (1990) (arrest warrants; origins dating to 1881); W. VA. CODE § 62-1A-5 (1992) (search warrants); WYO. STAT. § 7-7-104 (1987) (search warrants), § 7-8-104 (1987) (arrest warrants; origins dating to 1876).

[64]*See* Goddard, *supra* note 12, at 456. Goddard observes that the early American cases did not generally focus on the "announcement" requirement of the rule because "officers generally announced their purpose and were refused entry prior to breaking into homes." *Id.* at 456 (citations omitted)). In addition, Goddard asserts that the influence of *Semayne's Case*, which first articulated the knock-and-announce rule, was attested by the fact that the announcement requirement was usually fulfilled. *Id.* (citation omitted).

[65]In understanding the rationale behind the "exigent circumstances" exceptions to the knock-and-announce rule, two justifications arise. One justification, evident in early state court decisions, is that the "peril" and "destruction of evidence" exceptions promote efficient and safe law enforcement. *See* People v. Maddox, 294 P.2d 6 (Cal. 1956) (excusing noncompliance where officers act with probable cause and compliance would lead to the "destruction of evidence"); Read v. Case, 4 Conn. 166 (1822) (excusing compliance with the knock-and-announce rule where "[i]mminent danger to human life" exists). Similarly, Professor LaFave notes that the exceptions allow for situations where "some emergency mak[es] notice impracticable." 3 LAFAVE, *supra* note 4, § 6.2(d), at 289.

Justice Brennan gave a somewhat different justification for the exceptions, asserting that the exceptions were "predicated on knowledge or awareness of [an] officer's presence." Ker v. California, 374 U.S. 23, 58 (Brennan, J., plurality). Thus, Justice Brennan reasoned that on such occasions where the circumstances fall within the confines of the exceptions, announcement is unnecessary because the person is already aware of the officer's presence and authority. *Id.* at 54-55 (Brennan, J., plurality). *See* Goddard, *supra* note 12, at 474 ("The common thread woven through the exceptions to the knock-and-announce rule [is] a requirement of some subjective knowledge by the suspect.").

[66]Read v. Case, 4 Conn. 166 (1822).

[67]4 Conn. 166 (1822).

[68]*Id.* at 167. According to the facts, Read had earlier been arrested and released on bail, with Case serving as his bail. *Id.* On the day in controversy, Case went to Read's home and gained entrance by assuring him that "he had nothing against him, and would not let any one in." *Id.* When law authorities knocked on the door later in the evening,

The court affirmed the general prohibition against forceful entry without prior announcement, but considered whether a "just and reasonable exception" existed.[69] Noting Read's promise "to resist even to the shedding of blood,"[70] the court excused the announcement requirement, opining that it was unnecessary in such cases where "[i]mminent danger to human life" existed.[71]

American courts also acknowledged a "fresh pursuit" exception to the rule, governing situations where an officer is pursuing a person who has just committed a crime, or who has just escaped from custody.[72] In *People v. Pool*,[73] the defendant and others were confronted by a deputy sheriff in their living quarters after having robbed two stage-coaches.[74] The armed deputy demanded that the men surrender, but gunfire ensued resulting in the

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Case "unbolted the door, with one hand, and reached a gun, with the other, . . . [and] at the same time, he let in a number of men, who seized [Read], and dragged him away to prison." *Id.*

[69]*Id.* at 170. The court appeared to have been applying *Semayne's* rule in the context of the case, stating, "If the principal has withdrawn himself within his own house, and fastened his doors, the bail may break them open to arrest him, after having signified the cause of his coming, and requested the principal to open them." *Id.*

[70]*Id.* Case asserted at trial that upon his suggestion to Read to turn himself into the authorities, that "[Read] told him, that he should not; that his house was his castle; that he had a gun, and should protect himself." *Id.* at 167.

[71]*Id.* In support of the exception to the knock-and-announce rule, the *Read* court stated:

> Imminent danger to human life, resulting from the threats and intended violence of the principal towards his bail, constitutes a case of high necessity; and it would be a palpable perversion of a sound rule to extend the benefit of it to a man, who had full knowledge of the information he insists should have been communicated; and who waited only for a demand, to wreak on his bail the most brutal and unhallowed vengeance.

Id.

[72]*See, e.g.*, People v. Pool, 27 Cal. Rptr. 573, 577 (1865).

[73]27 Cal. Rptr. 573 (1865).

[74]*Id.* at 574-75. Thirteen other men accompanied Pool in the commission of the crime. *Id.* at 574. The deputy sheriff discovered Pool and his men the morning after the robbery at the "Somerset House." *Id.* at 575.

deputy's death.[75] At trial, Pool asserted that his actions were justified by the deputy's failure to state his authority and purpose for the arrest.[76] In rejecting the defense, the court summized, "Where a party is apprehended in the commission of an offense, or upon fresh pursuit afterward, notice of the official character of the person making the arrest or of the cause of the arrest is [unnecessary], because he must know the reason why he is apprehended."[77] Because the court found that Pool had such knowledge of his pursuers, the court reasoned that is was unnecessary for the sheriff to have formally announced his authority.[78]

Years later, and shortly before the United States Supreme Court's decision in *Miller v. United States*,[79] the California Supreme Court confirmed yet another exception to the knock-and-announce rule.[80] In *People v. Maddox*,[81] the court permitted noncompliance with a California knock-and-announce statute where such compliance would have resulted in the "destruction of evidence."[82] In *Maddox*, police officers, acting with knowledge of drug activity in Maddox's home, went to the premises to arrest him.[83] After knocking on the door, the officers heard a male voice reply,

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[75]*Id.*

[76]*Id.* Specifically, Pool argued that the deputy had failed to "inform them in terms of his official character, [or] the cause of for the attempted arrest." *Id.*

[77]*Id.* at 576.

[78]*Id.* at 580. The court reasoned that, "The circumstance of having committed the crime of robbing the stage-coach was sufficient to cause them to apprehend pursuit." *Id.* at 578.

[79]357 U.S. 301 (1958).

[80]People v. Maddox, 294 P.2d 6 (Cal. 1956).

[81]294 P.2d 6 (Cal. 1956).

[82]*Id.* at 9. For commentary concerning the "destruction of evidence" exception, *see generally* 3 LAFAVE, *supra* note 4, at § 6.2(d); Garcia, *supra* note 5; Driscoll, *supra* note 5; Goddard, *supra* note 12.

