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WILSON V. ARKANSAS AND THE KNOCK AND ANNOUNCE RULE: GIVING CONTENT TO THE FOURTH AMENDMENT

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WILSON v. ARKANSAS AND THE KNOCK AND ANNOUNCE RULE: GIVING CONTENT TO THE FOURTH AMENDMENT

I. Introduction

In *Wilson v. Arkansas*,[1] the U.S. Supreme Court held that "the common law 'knock and announce' principle[2] forms part of the reasonableness inquiry under the Fourth Amendment."[3] By so holding, the Court attempted to give "content" to the Fourth Amendment[4] requirement that searches and seizures be reasonable.[5] The Court also limited its holding, however, and stated that "not . . . every entry must be preceded by an announcement,"[6] in light of strong government interests such as the existence of a threat of physical violence against an officer or the likelihood of the destruction of evidence.[7] However, the Court stopped short of giving a "comprehensive catalog of [such]

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[1] 115 S. Ct. 1914 (1995).

[2] For a discussion of the knock and announce principle, *see infra* notes 79 to 141 and accompanying text.

[3] *Wilson*, 115 S. Ct. at 1915.

[4] 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.

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

[6] *Id.* at 1918.

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

relevant countervailing factors."[8] Instead, the Court left to the lower courts "the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."[9]

A. Facts of Wilson v. Arkansas

In late 1992, Sharlene Wilson made several narcotics sales to an Arkansas State Police informant.[10] Wilson consummated some of these sales at her home, which she shared with Bryson Jacobs.[11] On the final occasion, Wilson waived a semi-automatic pistol in the informant's face, threatening to kill the informant if she were working for the police.[12] The next day, the police obtained search and arrest warrants to search Wilson's home and arrest her and Jacobs.[13] When the officers arrived at Wilson's house to execute the warrants, they found the front door open and entered the house through an unlocked screen door.[14] Once inside, the officers identified themselves and announced that they had a warrant to search the house.[15] The officers seized narcotics, narcotic paraphernalia, a gun and ammunition.[16] The officers found Wilson in the bathroom, flushing marijuana down the toilet, arrested her and Jacobs, and charged them with various narcotics crimes.[17]

Wilson moved "to suppress the evidence seized . . . on various grounds,[18] including that the officers had failed to 'knock and announce'

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[8] *Id.* at 1919.

[9] *Id.*

[10] *Wilson*, 115 S. Ct. at 1915.

[11] *Id.* Jacobs had previously been convicted of arson and firebombing. *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Wilson*, 115 S. Ct. at 1915.

[16] *Id.* at 1916.

[17] *Id.*

[18] *Id.*

their presence before entering her home."[19] The Court denied Wilson's suppression motion,[20] and she was convicted on all charges after a jury trial.[21] Wilson was sentenced to thirty-two years in prison.[22]

Wilson appealed her conviction to the Arkansas Supreme Court.[23] In affirming her conviction, the Court determined that the warrant issued to search Wilson's home was based on probable cause.[24] The Court also found no authority to support Wilson's contention that the Fourth Amendment requires compliance with the knock and announce principle,[25] and affirmed the lower court's denial of Wilson's suppression motion as well.[26]

Wilson appealed to the United States Supreme Court, which granted certiorari "to resolve the conflict among the lower courts as to whether the common law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry."[27] The Court held that it does,[28] reversed the Arkansas Supreme Court,[29] and remanded the case for further proceedings.[30]

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[19] *Id.*

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

[21] *Id.*

[22] *Id.*

[23] Wilson v. State, 878 S.W.2d 755 (Ark. 1994).

[24] *Id.* at 758. The Arkansas Supreme Court based its probable cause finding on a number of considerations. *Id.* First, the Court noted that the officer's affidavit in support of the search warrant recited that a confidential informant had purchased drugs from Wilson at her home. *Id.* Second, the officer observed Wilson leave her home and proceed to a meeting with the informant, where the officer observed a drug transaction. *Id.* The court ruled that these facts supported the probable cause determination that Wilson possessed drugs at her home, and therefore, a search warrant was justified. *Id.*

[25] *Id.*

[26] *Id.*

[27] *Wilson*, 115 S. Ct. at 1916 (footnote omitted).

[28] *Id.*

[29] *Id.*

[30] *Id.* For a discussion of the issue that the Supreme Court remanded back to the Arkansas Supreme Court, namely whether the search was "reasonable" notwithstanding the officers' failure to knock and announce, *see infra* notes 162-65 and accompanying text.

B. Reaction to the Wilson *Decision*

Media and scholarly reaction to the *Wilson* decision has been mixed. Most agree, however, that the decision, which resolved "decades of constitutional debate"[31] over the knock and announce rule's implications, was a win for defendants' rights.[32] In fact, one author said that the decision "should have an immediate practical impact [on defendants' rights] by forcing police departments and law enforcement agencies at all levels to re-examine their 'no-knock' and 'dynamic entry' search and seizure policies."[33] Also praised was the Court's decision to leave to the lower courts the "task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."[34] The *Wilson* decision has prompted concern as well.[35] In light of the Court's unwillingness to clearly define the exceptions to the knock and announce requirement,[36] lower courts must remain

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[31] Linda Greenhouse, *In Home Searches, Police Must Knock, Court Rules*, N.Y. TIMES, May 23, 1995, at B10. For a discussion of the ambiguity of the relationship between the knock and announce rule and the Fourth Amendment prior to *Wilson*, *see infra* notes 105-10 and accompanying text.

[32] *Id.* (stating that Tracey Maclin, a Boston University law professor who filed the *amicus* brief for the American Civil Liberties Union in *Wilson*, asserted that the *Wilson* decision helps defendants by insuring that the police must have "some good reason before they start knocking doors down"); *see also Police Generally Must Announce Before Entering, Court Decides*, WASH. POST, May 23, 1995, at A6 [hereinafter *Must Announce*] (proclaiming that the decision was a "rare win for defendants"); Marcia Coyle, *The Justices Close Ranks on 'Knock and Announce,'* NAT'L L.J., June 5, 1995, at A14 (reporting that the head of the National Association of Criminal Defense Lawyers declared: "The Fourth Amendment lives!").

[33] Coyle, *supra* note 32.

[34] *Wilson*, 115 S. Ct. at 1919.

[35] Greenhouse, *supra* note 31 (noting that "[i]t was unclear how, within the framework of today's ruling, the Court might respond to a general rule permitting the police to make unannounced, forced entries when the object of the search warrant was evidence of drug dealing").

[36] *Wilson*, 115 S. Ct. at 1919. For a discussion of the exceptions to the knock and announce rule, *see infra* notes 123-41 accompanying text.

"vigilant to prevent [the] exceptions from overwhelming the rule."[37] Indeed, the Court's expansive approach to reasonableness may be "a loophole that anyone can walk through."[38] Although mixed, the reaction to the Supreme Court's decision in *Wilson* supports the conclusion that the case will benefit defendants rather than the government.[39]

This Comment first examines the Fourth Amendment's scope and traditional remedies for Fourth Amendment violations. Then, the Comment discusses the scope and development of the knock and announce principle, state interpretation of the rule, and exceptions to the knock and announce rule. Having established the basic theories underlying the knock and announce rule, the Comment examines the Supreme Court's holding in *Wilson*. Finally, the Comment evaluates the possible implications of *Wilson* and makes a recommendation regarding necessary considerations in light of the ruling.

II. The Fourth Amendment

A. Scope

The Fourth Amendment[40] secures the peoples' right "to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures . . . ."[41] The principle purpose of the Fourth

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[37] *Must Announce, supra* note 32.

[38] Greenhouse, *supra* note 31. This concern stems from the Court's refusal to delineate specific exceptions to the knock and announce requirement. *Id.* Instead, the Court left that responsibility to the lower courts, while providing a minimal amount of guidance as to when an officer can execute a search warrant without knocking and announcing his presence. *Wilson*, 115 S. Ct. at 1919. For a discussion of the criticisms of the Court's refusal to outline specific exceptions to the knock and announce rule, *see infra* notes 212-26 and accompanying text.

[39] Greenhouse, *supra* note 31.

[40] U.S. CONST. amend. IV.

[41] *Id.* (emphasis added).

