

**WILSON V. ARKANSAS: THIRTY YEARS AFTER KER  
THE SUPREME COURT ADDRESSES THE  
KNOCK AND ANNOUNCE ISSUE**

The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his forces dare not cross the threshold of the ruined tenement.<sup>1</sup>

**I. INTRODUCTION**

One of the cornerstones of liberty is respect for the right to personal privacy.<sup>2</sup> Respect for the concept of personal privacy in the home can be traced from Biblical times.<sup>3</sup> Always regarded as a sacred and fundamental right, some commentators believe that the American Revolution was a direct response to England's lack of respect for the Colonists' personal privacy.<sup>4</sup>

The Fourth Amendment<sup>5</sup> to the United States Constitution recognizes the importance of protecting the right to privacy in the home. Accordingly, the Constitution places limitations on when a compelling governmental interest can displace this fundamental right.<sup>6</sup> The Supreme Court has long recognized that the Fourth Amendment's protection of privacy is of paramount impor-

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1. NELSON S. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 49-50 (1937) (quoting William Pitt's remarks in a 1763 Parliamentary debate on a proposed cider tax).

2. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (indicating that the right of privacy includes the right of an individual to be free from excessive governmental intrusion).

3. LASSON, *supra* note 1, at 13-50 (tracing the Common Law's respect for the sanctity of personal privacy in the home from Biblical Times, Hebrew law, Roman law, early Anglo Saxon and the common law up until the present day).

4. This was due to the issuance of the writs of assistance, which allowed custom officials to forcibly enter premises in order to search for uncustomed or prohibited goods. *See* LASSON, *supra* note 1; 1 WAYNE LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.1(a) (2d ed. 1987); Note, *Announcement in Police Entries*, 80 YALE L.J. 139, 144-45 (1970) [hereinafter *Announcement*].

5. 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.

6. The Fourth Amendment limits intrusions on personal privacy in the home through the "Reasonableness Clause" (invalidating *unreasonable* searches and seizures), and the "Warrant Clause" (requiring warrants to be issued only upon *probable cause* and then requiring those warrants to be specific). *See id.*

tance to the preservation of freedom.<sup>7</sup> The harsh sanction of the "exclusionary rule"<sup>8</sup> illustrates the Court's serious commitment to protecting the Fourth Amendment's guarantee of privacy.<sup>9</sup> The "knock and announce rule"<sup>10</sup> is one manner in which personal privacy is protected from unreasonable searches and seizures.<sup>11</sup>

Competing policy concerns now threaten the once sacred knock and announce rule. Courts are being pressured to abandon traditional constitutional safeguards in order to assist law enforcement officers in the "War on Drugs."<sup>12</sup> In recent years the United States government has escalated this battle in an effort to curb the serious epidemic of drug abuse and violence.<sup>13</sup>

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7. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). "The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which is 'basic to a free society.'" *Id.* (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)).

8. The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search. *Murray v. United States*, 487 U.S. 533, 536 (1988).

Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of primary evidence, or that is otherwise acquired as an indirect result of the lawful search, up to the point at which the connection with the unlawful search becomes "so attenuated as to dissipate the taint."

*Id.* at 536-37 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

9. *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court).

10. Also referred to as the "notice requirement" or the "rule of announcement," this rule states that a police officer, who seeks entry into a home for purpose of executing a search or arrest warrant, must first identify himself and then state the purpose for demanding entry. 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL PROCEDURE* § 165 (13th ed. 1989). The rule as it now stands in the United States developed through the common law of England over the course of hundreds of years. See G. Robert Blakey, *The Rule of Announcement and Unlawful Entry*: *Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499 (1964).

11. See Blakey, *supra* note 10.

12. See Charles P. Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 COLUM. L. REV. 685, 685 (1993). "Faced regularly with the grim results of the illegal drug trade, the judiciary may well be tempted to offer aid to the Government in its War on Drugs. But no matter how pressing the perceived need, the judiciary is simply without authority to trim back the Fourth Amendment." *Id.* at 685 n.1 (quoting *Hartness v. Bush*, 919 F.2d 170, 174 (D.C. Cir.) (Edwards, J., dissenting), *cert. denied*, 501 U.S. 1251 (1991). But see Donald B. Allegro, Note, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant Is an Idea Whose Time has Come*, 64 NOTRE DAME L. REV. 552 (1989) (arguing for the use of the no-knock warrant because police face an increased threat of violence when executing high risk narcotics search warrants).