[83]*Maddox*, 294 P.2d at 7. The officers testified that they had placed Maddox's home under surveillance for the prior month, and had observed known narcotics users frequenting the residence. *Id.* On the day in question, the officers had arrested Roy Cleek and Joe Davis after they were seen leaving Maddox's home. *Id.* The men informed the officers that they had purchased drug paraphernalia and used heroine in Maddox's home that day. *Id.* The officers then proceeded to Maddox's home to arrest him. *Id.*

"Wait a minute," and the sound of retreating footsteps.[84] One of the officers then forcibly entered the defendant's home and observed Maddox running toward his bedroom with a spoon in his hand.[85] A subsequent search uncovered narcotics and related paraphernalia.[86]

Writing for the court, Justice Traynor first acknowledged that in failing to demand admittance and announce authority before entering, the officer's conduct explicitly violated the terms of the statute.[87] Justice Traynor, however, framed the issue as whether the existence of probable cause for the officers' entry excused the announcement requirement.[88] In ruling, the court considered the competing policy considerations behind the "demand and explanation requirements,"[89] but reasoned that the existence of probable cause, coupled with the facts surrounding the entry, justified the officers' failure to comply with the general rule.[90] Thus, because the officers acted

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[84]*Id.*

[85]*Id.* at 7-8. The spoon was later found to contain traces of heroine. *Id.* at 8.

[86]*Id.* Specifically, the subsequent search revealed "two hypodermic needles, a syringe, and an eye dropper on the kitchen table." *Id.*

[87]*Id.*

[88]*Id.*

[89]*Id.* at 9. Justice Traynor noted a number of considerations in regard to the "demand and explanation requirements," stating:

> The officer's compliance with them will delay his entry, and cases might arise in which the delay would permit destruction or secretion of evidence so that what the search turns up would depend on the officer's compliance with the section. In other cases, however, the evidence may not be readily disposed of, and in still others it may be impossible to determine whether or not the evidence would still have been available had there been the delay incident to complying with the section.

Id.

[90]*Id.* In arriving at this conclusion, Justice Traynor stressed that the primary function of the demand and explanation requirements "is to prevent unreasonable invasions of the security of the people in their persons [and] houses." *Id.* Justice Traynor asserted, however, that when an officer enters a home to effectuate an arrest acting on probable cause "and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable." *Id.* Justice Traynor also added that "since the officer's right to invade defendant's privacy clearly appear[ed], there [was] no compelling need for strict compliance with the requirements of section 844 to protect basic

with probable cause, Justice Traynor held that their belief that Maddox may have been destroying evidence justified their unannounced entry.[91]

C. INITIAL SUPREME COURT TREATMENT OF THE KNOCK-AND-ANNOUNCE RULE

The early American decisions reflected the fact that the knock-and-announce rule undoubtedly became "a tradition embedded in Anglo-American law."[92] Because the drafters of the Bill of Rights did not specifically incorporate this principle, however, the United States Constitution remained devoid of such a requirement.[93] A textual reading of the Fourth Amendment reveals its prohibitions against *unreasonable* searches and seizures, but does not reveal any explicit prohibition against *unannounced* searches and seizures.[94] Codification of the principle at the federal level later subjected federal agents to the parameters of the rule, and further established its salience in American jurisprudence.[95] As a result, the relationship of the knock-and-announce rule and the Fourth Amendment became an important issue, warranting Supreme Court attention.[96]

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constitutional guarantees." *Id.*

[91]*Id.*

[92]Miller v. United States, 357 U.S. 301, 313 (1958).

[93]The Supreme Court, however, confirmed in New Jersey v. T.L.O., 469 U.S. 325 (1985), that the Fourth Amendment requires that all "searches and seizures be reasonable." *Id.* at 337.

[94]For the text of the Fourth Amendment, see *supra* note 3.

[95]Known as the federal "knock-and-announce" rule, 18 U.S.C. § 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109 (1988). Congress originally enacted the provision to effectuate the prosecution of espionage rings and arms smugglers during World War I. *See id.*

[96]*See, e.g.*, Sabbath v. United States, 391 U.S. 585 (1968); Ker v. California, 374 U.S. 23 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Miller v. United States, 357 U.S. 301 (1958).

In its first encounter with the knock-and-announce principle, the Court interpreted the rule based on criteria codified in the federal knock-and-announce statute.[97] In *Miller v. United States*,[98] the Court considered the lawfulness of a warrantless arrest where federal officers had announced their presence, but had failed to state their purpose before entering an apartment.[99] The officers had arrived at Miller's home to effect both a search and an arrest.[100] After knocking on the front door, the officers identified themselves at Miller's request, but then forced their way inside when Miller attempted to shut the door.[101] A subsequent search uncovered narcotics, as well as "marked" money.[102]

Writing for the Court, Justice Brennan held that the officers' failure to state their purpose before entry violated the knock-and-announce statute.[103] In so holding, the Justice first observed that the federal knock-and-announce statute incorporated the common law requirement of statement of purpose and

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[97]*See* 18 U.S.C. § 3109 (1988). In Miller v. United States, 357 U.S. 301 (1958), Justice Brennan began the Court's analysis by first stating that the validity of the arrest was "to be determined by reference to the law of the District of Columbia." *Id.* at 305-06. However, due to the similarities between the federal knock-and-announce rule and those developed by the District of Columbia Court of Appeals in Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949), Justice Brennan concluded that "the validity of the entry to execute the arrest without warrant must be tested by criteria identical with those embodied in 18 U.S.C. § 3109, which deals with entry to execute a search warrant." *Id.* at 306.

[98]357 U.S. 301 (1958).

[99]*Id.* at 303-04.

[100]*Id.* at 303. The officers' arrival at Miller's home followed a series of events in which the police enlisted the aid of two men who had been arrested earlier. *Id.* at 302-03. The agents used a "marked money" operation whereby the money was used to purchase narcotics which ultimately came from Miller's apartment. *Id.*

[101]*Id.* at 303-04. Specifically, Officer Wurms responded to Miller's inquiry by stating, "Police," albeit in a low voice. *Id.* at 303. Miller then "opened the door on an attached chain and asked what the officers were doing there." *Id.* Before the officers could respond, however, Miller attempted to close the door. *Id.* The officers then entered the premises by reaching inside and unchaining the lock. *Id.* at 303-04.