Amendment is "to protect liberty and privacy from arbitrary and oppressive interference by government officials."[42]

There is no precise formula to determine whether a particular search is "reasonable" within the meaning of the Fourth Amendment.[43] Rather, the test of "reasonableness" requires an ad hoc balancing of two competing interests:[44] (1) the government's need for the particular search and (2) the effect of the search on the individual's Fourth Amendment rights.[45] In balancing these interests, courts consider the scope of the intrusion, the manner and place in which it is conducted, and the justification for initiating it.[46] Although "reasonableness" depends upon

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[42] U.S. v. Ortiz, 422 U.S. 891, 895 (1975); *see also* Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (holding that "the essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials . . . in order to 'safeguard the privacy and security of individuals against arbitrary invasions'") (citations omitted); Ker v. California, 374 U.S. 23, 32 (1963) (explaining that "[i]mplicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom"); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (holding that "[t]he security of one's privacy against arbitrary intrusion by the police" is at the "core" of the Fourth Amendment), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[43] Bell v. Wolfish, 441 U.S. 520, 559 (1979) (explaining that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application"); Go-Bart Importing Co. v. U.S., 282 U.S. 344, 357 (1931) (explaining that the determination of reasonableness must be decided on the facts and circumstances of a particular case); *see Ker*, 374 U.S. at 33 (citing U.S. v. Rabinowitz, 339 U.S. 56, 63 (1950) (holding that the Fourth Amendment is to be "liberally construed")).

[44] *See* Tennessee v. Garner, 471 U.S. 1, 7-8 (1985) (holding that this balancing is the "key principle of the Fourth Amendment"); U.S. v. Place, 462 U.S. 696, 703 (1983) (explaining that reasonableness requires balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion"); *Bell*, 441 U.S. at 559 (holding that "[i]n each case [the test of reasonableness] requires a balancing of the need for the particular search against the invasion of personal rights that the search entails"). *Contra* Dunaway v. New York, 442 U.S. 200, 219-20 (1979) (White, J., concurring) (arguing that balancing must not be done in an "ad hoc, case-by-case fashion by individual police officers").

[45] *Garner*, 471 U.S. at 7-8; *Place*, 462 U.S. at 703; *Bell*, 441 U.S. at 559.

[46] *Garner*, 471 U.S. at 7-8; *Bell*, 441 U.S. at 559.

the facts and circumstances of a particular case,[47] those facts and circumstances "must be viewed in light of established Fourth Amendment principles."[48] Because one of the factors to be considered in determining "reasonableness" is the extent of the intrusion,[49] the manner in which the officers conduct the search is an inherent consideration.[50] The Fourth Amendment protects individuals from unreasonable federal and state searches alike, through the Fourteenth Amendment's Due Process Clause.[51]

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[47] *Garner*, 471 U.S. at 7-8; *Bell*, 441 U.S. at 559.

[48] Chimel v. California, 395 U.S. 752, 765 (1969) (overruling U.S. v. Rabinowitz, 339 U.S. 56, 83 (1950), and citing Justice Frankfurter's dissenting opinion therein, that the test of what is a "reasonable" search or seizure includes a consideration of "the history and the experience which [the Fourth Amendment] embodies and the safeguards afforded by [the Amendment] against the evils to which it was a response").

[49] *Garner*, 471 U.S. at 8; *Place*, 462 U.S. at 703.

[50] *See Garner*, 471 U.S. at 8; *see also Ortiz*, 422 U.S. at 895 (holding that "[t]he Fourth Amendment's requirement that searches and seizures be reasonable also may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation").

[51] The Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1; *see also Mapp*, 367 U.S. at 655 (holding that evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state court); *Ker*, 374 U.S. at 33 (recognizing that the standard of reasonableness is the same under the Fourth and Fourteenth Amendments); *Wolf*, 338 U.S. at 27-28 (stating that the basic security of privacy against arbitrary police intrusion, although the core of the Fourth Amendment, is enforceable against the states through the Fourteenth Amendment).

B. Traditional Remedies for Fourth Amendment Violations

In 1914, in *Weeks v. United States*,[52] the Supreme Court held that evidence obtained in violation of an individual's Fourth Amendment rights cannot be used against that individual in a criminal prosecution.[53] This holding became known as the "Exclusionary Rule."[54] The main goal of the Exclusionary Rule was to deter government officials from violating citizens' Fourth Amendment rights by making evidence obtained in violation of the Fourth Amendment unavailable for use in a criminal prosecution.[55] The rule was limited solely to actions of the "federal government and its agencies."[56] Therefore, even under the Exclusionary Rule, a criminal court could not suppress evidence obtained in violation of the Fourth Amendment by government officials who acted in their individual capacity.[57]

In 1961, however, the Supreme Court broadened the applicability of the Exclusionary Rule.[58] In *Mapp v. Ohio*,[59] the Court held that "*all* evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court."[60] This holding eliminated the distinction drawn in *Weeks* between searches conducted

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[52] 232 U.S. 383 (1914).

[53] *Id.* at 391-93.

[54] Elkins v. U.S., 364 U.S. 206, 210 (1960).

[55] *Weeks*, 232 U.S. at 393 (arguing that the protection of the Fourth Amendment would be of no value if evidence obtained in violation thereof is admissible as evidence against the accused). *See Mapp*, 367 U.S. at 647-48 (citing *Weeks*, 232 U.S. at 393); *see also* California v. Cahan, 282 P.2d 905, 911 (1955) (holding that the most effective means of securing compliance with constitutional provisions is to deem evidence obtained in violation of constitutional guarantees inadmissible).

[56] *Weeks*, 232 U.S. at 398 (reasoning that because the Fourth Amendment only protects individuals from unreasonable *government* searches and seizures, it "is not directed to individual misconduct of [government] officials").

[57] *Id.*

[58] *Mapp*, 367 U.S. at 643.

[59] *Id.*

[60] *Id.* at 655 (emphasis added).

by government officials acting of their own accord, and by officials acting under the color of their official authority.[61]

Jurisdictions that rejected the Exclusionary Rule provided other ways to protect an individual's Fourth Amendment rights.[62] Those ways included the common law action for damages against the arresting officer,[63] against one who issues a warrant "maliciously and without probable cause,"[64] and against a magistrate who has acted without jurisdiction in issuing a warrant.[65] Similarly, the common law provided that an individual could, without liability, use force to resist an unlawful search.[66]

In 1979, Congress codified the right of an individual to recover monetary damages from government officials who violated the individual's constitutional rights.[67] The Supreme Court addressed this remedy in *Bivens v. Six Unknown Named Agents of Federal Bureau of*

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[61] For a discussion of the applicability of the Fourth Amendment to government officials acting under their own authority, *see supra* note 56 and accompanying text.

[62] *Wolf*, 338 U.S. at 28-31 (concluding that because the decision in *Weeks v. U.S.*, 232 U.S. 383, was "a matter of judicial implication," and not a ruling on the explicit requirements of the Fourth Amendment, many individual states had reasonably refused to recognize the exclusion of evidence as "an essential ingredient of the [Fourth Amendment] right").

[63] *Id.* at 30 n.1 (citations omitted).

[64] *Id.*

[65] *Id.*

[66] *Wolf*, 338 U.S. at 30 n.1 (citations omitted).

[67] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

Narcotics.[68] The Court observed that the Fourth Amendment does not specifically "provide for its enforcement by an award of money damages for the consequences of its violation."[69] But, the Court concluded that a monetary award of damages is nonetheless appropriate in the absence of an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover damages from the agents."[70] Therefore, as long as the individual can demonstrate an injury resulting from the officer's violation of his or her Fourth Amendment rights, the individual "is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts."[71]

The Supreme Court, however, has limited the statutory right of individuals to recover money damages under the federal Civil Action for Deprivation of Rights Law.[72] Recognizing the societal costs of

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[68] 403 U.S. 388 (1971). In *Bivens*, agents from the Federal Bureau of Narcotics, acting under claim of federal authority and allegedly without a warrant, entered Bivens' apartment and arrested him for alleged narcotics violations. *Id.* at 389. The agents allegedly "manacled" Bivens in front of his wife and children, and threatened to arrest the entire family. *Id.* After searching the apartment, the agents took Bivens to the federal courthouse where he was interrogated, booked, and subjected to a visual strip search. *Id.* Bivens sued the agents in federal district court, alleging to have suffered "great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct." *Id.* at 389-90. He sought $15,000 in damages from each agent. *Id.* at 390. The District Court dismissed the complaint on the ground, inter alia, that it failed to state a cause of action. 276 F. Supp. 12 (E.D.N.Y. 1967), *aff'd*, 409 F.2d 718 (9th Cir. 1969).

[69] *Bivens*, 403 U.S. at 396.

[70] *Id.* at 397.

