

December 2012

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Recommended Citation

Sonnenreich, Michael R. and Ebner, Stanley (1970) "No-Knock and Nonsense, An Alleged Constitutional Problem," *St. John's Law Review*. Vol. 44 : No. 4 , Article 3.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol44/iss4/3>

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NO-KNOCK AND NONSENSE, AN ALLEGED CONSTITUTIONAL PROBLEM†

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On July 16, 1969, the Nixon Administration sent to the Congress a major revision of the existing federal narcotic and dangerous drug laws entitled the Controlled Dangerous Substances Act.¹ Hearings have been held in the Senate and much debate has ensued. In addition to discussions concerning penalties, industry regulation and research, one item has attracted a great deal of attention, indeed, far more than anyone involved with the proposal originally thought. From the first, "no-knock" was the lead for newspaper articles concerning the bill.² It became immediately apparent that there existed a great deal of misinformation about this no-knock authority and its impact upon the average citizen. Visions of kicked-in doors, sinister police invading residences in the dark of night, and other manifestations of the "police state" sprang to mind. In addition to this popular misconception, the only formal disagreement to come out of the Senate Judiciary Committee, which reported favorably on the Controlled Dangerous Substances Act, concerned no-knock and questioned its constitutionality. Indeed, this controversy eventually led to a revision of the original no-knock provision before the proposed Act was passed by the Senate. The House has not yet acted on the bill.

This article has been written to place the issue in proper perspective. The historical origins of no-knock in the common law will be traced, and the relevant state statutes and decisions will be analyzed. The federal posture, legislation and case law, will also be examined. Finally, the article will refocus upon the proposed Controlled Dangerous Substances Act and its no-knock provision, section 702(b). It is the opinion of the authors that this section is, in fact, a realistic compromise between those who favor the common-law exception in its

† The views expressed herein are those of the authors and do not necessarily represent the views of the Bureau of Narcotics and Dangerous Drugs specifically, nor of the Department of Justice generally. The authors wish to acknowledge the invaluable assistance of Roy E. Kinsey and Robert G. Pinco.

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¹ S.3246, 91st Cong. 2d Sess. (1970).

² See, e.g., Stokes, *Nixon's Drug Bill*, THE NATION, Sept. 22, 1969, at 271.

totality and those who insist that such authority is an unconstitutional invasion of privacy.

I. HISTORICAL DEVELOPMENT OF "THE KNOCK" COMMON LAW

England

A man's home, mortgaged though it may be, has long been considered under Anglo-American tradition to be his castle. Indeed, this principle is embodied in the fourth amendment to the United States Constitution, which prohibits "unreasonable searches and seizures."³ Yet, long before the framers of that document set quill to ink, the English judiciary had consistently been compelled to consider the issue of the King's right of entry into private dwellings. The difficulties inherently involved in this question can be illustrated by the fact that the ancient principle which proclaims that "Every man's house is his castle" is matched in age by the maxim that "The King's keys unlock all doors."⁴ Actually, these principles relate to different processes, the former applying to civil actions, and the latter to those of a criminal nature. Thus, the fifteenth century statement of the rule indicated that invasion of the home was justified in cases involving a felony; the apprehension of the felon was in the interest of both the common weal and the King. On the other hand, in cases involving debt or trespass, the interest of a private party would not justify the invasion of a dwelling to apprehend the wrongdoer.⁵

The most familiar statement of the common-law rule is contained in *Semayne's Case*⁶:

In all cases when the King is [a] party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the [King's] process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open [the] doors⁷

Since the opinion was actually concerned with a writ issued in a civil

³ 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.

⁴ See BROOM'S LEGAL MAXIMS 281, 432 (10th ed. 1929).

⁵ Y. B. Pasch., 13 Edw. 4, f.9a (1455).

⁶ 77 Eng. Rep. 194 (Ex. 1603). The use of the word "ought" in the last sentence of the dictum should be noted as it relates to a central issue within the framework of this article.

⁷ *Id.* at 195.

case, it was only by way of dicta that "the knock," or announcement of purpose, was enunciated as a specific obligation in connection with authorized entry into private dwellings.

During this period in English history, authorities differed as to the circumstances under which a breaking of doors would be permissible. For example, Coke expressed the view in his *Fourth Institutes* that a warrant to break open a house in search for a felon, issued upon suspicion, contravened both the Magna Carta and existing case law.⁸ However, the indictment of the suspected party would empower the sheriff, by virtue of the warrant, to forcibly enter the house.⁹ On the other hand, Hale apparently believed that, even in the absence of a warrant, a constable possessed sufficient power to break open a door whenever a felony had actually been committed. In addition, he indicated that when a suspected felon took flight and entered a house, a warrantless constable could break in if "the door will not be opened upon demand of the constable and notification of his business."¹⁰

While the debate continued and the common-law standards evolved,¹¹ it is apparent that houses were in fact being entered on a sufficiently indiscriminate basis to contribute to a general feeling of uncertainty and discontent.¹² Yet, it is clear that during this period, discussion of the governmental right to break and enter private dwellings centered not upon the necessity of prior warning or announcement of purpose, but rather, upon the *justification* for the breaking or, in other words, the "reasonableness" of the forced entry. Judges and legal scholars of that era were concerned with such relevant questions as: Was there a warrant? Was there hot pursuit? Was the commission of a felony observed? Was there an immediate threat of violence or danger to the law enforcement official? And finally, was there a previous notice of authority and purpose?¹³

Within the context of the above circumstances, the phraseology used in *Semayne's Case* becomes more significant as an expression of seventeenth century legal philosophy in England. The sheriff "ought" to signify why he is about to execute the King's process before he breaks and enters. But the broadest examination of English law and

⁸ E. COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING JURISDICTIONS OF COURT* 177 (6th ed. 1681).

⁹ *Id.*

¹⁰ 2 M. HALE, *PLEAS OF THE CROWN* 90-92 (1st Am. ed. 1847).

¹¹ See W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 598 (3d ed. 1934).

¹² Similarly, it was the subsequent employment of the so-called "writs of assistance" during the colonial era which pointed to a parting of the ways between England and her colonies.

¹³ See *Accarino v. United States*, 179 F.2d 456, 460-62 (D.C. Cir. 1949).

precedent discloses no evidence that such a suggestion was ever, in fact, a requirement which would render the subsequent entry legal. For too long this case has been read out of context; to ignore the precatory wording is to further confuse the problem.

United States

In the United States, the common-law rule of *Semayne's Case* was generally followed in early decisions. Thus, in *Oystead v. Shed*,¹⁴ the Massachusetts Supreme Judicial Court emphasized the right of a citizen to be free from forcible entry into his home for civil arrest purposes, although there is some question as to whether this pronouncement was necessary to the decision. It was recognized, however, that force could be utilized when the entry was effected to seize specific goods (as under writs of attachment).¹⁵ Similarly, it was recognized as early as 1822 that, if notice was in fact a general requirement, under certain circumstances that requirement would be rendered unnecessary. One such instance was clearly enunciated by a Connecticut court in *Read v. Case*,¹⁶ which held that imminent danger to life eliminated the need to provide notice. Indeed, a later Kentucky case, *Hawkins v. Commonwealth*,¹⁷ attempted to extend this rule, indicating that no notice whatsoever was required in criminal cases, since the "offender" would then be presented with an opportunity to avoid the process of the law. The continuing uncertainty regarding the notice or announcement aspect in criminal cases was exemplified in *Commonwealth v. Reynolds*,¹⁸ which attempted to summarize the existing law by stating that an officer could *always* break and enter after announcement of purpose and refusal, but that some courts had refused to impose such an obligation upon law enforcement authorities where the crime constituted a misdemeanor.

STATUTES

At the turn of the century, the states began to enact statutes specifically dealing with the authority of an officer to break and enter in order to make an arrest.¹⁹ Although initially the vast majority of these statutes expressly required some form of notice prior to forcible entry,²⁰

¹⁴ 13 Mass. 520 (1816).

¹⁵ *Keith v. Johnson*, 31 Ky. 604 (1833).

¹⁶ 4 Conn. 166 (1822).

¹⁷ 53 Ky. 395 (1854).

¹⁸ 120 Mass. 190 (1876).

¹⁹ See notes 21-80 and accompanying text *infra* for a treatment of various state statutes dealing with the authority to execute search or arrest warrants via forced entry.

²⁰ See Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 508 (1964).

a more recent trend has been toward the elimination of the notice requirement under specified conditions.

California

California has developed a fairly stringent approach to noncompliance with the "knock and notice" provisions of its penal code. The California statute closely resembles its federal counterpart, section 3109 of the Criminal Code,²¹ but the decisions of the California judiciary have developed a far more substantial basis for it than the federal courts. In addition, the large number of California decisions has placed that state in a position of leadership with respect to the numerous other states which have identical or very similar statutes.²² Thus, it is appropriate that our discussion of the relevant statutes should begin with an examination of the California experience.

Section 844 of the California Penal Code provides:

To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.²³

On its face, the statute is merely a codification of the common law and, as such, the very fact that the common-law exceptions were omitted would seem to preclude any form of no-knock arrest or search. Nevertheless, in 1956, compliance with the statute was interpreted by the California Supreme Court in *People v. Maddox*²⁴ to be excused under the common-law exceptions to the rule of announcement.²⁵ Thus, announcement before arrest was excused if the facts known to the officer

²¹ 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 (1964).

²² See notes 44-80 and accompanying text *infra*.

²³ CALIF. PENAL CODE § 844 (West Supp. 1968).

²⁴ 46 Cal. 2d 301, 294 P.2d 6, *cert. denied*, 352 U.S. 858 (1956). In *Maddox*, the police had defendant's premises under surveillance for approximately a month and had witnessed known narcotics addicts frequenting the place. In fact, on the day of the arrest and immediately prior thereto, the police arrested two addicts who stated that they had just left the premises. When the police knocked on defendant's door, they were told to "wait a minute," and then they heard the sound of retreating footsteps. They then broke the door and entered the house. See also *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955).