[102]*Id.* at 304.

[103]*Id.* at 313-14.

authority.[104] The Justice also pronounced that the rule applied to arrests made with a warrant, as well as to warrantless arrests where officers act on probable cause.[105] The Court recognized state decisions holding that justification for noncompliance may exist in exigent circumstances, but declined to address the exceptions to the general rule.[106]

Justice Brennan, however, considered whether Miller's actions indicated knowledge of the purpose for the officer's presence, rendering announcement a "useless gesture."[107] The Justice responded in the negative, asserting that the officers could not have been "virtually certain" that Miller had knowledge of their purpose.[108] In support, Justice Brennan reasoned that an express requirement of announcement serves important procedural functions, and reflects the law's prohibition against the unlawful invasion of a citizen's home.[109]

Four years later, the Court encountered similar circumstances in *Wong*

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[104]*Id.* at 308. Justice Brennan cited *Semayne's Case* as the origin of the rule, and noted that it was also incorporated "in the statutes of a large number of States, and in the American Law Institute's proposed Code of Criminal Procedure, § 28." *Id.* at 308-09.

[105]*Id.* at 309.

[106]*Id.* As to the exigent circumstances, Justice Brennan cited Read v. Case, 4 Conn. 166 (1822) (excusing compliance "when the officers may in good faith believe that they or someone within are in peril of bodily harm") and People v. Maddox, 294 P.2d 6 (Cal. 1956) (excusing compliance where "the person to be arrested is fleeing or attempting to destroy evidence"). *Id.* The Justice, however, refused to discuss the issue because the government had failed to claim the existence of any such circumstances. *Id.*

[107]*Id.* at 310. Justice Brennan stated, "It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture." *Id.* (citations omitted).

[108] *Id.* In refuting the contention that Miller's act of closing the door reflected his knowledge of the officers' presence, the Justice argued:

> The most that can be said is that [Miller's] act in attempting to close the door might be the basis for the officers being virtually certain that [Miller] knew there were police at his door conducting an investigation. This, however, falls short of a virtual certainty that the petitioner knew of their purpose to arrest him.

Id. at 312-13.

[109]*Id.* at 313.

Sun v. United States.[110] In *Wong Sun*, federal narcotics agents initially attempted to enter one of the defendant's apartments by falsely stating the reason for their presence.[111] When an agent subsequently identified himself, the defendant fled into the apartment as the agents pursued and eventually arrested him.[112] Applying the rationale set forth in *Miller*, the Court held the entry illegal due to the agent's failure to announce his presence and authority before entering.[113]

Again writing for the majority, Justice Brennan first rejected the assertion that the defendant's conduct indicated knowledge of the purpose of the agent's presence.[114] As in *Miller*, the Justice noted the absence of facts justifying the conclusion that the agents were "virtually certain" that the defendant knew the purpose of their presence.[115] Although Justice Brennan noted the government's failure to assert exigent circumstances for the noncompliance, the Justice specifically recognized "the imminent destruction of vital evidence, or the need to rescue a victim in peril," as viable exceptions to the rule.[116]

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[110]371 U.S. 471 (1963).

[111]*Id.* at 474. One of the officers, of Chinese ancestry, initially told the defendant that he was "calling for laundry and dry cleaning." *Id.* The defendant replied that he was closed and started to close the door when the agent informed the defendant that he was a federal narcotics agent. *Id.* The defendant then slammed the door and ran back to a room where his wife and child were sleeping, as the agents entered and followed him down the hall. *Id.*

[112]*Id.*

[113]*Id.*

[114]*Id.* at 482. Justice Brennan stated: "In the instant case, [the defendant's] flight from the door afforded no surer an inference of guilty knowledge than did the suspect's conduct in the *Miller* case." *Id.* The Justice further asserted that the agent's subsequent identification of himself failed to "adequately [dispel] the misimpression engendered by his own ruse." *Id.* at 482-83 (citations omitted).

[115]*Id.* at 483. Justice Brennan asserted that "[the defendant's] refusal to admit the officers and his flight down the hallway thus signified a guilty knowledge no more clearly that it did a natural desire to repel an apparently unauthorized intrusion." *Id.*

[116]*Id.* at 483-84 (citation omitted).

D. *KER V. CALIFORNIA* — A DIVIDED COURT ASSESSES BOTH THE CONSTITUTIONALITY AND EXCEPTIONS TO THE KNOCK-AND-ANNOUNCE RULE

Ker v. California[117] provided the Court with an opportunity to clarify the uncertainty surrounding the knock-and-announce rule. Although the case required the Court to interpret a California statute, the Court nonetheless addressed the facts in light of the Fourth Amendment's prohibition against unreasonable searches.[118] As a result, eight Justices held that, regardless of state law, an officer's failure to state his purpose and authority may violate federal constitutional standards of reasonableness.[119] The same eight Justices, however, divided evenly on two issues.[120] First, uncertainty continued as to whether, absent exigent circumstances, the Fourth Amendment mandated announcement in all cases.[121] Second, the Court

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[117]374 U.S. 23 (1963).

[118]Justice Clark stated:

> Since the petitioner's federal protection from unreasonable searches and seizures by police officers is here to be determined by whether the search was incident to a lawful arrest, we are warranted in examining that arrest to determine whether, *notwithstanding its legality under state law*, the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of the accompanying search.

Id. at 38 (Clark, J., plurality) (emphasis added).

[119]*Id.*; *id.* at 46 (Brennan, J., plurality). Justice Brennan joined in that part of Justice Clark's opinion which held that state searches and seizures were to be judged by the same standard of reasonableness as is required under the Fourth Amendment. *Id.* Justice Harlan concurred in Justice Clark's plurality opinion, but reached the conclusion on the basis of the Due Process Clause of the Fourteenth Amendment. *Id.* at 44 (Harlan, J., concurring in judgment). The Justice reasoned, "State searches and seizures, on the other hand, have been judged, and in my view properly so, by the more flexible concept of 'fundamental' fairness, of rights 'basic to a free society,' embraced in the Due Process Clause of the Fourteenth Amendment." *Id.*

[120]*See infra* notes 124-143 (discussing the contrasting plurality opinions from *Ker*).