13. Federal spending for fighting drugs has increased from under \$1 billion in 1980 to \$13 billion in 1993. JAMES BOVARD, *LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY*

In *Wilson v. Arkansas*,<sup>14</sup> the Supreme Court addressed the opposing policy concerns of the Fourth Amendment, the right of privacy and the countervailing law enforcement interests.<sup>15</sup> The Court granted *certiorari* in order to resolve a split among the lower courts as to whether or not the knock and announce principle formed a part of the Fourth Amendment's reasonableness inquiry.<sup>16</sup> Relying on the common law's traditional protections against unreasonable searches and seizures, the Court held that the knock and announce principle formed a part of the reasonableness inquiry under the Fourth Amendment.<sup>17</sup>

This Note will initially discuss the historical background of the knock and announce principle and its evolution from the English common law. Next, the Note will address the facts and the holdings of *Wilson*, in the lower courts and the Supreme Court. Finally, the Note will analyze the *Wilson* decision and its precedential value.

## II. BACKGROUND

### *Common Law Beginnings in England*

The knock and announce principle tracks its roots to the common law, beginning in 1603 with *Semayne's Case*,<sup>18</sup> which dealt with the forcible en-

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201 (1994). It is evident that the war on drugs has taken a heavy toll on government officials. In 1989 the police chief of Los Angeles, Daryl Gates, recommended that drug abusers "be taken out and shot." *Id.* Gates' recommendation could have meant executing up to two million people in Los Angeles County alone. Former federal drug czar William Bennett suggested abolishing habeas corpus to aid in the fight against drugs, and said that he would not be opposed to public beheadings of drug dealers. *Id.*

14. 115 S. Ct. 1914 (1995).

15. *Id.*

16. *Wilson v. Arkansas*, 878 S.W.2d 755 (Ark.), *cert. granted*, 115 S. Ct. 571 (1994). The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. For examples of the split among the lower courts, see *People v. Gonzalez*, 259 Cal. Rptr. 846 (1989) (stating that the knock and announce principle is part of the Fourth Amendment requirement of reasonableness); *People v. Saechao*, 544 N.E.2d 745, 748 (Ill. 1989) (stating that failure to knock and announce is not necessarily a constitutional violation, but rather serves as an important consideration in determining whether an arrest or search is constitutionally reasonable); *Commonwealth v. Goggin*, 587 N.E.2d 785, 787 (Mass. 1992) (stating that the knock and announce principle is one of common law which is not constitutionally compelled).

17. *Wilson*, 115 S. Ct. at 1915 (holding that the "common law 'knock and announce' principle forms part of the reasonableness inquiry under the Fourth Amendment.").

18. 77 Eng. Rep. 194 (K.B. 1603). The knock and announce principle has been traced back to a statute dating from the year 1275 A.D. Petitioner's Brief, *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995) (No. 94-5707) (citing 1 STATUTES AT LARGE, FROM THE MAGNA CARTA TO THE END OF THE ELEVENTH PARLIAMENT OF GREAT BRITAIN, ANNO 1761, 3 Edw. I, ch. 17 (D.

try into a residence in a civil matter.<sup>19</sup> The King's Bench set forth the knock and announce principle for the first time:

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 K[ing'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 doors . . . .<sup>20</sup>

However, the extent to which the knock and announce principle applied to criminal matters remained uncertain,<sup>21</sup> and the leading common law authorities disagreed as to the rule's application in the criminal context.<sup>22</sup> In 1757 the English courts finally decided that the knock and announce principle applied in criminal cases, and said that officers executing an arrest warrant had to comply with the knock and announce principle.<sup>23</sup>

Pickering ed. 1762)).

19. See *Semayne's Case*, 77 Eng. Rep. at 194-95. Application of the rule in a criminal context did not arise until 150 years after *Semayne's Case* was decided. See *infra* note 23 and accompanying text.

20. *Semayne's Case*, 77 Eng. Rep. at 195.