²⁵ See 6 C.J.S. *Arrest* § 14 n.21 (1955).

before his entry were sufficient to support his good faith that compliance would have increased his peril or frustrated the arrest.²⁶ Additionally, in *Maddox*, as well as in a series of similar cases which followed, destruction of evidence was recognized as another ground for noncompliance with section 844 or its warrant counterpart, section 1531.²⁷ The destruction exception was traditionally limited to narcotics and bookmaking paraphernalia, since it was based on the assumption that, by the very nature of these items, they were easily disposable. The California courts extended this standard in narcotic cases (which comprised the bulk of the cases in this area) by not requiring any showing whatever of particular exigency, as would generally be required to excuse compliance with the knock or notice provisions of its statutes.

During the decade following *Maddox*, the California courts failed to grant suppression motions on unlawful entry pleas.²⁸ Finally, in 1967, in an abrupt reversal, the California Supreme Court in *People v. Gastelo*²⁹ declared:

we have excused compliance with the statute in accordance with established common law exceptions to the notice and demand requirements on the basis of the specific facts involved. No such basis exists for nullifying the statute in all narcotics cases, and, by logical extension, in all other cases involving easily disposable evidence.³⁰

Thus, the Court clearly foreclosed noncompliance with the statutory requirements of knock and notice when such noncompliance was based solely on the police officer's "general experience relative to the disposability and the kind of evidence sought and the propensity of offenders to effect disposal."³¹

"Just as the police must have sufficiently particular reason to enter

²⁶ *Read v. Case*, 4 Conn. 166, 170 (1822).

²⁷ The officer may break open any outer door or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

CALIF. PENAL CODE § 1531 (West 1956). See cases collected in *People v. DeSantiago*, 71 A.C. 18, 453 P.2d 353, 76 Cal. Rptr. 809 (1969).

²⁸ See *Blakey*, *supra* note 20, at 532 n.245.

²⁹ 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967). In *Gastelo*, the police, on the basis of a reliable informant's report that he had purchased narcotics from defendant at the apartment of defendant's girlfriend, obtained a warrant for the search of said apartment. Early one morning four officers went to the apartment, and without knocking, announcing their purpose or demanding admittance, they forced entry. The police served the warrant, searched the apartment and found a small packet of heroin. Defendant was arrested and later confessed to possession of the heroin. On appeal from his conviction, defendant contended that the trial court had committed prejudicial error in admitting the heroin into evidence over his objection that it was illegally seized.

³⁰ *Id.* at 588, 432 P.2d at 708, 63 Cal. Rptr. at 12.

³¹ *People v. DeSantiago*, 71 A.C. 18, 24, 453 P.2d 353, 359, 76 Cal. Rptr. 809, 815 (1969).

at all, so must they have some particular reason to enter in the manner chosen."³² The Court further stated that the particular reason for the mode of entry had to be based upon specific facts which would lead a police officer to reasonably conclude that the occupants of the place to be searched had resolved to effect disposal in the event of police intrusion.³³

A month and a half later, in *Meyer v. United States*,³⁴ the United States Court of Appeals for the Ninth Circuit, citing the *Gastelo* case, granted a motion to suppress evidence seized in a raid on a "bookie operation where officers had no reason for omitting a prior announcement of their identity and purpose except general knowledge that destruction of evidence [betting slips] was likely in this type of offense."³⁵ The court, quoting from *Gastelo*, stated:

Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action attempting to disturb the security of people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard — the requirement of particularity — would be lost.³⁶

It at once became apparent that *Gastelo* (on the state level) and *Meyer* (on the federal level) were redefining the constitutional and practical limits of the knock and announce rule in a relatively exacting manner. Then, in *People v. Carillo*,³⁷ the California Court retreated slightly from the strict position it had assumed in *Gastelo*, by permitting noncompliance when, immediately prior to entry, the arresting officers were able to detect activity from within the residence which might lead them to reasonably conclude that the occupants within were then engaged in the destruction of the evidence sought.

In *People v. Rosales*,³⁸ and again in *Greven v. Superior Court*,³⁹ the Court attempted to clearly delineate the parameters of excusable noncompliance with the knock and notice requirements of sections 844 and 1531. Defining the constitutional basis of the announcement re-

³² 67 Cal. 2d 586, 588, 432 P.2d 706, 708, 63 Cal. Rptr. 10, 12 (1967).

³³ Cf. *People v. Barnett*, 156 Cal. App. 2d 803, 320 P.2d 128 (1958).

³⁴ 386 F.2d 715 (9th Cir. 1967).

³⁵ *Id.* at 718.

³⁶ *Id.*

³⁷ 64 Cal. 2d 387, 412 P.2d 377, 50 Cal. Rptr. 185 (1968), citing *Ker v. California*, 374 U.S. 23, 46 (1963) (dissenting opinion of Mr. Justice Brennan).

³⁸ 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (1968).

³⁹ 71 A.C. 303, 455 P.2d 432, 78 Cal. Rptr. 504 (1969).

quirement, the *Rosales* Court stated "that [this] requirement is . . . the essence . . . which safeguard[s] individual liberty."⁴⁰ The Court also emphasized that such rules reflect a concern not only for the rights of persons suspected of crimes but also for the security of innocent persons who may be on the premises. Similarly, the *Greven* Court noted that "the reverence of the laws for the individual's right of privacy in his house [is paramount],"⁴¹ and then expounded upon the public policy argument of discouraging, whenever possible, creation of situations conducive to violence.⁴² It went on to state that substantial compliance with the knock and notice rule required at least an identifying announcement by officers, even if the exigencies of the situation would have prevented a statement of purpose. This, the Court stated, was as far as the case would stretch the term "substantial compliance" for excusing law enforcement authorities from the mandates of sections 844 and 1531 of the penal code.

Thus, the California courts have placed the fourth amendment in a fairly prominent position, restricting to a great degree the latitude of discretion previously accorded law enforcement authorities. But the restrictions have been fairly realistic, leaving the court, rather than a formalistic rule, the arbiter of new situations arising out of searches and arrests. This approach, as will be seen, is far more flexible than the District of Columbia's approach which rejects most judicial exceptions to its knock and notice statute.⁴³

Florida

Florida has a statute similar to California, but has adopted a much stricter approach to its interpretation.⁴⁴ For example, in *Benefield v.*

⁴⁰ 68 Cal. 2d at 304, 437 P.2d at 492, 66 Cal. Rptr. at 4, quoting *Ker v. California*, 374 U.S. 23, 49 (1963) (dissenting opinion of Mr. Justice Brennan). The Court also quoted from *Miller v. United States*, 357 U.S. 301 (1958), but did not apply the *virtually certain test*. Rather, the Court required a reasonable good faith belief as to the exceptions to the announcement requirement provided such belief was accompanied by more than general knowledge as to the comparative ease of disposing of narcotics. For a discussion of *Miller*, see notes 85-96 and accompanying text *infra*. *Rosales* held that the failure of the enforcement authorities to explain their purpose and demand entrance vitiated the arrest. The police, acting on information that defendant was selling narcotics, had observed him from the window and surrounded the house prior to forcing entry. Under these facts, noncompliance with section 844 could not be excused since there was "no suspicious activity," and "no evidence that would justify a belief that such compliance would have increased the officer's peril, frustrated the arrest, or resulted in the destruction of the evidence."

⁴¹ 71 A.C. at 306, 455 P.2d at 435, 78 Cal. Rptr. at 507, quoting *Miller v. United States*, 357 U.S. 301, 313 (1958).

⁴² *Id.* at 307, 455 P.2d at 436, 78 Cal. Rptr. at 508.

⁴³ See *Miller v. United States*, 357 U.S. 301, 309 (1958); *Hair v. United States*, 289 F.2d 894 (D.C. Cir. 1961).

⁴⁴ FLA. STAT. ANN. § 901.19 (1965).

State,⁴⁵ the Supreme Court of Florida noted that its statute, a mere codification of the common law, was not burdened by the exceptions to the knock and announce rule which had been engrafted by the California courts onto their statute.⁴⁶ Nonetheless, the Court then devised four exceptions to the Florida rule:

1. where the person within already knows the officer's authority and purpose;
2. where the officers are justified in the belief that the persons within are in imminent peril of bodily harm;
3. if the officer's peril would have been increased had he demanded entrance and stated the purpose or,
4. where those within made aware of the presence of someone outside are then engaged in activities which justify the officers in the belief that an escape or destruction of evidence is being attempted.⁴⁷

The following year, in *Koptyra v. State*,⁴⁸ the Florida District Court of Appeals was confronted with a no-notice entry situation in which no force was involved. An undercover agent, after attending a "pot party" for a short time, left and returned shortly thereafter with additional officers to arrest those present at the party. The agent, who was admitted to the house upon knocking, merely permitted his colleagues to follow him through the door. In concert, they then proceeded to arrest the occupants and to search the entire area immediately adjacent thereto.⁴⁹ The court affirmed the conviction, but sidestepped the constitutional issue by distinguishing *Benefield* on the ground that the case at bar did not involve a breaking. This interpretation, of course, was rendered inapplicable.

Thus, it appears that the present state of the exceptions in Florida, *i.e.*, those stated in *Benefield*, represent a stricter interpretation of the common-law exceptions to knock and notice than California has adopted.

⁴⁵ 160 So. 2d 706 (Fla. 1964). The facts in *Benefield* closely parallel *Miller v. United States*, 357 U.S. 301 (1958). For a discussion of *Miller*, see notes 85-96 and accompanying text *infra*. The *Benefield* court rejected the State's reliance upon *Ker* as justification for noncompliance with the statute.

⁴⁶ *Id.* at 710.