[71] *Id. See, e.g.*, Patriarca v. Federal Bureau of Investigations, 639 F. Supp. 1193, 1198 (D.R.I. 1986) (holding that because the remedy that plaintiff sought fit "foursquare" within the Supreme Court's opinion in *Bivens*, plaintiff could obtain relief against the government defendants), *rev'd on other grounds sub nom. In re* Providence Journal Co., 829 F.2d 1342 (1st Cir. 1986); Sanabria v. Monticello, 424 F. Supp. 402, 409 (S.D.N.Y. 1976) (finding "a cause of action in damages against a municipality available to an individual who has suffered a constitutional deprivation").

permitting damage suits against government officials, the Court held that such officials performing discretionary functions may be provided with "qualified immunity."[73] Qualified immunity, an affirmative defense that must be pleaded by the government official at trial,[74] shields the agent from civil damages arising from the agent's violations of an individual's constitutional rights.[75] The availability of this "shield," however, "generally turns on the 'objective legal reasonableness' of the action,"[76] "assessed in light of the legal rules that were 'clearly established' at the time it was taken."[77]

III. The Knock and Announce Rule

A. Scope and Development

At early English common law, the King's Bench recognized the sheriff's ability to "break the party's house" to execute a search warrant.[78] In so holding, the King's Bench balanced the commonwealth's interest in apprehending felons[79] with the individual's interest in protecting his

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[72] 42 U.S.C. § 1983. *See* Anderson v. Creighton, 483 U.S. 635, 638-41 (1987) (discussing the availability of the qualified immunity defense); Harlow v. Fitzgerald, 457 U.S. 800, 813-20 (1982) (holding that qualified immunity could be an alternative to absolute immunity). *See generally* David P. Stoelting, *Qualified Immunity for Law Enforcement in Section 1983, Excessive Force Cases*, 58 U. CIN. L. REV. 243, 243-51 (1989) (examining the applicability of the qualified immunity defense as applied to excessive force cases brought under 42 U.S.C. section 1983).

[73] *Anderson*, 483 U.S. at 638.

[74] *Harlow*, 457 U.S. at 815.

[75] *Anderson*, 483 U.S. at 638-39; *cf. Harlow*, 457 U.S. at 806-07 (stating that in past decisions "officials whose special functions or constitutional status requires complete protection from suit" have been granted "absolute immunity") (citing Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975)).

[76] *Anderson*, 483 U.S. at 639 (citing *Harlow*, 457 U.S. at 819).

[77] *Id.*

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

[79] *Id.* at 197.

home.[80] The Court recognized the sanctity of the home and thus required that the sheriff announce his purpose[81] and request that the door be opened before he "breaks" the door down.[82] Moreover, the sheriff could not "break" the party's house if the doors were already open.[83] *Semayne's Case*[84] is one of the earliest recognitions of the common law knock and announce principle.[85]

Further early support for the knock and announce rule appeared in the *Case of Richard Curtis*.[86] In *Curtis*, the King's Bench specifically held that before officers execute a search warrant, they must first demand admittance[87] and give "due notice of their warrant."[88] But, the Court stopped short of requiring any precise litany to satisfy the announcement requirement.[89] Rather, it was sufficient that the individual received notice that the officers were there to execute valid judicial process.[90] Therefore, if the individual refused to admit the

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[80] *Id.* at 195 (acknowledging that "the house of every one is to him as his castle and fortress" and that "if thieves come to a man's house to rob him," he may defend his home with deadly physical force (citations omitted); *id.* at 196 (recognizing that "great damage and inconvenience" might result from unannounced entry).

[81] *Semayne*, 77 Eng. Rep. at 195.

[82] *Id.*

[83] *Id.* at 196 (holding that "if [the sheriff] breaks the house when he may enter without breaking it (that is, on request made, or if he may open the door without breaking), he is a trespasser") (citations omitted).

[84] 77 Eng. Rep. 194 (K.B. 1603).

[85] *Wilson*, 115 S. Ct. at 1917 n.2 (stating that the "knock and announce" rule predates *Semayne's Case*, which "is usually cited as the judicial source of the common law standard").

[86] 168 Eng. Rep. 67 (K.B. 1757).

[87] *Id.* at 68.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 68; *Wilson*, 115 S. Ct. at 1917 (citing Lee v. Gansell, 98 Eng. Rep. 700, 705 (K.B. 1774) (holding that the door may be broken "when due notification and demand has been made and refused")).

officers, he did so at his own peril,[91] and the officer could break the door down to execute the warrant.[92]

The knock and announce principle also gained early acceptance in American statutory law.[93] In as early as 1917, Congress codified the requirement that officers knock and announce their presence before executing a search warrant.[94] On June 25, 1940, Congress enacted 18 U.S.C. section 3109, which 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.[95]

In *Miller v. United States*,[96] the Supreme Court announced that Congress "declared in [18 U.S.C.] §3109 the reverence of the law for the individual's right of privacy in his house."[97]

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[91] *Curtis*, 168 Eng. Rep. at 68.

[92] *Id.*

[93] Most of the states that ratified the Fourth Amendment—including New York, New Jersey, and Virginia—gave credence to the English common law principle by enacting statutes that required announcement prior to executing a search warrant. *Wilson*, 115 S. Ct. at 1917. Moreover, several states—including Massachusetts, Pennsylvania, New York, and New Jersey—enacted statutes permitting the breaking of the door of a dwelling once admittance was refused. *Id.*

[94] 18 U.S.C. §§618, 619 (1940), *amended by* 18 U.S.C. § 3109 (1994).

[95] 18 U.S.C. §3109 (1997).

[96] 357 U.S. 301 (1958).

[97] *Miller*, 357 U.S. at 313.

It was not until 1958, in *Miller v. United States*,[98] that the Supreme Court had its first opportunity to carve out the scope and applicability of section 3109.[99] In *Miller*, the Court held that federal officers violated section 3109 when they broke down Miller's door without expressly demanding admission or stating the purpose for their presence.[100] Therefore, the Court held, Miller's arrest was unlawful and the evidence seized was suppressed under the Exclusionary Rule.[101] In so holding, the Court concluded that "[t]he 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."[102] But, the Court stopped short of addressing the reasonableness of the search in Fourth Amendment terms.[103]

Until *Wilson*,[104] the relationship between the knock and announce rule and the Fourth Amendment remained unclear.[105] Indeed, prior to *Wilson*, the Supreme Court had defined the meaning of the term

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[98] In *Miller*, Washington, D.C. police officers, upon a tip and without a warrant, knocked on the door of Miller's apartment. *Id.* at 302-03. Upon Miller's inquiry, "Who's there?" the officers replied "Police." *Id.* at 303. Miller opened the door slightly, but left the safety-chain on, and asked the officers what they wanted. *Id.* Before the officers could answer, however, Miller quickly attempted to close the door. *Id.* The officers reached in, broke the chain, and forced the door open. *Id.* at 303-04. Once inside, the officers arrested Miller and seized incriminating evidence that was later used against Miller at his trial. *Id.*

[99] *See Wilson*, 115 S. Ct. at 1918 (describing *Miller* as an early acknowledgement that the common law principle of announcement was "embedded in Anglo-American law"); 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, 459 (1995).

[100] *Miller*, 357 U.S. at 313-14.

[101] *Id.* at 314. For a discussion of the Exclusionary Rule, *see supra* notes 53-62 and accompanying text.

[102] *Id.* at 313.

[103] *Wilson*, 115 S. Ct. at 1918 n.3 (stating that in *Miller*, the Court focused on the statutory requirement of announcement found in 18 U.S.C. section 3109 (1958 ed.), not on the constitutional requirement of reasonableness).

[104] *Wilson*, 115 S. Ct. 1914.

[105] *Id.* at 1918; Goddard, *supra* note 99, at 450.

"break open" in section 3109,[106] and discussed circumstances under which exigency may excuse compliance with the section.[107] Nevertheless, in as early as 1963, Justice Brennan, writing for four concurring Justices in *Ker v. California*,[108] recognized that the knock and announce rule was a part of the Fourth Amendment.[109]

Although the Fourth Amendment and section 3109 serve overlapping purposes,[110] section 3109 applies only to federal officers executing a federal search warrant.[111] And, when state officers, acting totally without federal involvement, seize evidence in violation of section 3109 that is later offered in a federal prosecution, section 3109

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[106] Sabbath v. U.S., 391 U.S. 585, 590 (1968) (holding that "'breaking' not only consists of break[ing] down a door, forc[ing] open a chain lock on a partially opened door, or open[ing] a locked door with a passkey, [but it also consists of] open[ing] a closed but unlocked door").

[107] *Ker*, 374 U.S. at 39-41 (explaining that such exigencies include the risk of destruction of evidence, danger to police officers, or if announcement would frustrate the purpose of the search (quoting California v. Maddox, 294 P.2d 6, 9 (1956))).