21. See Blakey, *supra* note 10, at 501; Michael R. Sonnenreich & Stanley Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626, 628-29 (1970) (claiming that the rule of announcement is not required even in civil cases, because *Semayne's Case* stated that a sheriff merely "ought" to announce his identity and purpose before forcibly entering a residence).

22. Sir Matthew Hale believed that the rule applied equally to arrest and search warrants. 1 SIR MATTHEW HALE, PLEAS OF THE CROWN 583 (1736) ("A man that arrests upon suspicion of felony may break open doors, if the party refuses upon demand to open them . . ."); 2 SIR MATTHEW HALE, PLEAS OF THE CROWN 150-51 (1736) ("[I]f the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door."). William Hawkins only applied the rule to the execution of arrest warrants. See 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 86 (6th ed. 1777) ("[N]o one can justify the breaking open of another's doors to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance."). Sir Michael Foster applied the rule to both civil and criminal cases. SIR MICHAEL FOSTER, CROWN LAW 320 (3d ed. 1792) ("In every case where doors may be broken open in order to arrest, whether in cases criminal or civil, there must be such notification, demand, and refusal, before the parties concerned proceed to that extremity.").

23. *Case of Richard Curtis*, 168 Eng. Rep. 67 (K.B. 1757). Curtis was on trial for the murder of an officer who had forcibly entered his residence without compliance with the rule of announcement. *Id.* at 67. He argued that noncompliance with the rule made the killing a justifiable homicide. *Id.* A unanimous court held that officers possessing a valid warrant may forcibly enter premises only after meeting the rule of announcement. *Id.* at 68 (stating "peace officers, having a legal warrant to arrest for a breach of the peace, may break open doors, after having demanded admittance and given due notice of their warrant."). See also *Lee v. Gansell*, 98 Eng. Rep. 700 (K.B. 1774) (upholding the rule in a case which dealt with forcible entry through the outer doors of a residence). But see *Ratcliffe v. Burton*, 127 Eng. Rep. 123 (C.P. 1802) (determining in two of the four opinions given by this court that the knock and announce principle applied in civil cases, but not criminal cases); *Launock v.*

As applied under English law, the knock and announce principle was never stated as an inflexible rule.<sup>24</sup> Rather, the courts developed exceptions to the rule as they struggled to determine its proper scope.<sup>25</sup> The knock and announce principle was dispensed with where it would serve as a "useless gesture,"<sup>26</sup> or where the officers were placed in danger of "peril."<sup>27</sup>

### *The Early American Experience with the Knock and Announce Principle*

The American courts continued to apply the knock and announce principle.<sup>28</sup> However, there were uncertainties regarding its application in criminal cases.<sup>29</sup> It was only clear that the rule applied in all civil matters<sup>30</sup> and that it contained exceptions.<sup>31</sup>

The Colonists' first experience with the knock and announce principle came from their encounters with the infamous "writs of assistance."<sup>32</sup> The writs created general resentment among the Colonists against the government's power to arbitrarily search and seize.<sup>33</sup> Even though the writs

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Brown, 106 Eng. Rep. 482 (K.B. 1819) (stating that the notice requirement would apply to misdemeanors but would not yet be extended to felony cases).

24. See *Ker v. California*, 374 U.S. 23 (1963); Blakey, *supra* note 10, at 501-04.

25. See *Pugh v. Griffith*, 112 Eng. Rep. 681 (K.B. 1838); *Mahomed v. The Queen*, 13 Eng. Rep. 293 (P.C. 1843). Both *Pugh* and *Mahomed* set forth exceptions to the knock and announce principle. See *infra* notes 26 and 27.

26. See *Pugh*, 112 Eng. Rep. at 686 (stating that "a demand should be made by the sheriff in particular cases; but the necessity of a demand in the present case is obviated, because there was nobody on whom a demand could be made."). The "useless gesture" exception is also referred to as the "senseless ceremony" exception. See *Allen v. Martin*, 10 Wend. 300, 304 (N.Y. Sup. Ct. 1833).

27. See *Mahomed*, 13 Eng. Rep. at 296. The court recognized the absurdity of enforcing the notice requirement in this case, and asked the question: "While [the defendant] was firing pistols at [the officers], were they to knock at the door, and ask him to be pleased to open it for them?" *Id.*

28. See *supra* notes 18-27 (discussing the development of the common law knock and announce principle).

29. See *supra* notes 21-23 (discussing the uncertainty of common law authorities as to the application of the knock and announce principle to criminal cases).