⁴⁷ *Id.* In *Benefield*, the police gained access to defendant's home by opening an unlocked door. Immediately prior to the entry, one Hollander had informed the officers that he had deposited money with defendant as a "payoff" to secure a liquor license. Under these facts, the unannounced entry was regarded as violative of the Florida statute.

⁴⁸ 172 So. 2d 628 (Fla. D. Ct. 1965).

⁴⁹ Under *Chimel v. California*, 395 U.S. 752 (1969), such a search incidental to an arrest would no longer be permitted. See notes 123-124 and accompanying text *infra*.

Utah

Utah, Idaho, Iowa and South Dakota,⁵⁰ like Florida and many other states which have adopted statutes resembling the knock and notice provisions of the California Penal Code, have used California's decisions as a basis for interpreting their own statutes. For example, in 1967, Utah amended its search warrant provision to read:

Officer may break door or window to execute warrant — Authority. 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 the warrant:

(1) If, after notice of his authority and purpose, he is refused admittance; or

(2) Without notice of his authority and purpose, if the judge, justice or magistrate issuing the warrant has inserted a direction therein that the officer executing it shall not be required to give such notice. The judge, justice or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought is a narcotic, illegal drug, or other similar substance which may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or any other may result, if such notice were to be given.⁵¹

Clearly, this provision merely codified California case law as it existed immediately prior to the *Gastelo*,⁵² *Rosales*,⁵³ and *Greven*⁵⁴ cases. Although the Utah Supreme Court has not yet interpreted the statute, it has, in essence (at least on its face), rejected the fourth amendment based argument. Instead, it has adopted an expanded common-law approach, requiring a mere affirmation by the arresting officer that the object sought was of an easily disposable nature without any requirement as to the exigencies of the situation. Yet, the Utah Supreme Court has been at least somewhat cognizant of the constitutional ramifications of the no-knock provision. In *State v. Loudon*,⁵⁵ the Court, addressing itself to a slightly different situation, noted that, while constitutional safeguards were not to be ignored, nevertheless they were to be weighed against the "practical exigencies of police work."⁵⁶ This case seems to

⁵⁰ UTAH CODE ANN. § 77-13-12 (1953); IDAHO CODE ANN. §§ 19-611, 19-4409 (1948); IOWA CODE ANN. § 751.9 (1950); S.D. CODE §§ 23-22-18, 23-15-14 (1967).

⁵¹ UTAH CODE ANN. § 77-54-9 (1953).

⁵² 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967).

⁵³ 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (1968).

⁵⁴ 71 A.C. 303, 455 P.2d 432, 78 Cal. Rptr. 504 (1969).

⁵⁵ 15 Utah 2d 64, 387 P.2d 240 (1963).

⁵⁶ *Id.* at 67, 387 P.2d at 243. The Court discussed in detail the constitutional safeguards espoused by the United States Supreme Court in *Ker v. California*, 374 U.S. 23 (1963). For a discussion of this case, see notes 100-07 and accompanying text *infra*.

have been the extent of Utah's consideration of no-knock, and represents, at best, an evasion of the constitutional issue — at least for the time being.

Washington

Washington, which also has a statute similar to California's section 844, has interpreted noncompliance with the knock and announce rule in a slightly different manner than California. Addressing itself to the constitutional issue in *State v. Young*,⁵⁷ the Supreme Court of Washington held that, "when officers come armed with a search warrant, forcible entry without announcement of identity and purpose may be justified when exigent and necessitous circumstances exist."⁵⁸ Since such circumstances may be deemed to exist when, "narcotics or other property subject to immediate destruction" are involved,⁵⁹ the Washington Court adopted a position which is roughly analogous to the post-*Maddox* attitude of the California courts.⁶⁰

New York, Nebraska, South Carolina and North Dakota

Several states have adopted a slightly different approach to the no-knock exceptions to the rule requiring notice of identity and purpose by the arresting officer. Nebraska, New York, North Dakota and South Carolina⁶¹ have included the requirement of judicial approval for a no-knock direction to any arrest or search warrant. Illustrative is section 799 of the New York Code of Criminal Procedure which specifies:

The officer may break open an outer or inner door or window of a building, or any part of the building, or anything therein, to execute the warrant, (a) if, after notice of his authority and purpose, he be refused admittance, or (b) without notice of his authority and purpose, if the judge, justice or magistrate issuing the warrant has inserted a direction therein that the officer executing it shall not be required to give such notice. The judge, justice or magistrate may so direct only upon proof under oath, to his satisfaction, that the property sought may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice were to be given.⁶²

⁵⁷ 76 Wash. 2d 212, 455 P.2d 595 (1969).

⁵⁸ *Id.* at 214, 455 P.2d at 598. The Court cited both *Ker v. California*, 374 U.S. 23 (1963) and *Miller v. United States*, 357 U.S. 301 (1958). *Id.* at 213-14, 455 P.2d at 597.

⁵⁹ The Washington Supreme Court specifically noted that its new rule was similar to the *Maddox* case. *Id.* at 214, 455 P.2d at 598.

⁶⁰ *Id.*

⁶¹ NEB. REV. STAT. § 29411 (1965); N.Y. CODE CRIM. PROC. §§ 175, 178, 799 (McKinney 1964); N.D. CODE § 29-29.1-01 (1967); S.C. CODE §§ 17-257, 53-198 (1962).

⁶² N.Y. CODE CRIM. PROC. § 799 (McKinney 1964).

There is presently a controversy as to whether the addition of this clause requiring judicial approval will satisfy the fourth amendment *reasonableness* requirement set out by the United States Supreme Court in *Ker v. California*.⁶³ One point of view can be found in *People v. DeLago*.⁶⁴ There, the New York Court of Appeals permitted police officers armed with a search warrant to make an unannounced entry at the apartment of the defendant where

it was represented to the court by affidavit that gambling materials were likely to be found at this location and in issuing the warrant, the court could take judicial notice that contraband of that nature is easily secreted or destroyed if persons unlawfully in possession thereof are notified in advance that the premises are about to be searched.⁶⁵

Citing and discussing *Ker* and *Maddox*, the Court found that the police tactics were inoffensive to constitutional standards, and that section 799, which authorizes the inclusion of the no-knock provision in the search warrant after judicial approval, was also in compliance with the mandates of the fourth amendment. The Court made this finding notwithstanding the fact that

there [was] nothing in the affidavit to show specifically how or where these gambling materials would be likely to be destroyed or removed, [because] the likelihood they would be was an inference of fact which the Judge signing the warrant might draw.⁶⁶

Thus *DeLago* indicates that the New York courts recognize that there is a question of constitutional dimension, but that exigent circumstances, which do not have to be supported by specific facts, remove the forcible entry from constitutional condemnation. It is also worth noting that the lower New York courts have held that an unannounced entry could be made without a warrant if there existed probable cause to arrest and exigent circumstances justified noncompliance with the statute.⁶⁷

⁶³ 374 U.S. 23 (1963). For a discussion of this case, see notes 100-07 and accompanying text *infra*.

⁶⁴ 16 N.Y.2d 289, 213 N.E.2d 659, 266 N.Y.S.2d 353 (1965), *cert. denied*, 383 U.S. 963 (1966).

⁶⁵ *Id.* at 292, 213 N.E.2d at 661, 266 N.Y.S.2d at 356.

⁶⁶ *Id.*

⁶⁷ *People v. McIlwain*, 28 App. Div. 2d 711, 281 N.Y.S.2d 218 (2d Dep't 1967); *People v. Montanaro*, 24 Misc. 2d 624, 229 N.Y.S.2d 677 (Kings County Ct. 1962); *People v. Cocchiara*, 31 Misc. 2d 495, 221 N.Y.S.2d 856 (Ct. Gen. Sess. N.Y. County 1961).

District of Columbia

Basically, three statutes concern search warrant entries in the District of Columbia, and all three have very similar language;⁶⁸ two are local statutes applicable only to the District,⁶⁹ while the third, section 3109 of the Criminal Code,⁷⁰ is of general application. For many years the latter has been held applicable to the District of Columbia, and the case law for any of the three has been considered almost interchangeable.⁷¹ Each of the statutes bears a marked resemblance to the California statute, yet they have been interpreted in an entirely different manner by the Supreme Court and the lower federal courts in the District. While the California courts have engrafted a series of exceptions onto their statute, decisions in the District of Columbia relating to section 3109 have continued to interpret any possible exceptions to the "knock and wait" rule in a highly restrictive manner.

One of the major cases in the District of Columbia was *Accarino v. United States*,⁷² which involved a warrantless arrest and search, and a subsequent gambling conviction. The Court of Appeals for the District of Columbia Circuit discussed at length the common-law background of the rule requiring notice and announcement of purpose.⁷³ Emphasizing "a man's right of privacy in his home," the *Accarino* court rejected the Government's repeated attempts to excuse its failure to obtain a warrant for the forcible arrest and search. (*Accarino* was subsequently utilized by the District of Columbia courts as a basis for their interpretation of the District of Columbia and federal warrant statutes.)

In 1958 the landmark case of *Miller v. United States*⁷⁴ was handed down by the Supreme Court. It would serve no purpose to discuss *Miller* extensively at this point, since the case will be treated in considerable depth in a subsequent section.⁷⁵ Suffice it to say that Mr.

⁶⁸ 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.

⁶⁹ 18 U.S.C. § 3109 (1964).

⁶⁹ D.C. CODE ANN. § 25-129(g) (1967) (liquor); D.C. CODE ANN. § 33-414(g) (1967) (narcotics).

⁷⁰ 18 U.S.C. § 3109 (1964).

⁷¹ See, e.g., *United States v. Miller*, 357 U.S. 301, 306 (1958); See Blakey, *supra* note 20, at 513 for a more complete explanation of the application of section 3109 to the District of Columbia.

⁷² 179 F.2d 456 (D.C. Cir. 1949).

⁷³ *Id.* at 460; see Blakey, *supra* note 20, at 510-14.

⁷⁴ 357 U.S. 301 (1958).