[108] 374 U.S. 23 (1963). In *Ker*, the officers, acting without a warrant, obtained a passkey to Ker's apartment from the landlord and quietly entered the apartment. *Id.* at 28. Once inside, the officers identified themselves as such to Ker and his wife. *Id.* The officers found narcotics and arrested the Kers. *Id.* at 28-29.

[109] *Ker*, 374 U.S. at 47-59.

[110] U.S. v. Sagaribay, 982 F.2d 906, 909 (5th Cir.), *cert. denied*, 114 S. Ct. 160 (1993). In *Sagaribay*, the Court explained that "[s]ection 3109 serves several Fourth Amendment interests. Among those are (1) protecting law enforcement officers and household occupants from potential violence; (2) preventing unnecessary destruction of private property; and (3) protecting people from unnecessary intrusion into their private activities." *Id.* (citing United States v. Nolan, 718 F.2d 589 (3d Cir. 1983)). But, the Court acknowledged that the overlap between section 3109 and the Fourth Amendment is not always clear. *Sagaribay*, 982 F.2d at 909.

[111] *Sabbath*, 391 U.S. at 588; United States v. Andrus, 775 F.2d 825, 844 (7th Cir. 1985); United States v. Valenzuela, 596 F.2d 824, 829-30 (9th Cir.), *cert. denied*, 441 U.S. 965 (1979).

will not apply.[112] Nonetheless, searches must always be "reasonable within the meaning of the Fourth Amendment."[113]

B. State Law and the Knock and Announce Rule

Despite apparent uniformity in federal statutory law, states varied widely in their respective adoptions of knock and announce rules through statutes and common law prior to *Wilson*. Before *Wilson*, at least thirty-three states had statutes that required notice before entry to execute a search warrant.[114] Nine states' statutes were silent on notice,[115]

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[112] U.S. v. Moore, 956 F.2d 843, 847 (8th Cir. 1992); U.S. v. Gatewood, 60 F.3d 248, 249 (6th Cir. 1995). *See* U.S. v. Murcer, 849 F. Supp. 288, 292 (D.Del. 1994), *aff'd* 52 F.3d 318 (3d Cir. 1995). Several factors to be considered in determining whether a search is federal or state in nature include: (1) whether the warrant was issued under state law and directed to state officers; (2) whether the warrant was predicated on probable violations of state law; (3) whether federal agents assisted in obtaining the warrant; (4) whether federal agents instigate or supervised the search; (5) whether the defendant was initially arrested by local police officers; (6) whether the majority of the evidence was found by state officers; (7) whether the product of the search, placed in the custody of local police, form the basis of a state prosecution. *Id. Aff'd*, 52 F.3d 318 (3d Cir.), *cert. denied*, 116 S. Ct. 256 (1995).

[113] *See Valenzuela*, 596 F.2d at 830 (holding that in determining whether a warrant was properly executed, the general "reasonableness" standard is applicable).

[114] Brief for Petitioner at app. A, Wilson v. Arkansas, 115 S. Ct. 1914 (1995) (No. 94-5707) (listing the states and statutes requiring notice). They are: Alabama (ALA.CODE §15-5-9) (1995), Alaska (ALASKA STAT. §§12.25.100 & 12.35.040) (Michie 1996), Arizona (ARIZ. REV. STAT. §§13-3916(B) & 13-3891) (1996), Arkansas (ARK. CODE ANN. §16-81-107) (Michie 1995) (requiring notice of an entry solely to effect an arrest), California (CAL. PENAL CODE §§844 & 1531) (West 1997), Florida (FLA. STAT. ANN. §§901.19(1) & 933.09) (West 1997), Georgia (GA. CODE ANN. §17-5-27) (1996), Hawaii (HAW. REV. STAT. §§ 803-11 & 803-37) (1996), Idaho (IDAHO CODE §§19-611 & 19-4409) (1996), Indiana (IND. CODE ANN. § 35-33-5-7) (West 1996), Iowa (IOWA CODE ANN. §§804.15 & 808.6) (West 1996), Kentucky (KY. REV. STAT. § 70.078) (Michie 1996), Louisiana (LA. CODE CRIM. PROC. ANN. arts. 164 & 224) (West 1997), Michigan (MICH. COMP. LAWS ANN. §28:880) (West 1996), Minnesota (MINN. STAT. § 629.34) (1996), Mississippi (MISS. CODE ANN. §§41-29-1579 & 99-3-11) (1996), Missouri (MO. ANN. STAT. § 544.200) (West 1997), Nebraska (NEB. REV. STAT. §29-411) (1996), Nevada (NEV. REV. STAT. §§171.138 & 179.055(1)) (1995), New Jersey (N.J. STAT. ANN. § 33:1-58) (West 1996) (requiring notice only in liquor

despite notice being required at common law.[116] And, six states, including Arkansas, had no general statutory or common law requirement of notice before entry.[117]

Even among those states that required officers to knock and announce their presence before executing a search warrant, each state interpreted the knock and announce rule differently. California, for example, specifically prohibited judges from issuing no-knock warrants altogether.[118] To the contrary, several states' statutes permitted magistrates to issue a search warrant that authorized entry without notice.[119] The validity of these statutes in light of *Wilson's* unqualified

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searches), New York (N.Y. CRIM. PRO. LAW §§690.50 & 690.35(3)(b)) (McKinney Supp. 1997), North Carolina (N.C. GEN. STAT. §§ 15A-251 & 15A-401) (1996), North Dakota (N.D. CENT. CODE §§29-29-08 & 29-06-14) (1995), Ohio (OHIO REV. CODE ANN. §§2935.12 & 2933.231(B)) (Anderson 1997), Oklahoma (OKLA. STAT. tit. 22 §§ 197 & 1228) (1996), Oregon (OR. REV. STAT. §133.575(2))(1995), Pennsylvania (PA. CRIM. PRO. §2007) (1997), South Dakota (S.D.CODIFIED LAWS §§23A-35-8 & 23A-35-9) (Michie 1996),Tennessee (TENN. CODE ANN. §§40-7-107) (1996), Texas (TEX. CODE CRIM. P. ANN. art. 15.25 & 18.06(b)) (West 1997), Utah (UTAH CODE ANN. §§ 77-7-8 & 77-23-210) (1996), Washington (WASH. REV. CODE. ANN. §10.31.040) (West 1996), West Virginia (W.VA.CODE §62-1A-5) (1996) and Wyoming (WYO. STAT. ANN. §§7-7-104) (Michie 1996).

[115] *Id.* at app. B (listing the states whose statutes are silent on notice by caselaw: Connecticut, Delaware, Massachusetts, New Hampshire, New Mexico, Rhode Island, Wisconsin, Vermont and Virginia).

[116] *Id.*

[117] *Id.* at app. D (listing the states and their statutes which do not require notice: Arkansas (ARK. CODE ANN. § 16-81-107) (Michie 1995), Colorado (COLO. REV. STAT. §16-3-304(3)(b)) (1997), Illinois (ILL. COMP. STAT. 725.I.L.C.S. §5/108-8) (West 1996), Kansas (KAN. STAT. ANN. § 22-2405(3) & 22-2508) (1995), Maryland (no statute applicable), and New Jersey (N.J. STAT. ANN. §33:1-58) (West 1996).

[118] *See* Parsley v. Superior Court, 513 P.2d 611, 615 (Cal. 1973) (holding that advance judicial approval will not justify an officer's unannounced entry); People v. Henderson, 129 Cal. Rptr. 844 (2d Dist. 1976) (re-affirming that the "failure of the officers to comply with [California's knock and announce statute] cannot be predicated on judicial authorization contained in the search warrant").

[119] *See, e.g.*, ILL. REV. STAT. ch. 725, para. 5/108-8 (West 1995); MISS. CODE ANN. § 41-29-157 (c)(2)(1995); NEB. REV. STAT. §29-411(1994); N.Y. CRIM. PROC. LAW § 690.50(2)(b) (McKinney 1995).

holding—that the knock and announce rule forms part of the Fourth Amendment's reasonableness inquiry[120]—is unclear.[121]

C. Exceptions to the Knock and Announce Requirement

Similarly vulnerable after *Wilson* is Wisconsin's common law "blanket rule" exception to the knock and announce requirement.[122] That exception provides that when the subject of the search warrant is narcotics, the police can dispense with the rule of announcement and make a no-knock entry.[123] The reasoning behind this blanket exception is that the "easily disposable nature of narcotics provides police with evidence sufficient to form a reasonable belief that no-knock entry is necessary to prevent the destruction of evidence."[124] For example, in *Wisconsin v. Stevens*,[125] Justice Shirley S. Abrahamson concurred with the majority's opinion that the evidence seized as part of the search of

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[120] *Wilson*, 115 S. Ct. at 1915.

[121] For a discussion of *Wilson's* effect on state law, *see infra* notes 187-211 and accompanying text.