[121]In Justice Clark's plurality opinion, the Justice found that the circumstances of the case supported the officer's failure to announce his presence and authority, and satisfied the Fourth Amendment reasonableness test. *Ker*, 374 U.S. at 40 (Clark, J., plurality). The Justice, however, did not opine as to whether the Fourth Amendment mandated announcement absent exigent circumstances. *Id.* In contrast, Justice Brennan asserted that the Fourth Amendment requires announcement in all cases, unless certain exceptions are

split as to whether the officers' method of entry had violated the Fourth Amendment, rendering the subsequent search illegal.[122] In particular, the Justices divided on the interpretation of the statute's exceptions.[123]

1. JUSTICE CLARK'S PLURALITY OPINION

Justice Clark's plurality opinion asserted that the officers' conduct violated no "federal constitutional standards of reasonableness."[124] The Justice first distinguished the Court's decision in *Miller* by noting that the California statute explicitly included "an exception to the notice requirement where exigent circumstances [were] present."[125] Citing judicial authority in support of the exception,[126] Justice Clark reasoned that the officer's

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met. *Id.* at 47 (Brennan, J., plurality).

[122]Justice Clark's plurality opinion held that exigent circumstances vindicated the officers' unannounced entry. *Id.* at 38 (Clark, J., plurality). In contrast, Justice Brennan contended that the officers' conduct had not met the requirements of the exceptions, thereby violating the Fourth Amendment. *Id.* at 46 (Brennan, J., plurality).

[123]As to the division between the Justices, Professor LaFave observes:

> A close reading of *Ker* makes it clear that the plurality and dissenting opinions are not in disagreement as to whether a blanket or [blanket]-type rule is to be followed [for the destruction-of-evidence exception], but only as to the sufficiency of the showing of particulars in that case.

3 LAFAVE, *supra* note 4, § 6.2(d), at 290.

[124]*Ker*, 374 U.S. at 38 (Clark, J., plurality). Justice Black, Justice Stewart, and Justice White joined in Justice Clark's opinion. *Id.* at 24 (Clark, J., plurality). *See* Goddard, *supra* note 12, at 467-68 (characterizing Justice Clark's reasoning as "at best circular" for "simply quoting from a California case, and noting the Court's previous allusion to a possible imminent destruction of evidence exception, thereby not providing an independent explanation" (citations omitted)).

[125]*Ker*, 374 U.S. at 39 (Clark, J., plurality). Justice Clark asserted that in *Miller*, the Court had no reason to examine the issue of exigent circumstances because § 3109 did not provide for any such exceptions. *Id.* at 38-39 (citing Miller v. United States, 357 U.S. 301 (1958)).

[126]Justice Clark referred to Justice Traynor's opinion in *People v. Maddox* which stated, in pertinent part:

> [S]uspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in

failure to give notice was justified in two respects.[127] First, the Justice applied the "destruction of evidence" exception, noting the officers' belief that Ker possessed drugs which could easily be destroyed.[128] Second, Justice Clark reasoned that noncompliance was justified because Ker's conduct suggested that he *might* have been aware of the purpose for the officers' presence.[129] As a result, Justice Clark concluded that under the circumstances, the officers' method of entry, "sanctioned by the law of California," had not violated the reasonableness standard of the Fourth Amendment.[130] The Justice, however, did not address the issue of whether absent exigent circumstances, the Fourth Amendment would have mandated announcement.[131]

2. JUSTICE BRENNAN'S PLURALITY OPINION

Conversely, Justice Brennan's plurality opinion held that the officers'

> getting to a place where he is entitled to be more quickly than he would, had he complied with section 844. Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose.

Id. at 39-40 (Clark, J., plurality) (quoting People v. Maddox, 294 P.2d, 6, 9 (Cal. 1956) (citations omitted)).

[127]*Id.* at 40 (Clark, J., plurality).

[128]*Id.*

[129]*Id.* (emphasis added). The conduct that Justice Clark referred to was "Ker's furtive conduct in eluding [the officers] shortly before the arrest." *Id.* Justice Clark appeared to have been applying Justice Brennan's "virtual certainty" standard from Miller v. United States, 357 U.S. 301 (1958). *See Miller*, 357 U.S. at 310 (asserting that announcement will be excused only where officers are "virtually certain" that a resident has knowledge of their purpose). However, Justice Clark's use of the word "might" suggests a lower threshold for excusing compliance with the knock-and-announce rule. *Ker*, 374 U.S. at 40 (Clark, J., plurality). Professor LaFave, however, asserts that Justice Clark did not intend to establish a lower standard for compliance. 3 LAFAVE, *supra* note 4, § 6.2(d), at 290. Rather, LaFave argues that the Justice's conclusion was merely based on the "particular circumstances of the case." 3 *id.*

[130]*Ker*, 374 U.S. at 40-41 (Clark, J., plurality).

[131]*Id.*

failure to announce their authority and purpose had violated the Fourth Amendment.[132] The Justice reasoned that, even where officers act on probable cause, unannounced police entry will violate the Fourth Amendment unless it meets certain limited exceptions.[133] Justice Brennan opined that announcement may be excused only where the inhabitants "already know of the officer's authority and purpose," or where the officers justifiably believe "that persons within are in imminent peril of bodily harm," or where the officers justifiably believe that announcement would result in escape or the destruction of evidence.[134]

Noting the premise of the Fourth Amendment as protecting individual liberty, Justice Brennan argued that "rigid restrictions upon unannounced entries" were necessary to effectuate such protections.[135] Further, the Justice reconciled *Miller* by observing that the Court's decision had specifically not contemplated the constitutional ramifications of unannounced

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[132]*Id.* at 46 (Brennan, J., plurality). Justice Brennan was joined by Chief Justice Burger, Justice Douglas, and Justice Goldberg. *Id.*; *see also* Goddard, *supra* note 12, at 468-70 (observing that Justice Brennan's reasoning "creates a high threshold for invocation of the destruction of evidence exception [by] calling for an objective inquiry into the particular circumstances of each case").

[133]*Ker*, 374 U.S. at 47 (Brennan, J., plurality).

[134]*Id.* Specifically, Justice Brennan stated:

> The Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, *except* (1) where the persons within already know of the officer's authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

Id. (emphasis added).