30. See *supra* notes 18-22 (establishing the origins of the knock and announce principle in civil matters).

31. See *supra* notes 24-27 (setting forth the common law's development of exceptions to the knock and announce principle).

32. See *supra* note 4 (discussing the writs of assistance).

33. See LASSON, *supra* note 1, 51-78. In 1761, James Otis, Jr. represented merchants in Boston who were opposed to the renewal of the writs. *Id.* at 58-59. Although he lost the case, his passionate speech against the abuses of the writs is credited by John Adams as being the birth of the American Revolution. *Id.* See also *Announcement*, *supra* note 4, at 144-45 (discussing the Colonists' outrage with the writs).

caused an outrage among the Colonists, they did include the giving of notice prior to the forcible entry of a residence.<sup>34</sup>

Before the enactment of the Fourth Amendment, at least ten of the thirteen original states had statutes which required notice before the execution of warrants.<sup>35</sup> It is also clear that the framers of the Fourth Amendment were familiar with the history of the writs of assistance and their notice requirement.<sup>36</sup> The Fourth Amendment's protections of individual freedom undoubtedly supported the requirement for police officers to announce their purpose and authority before breaking into an individual's home.<sup>37</sup>

The early American case history concerning forcible entry shows that the courts followed the knock and announce principle.<sup>38</sup> In addition, most American courts followed the rule in criminal cases.<sup>39</sup> The courts that applied the

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34. See *Ker v. California*, 374 U.S. 23, 52 (Brennan, J., dissenting); LASSON, *supra* note 1 (supporting the idea that officials executing the writs of assistance used notice prior to entering a residence); Blakey, *supra* note 10 (discussing the absence of "notice issues" in the early American cases as evidence of the use of notice by officials executing arrest and search warrants); *Announcement*, *supra* note 4, at 144-45 (stating that the Colonists did not include lack of notice among their objections to the writs because it was customarily given).

35. Petitioner's Brief at 25, *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995) (No. 94-5707).

36. See *Wilson v. Arkansas*, 115 S. Ct. 1914, 1917 (1995) (stating that most of the states that ratified the Fourth Amendment had enacted state constitutional provisions or statutes which incorporated the common law, including the knock and announce principle); *Moskal v. United States*, 498 U.S. 103, 116 (1990) (finding that Congress presumed to adopt common law meanings when adopting legislation based on common law principles); LASSON, *supra* note 1 (discussing the history and development of the Fourth Amendment); *Announcement*, *supra* note 4, at 144-45.

37. See *Ker*, 374 U.S. at 49 (Brennan, J., dissenting); *Miller v. United States*, 357 U.S. 301, 313 (1958) (stating that the common law knock and announce principle is deeply embedded in Anglo-American law); LASSON, *supra* note 1; Blakey, *supra* note 10.

38. See *Oystead v. Shed*, 13 Mass. 520 (1816) (establishing in American case law the right of a person to be free from forcible entry into his home); Blakey, *supra* note 10, at 504; Sonnenreich & Ebner, *supra* note 21, at 629; Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 798 (1924) (recognizing the requirement of notice in the early American cases). "Before doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, unless this is already understood, or the peril would be increased." *Id.* at 802.

39. Blakey, *supra* note 10, at 506. Courts did not have to address lack of notice in most criminal cases because officers gave notice before executing an arrest or search warrant. See *State v. Shaw*, 1 Root 134 (Conn. Super. Ct. 1789) (holding that notice given before entry in execution of a criminal arrest warrant for lewd behavior was lawful); *Kelsy v. Wright*, 1 Root 84 (Conn. 1783) (holding that notice given in executing a criminal arrest warrant for treason was lawful). *Bell v. Clapp*, 10 Johns. 263 (N.Y. Sup. Ct. 1813) (finding that execution of search warrant preceded by notice was valid); *But see Hawkins v. Commonwealth*, 53 Ky. (14 B. Man.) 395, 397 (1854) (holding that announcement was not required in criminal cases because it would give the defendant an opportunity to escape); *Commonwealth v. Reynolds*, 120 Mass. 190, 196 (1876) (recognizing a split among the courts on whether to impose a notice requirement in misdemeanor cases); *Barnard v. Bartlett*, 64 Mass. (1 Cush.) 501, 503 (1852) (requiring only notification of purpose prior to forcible entry).