[122] *See* Wisconsin v. Stevens, 511 N.W.2d 591, 595 (Wis. 1994), *cert. denied*, 115 S. Ct. 2245 (1995). In *Stevens*, the Wisconsin Supreme Court held that:

> [W]hen the police have a search warrant, supported by probable cause, to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs 'evidence of drug dealing,' they necessarily have reasonable cause to believe exigent circumstances exist. Thus, in all such searches the police are justified in dispensing with the rule of announcement and making a no-knock entry.

Id. at 595 (citations omitted); Wisconsin v. Ker, 511 N.W.2d 586, 590 (Wis. 1994) (holding that no-knock entry was valid based on *Stevens*), *cert. denied* 115 S. Ct. 2245 (1995); State v. Gonzalez, 520 N.W.2d 290 (1994).

[123] *Stevens*, 511 N.W.2d at 595; *Ker*, 511 N.W.2d at 590; *Gonzalez*, 520 N.W.2d at 290.

[124] *Stevens*, 511 N.W.2d at 595.

[125] 511 N.W.2d 591, 595 (1994), *cert. denied*, 115 S. Ct. 2245 (1995).

defendant's home should not be suppressed.[126] Justice Abrahamson, however, would not concur with the majority's blanket exception to the knock and announce rule.[127] Justice Abrahamson argued that the evidence was admissible because the likelihood that evidence will be destroyed may excuse the officers from knocking and announcing their presence before executing the warrant.[128] Thus, Justice Abrahamson concluded, a blanket exception to the knock and announce rule was not necessary.[129] The U.S. Supreme Court denied certiorari to this case.[130] At least one other jurisdiction has adopted a blanket exception to the knock and announce rule.[131]

Most jurisdictions have specifically rejected any blanket exception to the knock and announce rule.[132] But, this is not to say that

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[126] *Stevens*, 511 N.W.2d at 599-600. In *Stevens*, several members of the Green Bay Police Department executed a search warrant at Bruce Stevens' home. *Id.* at 592. Because the officer did not request a no-knock warrant, the warrant did not authorize a no-knock entry. *Id.* The officers rang Stevens' doorbell and announced that they had a pizza delivery. *Id.* When the officers realized that they were not going to gain entry as a result of this ruse, they yelled: "Police, search warrant," and forced the door open and entered. *Id.* Approximately four to five seconds passed between the time that the officers announced their identity and broke the door open. *Id.* Once inside, the officers retrieved narcotics. *Id.* at 593. At the suppression hearing, the trial court found that the amount of time between announcement and entry was inadequate, and suppressed the evidence retrieved. *Id.* The Wisconsin Supreme Court reversed, holding that in all cases where narcotics are the subject of the search, "the police are justified in dispensing with the rule of announcement and making a no-knock entry." 511 N.W.2d at 595.

[127] *Id.* at 602.

[128] *Id.* at 600.

[129] *Id.*

[130] Stevens v. Wisconsin, *cert. denied,* 115 S. Ct. 2245 (1995), and Kerr v. Wisconsin, *cert. denied,* 115 S. Ct. 2245 (1995).

[131] *Murcer*, 849 F. Supp. at 295 (holding that "when the form and quantities of drug suspected to be present increase the likelihood that they can be easily destroyed," the blanket exception to the knock and announce rule is appropriate).

[132] *See, e.g.*, Gaston v. Toledo, 665 N.E.2d 264 (Ohio 1995) (holding that the "sounder view is 'that announcement is not required if, before arriving to search, the police have particular reasons to reasonably believe in a particular case that evidence would be destroyed'" (citing State v. Gassner, 488 P.2d 822 (Or. Ct. App. 1971); United States v. Moore, 956 F.2d 843, 850 (8th Cir. 1992) (concluding that a blanket exception to the knock

every entry to execute a search warrant must be preceded by an announcement.[133] Instead, where "exigent circumstances" exist,[134] the officers need not knock and announce their presence before entering.[135] Such exigent circumstances include a threat of physical violence and the destruction of evidence.[136] But, the mere presence of drugs and weapons at the location to be searched, however, does not rise to exigency, *per se*.[137]

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and announce rule in drug cases is "patently unjustifiable," and would result in the "violent and intrusive execution of many search warrants"); Massachusetts v. Scalise, 439 N.E.2d 818, 820-21 (Mass. 1982) (explaining that "there is no blanket exception to the knock and announce rule which can be invoked where the object of the search is drugs"); California v. Gastelo, 432 P.2d 706, 708 (Cal. 1967).

> Neither this court nor the United States Supreme Court has held that unannounced forcible entries may be authorized by a blanket rule based on the type of crime or evidence involved . . . . Unannounced forcible entry is in itself a serious disturbance of [individuals' security in their homes] and cannot be justified on a blanket basis. *Id.*

[133] *Wilson*, 115 S. Ct. at 1918.

[134] For a discussion of what is an exigent circumstance, *see supra* note 107.

[135] U.S. v. Kennedy, 32 F.3d 876, 882 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995); *see also* U.S. v. Lalor, 996 F.2d 1578, 1584 (4th Cir.), *cert. denied*, 114 S. Ct. 485 (1993); U.S. v. Nabors, 901 F.2d 1351, 1354 (6th Cir.), *cert. denied*, 498 U.S. 871 (1990); U.S. v. Spinelli, 848 F.2d 26, 29 (2d Cir. 1988) (holding that the officers' belief that there is an emergency situation must be objectively reasonable).

[136] *Wilson*, 115 S. Ct. at 1918-19. *See generally* U.S. v. Brown, 52 F.3d 415, 421 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 754 (1996). There are six "touchstones" for determining the existence of exigent circumstances, including: "(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; . . . and (6) the peaceful circumstances of the entry" (citing U.S. v. Gordils, 982 F.2d 64, 69 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1953 (1993)). The Court also recognized the likelihood of the destruction of evidence as a circumstance demonstrating exigency. *Id.*

[137] *See* U.S. v. Stewart, 867 F.2d 581, 585 (10th Cir. 1989) (holding that the facts that the defendant had once been seen with a pistol and was of Jamaican descent does not constitute exigency); U.S. v. Flickinger, 573 F.2d 1349, 1354-55 (9th Cir.) (holding that the critical question is not simply whether drugs are on the premises, but whether that evidence was in "imminent danger" of being destroyed), *cert. denied*, 439 U.S. 836 (1978), *overruled by* U.S.

Moreover, exigent circumstances are not matters known to the executing officers before the warrant was issued.[138] And, the government bears the burden of establishing that exigent circumstances excused compliance with the knock and announce rule.[139] The ad hoc determination of exigency appears to comport with the ad hoc determination of "reasonableness" in Fourth Amendment terms.[140]

IV. Wilson v. Arkansas

A. The Parties' Arguments and the Court's Holding

The parties' arguments in *Wilson* were fairly straight-forward, given the narrow issue on which the Supreme Court granted certiorari.[141]

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v. McConney, 728 F.2d 1195 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984); *cf.* California v. Dumas, 512 P.2d 1208, 1212 (Cal. 1973) (holding that exigency excused compliance with knock and announce rule where informant told officers that defendant habitually answered the door armed with a firearm).

[138] *See Stewart*, 867 F.2d at 585 (explaining that "[i]t is difficult to understand how the circumstances were 'exigent' when the officers had an entire day to formulate a response to those circumstances"); *cf.* Washington v. Jeter, 634 P.2d 312, 314 (Wash. Ct. App. 1981) (holding that exigent circumstances "must be based upon specific facts learned prior to execution of the warrant or observed at the scene, in contrast to a generalized speculation by law enforcement officers that their safety may be endangered or contraband destroyed"), *appeal denied*, 96 Wash.2d 1027 (Wash. 1982).

[139] U.S. v. Maden, 64 F.3d 1505, 1509 (10th Cir. 1995) (holding that the government must demonstrate that exigent circumstances exist) (citing U.S. v. Parra, 2 F.3d 1058, 1064 (10th Cir. 1993)).

[140] For a discussion of the ad hoc determination of reasonableness, *see supra* notes 44-52 and accompanying text.