⁷⁵ See notes 85-96 and accompanying text *infra*. See generally Blakey, *supra* note 20, at 516-31.

Justice Brennan, who delivered the opinion for the Supreme Court, evaded the issue of whether section 3109, as a codification of the common law, implicitly encompassed exceptions adopted in such states as California with the statement "whether the unqualified requirements of the rule admit an exception justifying noncompliance in exigent circumstances is not a question we are called upon to decide in this case."⁷⁶ However, other decisions by the District of Columbia Circuit interpreted possible exceptions to section 3109 in a fairly strict manner, requiring almost total compliance with the statute's mandates. For example, in *Masiello v. United States*,⁷⁷ there was a conflict in the testimony as to whether or not the police, who had announced only their presence before entering the premises, had notified the defendant that they had a search warrant. The court remanded the case to determine if the police had *in fact* totally complied with the statute's knock and notification requirements. Similarly, in *Keiningham v. United States*⁷⁸ and *Hair v. United States*,⁷⁹ the court stated that the *Miller* rule requires police officers "who seek to invade the privacy of an individual's home to announce their authority and their purpose in demanding entrance before 'barging in.'"⁸⁰ These decisions indicate a judicial reluctance to permit any expansion of no-knock in the District of Columbia.

II. ANNOUNCEMENT AND THE CONSTITUTION

The fourth amendment to the United States Constitution denounces only "unreasonable" searches and seizures. This is a word which, quite naturally, has confounded legal scholars for hundreds of years. Yet, the fourth amendment was approved only after the inclusion of the language banning "unreasonable seizures and searches."⁸¹ Undoubtedly, individual reaction against the so-called "general warrants" or "writs of assistance" was primarily responsible for its inclusion. However, as was previously indicated, neither this attitude nor the

⁷⁶ 357 U.S. at 309.

⁷⁷ 304 F.2d 399 (D.C. Cir. 1962).

⁷⁸ 287 F.2d 126 (D.C. Cir. 1960).

⁷⁹ 289 F.2d 894 (D.C. Cir. 1961).

⁸⁰ *Id.* at 896. It is worth noting that the *Hair* court excluded evidence of gambling paraphernalia; several state courts have held such material to be "easily disposable" contraband which would permit noncompliance with their knock and notice statutes. The *Hair* decision was merely a reaffirmation of a similar holding in an earlier case. See *Woods v. United States*, 240 F.2d 37 (D.C. Cir. 1956).

⁸¹ See B. MITCHELL & L. MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES 199 (1964).

standard was novel. The common law was fairly well settled against unreasonable searches in general, although no rules of reason had been clearly defined. Use of the term "unreasonable" was, of course, practical and, at the same time, the most farsighted way of satisfying current feeling in 1789, while providing flexibility for the future. Nevertheless, the term must have had some definite connotations to the founding fathers and their contemporaries during the consideration and approval of the Bill of Rights. The growth of the law in this area would tend to obscure this fact, although modern courts often pay lip service (and sometimes more) to common-law trends and traditions.⁸² It might be well to bear in mind the words of Mr. Chief Justice Taft on this subject:

The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.⁸³

The language of the fourth amendment suggests that the search and seizure itself was of primary concern to the drafters. The protection of the amendment extends to "persons, houses, papers, and effects," each of which can involve different factual circumstances. Whether an announcement of purpose is required for any or all of these protected entities is beyond the scope of the present discussion, for the Supreme Court in recent years has evidently concluded that a statement of identity and purpose is a basic prerequisite to entry into a home without the occupant's acquiescence — a prerequisite that has constitutional dimensions.⁸⁴ However, the road to this conclusion is sinuous at best, being paved with inconsistencies as well as exceptions. Furthermore, the end of the road is not necessarily in sight.

In deciding the case of *Miller v. United States*,⁸⁵ Mr. Justice Brennan and his colleagues were, in effect, confronting the rule of an-

⁸² See, e.g., *Miller v. United States*, 357 U.S. 301 (1958); *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949).

⁸³ *Carroll v. United States*, 267 U.S. 132, 149 (1924).

⁸⁴ *Ker v. California*, 374 U.S. 23 (1963).

⁸⁵ 357 U.S. 301 (1958). In *Miller* the officers involved had neither a search nor an arrest warrant. After arriving at the apartment in question, one of the officers knocked on the door, and in response to an inquiry as to who was there, replied in a low voice, "police." The defendant opened the door slightly, leaving the safety chain intact. Upon seeing the officer, he immediately started to close it. However, one officer grabbed the door and was able to force entry by breaking the chain. Miller and his girlfriend were arrested, and a search of the apartment uncovered marked informant money. The defendants' pretrial motion to suppress the evidence as illegally seized was denied, and when the trial judge subsequently refused to consider the question of suppression, the defendants were found guilty of violating the District of Columbia's narcotics laws. This conviction had been affirmed on appeal and the Supreme Court granted certiorari.

nouncement for the first time. In rendering its decision, the Supreme Court quite naturally turned to *Accarino*, which was considered something of a landmark at the time due to its extensive discussion of the common-law rule on forcible entry. *Accarino*, like *Miller*, involved a case arising in the District of Columbia, but there are several factors which make Mr. Justice Brennan's deference to "the rule of *Accarino*" somewhat unfortunate. To begin with, *Accarino* was based, to a great extent, upon the absence of an arrest warrant. Judge Prettyman had concluded:

Unless the necessities of the moment require that the officer break down a door, he cannot do so without a warrant; and if in reasonable contemplation there is opportunity to get a warrant, or the arrest could as well be made by some other method, the outer door to a dwelling cannot be broken to make an arrest without a warrant.⁸⁶

It was primarily on this basis that the *Accarino* court had determined that the evidence, which was seized following the forced entry and subsequent arrest of the defendant by law enforcement officers, should have been excluded. Unfortunately, however, Judge Prettyman chose to add the following comment:

Upon one topic there appears to be no dispute in the authorities. Before an officer can break open a door to a home, he must make known the cause of his demand for entry.⁸⁷

If indeed there had been no dispute prior to *Accarino*, it was because the issue had never been squarely presented in a modern criminal case. Furthermore, as previously mentioned, the common law was by no means fixed on this point (except in the general agreement that there were reasonable exceptions to any announcement rule which might exist).

Miller, like *Accarino*, was decided on non-constitutional grounds. Language to the contrary notwithstanding, a close reading reveals that *Miller* stands as a determination of District of Columbia law, the fourth amendment being only indirectly involved. As in *Accarino*, the officers who arrested Miller after the forced entry had no warrant. Both cases speak in terms of a common-law right of privacy in the home.⁸⁸ Similarly, both cite *Semayne's Case*⁸⁹ as well, but while *Accarino* recognized that this venerable decision concerned a writ issued

⁸⁶ 179 F.2d at 464.

⁸⁷ *Id.* at 465.

⁸⁸ 357 U.S. at 313; 179 F.2d at 464.

⁸⁹ 77 Eng. Rep. 194 (Ex. 1603).

in a civil case,⁹⁰ *Miller* recited the oft-quoted pronouncement as if it related to breaking in order to arrest for a felony.⁹¹ Such a misconception with regard to *Semayne's Case*, and to the entire body of Anglo-American law on this subject, is regrettably not uncommon. More serious is the fact that Mr. Justice Brennan failed to reach any conclusions with respect to common-law exceptions (such as the immediate threat of violence). Additionally, the rationale underlying the notice rule, *i.e.*, that a knock of notice was, in most cases, the better way to avoid violence which might breach the King's peace, was completely ignored. The concept of privacy, as relied upon by *Miller*,⁹² is a somewhat later and more amorphous development. Prior to the adoption of the Constitution, the statement that "the King's keys unlock all doors"⁹³ was probably closer to the truth.

Although *Miller* may be based upon "the rule of *Accarino*" or District of Columbia law, its implications are broader because of the majority's insistence on relating its holding to section 3109 of the Criminal Code.⁹⁴ In Mr. Justice Brennan's view, this section reflected a congressional desire to codify the traditional rules of forced entry.⁹⁵ He construed it as a restatement of *Semayne's Case*, and therefore applicable, in effect, to all forcible entries, although by its language section 3109 is limited to the execution of search warrants. The ambiguity thus developed is evidenced by the decisions which followed *Miller*.⁹⁶

In *Wong Sun v. United States*,⁹⁷ the Supreme Court's next major opportunity to consider its holding in *Miller*, Mr. Justice Brennan again articulated for the majority. Here, agents had forcibly entered a dwelling without a prior notice of authority and purpose, although one of the agents apparently identified himself to the defendant before forcing open the door to effectuate the arrest.⁹⁸ Mr. Justice Brennan repeated the "virtual certainty" test he formulated in *Miller*, but could find no facts justifying the conclusion that the officers were virtually

⁹⁰ 179 F.2d at 460. See note 7 and accompanying text *supra*.

⁹¹ 357 U.S. at 308.

⁹² *Id.* at 307.

⁹³ BROOM'S LEGAL MAXIMS, *supra* note 4, at 432.

⁹⁴ 18 U.S.C. § 3109 (1964).

⁹⁵ 357 U.S. at 313.

⁹⁶ See, *e.g.*, *United States v. Barrow*, 212 F. Supp. 837 (E.D. Pa. 1962), where Judge Lord relied upon *Miller* as interpreting section 3109 to apply to the broad range of search and seizure situations. As he put it, "[p]lainly stated, the Court had to decide not the application of a local rule as such, but whether or not the criteria of section 3109 has been met . . ." *Id.* at 845.

⁹⁷ 371 U.S. 471 (1963).

⁹⁸ *Id.* at 474.

certain that the defendant already knew their purpose. However, the door to other exceptions recognized at common law was opened somewhat wider in *Wong Sun*, when Mr. Justice Brennan specifically mentioned the exceptions of "the imminent destruction of vital evidence, or the need to rescue a victim in peril"⁹⁹ while reiterating the fact that the Government claimed no such circumstances in the case.