[135] *Id.* at 53 (Brennan, J., plurality); *see also* Goddard, *supra* note 12, at 469 ("The practical effect of [Justice] Brennan's test . . . is that police must knock as a means of ensuring the suspect's subjective awareness. Only then does objective evidence of activity within make in a 'virtual certainty' that the suspect subjectively knows of the police presence." (citation omitted)).

entry.[136]

Justice Brennan next attempted to justify the exceptions to the rule by asserting that they were "predicated on knowledge or awareness of the officer's presence."[137] The Justice reasoned that where an occupant is already aware of an officer's presence and authority, the announcement requirement is implicitly fulfilled.[138] The Justice contended that absent such awareness, noncompliance was not justified "unless possibly where the officers are justified in the belief that someone within is in immediate danger of bodily harm."[139] Justice Brennan further contended that constitutional and law enforcement considerations supported the "awareness" requirement.[140]

Addressing Justice Clark's reasoning, Justice Brennan first rejected the argument that Ker's conduct prior to the arrest suggested that he was aware

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[136]*Ker*, 374 U.S. at 53 (Brennan, J., plurality). Justice Brennan asserted that *Miller* "did not rest upon constitutional doctrine but rather upon an exercise of this Court's supervisory powers." *Id.* (citing Miller v. United States, 357 U.S. 301 (1958)). In addition, the Justice argued, "Nothing we said in *Miller* so much as intimated that, without such a basis for decision, the Fourth Amendment would not have required the same result." *Id.* (citing Miller v. United States, 357 U.S. 301 (1958)).

[137]*Id.* at 58 (Brennan, J., plurality).

[138]*Id.* at 54-55 (Brennan, J., plurality).

[139]*Id.* at 55 (Brennan, J., plurality).

[140]*Id.* at 55-57 (Brennan, J., plurality). Noting constitutional support for the requirement of "awareness," Justice Brennan offered two contentions. *Id.* at 55-56 (Brennan, J., plurality). First, the Justice argued that "any exception not requiring a showing of such awareness necessarily implies a rejection of the inviolable presumption of innocence." *Id.* at 56 (Brennan, J., plurality). Second, Justice Brennan asserted that "in the absence of a showing of awareness by the occupants of the officers' presence and purpose, 'loud noises' or 'running' within would amount, ordinarily, at least, only to ambiguous conduct." *Id.* at 57 (Brennan, J., plurality). For other Supreme Court decisions dealing with the ambiguous conduct of a resident in a forced entry case, see Wong Sun v. United States, 371 U.S. 471, (1963) (holding that the inhabitant's flight down the hall was ambiguous where the officer first misrepresented his purpose); Miller v. United States, 357 U.S. 301 (1958) (finding a suspect's closing of the door in response to "Police" to be ambiguous conduct).

Justice Brennan also contended that the "awareness" requirement served important law enforcement considerations. Ker v. California, 374 U.S. 23, 57 (1963) (Brennan, J., plurality). The Justice reasoned that such a requirement would help to reduce "mistaken identity" cases where officers erroneously enter the wrong house, and would also protect the officers against occupants mistaking them for trespassers. *Id.* at 57-58 (Brennan, J., plurality).

of the officers' presence.[141] More importantly, Justice Brennan dismissed Justice Clark's "destruction of evidence" exception as "fail[ing] to meet the requirements of the Fourth Amendment."[142] In so finding, the Justice contended that the record was devoid of evidence that would have "justif[ied] the officers in the belief that anyone within was attempting to destroy evidence."[143]

IV. A UNANIMOUS COURT HOLDS THAT THE KNOCK-AND-ANNOUNCE RULE IS PART OF THE FOURTH AMENDMENT REASONABLENESS INQUIRY

Writing for a unanimous Court in *Wilson v. Arkansas*,[144] Justice Thomas began the Court's analysis by noting the role of the Fourth Amendment in protecting people against unreasonable searches and seizures.[145] The Justice observed that in assessing the ambit of this right, the Court historically relied on the "traditional protections . . . afforded by the common law at the time of the framing."[146] Although the Fourth Amendment mandates that all "searches and seizures be reasonable,"[147] Justice Thomas opined that the scope of this right may also be examined with regard to the Framers' intent.[148] The Justice then stated that a survey of the common law clearly demonstrates that whether an officer announces his

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[141]*Id.* at 60 (Brennan, J., plurality). Justice Brennan argued that the exception is not met by "mere conjecture," but rather by "evidence which shows that the occupants were in fact aware that the police were about to visit them." *Id.* In support, the Justice noted the conduct of the Kers' upon the officers' entry: "George Ker was sitting in his living room reading a newspaper, and his wife was busy in the kitchen. The marijuana, moreover, was in full view on the top of the kitchen sink." *Id.*

[142]*Id.* at 61 (Brennan, J., plurality).

[143]*Id.*

[144]115 S. Ct. 1914 (1995).

[145]*Id.* at 1916.

[146]*Id.*; *see, e.g.*, California v. Hodari D., 499 U.S. 621, 624 (1991); United States v. Watson, 423 U.S. 411, 418-20 (1976); Carroll v. United States, 267 U.S. 132, 149 (1925).

[147]*Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)).

[148]*Wilson*, 115 S. Ct. at 1916.

authority prior to the entry of a dwelling is a factor to be considered in determining the reasonableness of a search and seizure.[149]

Surveying the common law foundations of the knock-and-announce rule, Justice Thomas observed that the ability of an officer to enter a residence has always been subject to the disclosure of the officer's presence and authority prior to entry.[150] Further, the Justice noted the rapid interjection and acceptance of the principle in early American law.[151] In recognizing the Court's prior affirmation of the rule, Justice Thomas also observed that the Court had never explicitly held the principle to be an element of the Fourth Amendment reasonableness inquiry.[152] The Justice then held that the method of an officer's entry is a factor to be considered when examining the reasonableness of a search or seizure.[153] Rejecting the lower court's decision, the Justice proffered that in "some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment."[154]

Justice Thomas cautioned, however, that the act of announcement need not always precede entry.[155] Rather, Justice Thomas characterized the reasonableness requirement as "flexible," opining that countervailing law enforcement interests should be considered.[156] Continuing, Justice Thomas observed that mitigating factors such as "a threat of physical violence," "[instances] where a prisoner escapes from [the police] and retreats to his

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[149]*Id.*

[150]*Id.* at 1916-17 (citations omitted). For a discussion of *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1603), the origin of the knock-and-announce rule, see *supra* notes 52-54, and accompanying text.

[151]*Wilson*, 115 S. Ct. at 1917 (citations omitted).