knock and announce principle carved out exceptions for situations where notice was not required.<sup>40</sup>

*The Federal "Knock and Announce" Statute: 18 U.S.C. § 3109 and the Supreme Court*

The federal "knock and announce statute"<sup>41</sup> is found at 18 U.S.C. § 3109.<sup>42</sup> The statute was enacted under emergency conditions to prosecute espionage rings and arms smugglers during World War I.<sup>43</sup> Since its enactment in 1917, it has governed the manner in which federal officers execute both search and arrest warrants.<sup>44</sup>

In 1958 the Supreme Court addressed the federal knock and announce principle for the first time in the case of *Miller v. United States*.<sup>45</sup> Justice Brennan, writing for the Court, held that evidence should have been suppressed based on an officer's failure to comply with the notice requirement of § 3109.<sup>46</sup> Brennan stated that the knock and announce principle "should

40. See *Read v. Case*, 4 Conn. 166 (1822) (articulating an early formulation of the "peril" exception to the notice requirement, stating that notice was not necessary where there was an imminent danger to life); *Blakey*, *supra* note 10, at 505-06; *Sonnenreich & Ebner*, *supra* note 21, at 629.

41. Marvin O. Meier, Annotation, *What Constitutes Violation of 18 U.S.C.S. § 3109 Requiring a Federal Officer to Give Notice of His Authority and Purpose Prior to Breaking Open Door or Window or Other Part of House to Execute Search Warrant*, 21 A.L.R. FED. 820, § 1a n.1 (1974).

42. The statute provides that:

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

18 U.S.C. § 3109 (1988) (originally enacted as Espionage Act of June 15, 1917, ch. 30, tit. XI, § 8, 40 Stat. 229).

43. *Garcia*, *supra* note 12, at 690.

44. *Meier*, *supra* note 41, at § 2a.

45. 357 U.S. 301 (1958). Police officers forcibly entered Miller's apartment and found marked money that had been given to an informant to purchase drugs. *Id.* at 302-04. The officers knocked on Miller's door shortly after they suspected that an illegal sale of heroin had occurred. *Id.* at 303. Upon inquiry from within as to who was there, the officer replied in a low voice, "police," and Miller opened the door on an attached chain and asked what the officers were doing there. *Id.* Before either responded, Miller attempted to close the door, and the officers put their hands inside the door and ripped the chain off. *Id.* at 303-04. The officers entered and arrested Miller and seized the marked money. *Id.* at 304. Miller's pretrial motion to suppress the money was denied and he was convicted for violation of federal narcotics laws. *Id.* at 304-05. Justice Brennan stated that the issue was whether the arrest and subsequent search were unlawful due to the officers' failure to knock and announce before entry. *Id.* at 305. He did not consider two additional points raised by Miller: (1) the officers had no probable cause to arrest Miller without a warrant; and (2) the search was not justified as being incident to a lawful arrest. *Id.*

46. *Id.* at 308-09 (deciding the case on statutory, rather than constitutional grounds). The

not be given grudging application" because it is "deeply rooted in our heritage . . ." and is "embedded in Anglo-American law."<sup>47</sup> Although Brennan stated that the case did not present the issue of whether or not there were exceptions to the rule for "exigent circumstances,"<sup>48</sup> in dictum he set out the "virtual certainty" test<sup>49</sup> as a possible exception to the rule of announcement.<sup>50</sup>

In the 1963 case of *Wong Sun v. United States*,<sup>51</sup> the Court recognized two more possible exceptions to the federal knock and announce statute: (1) the "peril exception;" and (2) the "destruction of evidence exception."<sup>52</sup> Once again Justice Brennan wrote the Court's opinion which stated that noncom-

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court does not decide cases on a constitutional basis when a nonconstitutional basis for the decision is available. See *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961).