Up to this point, "the knock" itself had not yet assumed constitutional proportions; prior holdings were based on common law, state law, section 3109, and various combinations of these authorities. Consequently, the stage was not particularly well set for *Ker v. California*.¹⁰⁰ Mr. Justice Clark, who had dissented in both *Miller* and *Wong Sun*, wrote for the *Ker* majority. Mr. Justice Brennan, on the other hand, authored the dissent, which expressed the views of the Chief Justice and two other Justices as well.¹⁰¹ Although the decision was extremely close, there was virtual unanimity on one point: the rule of announcement is a constitutional requirement implicit in the fourth amendment proscription against unreasonable searches and seizures. But, while the minority felt that the circumstances in *Ker* did not satisfy any exceptions to the "knock" requirement which they were willing to recognize, the majority was of the view that

in the particular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment.¹⁰²

George and Diane Ker were undoubtedly surprised when law enforcement officers quietly utilized a pass key to enter their apartment. In fact, they neglected to conceal a two pound brick of marihuana which was resting ostentatiously in their kitchen. More marihuana was subsequently discovered in both the kitchen and bedroom after the Kers were arrested. There was no warrant obtained, nor was there any announcement of identity and purpose, prior to the officers' surreptitious entry. The omission of notice was ostensibly to prevent the destruction of evidence,¹⁰³ and was sanctioned by a judicial exception to the California statute which ordinarily required announcement.¹⁰⁴

Although no force was used to effect the entry in *Ker*, the majority

⁹⁹ *Id.* at 484.

¹⁰⁰ 374 U.S. 23 (1963).

¹⁰¹ *Id.* at 46.

¹⁰² *Id.* at 40-41.

¹⁰³ *Id.* at 28.

¹⁰⁴ See, e.g., *People v. Maddox*, 46 Cal. 2d 301, 294 P.2d 6, cert. denied, 352 U.S. 858 (1956) discussed at note 24 and accompanying text *supra*.

recognized that the use of a pass key under these circumstances was the legal equivalent of a breaking. However, the Court refused to consider the question of entry by ruse or trickery,¹⁰⁵ thereby fostering future uncertainty on this issue. Additionally, despite the fact that this area is pervaded with unresolved questions, the Court chose to overlook the opportunity to clarify the relevant standards. In relying upon "the particular circumstances of this case,"¹⁰⁶ Mr. Justice Clark evidently recognized a "destruction of evidence" exception, but refused to discuss other "exigent circumstances" — although Mr. Justice Brennan listed his three somewhat restrictive exceptions.¹⁰⁷ Similarly, the majority opinion did not clarify whether the same result would obtain in this case if federal rather than state officers had been involved, or if a search or arrest warrant had been issued. But one thing must be said for *Ker*: although the rules for its application were left uncertain, with Mr. Justice Clark and Mr. Justice Brennan polarized, an exception to the announcement rule was incorporated into the fourth amendment for situations where there is a reasonable possibility that evidence might otherwise be destroyed.

At least one jurisdiction felt that the destruction exception set forth in *Ker* should be clarified to a much greater degree. In *Meyer v. United States*,¹⁰⁸ the Court of Appeals for the Ninth Circuit was faced with a situation in which the police had, by their own admission, failed to comply with the state statute. The omission of the required knock and notice was based solely upon the general knowledge of the arresting officers regarding the disposability of paraphernalia used in bookmaking operations. The Government conceded that a violation of the knock and announce provisions of the statute would render the arrest and subsequent search invalid and the evidence obtained inadmissible. It argued, however, that because of the general nature of bookmaking paraphernalia, the *Ker* destruction exception excused noncompliance with the statute. The Ninth Circuit, in a per curiam decision, flatly rejected this position. Citing the *Gastelo* case¹⁰⁹ as controlling, the

¹⁰⁵ See *Jones v. United States*, 304 F.2d 381 (D.C. Cir. 1962), cert. denied, 371 U.S. 851 (1963); *Leahy v. United States*, 272 F.2d 487 (9th Cir. 1959), cert. granted, 363 U.S. 810 (1960), appeal dismissed per stipulation, 364 U.S. 945 (1961).

¹⁰⁶ 374 U.S. at 40-41.

¹⁰⁷ (1) where the persons within already know of the officers' 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. at 47 (dissenting opinion).

¹⁰⁸ 386 F.2d 715 (9th Cir. 1967).

¹⁰⁹ 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967).

court stated that neither it nor the Supreme Court had ever held that mere disposability of the evidence sought would render a no-knock, forcible entry constitutionally reasonable. The court noted that the Supreme Court in *Ker* had divided four-to-four on the question of whether the evidence offered to excuse compliance with the notice and demand requirements was in fact constitutionally sufficient. It construed *Ker* as excusing compliance with the statute, in accordance with the established common-law exceptions, *only* on the basis of the *specific facts* presented in that case; “[o]therwise, the constitutional test of reasonableness would turn only on practical expediency and the [fourth] amendment’s primary safeguard — the requirement of particularity — would be lost.”¹¹⁰

Meyer thus attempted to clarify the destruction exception set forth in *Ker*. Clearly, in the Ninth Circuit’s view, that case stood for the proposition that no-knock is permissible in the destruction of evidence situation. However, it is equally clear that the *Meyer* court would require a more stringent form of judicial review based upon the particularity of the facts in the case at hand.

In reliance upon *Ker*,¹¹¹ some states have codified the destruction of evidence exception, and have authorized the issuance of no-knock warrants;¹¹² predictably, state courts appear to be upholding such legislation.¹¹³ *Sabbath v. United States*,¹¹⁴ the most recent Supreme Court decision in this area, indicates that these courts are on relatively safe ground. Although the decision in *Sabbath* turned upon an application of section 3109, rather than the fourth amendment, Mr. Justice Marshall’s opinion helped to purify a few of *Ker*’s muddy waters. It verified that all entries into dwellings by federal officers are to be tested in terms of section 3109; *any* unannounced entry constitutes a “breaking,” regardless of actual force employed. This should not be surprising, especially in view of *Ker*. However, entry by ruse was once again set

¹¹⁰ 386 F.2d at 718.

¹¹¹ The Supreme Court has refused thus far to reconsider its position in *Ker*. See *La Peluso v. California*, 239 Cal. App. 2d 715, 49 Cal. Rptr. 85, cert. denied, 385 U.S. 829 (1966).

¹¹² See, e.g., NEB. REV. STAT. § 29-411 (1964); N.Y. CODE CRIM. PROC. § 799 (McKinney Supp. 1964); UTAH CODE ANN. § 77-54-9 (1967).

¹¹³ See, e.g., *People v. DeLago*, 16 N.Y.2d 289, 213 N.E.2d 659, 266 N.Y.S.2d 353 (1965), cert. denied, 383 U.S. 963 (1966). For a discussion of this, see notes 64-67 and accompanying text *supra*.

¹¹⁴ 391 U.S. 585 (1968). In *Sabbath*, customs agents had apprehended one Jones crossing the border from Mexico to California with cocaine allegedly given him by the defendant. The cocaine was also to be delivered to the defendant and the officers arranged for Jones to make the delivery. They waited five or ten minutes outside the defendant’s apartment after Jones had entered to make delivery. Then the agents, without a warrant, knocked, waited a few seconds, and then opened the unlocked door.

apart, which in itself provides some clarification.¹¹⁵ Most importantly, the Court reinforced the concept of implicit exceptions to the constitutional rule of announcement. It did so in a somewhat curious way, however, utilizing a footnote which speaks in terms of "[e]xceptions to any possible constitutional rule."¹¹⁶ And in referring to the "recognized" exceptions, the note cites Mr. Justice Brennan's dissent in *Ker* without reference to the majority opinion in that case. One can only conclude that this reference was due to Mr. Justice Brennan's neat exposition of what he viewed to be the exceptions — something Mr. Justice Clark and the majority failed to do. In other words, the citation should not be construed as favoring the minority view of the destruction of evidence exception over the majority view, thereby impliedly circumscribing, if not overruling, the holding in *Ker*. However, one cannot help but wish, once again, for greater certainty.

Where, then, are we at this point? For one thing, we seem to have a federal statute¹¹⁷ which is duplicative of both the common law and the Constitution. In the alternative, it appears that entries by state officers will be judged by state law and reviewed by fourth amendment standards in appropriate cases. On the other hand, entries by federal officers will be scrutinized in terms of section 3109, which codifies the common law. Both section 3109 and the fourth amendment contemplate exceptions in exigent circumstances, but whether section 3109 is more stringent in application cannot yet be determined. Certainly, there is a constitutionally recognized exception to the announcement rule, and a properly drafted amendment to section 3109 reflecting the exception for potential destruction of evidence should pass constitutional muster. Other exceptions might survive judicial scrutiny as well.¹¹⁸ One thing is certain: the constant growth in drug traffic is resulting in increased pressure from law enforcement agencies which will, in turn, encourage a corresponding growth in the law — or, if not growth, at the very least a clarification or refinement of existing standards.

Proponents of a strict announcement requirement have created a constitutional certainty from a common-law uncertainty. A structure resting upon such dubious foundation cannot long avoid some shifting. Undoubtedly, our founding fathers themselves would have disagreed if

¹¹⁵ *Id.* at 590 n.7, which indicates that the Court is not willing to go out of its way to undermine the established view of entry by ruse as being outside the scope of "breaking." Raised as a constitutional issue, the result might be different.

¹¹⁶ *Id.* at 591 n.8.

¹¹⁷ 18 U.S.C. § 3109 (1964).