[141] Wilson v. Arkansas, 115 S. Ct. 1914, 1916 (1995). The Court granted numerous parties permission to file briefs as *amicus curiae*. Briefs for *Amicus Curiae*, Wilson v. Arkansas, 115 S. Ct. 1914, 1916 (1995). Appearing in support of Wilson as petitioner were the American Civil Liberties Union, the A.C.L.U. of Arkansas, and the National Association of Criminal Defense Lawyers. Among those appearing in support of Arkansas as respondent were the Americans for Effective Law Enforcement, Inc., the International Association of Chiefs of Police, Inc., the State of California, Wayne County, Michigan, and the United

Sharlene Wilson argued that "[t]he common law knock and announce rule is so fundamental to our constitutional system that it must be considered a part of the reasonableness clause of the Fourth Amendment."[142] Therefore, Wilson urged, the Fourth Amendment requires officers executing a search warrant to knock and announce their presence before entry,[143] unless exigent circumstances excuse such announcement.[144]

The State of Arkansas, to the contrary, argued that "[n]either the text of the Fourth Amendment nor the Court's jurisprudence requires police officers to knock and announce before executing a search warrant."[145] The State contended that the existence of a valid search warrant itself carries much weight in determining whether a particular search was "reasonable" in Fourth Amendment terms.[146] Moreover, the State suggested that the Court should adopt a blanket rule exception to the knock and announce for narcotics.[147] In any event, the State argued that exigent circumstances warranted the officers' non-compliance with the knock and announce requirement.[148]

States. *Id.*

[142] Brief for Petitioner at 29.

[143] *Id.*

[144] *Id.*

[145] Brief for Respondent at 5.

[146] *Id.*

[147] *Id.* at 28.

[148] *Id.* at 27-29. These circumstances included the likelihood of the destruction of evidence and the potential of harm to the officers. *Id.* The State argued that because Wilson was the subject of a narcotics investigation, the likelihood that she would destroy evidence if the officers announced their presence was great. *Id.* Indeed, the State pointed out that this likelihood was confirmed when the officers entered and found Wilson flushing marijuana down the commode. *Id.* Moreover, the State maintained that the likelihood of physical violence was also great because Wilson had threatened the police informant with a handgun, and was "apparently ready to use deadly force to prevent her apprehension." *Id.* at 28. The Supreme Court, in deciding this case, also implied that the fact that Wilson's housemate, Jacobs, was previously convicted of firebombing also supported the conclusion that exigent circumstances might excuse compliance with the knock and announce rule. *Wilson*, 115 S. Ct. at 1919.

In response, Wilson argued, *inter alia*, that such a blanket exception would violate the Fourth Amendment.[149] Specifically, Wilson argued that because the knock and announce rule is a "reasonableness" consideration in Fourth Amendment terms, to allow officers to dispense with announcement when any of the indicia of exigency exists cuts directly against the Fourth Amendment requirement that searches and seizures be reasonable.[150]

On March 28, 1995, the Court heard oral argument in the *Wilson* case,[151] and rendered its unanimous decision on May 22, 1995.[152] The Court held that the knock and announce rule forms a part of the Fourth Amendment's reasonableness requirement.[153] In reaching its decision, the Court "looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing [of the Constitution]."[154] The Court found that these "traditional protections" dictated that "the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering."[155] The Court concluded that "[g]iven the longstanding common law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought 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."[156]

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[149] Petitioner's Reply Brief at 13-14.

[150] *Id.*

[151] United States Supreme Court Official Transcript, 1995 WL 243487 (U.S. Oral Arg. 1995). Counsel appeared for Sharlene Wilson, the State of Arkansas, and the United States. *Id.*

[152] *Wilson*, 115 S. Ct. at 1915.

[153] *Id.* at 1916.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 1918.

Moreover, the Court noted that not "every entry must be preceded by an announcement,"[157] observing that law enforcement interests may outweigh the presumption in favor of announcement.[158] Such interests may include the threat of physical violence and the likelihood that evidence will be destroyed if the officers knock and announce their presence before entering.[159] The Court did not give an exhaustive list of these governmental interests.[160] Instead, the Court left "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."[161]

The Supreme Court therefore reversed the judgment of the Arkansas Supreme Court, noting that exigent circumstances might well have provided a "necessary justification for the unannounced entry in this case."[162] The Court found that the Arkansas Supreme Court did not address this issue sufficiently, however,[163] and remanded the case "to allow the state court to make any necessary findings of fact and to make the determination of reasonableness in the first instance."[164]

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[157] *Wilson*, 115 S. Ct. at 1918.
[158] *Id.*
[159] *Id.* at 1918-19.
[160] *Id.* at 1919.
[161] *Id.*
[162] *Wilson*, 115 S. Ct. at 1919.
[163] *Id.*
[164] *Id.*

V. *The Effect of* Wilson v. Arkansas

A. *General Considerations of Requiring Officers to Knock and Announce Their Presence Before Executing a Warrant*

The knock and announce rule consists of several elements.[165] These elements include the amount of time that an officer must wait between announcing his presence and breaking in,[166] and the particular litany required to constitute proper announcement.[167] Although these elements are important considerations in determining whether the officers have complied with the knock and announce rule, courts have not been uniform in their evaluations of these elements.[168] Now that the knock and announce rule is a factor to be considered in determining whether a search is "reasonable" in Fourth Amendment terms, such a

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[165] For a discussion of the knock and announce rule, *see supra* notes 79-140 and accompanying text.

[166] *See* Poole v. U.S., 630 A.2d 1109, 1117 (D.C. Ct. App. 1993) (holding that the time of day or night is a factor to consider when determining the amount of time that must exist between announcement and forced entry; ten seconds not enough time), *cert. denied*, 115 S. Ct. 160 (1994); Hawaii v. Garcia, 887 P.2d 671, 679 (Haw. Ct. App. 1995) (holding that ten seconds between announcement and breaking down the door was "clearly insufficient to afford the occupants a reasonable opportunity to open the doors"); Illinois v. Saechao, 544 N.E.2d 745, 750 (Ill. 1989) (holding that five to ten seconds between announcement and breaking was sufficient); Nebraska v. Moore, 535 N.W.2d 417, 420 (Neb. Ct. App. 1995) (holding that "[s]peculation as to how long police officers must wait before making entry after knocking should be subject to a reasonableness rule under all circumstances").

[167] *See Garcia*, 887 P.2d at 675 (providing that an officer attempting to make an entry must meet three requirements before breaking into the place to be searched: "that the officer state his or her office, that he or she state his or her business, and that he or she demand entrance"). *Cf. Saechao*, 544 N.E.2d at 745 (holding that announcement was proper even if officer did not announce his purpose but merely stated that he was from the Sheriff's office).

[168] For a discussion of the inconsistencies in state courts' determinations on compliance with the knock and announce rule, see *infra* notes 167-75 and accompanying text.

lack of judicial uniformity cannot stand.[169] The inconsistent application of how long an officer must wait between announcing his presence and entering is one example of the lack of judicial uniformity.[170] Some courts have held that as few as five seconds is a sufficient amount of time.[171] Others have held that ten seconds is "clearly insufficient."[172] Still other jurisdictions take a more ad hoc approach, considering the time of the day or night,[173] and the overall reasonableness of the length of time that the officers waited.[174] This inconsistent application of the law leaves officers unable to determine whether their actions will violate an individual's Fourth Amendment rights. Therefore, traditional remedies for Fourth Amendment violations, such as the Exclusionary Rule,[175] may not be appropriate. As discussed above, the main goal of the Exclusionary Rule is to deter government agents from engaging in Fourth Amendment violative searches.[176] But, because officers are unable to determine whether they have waited a sufficient amount of time between announcement and breaking, the Exclusionary Rule will not serve this deterrent goal.[177] That is, officers cannot refrain from

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[169] *But see* Wilson, 115 S. Ct. at 1918 (holding that "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests"). For a discussion on the effect of *Wilson* on state laws, *see infra* notes 187-211 and accompanying text.

[170] For a discussion on the inconsistencies in the length of time required between an officer's announcement and his entry, *see infra* notes 171-75 and accompanying text.

[171] *See, e.g., Saechao*, 544 N.E.2d at 750 (holding that five to ten seconds between announcement and entering was sufficient).

[172] *See, e.g., Garcia*, 887 P.2d at 679.

[173] *See, e.g., Poole*, 630 A.2d at 1117.

[174] *See Moore*, 535 N.W.2d at 420.

[175] For a discussion of the traditional remedies for Fourth Amendment violations, *see supra* notes 53-67 and accompanying text.

[176] For a discussion of the Exclusionary Rule, *see supra* notes 52-78 and accompanying text.