[152]*Id.* at 1918 (citation omitted).

[153]*Id.* Justice Thomas reasoned: "Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment though that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." *Id.*

[154]*Id.*

[155]*Id.*

[156]*Id.* In support, Justice Thomas pointed to Wilson's concession that "the common-law principle of announcement was never stated as an inflexible rule requiring announcement under all circumstances." *Id.* (citations omitted).

dwelling," and situations where "officers have reason to believe that evidence would likely be destroyed if advance notice were given," may excuse announcement.[157] Rather than enunciating on the full scope of the exceptions to the rule, the Justice instead delegated the duty to the lower courts.[158] Justice Thomas, however, did opine that, while unannounced entry might be unconstitutional under the Fourth Amendment, sufficient law enforcement interests may be used to establish the reasonableness of the entry.[159]

Concluding, the Justice acknowledged the contentions in support of the reasonableness of the unannounced search of Wilson's dwelling.[160] Noting that such interests may serve to justify the entry, Justice Thomas nonetheless declined to rule on the merits, remanding the case so that the sufficiency of the considerations could be addressed.[161]

V. CONCLUSION

The Court's decision in *Wilson* did little to clarify the uncertainty surrounding the application of the knock-and announce rule.[162] Rather than

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[157]*Id.* at 1918-19.

[158]*Id.* at 1919. Later in the opinion, Justice Thomas attempted to clarify the Court's decision not to rule on the merits of the case stating:

> These considerations may well provide the necessary justification for the unannounced entry in this case. Because the Arkansas Supreme Court did not address their sufficiency, however, we remand to allow the state courts to make any necessary findings of fact and to make the determination of reasonableness in the first instance.

Id.

[159]*Id.*

[160]*Id.*

[161]*Id.*

[162]*See* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 447 n.240 (1995) (asserting that the *Wilson* decision "will likely prove trivial in practice" because "[o]fficers will usually find it easy to argue that it was reasonable not to give notice of entry"). *But see* Driscoll, *supra* note 5, at 25 (arguing that the decision served to "clarif[y] the relationship between the knock-and-announce rule and the Fourth Amendment"); *A Unanimous Boost For The Fourth Amendment*, ST. LOUIS POST-DISPATCH, May 25, 1995, at 6B ("Though the decision [in *Wilson*] may have little

addressing the more significant issue concerning the exceptions to the rule, the *Wilson* Court instead chose to focus primarily on the constitutional status of the rule.[163] By holding that an officer's method of entry is but one factor to be considered in evaluating the overall reasonableness of a search, the Court elevated the rule to constitutional status[164] and undoubtedly clarified some of the uncertainty that plagued the lower courts.[165] However, it should be recognized that prior to the decision, a majority of the states had already recognized such a premise in some statutory form.[166] As

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practical effect, because it gives lower courts wide discretion in how it can be applied, its broad statement of principle is welcome.").

[163]The fact that the issue is of lesser importance is suggested by the Court's unanimous decision, as compared to the sharply divided Court in *Ker*. *See* Ker v. California, 374 U.S. 23 (1963) (resulting in a four to four division between the Justices, with one Justice concurring in the judgment). In *Wilson* Justice Thomas refused to enunciate on the scope of the exceptions to the knock-and-announce rule, remanding the case to the state court for appropriate factual findings. *Wilson*, 115 S. Ct. at 1919.

[164]Garcia, *supra* note 5, at 693 (citation omitted). *See Review of Supreme Court's Term*, 64 U.S.L.W. 8 (Aug. 29, 1995) (reporting that the *Wilson* decision "added a constitutional dimension to the familiar discussion of when police officers may dispense with the requirement that they knock and announce their presence prior to execution of a search or arrest warrant").

[165]*See* 3 LAFAVE, *supra* note 4, § 6.2(a), at 283 (commenting that, in announcing that the knock-and-announce principle forms part of the Fourth Amendment reasonableness inquiry, the *Wilson* Court removed "the ambiguity resulting from *Ker*"); Driscoll, *supra* note 5, at 25 ("It is now clear that the Fourth Amendment requires adherence to the common law rule of announcement. . . .").

[166]*See* supra note 63 (listing the states that have adopted some form of the knock-and-announce provision). The State of New Jersey is in the minority of states which does not have a statutory requirement concerning the knock-and-announce rule. A spokesman for the state attorney general, however, confirmed that the knock-and-announce rule "is firmly entrenched in common law, and [is practiced] in New Jersey." *Id.* Later in 1995, the New Jersey Supreme Court held that officers in pursuit of suspects may forgo the announcement requirement, but specifically noted that the holding was limited to such cases involving fleeing suspects. Kathy Barrett Carter, *Jersey Supreme Court Rules Cops May Break Down Doors During Pursuit*, STAR-LEDGER, Dec. 14, 1995, at 20. Noting the limits of the court's decision, Barrett quoted Justice Garibaldi's opinion:

> "For example, if the police are executing a warrant at a suspect's home, rather than on a fleeing suspect that they by chance happen to see on the street, we expect that the police will present the warrant at a proper hour and will knock and announce their presence at the suspect's door."

a result, although both liberals and conservatives have claimed victory from the Court's ruling,[167] this aspect of the decision will have little impact.

The decision also will have little effect in clarifying the lower courts' application of the exceptions to the knock-and-announce rule.[168] Although Justice Thomas explicitly recognized certain exceptions to the rule,[169] the Court's failure to establish an analytical framework for their application represents the major deficiency in the opinion.[170] At the very least, the *Wilson* Court should have addressed the conflict remaining from *Ker*.[171] Justice Clark's and Justice Brennan's plurality opinions in *Ker* were radically

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Id. at 21 (citation omitted).

[167]*See* Coyle & MacLachlan, *supra* note 3, at A14 (reporting that following the *Wilson* decision, the head of the National Association of Criminal Defense Lawyers declared, "The Fourth Amendment lives!"); Lyle Denniston, *Voting Control Shifts To Right On High Court*, BALTIMORE SUN, July 2, 1995, at 1A (characterizing *Wilson* as a "significant liberal decision"). *But see* Ira Mickenberg, *Court Settles On Narrower View Of 4th Amendment: Majority Limits Exclusionary Rule, Permits School Drug Testing And Adopts A Bright Line On Hearsay*, NAT'L L.J., July 31, 1995, at C8 ("*Wilson* is significant because it extends the totality[-of-the-circumstances] standard to violations that once were considered fairly certain candidates for suppression . . . . There are many reported decisions in which the police had probable cause to conduct a search, but the evidence was suppressed because the search was executed in an unconstitutional manner. *Wilson*, however, makes this possibility much less likely."); *see also Police Generally Must Announce Before Entering, Court Decides*, WASH. POST, May 23, 1995, at A6 (commenting that the *Wilson* decision "was a rare win for defendants" because "[t]he high court in recent years has enhanced police power to conduct searches and seizures of evidence").