¹¹⁸ *E.g.*, to avoid loss of life or when there is virtual certainty that the officers' purpose is known.

asked specifically in 1789 whether they considered unannounced entries into dwellings "unreasonable." In fact, the exclusionary rule itself was not clearly formulated until almost one hundred years had elapsed.¹¹⁹ Nor could they have foreseen the growth in organized crime and the impact of present day gambling and drug traffic. To elevate the announcement rule to a constitutional requirement in 1963 was probably historically unsound. To premise it upon a vague right of privacy, rather than on the avoidance of potential violence was a further departure from precedent. Still, the rule exists and, as long as the right to individual privacy is, in fact, balanced with the public interest in suppressing illegal gambling and drug peddling, who will complain?

It is difficult to see, however, what actual protection is given to any right of privacy by the announcement rule. Once identity and purpose are stated, entry must always be permitted; if permission is denied, or even delayed for an inordinate amount of time, entry may be forced, provided the officer has a valid purpose in gaining admission. Since no discretion is vested in the occupant, in what manner does notice protect his privacy? If he has something to hide, perhaps the knock will provide him with more time to conceal or destroy it. If he plans to resist or flee, he will be alerted. On the other hand, if he plans none of these and is otherwise lawfully engaged, how will the knock benefit him? If the door is locked, he may be able to avoid a broken door by responding to the demand for entry. If he is engaged in very private activities, perhaps of a carnal nature, or is otherwise indisposed, he may have time to avoid embarrassment — but not interruption. Or if he is asleep, he will be spared the possible shock of awakening to the sight of a stranger in his home (entry by stealth), or of awakening to the sound of a breaking door.

Thus balanced, the protections to privacy seem to be somewhat tenuous when compared to the potential for public harm. This is particularly true with respect to potential destruction of evidence, especially when one considers that the probable cause requirement would have to be met in any event. And where a statute provides for the issuance of no-knock warrants, the judicial review factor must be added to the scales. In jurisdictions where such warrants are available, courts should of course look with a jaundiced eye upon officers who fail to obtain warrants without good cause. This is not to say that privacy should not be protected — constitutionally, if necessary. Many, if not most, searches would be "unreasonable" under the fourth amendment if preceded by an unannounced entry. But there is an extreme

¹¹⁹ *Boyd v. United States*, 116 U.S. 616 (1886).

need for reasonable exceptions to be identified and clarified. Exclusionary rules will not deter if they are not understood by the policeman on the beat.¹²⁰

Perhaps our view of privacy should be reconsidered. Would it not be inconsistent to permit electronic eavesdropping under the fourth amendment with appropriate judicial supervision,¹²¹ while denying no-knock entry under limited circumstances with similar supervision? Which is the greater invasion of privacy? It bears repeating that, if we are to continue to judge the announcement rule and its exceptions by fourth amendment standards, the somewhat vague and recent concept of privacy should not be given undue priority over traditional and more comprehensible concepts of reasonableness. Language from Mr. Justice Frankfurter's opinion in *United States v. Rabinowitz*,¹²² which was cited with approval by Mr. Justice Stewart in a more recent opinion overruling *Rabinowitz*,¹²³ helps to place the matter in perspective:

To say that the search must be reasonable is to require some criteria of reason. It is no guide at all either for a jury or for district judges or the police to say that an "unreasonable search" is forbidden — that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response.¹²⁴

III. NEW APPROACHES TO NO-KNOCK

The proposed Controlled Dangerous Substances Act contains a no-knock warrant provision similar to many of those mentioned earlier in this article.¹²⁵ Subsection (b) authorizes unannounced entries in cir-

¹²⁰ See Blakey, *supra* note 20, at 533.

¹²¹ See *Berger v. New York*, 388 U.S. 41 (1967).

¹²² 339 U.S. 56, 68 (1950) (dissenting opinion).

¹²³ *Chimel v. California*, 395 U.S. 752, 760 (1969). In *Chimel*, police officers, after serving the defendant with an arrest warrant at his home, proceeded to search the entire house for items taken in an alleged burglary. The Court invalidated the search as being unreasonable since, even though it was incidental to a valid arrest, there was no probable cause. The Court limited a search incidental to an arrest to the arrestee's person and the area "within his immediate control"—within which he might gain possession of a weapon or destructible evidence.

¹²⁴ 395 U.S. at 765, quoting *United States v. Rabinowitz*, 339 U.S. at 83 (dissenting opinion).

¹²⁵ Any officer authorized to execute a search warrant relating to offenses involving controlled dangerous substances the penalty for which is imprisonment for more than one year may, without notice of his authority and purpose, break open an outer or inner door or window of a building, or any part of the building or anything therein, if the judge or United States Magistrate issuing the warrant is satisfied that there is probable cause to believe that (A) the property sought may and if such notice is given, *will be easily and quickly destroyed or disposed of*, or (B) the giving of such notice *will immediately endanger the life or safety of*

cumstances where the judge or magistrate issuing the warrant is satisfied that there is probable cause to believe that, if the officers knocked and announced their authority and purpose, either the evidence sought will be quickly destroyed or the officers placed in danger of physical harm. These warrants may only be issued for offenses relating to controlled dangerous substances, and the warrant must state on its face that the officers executing it are authorized to dispense with knocking or announcing their authority and purpose. In addition, there is a requirement that the officers identify themselves and their purpose as soon as possible after gaining entry.¹²⁶

Strong opposition has been voiced against the proposed no-knock provision on both constitutional and policy grounds. Critics contended that the initial language of section 702(b), which authorized the issuance of a no-knock warrant if "there is probable cause to believe that if such notice were to be given the property at issuance in the case may be easily and quickly disposed of . . .,"¹²⁷ was too ambiguous and that it was susceptible to a wide variety of interpretations.¹²⁸ Additionally, they argued that the language did not make clear whether it was the nature of the property that was intended to be a ground for issuance of the warrant, or whether specific facts demonstrating that the occupants of the premises to be searched were ready, willing, and able to destroy the evidence at the first sign of police intrusion were required.¹²⁹

The original intent of section 702(b) was to require a two-step process for obtaining a no-knock warrant. The first was compliance

the executing officer or another person, and has included in the warrant a direction that the officer executing it shall not be required to give such notice: Provided, that any officer acting under such warrant, shall, as soon as practicable after entering the premises, identify himself and give the reasons and authority for his entrance upon the premises.

S.3246, 91st Cong., 2d Sess. § 702 (1970) (emphasis added).

¹²⁶ This proviso was included in the Senate Judiciary Committee to insure reasonably prompt notice to the occupants and thereby minimize the possibility of mistake of intent and potential violence.

¹²⁷ Before its amendment in the Senate, section 702(b) read: Any officer authorized to execute a search warrant relating to offenses involving controlled dangerous substances the penalty for which is imprisonment for more than one year may, without notice of his authority and purpose, break open an outer or inner door or window of a building, or any part of the building, or anything therein, if the judge or United States Magistrate issuing the warrant is satisfied that there is probable cause to believe that if such notice were to be given the property sought in the case *may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result*, and has included in the warrant a direction that the officer executing it shall not be required to give such notice: Provided, that any officer acting under such warrant, shall, as soon as practicable after entering the premises, identify himself and give the reasons and authority for his entrance upon the premises. (Emphasis added.)

¹²⁸ S. REP. NO. 613, 91st Cong., 1st Sess. 159 (1969).

¹²⁹ *Id.*

with the requirements necessary for obtaining a conventional search warrant: that there is probable cause to believe that a crime has been committed and that evidence or fruits of such crime are located on the premises to be searched. The next step was that the applicants also show that there is probably cause to believe that contraband drugs are located on the premises and that, by their nature, they are capable of quick destruction, and might in fact be so destroyed should the occupants be made aware of an imminent police intrusion. In effect, a number of elements was required: probable cause to believe that contraband drugs were located on the premises, that such drugs by their nature could be easily destroyed or disposed of, and that the occupants of the premises would be likely to destroy such drugs upon notice by the police of their intent to execute a search warrant. These requirements clearly satisfied the criteria established in existing law.¹³⁰ Nevertheless, the extensive criticism which the original section 702(b) was subjected to resulted in its amendment on the Senate floor;¹³¹ the present language — “will be easily and quickly destroyed or disposed of” and “will immediately endanger the life or safety of the executing officer”¹³² — reflects this amendment.

An alternative approach would be to require positivity rather than probable cause in any application for a no-knock authorization. This would comport with the general standard for the issuance of nighttime search warrants under rule 41(e) of the Federal Rules of Criminal Procedure.¹³³ Simply stated, a positivity standard requires a greater quantum of factual information than does the probable cause standard. Under normal probable cause standards, the judge or magistrate does not have to be positive that the evidence sought is located on the premises to be searched in order to grant the warrant. Rather, the applicant need only disclose sufficient facts to warrant an averment that the evidence sought is likely to be on the premises. However, such facts would be insufficient to meet the positivity test.¹³⁴

¹³⁰ See notes 21-80 and accompanying text *supra*.

¹³¹ Section 702 was amended pursuant to a provision offered by Senator Robert Griffin and strongly supported by Senator Joseph Tydings. Senator Tydings had successfully inserted similar “will result” language into the proposed District of Columbia Court Reform and Reorganization Act. In the House version of the latter, H.R. 16196, the “no-knock” provision merely requires that destruction or disposal be likely to result. Presumably, this conflict will eventually be resolved.

¹³² See note 125 *supra* for the entire text of the proposed subsection.

¹³³ FED. R. CRIM. P. 41(e).