[177] *See Wilson*, 115 S. Ct at 1918, 1919 (stating that the Fourth Amendment "should not be read to mandate a rigid rule of announcements that ignores countervailing law enforcement interests, "and leaving it to lower courts to deal with knock and announce requirements on case-by-case basis). For example, on the issue of unannounced entry, the

engaging in Fourth Amendment violative searches if they do not even know whether they are violating a person's Fourth Amendment rights by waiting five seconds between announcement and entry.[178]

Another element of the knock and announce rule is the specific type of announcement that is necessary to predicate a breaking. That is: What must the officer say and do before he breaks the door down?[179] This element is also in a state of jurisdictional flux.[180] Some jurisdictions require that the officer specify his or her office, that he or she has a warrant, and that the officer demand entry.[181] Other jurisdictions have held that an officer need not announce his purpose if the resident was already made aware of the officer's presence.[182] This

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court in *Wilson* held that while "a search of a dwelling might be constitutionally defective if officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." *Id.* at 1919. *Compare Garcia*, 887 P.2d at 675 (holding that ten seconds was not enough time) *with Saechao*, 544 N.E.2d at 750 (holding that five to ten seconds was sufficient time between knock and entry).

[178] For a discussion of the inconsistencies in state courts' findings regarding the amount of time required between knocking and entry, *see supra* notes 171-75 and accompanying text.

[179] *See Garcia*, 887 P.2d at 675 (providing the following three steps for an officer to meet before he breaks into the place to be searched: "that the officer state his or her office, that he or she state his or her business, and that he or she demand entrance"); *see also Saechao*, 544 N.E.2d at 749-50 (holding that resident was aware of officer's purpose when officer knocked at door, announced that he was from the sheriff's office, and requested admittance).

[180] *See generally* George E. Dix, *An Exclusionary Rule Showdown; The U.S. Court's Holding in* Wilson v. Arkansas *Will Make the Court of Criminal Appeals Address a Number of Fourth Amendment Entry Issues it Has Been Able to Ignore*, TEXAS LAWYER, July 10, 1995, at 26 (stating that in *Wilson*, "[n]o guidance was provided as to the kind of announcement constitutionally mandated," and noting that state approaches vary, from being "no different" than *Wilson*, to being more demanding).

[181] *Garcia*, 887 P.2d at 675.

[182] *See Saechao*, 544 N.E.2d at 745 (noting that where officers knocked on door and identified themselves as police officers, "it cannot be said that the residents were not made aware of the law enforcement officers' purpose").

leaves officers unable to determine what type of announcement is necessary to predicate a breaking.[183]

In sum, a result of the Supreme Court's *Wilson* holding is that the Court must now clearly define the knock and announce requirement. Indeed, to the extent that the Exclusionary Rule's goal is to deter,[184] that deterrent will not be effective because officers do not know what kind of announcement is required, and how long they must wait before breaking in.[185]

B. Wilson's *Effect on State Law*

The *Wilson* holding will also have a significant impact on state search and seizure law.[186] Specifically, Wisconsin's "blanket rule"

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[183] *See* Dix, *supra* note 180, at 26 (suggesting that the court should have given guidance "as to the kind of announcement constitutionally mandated").

[184] For a discussion of the deterrent goal of the Exclusionary Rule, *see supra* note 55 and accompanying text.

[185] *Compare* Garcia, 887 P.2d at 677 (holding that ten seconds not enough time between knock and entry, and announcement of purpose necessary), *with Saechao*, 544 N.E.2d at 750 (holding that five to ten seconds between knock and entry is sufficient, and specific announcement of purpose not necessary but may be implied from officers' presence). Such a case by case basis might present police officers with an infinite variety of search situations. *See, e.g.*, Dix, *supra* note 180 (noting that lower courts will now have to determine how long police officers must wait before forcibly entering a dwelling). Dix asks what "the sound of scurrying feet" might mean to an officer, that is, whether it might mean an attempt to destroy evidence, resist the officers, or simply get dressed to prepare "to submit to the search with a minimum of personal embarrassment." *Id.*

[186] *See generally* Dix, *supra* note 180 (discussing *Wilson's* impact on state law and suggesting that "*Wilson* will require that the Texas courts and many others considerably modify their approach," that the decision "will require state courts . . . to address 'in the first instance' a number of Fourth Amendment entry issues that they have up to now been able to ignore," and "will require quite extensive reconsideration of prior entry case law").

exception to the knock and announce requirement[187] is now vulnerable to constitutional attack.[188]

Blanket rule exceptions allow government agents to dispense with the announcement requirement whenever the subject of the search is narcotics.[189] No advance judicial authorization is required and, because of the "easily disposable nature of narcotics,"[190] the likelihood that the narcotics will be destroyed is irrelevant.[191] Therefore, officers may use a battering ram to crash through a person's front door armed only with a valid search warrant to justify this intrusion.[192] This result hardly comports with the *Wilson* holding that knocking and announcing is part of what makes a search reasonable in Fourth Amendment terms.

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[187] For a discussion of Wisconsin's blanket rule exception to the knock and announce rule, *see supra* notes 123-32 and accompanying text.

[188] On March 25, 1997, the Supreme Court heard arguments in *Richards v. Wisconsin*, (1997 U.S. LEXIS 2794). Steiney J. Richards was convicted in 1992 for narcotics sales. The officers, after obtaining a no-knock warrant, entered Richards' hotel room and seized cocaine, without announcing their presence. The Supreme Court held that "[t]he Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement for felony drug investigations." Thus, the Court overruled the Wisconsin Supreme Court's holding "that exigent circumstances justifying a no-knock are always present in felony drug cases." However, the Supreme Court affirmed the Wisconsin Supreme Court's decision to the extent that exigent circumstances existed in this particular case sufficient to justify the officers' entry without first knocking and announcing their presence. *See, e.g.*, Linda Greenhouse, *Court Rejects Special Rules for Drug Searches*, N.Y. TIMES, Apr. 29, 1997, at A14. *See also* John Nussbaumer, *"Knock, Knock." "Who's There?" Must Police Knock and Announce Themselves Before Entering a Home to Execute a Search Warrant?*, PREVIEW OF U.S. SUP. CT. CASES, Mar. 7, 1995, at 6 (arguing that this kind of blanket exception "might not pass constitutional muster").

[189] For a discussion of blanket exceptions to the knock and announce rule, *see supra* notes 123-32 and accompanying text.

[190] Wisconsin v. Stevens, 511 N.W.2d 591, 595 (Wis. 1994), *cert. denied*, 115 S. Ct. 2245 (1995).

[191] *Id.*

[192] *See* Moore v. Alabama, 650 So.2d 958, 960 (Ala. 1994) (stating that the fact that officers entered by "bashing the door with a battering ram" is not an issue on appeal).

Indeed, several jurisdictions have specifically rejected the blanket exception rule.[193] These jurisdictions hold that such exceptions would result in an increase in the "violent and intrusive" execution of search warrants,[194] and that unannounced forcible entry is such a disturbance of an individual's security in his home that it "cannot be justified on a blanket basis."[195] Therefore, the Supreme Court must either overrule Wisconsin's common law blanket exception to the knock and announce rule,[196] or recognize such an exception as a valid circumstance under which officers need not comply with the announcement requirement.[197]

Similarly, Texas has allowed officers to employ extravagant means to execute a search warrant.[198] On, June 10, 1990, Dallas police executed a search warrant on Juan Garcia's Dallas residence.[199] The officers used what is known as a "stun grenade" to gain access to Garcia's home.[200] This "grenade" is a diversionary device that "explodes with a loud noise and a bright flash but has no shrapnel."[201] The device "stuns" the occupants of the house so that the officers can enter and secure the premises without opposition.[202] After the officers threw the

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[193] For a discussion of the many jurisdictions that have rejected the blanket exception rule, *see supra* note 133 and accompanying text.

[194] U.S. v. Moore, 956 F.2d 843, 850 (8th Cir. 1992) (holding that a blanket rule permitting no-knock warrants in all drug cases, regardless of the form and quantity suspected to be present, is "patently unjustifiable").

[195] California v. Gastelo, 432 P.2d 706, 708 (Cal. 1967) (observing that "[n]either [the California Supreme Court] nor the United States Supreme Court has held that unannounced forcible entries may be authorized by a blanket rule based on the type of crime or evidence involved").

[196] *See* Wisconsin v. Williams, 485 N.W.2d 42, 48 (Wis. 1992) (holding that a person in possession of drugs and firearms poses such a great threat to law enforcement that these exigent circumstances justify an unannounced entry).

[197] *Id.*

[198] Dix, *supra* note 180.

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

grenade into Garcia's home and secured it, they found not only Garcia in the apartment, but also his pregnant wife and two children, ages nine months and two years.[203] Upon appealing his conviction, Garcia did not challenge the admissibility of the evidence obtained in the search.[204]

After *Wilson*, such an unannounced forced entry will probably not stand.[205] Indeed, the Supreme Court pointed out in *Tennessee v. Garner*[206] and *United States v. Ortiz*[207] that the manner in which a search or seizure is carried out is a consideration in determining whether a search is reasonable within the meaning of the Fourth Amendment.[208] And, because the search was not preceded by announcement, *Wilson* will likely prohibit such a search as well.