[168]*See* Driscoll, *supra* note 5, at 4 (arguing that "*Wilson* did little to clarify matters" concerning the destruction of evidence exception).

[169]*Wilson v. Arkansas*, 115 S. Ct. 1914, 1918-19 (1995). Justice Thomas alluded to the "peril" exception, the "fresh pursuit" exception, and the "destruction of evidence" exception. *Id.* at 1918-19.

[170]Professor LaFave describes Justice Thomas' opinion in *Wilson* as using "the most cautious and noncommittal language imaginable . . . ." 3 LAFAVE, *supra* note 4, § 6.2(a), at 284.

[171]*See supra* note 18 (providing commentary as to the lower courts' reactions to the *Ker v. California* decision); *see also* Goddard, *supra* note 12, at 470 ("During the decades following *Ker*, courts based their particular version of the destruction of evidence exception on one of the two plurality opinions. The resulting variation in interpretation has left the constitutional contours of the exception muddled." (citation omitted)).

different.[172] The language of Justice Clark's opinion suggests too low a threshold for establishing noncompliance, and tends to favor law enforcement interests.[173] For example, Wilson's displaying an automatice weapon while threatening to kill the undercover agent would clearly meet Justice Clark's "useless gesture" standard for noncompliance. The context of Wilson's statement more than suggests that she *might* have been aware of the purpose of the officers' presence.[174] In addition, although the Justice's "destruction of evidence" standard is ambiguous and undefined, the totality of the evidence in *Wilson*, as compared to the evidence in *Ker*, suggests that it would meet Justice Clark's standard.[175]

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[172]Professor LaFave notes that uncertainty continues as to "[t]he extent to which the Fourth Amendment requires notice in order to protect [liberty and law enforcement interests]." 3 LAFAVE, *supra* note 4, § 6.2(a), at 284. Professor LaFave attributes this uncertainty in part "to the absence of a majority opinion in *Ker*." *Id.*; *see also* Goddard, *supra* note 12, at 471 (observing that "[m]arked differences arise in the Justices' definitions of what type of police activity may be viewed as reasonable.").

[173]*See* Goddard, *supra* note 12, at 473 (arguing that in supporting the officers' actions in *Ker*, Justice Clark gave considerable deference to the "'practical demands of effective criminal investigation and law enforcement.'" (citation omitted)). In applying the "useless gesture" exception in *Ker*, Justice Clark excused noncompliance with the knock-and-announce rule where Ker *might* have been aware of the purpose for the officer's presence. Ker v. California, 374 U.S. 23, 40 (1963) (Clark, J., plurality).

[174]Professor LaFave seems to defend the criticism of Justice Clark's plurality opinion, asserting that the Justice did *not* hold that announcement was excused either because (1) Ker might have been aware of the officers' presence *or* (2) because of the officers' belief that narcotics could be destroyed. 3 LAFAVE, *supra* note 4, § 6.2(d), at 290. Rather, Professor LaFave states:

> The plurality opinion, in approving the failure to give notice, placed considerable emphasis on the fact that *in addition* to the officers' knowledge that narcotics 'could be quickly and easily destroyed' there also existed 'ground for the belief that [Ker] might well have been expecting the police' because of his earlier furtive conduct.

3 *id.* (emphasis in original). Thus, Professor LaFave concludes that Justice Clark's holding was based on "the particular circumstances of [the] case." 3 *id.*

[175]*See Ker*, 374 U.S. at 40 (Clark, J., plurality). In *Ker*, Justice Clark's only support in reasoning that the "destruction of evidence" exception was met was "the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed." *Id.*; *see also* Goddard, *supra* note 12, at 467-68 (criticizing Justice Clark's plurality opinion in that "[t]he Justice found the unannounced entry 'not reasonable' by simply quoting from a California case and noting the Court's previous allusion to a possible

In stark contrast, Justice Brennan's "virtual certainty" test reflects an extreme need to protect Fourth Amendment interests.[176] The test is impractical in that it is almost impossible to satisfy, absent a resident's explicit announcement of either an intention to harm officers or persons inside, or intentions to destroy evidence.[177] As a result, the test does not afford sufficient consideration to important law enforcement interests.[178] Even in *Wilson*, where the evidence demonstrated that Wilson had threatened an undercover agent with violence, it may still be argued under Justice Brennan's test that the officers could not have been "virtually certain" that Wilson would indeed resort to such violence.[179] It also may be argued that the facts of *Wilson* do not equate to a justifiable belief that Wilson would destroy evidence.[180] Accordingly, under Justice Brennan's test the

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imminent destruction of evidence." (citations omitted)).

[176]*See* Goddard, *supra* note 12, at 474 (writing that Justice Brennan's plurality opinion in *Ker* "recognized the need to protect the inviolate principles embedded in the Fourth Amendment, including the knock and announce rule, from interpretations such as that of Justice Clark." (citation omitted)).

[177]*See* Goddard, *supra* note 132 (commenting on the high threshold of proof created by Justice Brennan's "virtual certainty" test); Garcia, *supra* note 5, at 696 ("Justice Brennan's opinion only adds to courts' confusion over what particular circumstances must exist to trigger [the destruction of evidence] exception."). Goddard, however, also notes that "[t]he practical effect of Brennan's test, then, is that police must knock as a means of ensuring the suspect's awareness[;] . . . [o]nly then does objective evidence of activity within make it a 'virtual certainty' that the suspect subjectively knows of the police presence." Goddard, *supra* note 12, at 469-70 (citations omitted).

[178]*But see* Ker v. California, 374 U.S. 23, 57 (1963) (Brennan, J., plurality) (asserting that the "virtual certainty" test actually served important law enforcement interests by reducing "mistaken identity" cases, and protecting officers from residents who mistake them for trespassers).