¹³⁴ Rule 41(e), which governs the issuance of nighttime search warrants, requires that the affidavit disclose sufficient facts to warrant the affiant in asserting a positive belief that the evidence is located on the premises to be searched. *United States v. Raidl*, 250 F. Supp. 278 (N.D. Ohio 1965). An exception is made to rule 41(e) for issuance of search warrants involving narcotic drugs. By virtue of 18 U.S.C. § 1405 (1964), the execu-

Adoption of a positivity test for the issuance of no-knock warrants would mean that the applicant would have to disclose facts evidencing a positive belief that contraband drugs are on the premises to be searched, and that they are of such a nature that they can be easily disposed of or destroyed. While this test would clearly remedy many of the ambiguities which the critics have found inherent in the provision, it would impose a much heavier burden upon officers seeking no-knock authority. Additionally, it would compel the judiciary to determine just what standards apply to "positivity" versus "probable cause," — a question which has been consistently avoided in nighttime warrant cases.¹³⁵ While a compromise, this alternate approach is neither necessary nor recommended in the light of existing law.¹³⁶

Critics also assert that the proposed no-knock provision was of doubtful constitutional validity. Such contentions are based upon the fourth amendment's prohibition against unreasonable searches and seizures and the implied right of individual privacy.¹³⁷

Taken in a broad context, the right of privacy is the right of an individual to be left alone, shielded from unwarranted governmental intrusions.¹³⁸ However, in the words of Mr. Justice Stewart,

the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That amendment protects individual privacy against certain kinds of governmental intrusion, but its protection goes further, and often has nothing to do with privacy at all.¹³⁹

Some critics of the no-knock provision would find implicit in the right of privacy the requirement of advanced notice prior to any lawful governmental intrusion, such as the execution of a valid search warrant. However, the dimensions of an individual's right to privacy severely contract when one is dealing with the execution of a search warrant. For purposes of conducting a search, the officers authorized to execute the warrant are legally entitled to entry into the designated premises, with or without the consent of the occupant. Should an occupant refuse ad-

tion of search warrants relating to offenses involving narcotic drugs at any time of the day or night is permitted provided there is probable cause to believe that grounds for the warrant exist. This same exception has been incorporated into section 702(a) of the proposed Controlled Dangerous Substances Act.

¹³⁵ *Distefano v. United States*, 58 F.2d 963 (5th Cir. 1932); *United States v. Castle*, 213 F. Supp. 52 (D.D.C. 1962).

¹³⁶ This is especially true in view of the "will be easily and quickly destroyed" language now engrafted upon section 702(b). The question of evidence required by the language closely approaches the standard applied under the positivity approach.

¹³⁷ S. REP. NO. 613, 91st Cong., 1st Sess. 159 (1969).

¹³⁸ *United States v. Katz*, 389 U.S. 347 (1968).

¹³⁹ *Id.* at 349.

mission to the premises, the officers are also empowered to use the necessary force to gain entry.¹⁴⁰

When the framers of the Constitution made provisions for the issuance and execution of search warrants, they recognized that there would be instances in which an individual would have to be deprived of his substantive right to privacy. In order to protect the individual when this event should arise, the framers required the element of reasonableness in the conducting of any search. Hence, what is really meant by referring to the general rule requiring notice of authority and purpose prior to execution of a search warrant is a standard of reasonableness — a balancing of probable cause, need and the individual's right to privacy. Reasonableness is not an equivalent for "right to privacy," the latter being a part of the former and weighed, with other factors, to determine proper legal equilibrium.

The no-knock provision, requiring court authorization to dispense with an announcement, reasserts the general principle that reasonableness of a search demands notice of authority and purpose. It is also a codification of some exceptions to the general rule.¹⁴¹ In effect, it is a congressional declaration that under certain, specified circumstances, notice of authority and purpose can be dispensed with and the search will still remain within the bounds of reasonableness.

Relying upon past experience with narcotic and dangerous drug law enforcement, Congress could rationally justify these two exceptions as being necessary for effective law enforcement. It is merely asserting that under circumstances where prior notice would lead to destruction of evidence or would endanger the lives of the officers executing the warrant, an unannounced or forcible entry will not invalidate the search as unreasonable.

It should be emphasized that the provision does not compel Congress to impose a loose standard. Rather, while Congress will make a general finding that notice of authority and purpose can lead to destruction of evidence or injury to the officers, the provision requires, in addition, that a neutral judge or magistrate render a specific finding of either in each individual case. Before notice of authority and purpose can be dispensed with, the judge or magistrate issuing the warrant must be satisfied that there is probable cause to believe that such grounds exist. He must specifically find probable cause to believe

¹⁴⁰ *Butler v. United States*, 275 F.2d 889 (D.C. Cir. 1960).

¹⁴¹ Under the proposed no-knock provisions, the only times unannounced entries will be permitted are when knocking and announcing authority and purpose would either lead to the quick destruction of the evidence sought or where the officers executing the warrant are placed in danger of physical harm.

either destruction of the evidence or injury to the agents will result if notice of authority and purpose are given. Probable cause requires more than mere generalities; rather, it requires specific facts. A no-knock warrant under the proposed provision cannot be issued solely on the basis that most drug traffickers keep their supply of drugs in a place where they can be easily disposed of. More specificity is required by the definition of probable cause. Information relating to the actual location of the drugs or the propensity of the suspect to be violent will have to be known by the agents and made available to the judge when application for the warrant is made.

CONCLUSION

Having traced the historical background, state and federal legislation and case law regarding the requirement of announcing authority and purpose prior to entering a person's dwelling, the question settles down to a moral, rather than legalistic, judgment as to whether no-knock should be permitted. Weighing values of privacy, potential for violence and the need to preserve evidence in drug cases, it would seem that no-knock authority is not only necessary but desirable within the framework of the federal drug proposal. Since the proposed Act sets out the statutory requirements rather than placing reliance on common-law doctrines,¹⁴² it would provide law enforcement agencies a source on which to rely in this area. Furthermore, the bill requires the interposition of a judge or magistrate before no-knock authority can be obtained in executing a warrant. This judicial supervision has been repeatedly favored by the Supreme Court and should be required in this instant situation.¹⁴³

What is needed is meaningful reaction, not rationalization. Only then will the fourth amendment be upheld and the populace protected.

¹⁴² Note that in many states, federal officers are also considered state peace officers and can execute state laws under state procedures, *e.g.*, California.

¹⁴³ *Sibron v. United States*, 392 U.S. 40 (1968); *United States v. Katz*, 389 U.S. 347 (1968); *McDonald v. United States*, 335 U.S. 451 (1948).

APPENDIX†

STATES REQUIRING ANNOUNCEMENT OF AUTHORITY AND PURPOSE BEFORE FORCED ENTRY TO EXECUTE SEARCH WARRANTS OR ARRESTS (WITH OR WITHOUT A WARRANT)

State	Search Warrant	Arrests (with or without warrant)
Alabama	Notice Required ALA. CODE tit. 15, § 108 (1958).	Notice Required ALA. CODE tit. 15, §§ 153, 155 (1958).
Alaska	No-Knock Permitted ALASKA STAT. § 12.35.040 (1962).	Notice Required ALASKA STAT. § 12.25.100 (1962).
Arizona	Notice Required* ARIZ. REV. STAT. ANN. § 13-1446(B) (1956). * State v. Mendoza, 454 P.2d 140 (1968) (allowing "No-Knock" for destruction exception).	Notice Required ARIZ. REV. STAT. ANN. § 13-1411 (1956).
Arkansas	No Statute—Common Law Applies	Notice Required ARK. STAT. ANN. § 43-414 (1964).
California	Notice Required* CAL. PENAL CODE § 1531 (West Supp. 1969). * People v. Maddox, 46 Cal. 2d 301, 204 P.2d 6 (1956); People v. Gastelo, 67 Cal. 2d 586, 432 P.2d 706 (1967); People v. Rosales, 68 Cal. 2d 299, 437 P.2d 489 (1968) (allows No-Knock for destruction exception).	Notice Required* CAL. PENAL CODE § 844 (West Supp. 1969).
Colorado	No Statute—Common Law Applies	No Statute—Common Law Applies
Connecticut	No Statute—Common Law Applies* * State v. Marino, 152 Conn. 85, 203 A.2d 305 (1964) (allows No-Knock for destruction exception to common-law announcement rule).	No Statute—Common Law Applies
Delaware	No Statute—Common Law Applies* * Dyton v. State, 250 A.2d 383 (1969) (allows No-Knock for destruction exception to common-law announcement rule).	No Statute—Common Law Applies
District of Columbia	Notice Required D.C. CODE ANN. § 25-129(g) (1967) (liquor). D.C. CODE ANN. § 33-414(g) (1967) (narcotics). 18 U.S.C. § 3109 (Supp. IV, 1969). But an annotation to D.C. CODE ANN. § 23-301(6) (1967) states that for search or arrest that the police can break in after an announcement of identity and purpose. There are no exceptions. "Breaking and entering premises without an announcement is clearly illegal and an improper entry renders a subsequent search invalid."	No Provision—Common Law Applies

† The citations listed in the following appendix are illustrative only and in no way are to be considered all-inclusive.

APPENDIX (Continued)

State	Search Warrant	Arrests (with or without warrant)
Florida	Notice Required* FLA. STAT. § 933.09 (1967).	Notice Required FLA. STAT. § 901.19 (1967).
	* <i>Benefield v. State</i> , 160 So. 2d 706 (1964) (allows No-Knock for destruction exception).	
Georgia	Notice Required GA. CODE ANN. § 27-308 (1969).	No-Knock Permitted only with warrant GA. CODE ANN. § 27-205 (1969).
	The arrest provision states that the police may use force to break into a building and does not require any announcements prior to the breaking. The new search statute does require an announcement before breaking.	
Hawaii	No-Knock Permitted if door to house is open. Notice required if door is closed. HAWAII REV. LAWS tit. 37, § 708.37 (1968).	Notice Required HAWAII REV. LAWS tit. 37, § 708.11 (1968).
Idaho	Notice Required IDAHO CODE ANN. § 19-4409 (1948).	Notice Required IDAHO CODE ANN. § 19-611 (1948).
Illinois	No-Knock Permitted ILL. ANN. STAT. ch. 38, § 108-8 (Smith-Hurd 1964).	No-Knock Permitted ILL. ANN. STAT. ch. 38, § 107-5(d) (Smith-Hurd 1964).
	The arrest statute states that no notice or announcement required for arrest but <i>People v. Barbee</i> , 35 Ill. 2d 407, 220 N.E.2d 401 (1966) requires announcement before arrest. The search warrant section concludes that notice is not necessary if constitutional standards (of reasonableness) are met. <i>See also</i> <i>People v. Macias</i> , 39 Ill. 2d 208, 234 N.E.2d 783 (1968); <i>People v. Hartfield</i> , 94 Ill. App. 2d 421, 237 N.E.2d 193 (1968) (allowing No-Knock for destruction exception).	
Indiana	No Statute—Common Law applies*	Notice Required IND. ANN. STAT. § 9-1009 (1956).
	* <i>Hadley v. State</i> , 238 N.E.2d 888, 906 (1968) (allows No-Knock for destruction exception to the common-law rule of announcement).	
Iowa	Notice Required IOWA CODE ANN. § 755.9 (1966).	Notice Required IOWA CODE ANN. § 751.9 (1966).
Kansas	No Statute—Common Law applies	Notice Required KAN. STAT. ANN. § 62-1819 (1964).
Kentucky	No Statute—Common Law applies	Notice Required KY. REV. STAT. §§ 70.077, 70.078 (1969).
Louisiana	No-Knock Permitted LA. CRIM. PRO. CODE ANN. art. 164 (West 1967).	Notice Required LA. CRIM. PRO. CODE ANN. art. 224 (West 1967).
	The new statute on arrests without warrants is broader now and not limited only to felonies.	