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[203] Dix, *supra* note 180.

[204] *Id.*

[205] *See, e.g.*, U.S. v. Reyes, 922 F. Supp. 818 (S.D.N.Y. 1996) (holding that law enforcement agents can force entry only after the circumstances lead them to reasonably infer they have been refused admittance).

[206] 471 U.S. 1, 7-8 (1985). The police, in response to a "prowler inside call," arrived at a Memphis home. *Id.* at 3-4. A woman standing on a porch gestured toward the adjacent house, and told the officer that someone was trying to break into that house. *Id.* One of the officers approached the adjacent house and saw Edward Garner fleeing across the backyard. *Id.* The officer cornered Garner against a chain link fence and Garner crouched down next to the fence. *Id.* When the officer yelled "police, halt," Garner began to climb over the fence. *Id.* The officer shot Garner in the back of the head, and Garner died soon thereafter. *Id.* The Supreme Court granted certiorari to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. *Id.* at 3.

[207] 422 U.S. 891, 895 (1975). Border patrol officers stopped Ortiz's car for a routine immigration search at a traffic checkpoint. *Id.* They found three aliens in the trunk, and Ortiz was convicted of knowingly transporting illegal aliens. *Id.* The Supreme Court held that the Fourth Amendment forbids border patrol officers, without consent or probable cause, from searching private vehicles at traffic checkpoints removed from the border and its "functional equivalents." *Id.*

[208] For a discussion of the "reasonableness" requirement of the Fourth Amendment, *see supra* notes 42-52 and accompanying text.

In sum, *Wilson* will have an impact on state law.[209] It will require the Supreme Court to more clearly define the components of the knock and announce rule.[210] It will also have a significant impact on those states that have blanket exceptions to the knock and announce requirement, and on those that allow officers to employ particularly intrusive means to execute a warrant.

C. Wilson's *Effect on Exceptions to the Knock and Announce Rule*

The *Wilson* Court refused to delineate exceptions under which non-compliance with the knock and announce rule may be excused.[211] Instead, the Court left that task to the lower state and federal courts.[212] The Court's refusal to address the issue of exceptions has prompted criticism.[213] Indeed, Linda Greenhouse of *The New York Times* has classified the refusal as a "loophole."[214] Tracey Maclin, a Boston University law professor who filed the brief for the American Civil Liberties Union in *Wilson*,[215] stated that "the court's approach to the question of reasonableness might prove to be 'a loophole that anyone can walk through.'"[216] Indeed, the Court left almost as many issues concerning Fourth Amendment reasonableness unresolved as it resolved

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[209] *See, e.g.*, New Jersey v. Jones, 667 A.2d 1043, 1050 (N.J. 1995) (noting that "[f]ailure to adhere strictly to common law knock and announce requirement is obviated by the United States Supreme Court's recent decision in Wilson v. Arkansas.").

[210] U.S. v. Hudson, 100 F.3d 1409 (9th Cir. 1996) (Reinhardt, J., dissenting) (noting the variety of factors that can be considered when balancing the reasonableness of an unannounced entry).

[211] *Wilson*, 115 S. Ct. at 1919.

[212] *Id.*

[213] Greenhouse, *supra* note 31.

[214] *Id.*

[215] *See* Brief for American Civil Liberties Union as *amicus curiae* at 1, Wilson v. Arkansas, 115 S. Ct. 1914 (1995).

[216] *Id.*

by holding that the knock and announce rule is part of that reasonableness.[217]

The Court's refusal to delineate exceptions came under attack from another direction as well.[218] Specifically, in the context of the "totality of the circumstances" approach to reasonableness.[219] One author, Ira Mickenberg, has interpreted *Wilson* to hold that such an approach "allows and encourages" states to develop additional grounds for holding entries reasonable.[220] Mr. Mickenberg continues that "[u]nder the totality-of-the-circumstances scale, virtually any denial of suppression can be justified because there are no clear standards by which to evaluate a constitutional violation."[221]

However, this totality of the circumstances approach has always been the scale upon which Fourth Amendment reasonableness has been measured.[222] Indeed, it is well-settled that exigency may excuse compliance with the knock and announce rule.[223] Moreover, exigency requires an ad hoc, on the scene assessment of possible dangers to the officers or the likelihood of the destruction of evidence.[224] But, Mr. Mickenberg's argument gains strength when considered in the context of the *Wilson* Court's refusal to specify what exceptions may excuse compliance with the knock and announce rule.[225]

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[217] *See supra* notes 42-52, and accompanying text for a discussion of the "reasonableness" requirement of the Fourth Amendment.

[218] Ira Mickenberg, *Court Settles on Narrower View of 4th Amendment*, NAT'L L.J., July 31, 1995, at C8.

[219] *See supra* notes 42-52 and accompanying text.

[220] Mickenberg, *supra* note 218.

[221] *Id.*

[222] *Id.*

[223] For a discussion of the ad hoc determination of "reasonableness" in Fourth Amendment terms, *see supra* notes 44-52, and accompanying text.

[224] *Id.*

[225]

> We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced

D. The Extent to Which Wilson *Provides New Remedies and Limits Old Remedies*

The Exclusionary Rule, one traditional remedy to redress violations of Fourth Amendment rights,[226] has also been used to redress violations of the knock and announce rule.[227] But, as discussed below, other remedies, which have been typically used to protect individuals from violations of the Fourth Amendment, have not been extended to protect individuals from violations of the knock and announce requirement.[228]

Monetary damages, for example, have been an available remedy for an individual who has suffered injuries from a violation of his Fourth Amendment rights by federal officials.[229] However, in *Rivera v. U.S.*,[230] the United States District Court for the Southern District of New York specifically held that "there is no basis for a private right of action for money damages against [government agents who violate the federal

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> entry is reasonable under the Fourth Amendment. We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish reasonableness of an unannounced entry. *Wilson*, 115 S. Ct. at 1918-19.

[226] *See supra* notes 54 to 62 and accompanying text for a discussion of the Exclusionary Rule.

[227] *Id.*

[228] *See infra* notes 231-35 and accompanying text for a discussion of the Fourth Amendment remedies that have not been extended to violations of the knock and announce rule.

[229] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that a monetary award of damages is an appropriate remedy for an individual whose Fourth Amendment rights have been violated by a government official).

[230] 728 F. Supp. 250 (S.D.N.Y. 1990).

knock and announce statute]."[231] In so holding, the Court discussed Congress' intent in enacting section 3109, construed the explicit and implicit provisions of the statute, and considered the legislative history of section 3109.[232] These considerations, in light of the lack of judicial precedent,[233] led the court to conclude that a violation of section 3109 does not provide a private cause of action for a violation of the knock and announce rule.[234]

VI. Conclusion

By specifically holding that the knock and announce rule is part of the Fourth Amendment's reasonableness requirement,[235] *Wilson v. Arkansas* has re-defined the knock and announce rule. It will impact state law,[236] limit civil remedies for individuals whose Fourth Amendment rights have been violated,[237] and render the Exclusionary Rule ineffective.[238] The Supreme Court will be forced to act quickly to

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[231] *Rivera*, 728 F. Supp. at 262. Officers searched Garcia's apartment and two other apartments armed with a search warrant. *Id.* at 252-53. The apartment owners, including Garcia, claimed, inter alia, that the officers violated their Fourth Amendment rights in conducting the searches. *Id.* at 253. They also claimed that the officers committed the common law torts of false arrest, false imprisonment, malicious prosecution, among others. *Id.* As a threshold legal issue to the parties' claim that a private actions stems from the officers' failure to comply with 18 U.S.C. section 3109—the federal knock and announce statute—the Court District Court held that "there is no basis for a private right of action for money damages against the defendants." *Id.*

[232] *Id.* at 263.

[233] *Id.* at 264 (finding that "[n]o case has been cited or located in which a court has found a private right of action as a remedy for violation of the knock-and-announce statute").

[234] *Id.* at 187.

[235] *Wilson*, 115 S. Ct. at 1915.

[236] For a discussion of *Wilson's* effect on state law, *see supra* notes 187-211 and accompanying text.

[237] For a discussion of *Wilson's* effect on remedies for Fourth Amendment violations, *see supra* notes 227-35 and accompanying text.

[238] *Wilson*, 115 S. Ct. at 1915.

more clearly define the scope and impact of violations of the knock and announce requirement. In sum, by holding that the knock and announce principle forms part of the reasonableness inquiry of the Fourth Amendment,[239] the Court has indeed given content to the Fourth Amendment requirement that searches and seizures be reasonable. But, in so holding, the Court must now give content to the knock and announce rule.

Brent P. Reilly

[239] *Id.*