[179]*See* Wilson v. Arkansas, 115 S. Ct. 1914, 1915 (1995) (relating how the defendant, at a meeting with an informant working with Arkansas police, "produced a semiautomatic pistol" and threatened to kill the informant "if she turned out to be working for the police").

[180]In *Ker*, Justice Brennan observed:

> On the uncontradicted record, not only were the Kers completely unaware of the officers' presence, but again on the uncontradicted record, there was absolutely no activity within the apartment to justify the officers in the belief that anyone within was attempting to destroy evidence. Plainly enough, the Kers left the marijuana in full view on top of the sink because they were

evidence against Wilson most likely would be suppressed.

Because of this conflict, the *Wilson* Court should have rejected both plurality opinions from *Ker* and formulated a new test.[181] Neither opinion gives proper consideration to the competing interests at issue. For example, in an age of relative ease in obtaining firearms, as well as increased drug trafficking, the interpretation of the knock-and-announce rule should reflect the dangerous conditions that law enforcement encounters, as well as the split-second decisions that must be made. The interpretation of the rule, however, must also reflect the long-guarded liberty interest of a person to be secure in his home against unreasonable searches and seizures. The Court's decision to relegate such power to the lower courts, however, fails to resolve this problem. Even where state legislatures define the parameters of the exceptions, the question will remain as to the constitutionality of those rules. In addition, depending on a court's adoption of either the "blanket" approach or the "particularized" approach to applying the exceptions,[182] cases similar in nature will be decided differently.[183] As a result, absent Supreme Court guidance, neither liberty interests or law enforcement interests will be properly guarded.[184]

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wholly oblivious that the police were on their trail.

Ker, 374 U.S. at 23 (Brennan, J., plurality).

[181]*See* Driscoll, *supra* note 5, at 32 (proposing an "intermediate" standard to interpreting the "destruction of evidence" exception to the knock-and-announce rule).

[182]*See* 3 LAFAVE, *supra* note 20, § 6.2(d), at 290 (discussing the "blanket rule" approach and the "particularized" approach to applying the exceptions to the knock-and-announce rule).

[183]Driscoll recognizes this unresolved issue observing:

> In some jurisdictions, unannounced police entries are unlawful unless the entering officers can justify, by reference to specific facts, the determination that announcement would have resulted in the destruction of evidence. In other jurisdictions, however, the mere fact that the police believe illegal drugs to be within the premises justifies an unannounced entry.

Driscoll, *supra* note 5, at 4 (citations omitted).

[184]Professor LaFave asserts:

> The extent to which the Fourth Amendment requires notice in order to protect these interests remains a matter of some uncertainty. In part, this is attributable to the absence of a majority opinion in *Ker*, and to the fact that

In defense of the Court's position, the facts of *Wilson* themselves may have been a determinative factor in deciding not to champion either *Ker* plurality opinion, or to adopt a new test. For example, a striking difference between *Ker* and *Wilson* is that *Ker* involved a warrantless search, while the *Wilson* search proceeded pursuant to a warrant. Thus, in contrast to *Ker*, the basis for the officers' actions in *Wilson* had been established before they had even arrived at the premises. Accordingly, the facts of *Wilson* appear to weigh in favor of noncompliance. As a result of the extreme difference from *Ker*, the *Wilson* Court may have been reluctant to adopt a new interpretation of the rule in light of such facts. The Court may have been wary that a new interpretation based on facts favorable to noncompliance, could possibly cause lower courts to err on the side favoring law enforcement, while relegating the constitutional issue to a lower status.[185]

Regardless of the Court's motive for failing to address the "exceptions issue,"[186] however, the Court's decision failed to fill a major void in knock-and-announce jurisprudence. Until the Court resolves the exact parameters of the exceptions to the knock-and-announce rule, citizens' Fourth Amendment rights will continue to be violated, while safe and efficient law enforcement will continue to be deterred.[187]

> *Wilson* is quite recent, uses the most cautious and noncommittal language imaginable, and did not have occasion to explore in any detail the actual dimensions of this common-law-now-Fourth-Amendment requirement.

3 LAFAVE, *supra* note 4, § 6.2(a), at 284 (citations omitted); *see also* Driscoll, *supra* note 5, at 25 ("*Wilson v. Arkansas* provides little guidance to lower courts faced with 'the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.'" (citation omitted)).

[185]One commentary suggests that *Wilson* may nonetheless have accomplished this, stating that "*Wilson* . . . both allows and encourages states to develop additional grounds for holding unannounced entries reasonable." 63 U.S.L.W. 39, d1 (Apr. 18, 1995).

[186]Justice Thomas stated that the Court would not rule on the merits of the case because the Arkansas Supreme Court did not sufficiently address all the facts of the case. Wilson v. Arkansas, 115 S. Ct. 1914, 1919.

[187]The story of Anthony Raymond is a prime example of why the *Wilson* Court needed to articulate a clearer standard for applying the knock-and-announce rule. Alan J. Craver, *Man Convicted In Case Called 'Class Warfare'*, BALTIMORE SUN, June 1, 1995, at 1B. According to the report, police obtained a warrant to search Raymond's home after discovering marijuana stems and seeds in his garbage bags. *Id.* A subsequent search involved "[e]ight officers, wearing black battle-dress uniforms and with some carrying machine guns, burst through the front door of Mr. Raymond's home with a battering ram." *Id.* The search uncovered "portions of three marijuana cigarettes and rolling papers." *Id.*

The court overruled Raymond's objection that the evidence be suppressed due to the officers' failure to knock and announce. *Id.* In so ruling, the court stated that announcement may be excused where the lives of officers or citizens may be in danger, or where "evidence could be destroyed if police take the time to knock and announce themselves." *Id.* A law enforcement official testified that the police believed certain people in the Raymond house to be dangerous. *Id.* The same official, however, testified that the police "later learned that the men no longer lived there." *Id.*

This story indicates that the Supreme Court will eventually have to rule on the exact parameters of the knock-and-announce rule. As Mr. Raymond's case demonstrates, it is relatively easy for police to justify their actions in hindsight by simply invoking one of the Court's recognized exceptions. As a result, a person's constitutional right against unreasonable searches is afforded less protection and importance. If the Court refuses to reevaluate this issue, similar injustices will continue as the Fourth Amendment will become equivalent to the "Three-and-One-Half Amendment." *See* Coyle & MacLachlan, *supra* note 3, at A14.