APPENDIX (Continued)

State	Search Warrant	Arrests (with or without warrant)
Maine	No Statute—Common Law applies* * State v. Martelle, 252 A.2d 316 (1969) (allows No-Knock as an exception to the common-law rule of announcement. "An officer . . . is bound, on demand to make known his authority, but his omission to do so can do no more than deprive <i>him</i> of the protection which the law throws around its ministers, when in the rightful discharge of their duty.").	No Statute—Common Law applies*
Maryland	No Statute—Common Law applies* * Henson v. State, 236 Md. 518, 204 A.2d 516 (1969); Waugh v. State, 3 Md. App. 379, 239 A.2d 596 (1968) (allowing destruction exception to the common-law rule of announcement).	No Statute—Common Law applies*
Massachusetts	No Statute—Common Law applies* * Commonwealth v. Rossetti, 211 N.E.2d 658, 665 (1965) (Court referred to No-Knock for destruction exception to the common-law rule of announcement in dictum.)	No Statute—Common Law applies*
Michigan	Notice Required MICH. STAT. ANN. § 28.1259(6) (Cum. Supp. 1970). The search provision had not been included previously.	Notice Required MICH. STAT. ANN. § 28.880 (Cum. Supp. 1970).
Minnesota	No Statute—Common Law applies* * State v. Parker, 283 Minn. 127, 166 N.W.2d 347 (1969).	Notice Required MINN. STAT. ANN. §§ 639.33, 639.34 (1965).
Mississippi	No Statute—Common Law applies	Notice Required MISS. CODE ANN. § 2472 (1957).
Missouri	No-Knock Permitted MO. REV. STAT. § 542.390 (1959).	Notice Required MO. REV. STAT. § 544.200 (1959).
Montana	No-Knock Permitted* MONT. REV. CODES ANN. § 95-709 (1969).	Notice Required* MONT. REV. CODES ANN. § 95-901 (1969). * The general arrest statute and the search statute give the right to break in without the requirement of notice. The arrest with or without warrant statutes require notice unless notice would jeopardize the arrest.
Nebraska	No-Knock Permitted* NEB. REV. STAT. § 29-411 (1965).	No-Knock Permitted* NEB. REV. STAT. § 29-411 (1965). * "Warrants: execution; powers of officer; direction for executing. In executing a warrant for the arrest of a person charged with an offense, or a search warrant, or when authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance; or without giving notice of his authority and purpose, if the judge or magistrate issuing search warrant has inserted a direction therein that the officer executing

APPENDIX (Continued)

State	Search Warrant	Arrests (with or without warrant)
	<i>it shall not be required to give such notice, but the political subdivision from which such officer is elected or appointed shall be liable for all damages to the property in gaining admission. The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice be given; but this section is not intended to authorize any officer executing a search warrant to enter any house or building not described in the warrant."</i>	
Nevada	Notice Required NEV. REV. STAT. § 179.090 (1967).	Notice Required NEV. REV. STAT. § 171.138 (1967).
New Hampshire	No Statute—Common Law applies	No Statute—Common Law applies
New Jersey	No Statute—Common Law applies*	No Statute—Common Law applies*
	* State v. Juliano, 97 N.J. Super. 25, 234 A.2d 236 (1967) (allows No-Knock for destruction exception to common-law rule of announcement).	
New Mexico	No Statute—Common Law applies	No Statute—Common Law applies
New York	No-Knock Permitted* N.Y. CODE CRIM. PROC. § 799 (McKinney Supp. 1969).	Notice Required N.Y. CODE CRIM. PROC. §§ 175 (arrest with warrant), 178 (arrest without warrant) (McKinney Supp. 1969).
	* "The officer may break open an outer or inner door or window of a building, or any part of the building, or anything therein, to execute the warrant, (a) if, after notice of his authority and purpose, he be refused admittance, or (b) without notice of his authority and purpose, if the judge, justice, or magistrate issuing the warrant has inserted a direction therein that the officer executing it shall not be required to give such notice. The judge, justice, or magistrate may so direct only upon proof under oath, to his satisfaction, that the property sought may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice were to be given."	
North Carolina	No Statute—Common Law applies	Notice Required N.C. GEN. STAT. § 15.44 (Cum. Supp. 1969).
North Dakota	No-Knock Permitted if judge so provides N.D. CENT. CODE § 29-29.1-01 (Supp. 1969).	Notice Required N.D. CENT. CODE § 29-06-14 (1960).
Ohio	Notice Required* OHIO REV. CODE § 2935.12 (Anderson 1967).	Notice Required OHIO REV. CODE § 2935.12 (Anderson 1967).
	* United States v. Blank, 251 F. Supp. 166 (N.D. Ohio 1966) and State v. Johnson, 16 Ohio Misc. 278, 240 N.E.2d 574 (1968) (allowing No-Knock for destruction exception).	

APPENDIX (Continued)

State	Search Warrant	Arrests (with or without warrant)
Oklahoma	Notice Required OKLA. STAT. ANN. tit. 22, § 1228 (Supp. 1969).	Notice Required OKLA. STAT. ANN. tit. 22, §§ 194 (arrest with warrant), 197 (arrest without warrant) (Supp. 1969).
Oregon	Notice Required* ORE. REV. STAT. § 141.110 (Supp. 1969).	Notice Required ORE. REV. STAT. §§ 133.290 (arrest with warrant), 133.320 (arrest without warrant) (Supp. 1969).
	* State v. Cortman, 466 P.2d 681, 683 (1968) (allows No-Knock for destruction exception).	
Pennsylvania	No Statute—Common Law applies*	No Statute—Common Law applies.
	* United States <i>ex rel.</i> Manduchi v. Tracy, 350 F.2d 658 (3d Cir.), <i>cert. denied</i> , 382 U.S. 943 (1965) (allowed No-Knock for destruction exception to common-law rule of announcement).	
Rhode Island	No Statute—Common Law applies*	No Statute—Common Law applies.
	* State v. Johnson, 230 A.2d 831 (1967) (allows No-Knock for de- struction exception to common-law rule of announcement).	
South Carolina	No-Knock Permitted S.C. CODE ANN. § 17-257 (1962).	Notice Required S.C. CODE ANN. § 53-198 (1962).
South Dakota	No-Knock Permitted S.D. COMP. LAWS ANN. § 11C2 (1970).	Notice Required S.D. COMP. LAWS ANN. § 23-22-19 (1967).
Tennessee	Notice Required TENN. CODE ANN. § 40.509 (1955).	Notice Required TENN. CODE ANN. § 40.807 (1955).
Texas	No-Knock Permitted TEX. CODE CRIM. PROC. art. 18.18 (1966).	Notice Required TEX. CODE CRIM. PROC. art. 15.25 (1966).
Utah	No-Knock Permitted* UTAH CODE ANN. § 77-54-9 (Supp. 1969).	Notice Required UTAH CODE ANN. 1953, § 77-13-12 (Supp. 1969).
	* 1967 Amendment to search warrant provisions reads: "Officer may break door or window to execute warrant—Authority. 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 the warrant: (1) If, after notice of his authority and purpose, he is refused admittance; or (2) Without notice of his authority and purpose, if the judge, justice, or magistrate issuing the warrant has inserted a direction therein that the officer executing it shall not be required to give such notice. The judge, justice, or magistrate may so direct only upon proof under oath, to his satisfaction, that the property sought is a narcotic, illegal drug, or other similar substance which may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or any other may result, if such notice were to be given." <i>See also</i> State v. Loudon, 15 Utah 2d 64, 387 P.2d 240 (1963).	

APPENDIX (Continued)

State	Search Warrant	Arrests (with or without warrant)
Vermont	No-Knock Permitted VT. STAT. ANN. tit. 24, § 302 (1967).	No-Knock Permitted VT. STAT. ANN. tit. 24, § 302 (1967).
Virginia	No Statute—Common Law applies	No Statute—Common Law applies
Washington	No Statute—Common Law applies*	Notice Required* WASH. REV. CODE ANN. § 10.31.040 (Supp. 1969).
	* State v. Young, 76 Wash. 2d 212, 455 P.2d 595 (1969) (allows No-Knock for destruction exception).	
West Virginia	No-Knock Permitted for struc- tures other than a "dwelling" W. VA. CODE ANN. § 62.1A-5 (1966).	No Statute—Common Law applies
Wisconsin	No Statute—Common Law applies	No Statute—Common Law applies
Wyoming	Notice Required	Notice Required for arrest with warrant WYO. STAT. ANN. § 7-165 (1959). No statute for arrest without war- rant—Common Law applies