47. *Miller*, 357 U.S. at 313 ("The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application . . . [of a] . . . tradition embedded in Anglo-American law. . ."). Justice Brennan, writing for the Court, relied in large part on *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949), which was the first modern case on the knock and announce principle and which stated the rule was undisputed. But see *Sonnenreich & Ebner*, *supra* note 21, at 640-42 (criticizing Justice Brennan's decision in *Miller* for stating that common rule on announcement was fixed in criminal cases). The decision in *Miller* rested upon protection of the right of privacy in the home. *Miller*, 357 U.S. at 313 (stating that Congress' enactment of 18 U.S.C. § 3109 was a declaration of their reverence for the individual's right of privacy in his house). But see *Sonnenreich & Ebner*, *supra* note 21, at 641-42 (criticizing *Miller* for misconceiving the origin of the knock and announce rule in *Semayne's Case* as being founded on the right of privacy).

48. *Miller*, 357 U.S. at 309. Justice Brennan defined exigent circumstances as "the existence of circumstances excusing [non]compliance [with the notice requirement] . . ." *Id.* They are also defined as "those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure for which probable cause exists unless they act swiftly." BLACK'S LAW DICTIONARY 398 (6th ed. 1991).

49. *Miller*, 357 U.S. at 310 (citing *People v. Martin*, 45 Cal. 2d 755 (1955); *Wilgus*, *supra* note 38, at 798, 802). The virtual certainty test excuses compliance with the knock and announce principle when "the facts known to the officers would justify them being virtually certain that the [defendant] already knows their purpose so that an announcement would be a useless gesture." *Miller*, 357 U.S. at 310.

50. *Id.* (stating the virtual certainty test would serve as a threshold requirement before the useless gesture exception could be applied). Justice Brennan determined that the facts of this case did not meet the test. *Id.* at 310-13.

51. 371 U.S. 471 (1963). An officer posed as a customer to gain entry to laundry and was told by the defendant to return at a later time. *Id.* at 474. As the defendant started to close the door, the officer took out his badge and identified himself. *Id.* The defendant "slammed" the door shut and fled down the hallway. *Id.* Law enforcement officers then broke open the door and apprehended the defendant. *Id.* The court found that the officer failed to comply with the notice requirement before forcibly entering to search and arrest the defendant. *Id.* at 481-93.

52. *Wong Sun*, 371 U.S. at 484. "[T]he Government claims no extraordinary circumstances—such as the imminent destruction of vital evidence, or the need to rescue a victim in peril . . . which excused the officer's failure truthfully to state his mission before he broke in." *Id.*



pliance with the statute was not excused where the defendant's conduct was too ambiguous to meet the virtual certainty test.<sup>53</sup>

In *Ker v. California*,<sup>54</sup> the Supreme Court found for the first time exigent circumstances which excused compliance with the knock and announce principle.<sup>55</sup> Justice Clark's plurality's opinion found exigent circumstances based on both the destruction of evidence exception<sup>56</sup> and the useless gesture exception.<sup>57</sup> Justice Brennan dissented from the plurality's opinion<sup>58</sup> because he did not believe that the facts of the case presented exigent circumstances.<sup>59</sup> Brennan's dissent is helpful because it clearly set out three exceptions to the rule.<sup>60</sup> The dissent is also of value because of Brennan's systematic and de-

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53. *Id.* at 483 (stating that under the circumstances of the case, the defendant's refusal to admit the officers, and his subsequent flight down the hallway, were not sufficient to meet the virtual certainty test).

54. 374 U.S. 23 (1963). In *Ker*, the police failed to knock and announce before they entered the defendant's apartment by using a passkey. *Id.* When the police entered, they seized marijuana, which was later used at the defendant's trial to convict him of narcotics violations. *Id.*

55. *Id.* at 40 (Clark, J., plurality opinion).

Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police. We therefore hold that in the particular circumstances of this case the officers' method of entry . . . was not unreasonable under the standards of the Fourth Amendment . . .

*Id.* at 40-41. See also Blakey, *supra* note 10; Sonnenreich & Ebner, *supra* note 21.

56. *Id.* at 40 (stating that the officers' failure to give notice was excused because the defendant was in possession of narcotics which could quickly and easily be destroyed).

57. *Ker*, 374 U.S. at 41 (stating that compliance with the notice requirement was excused because the defendant's earlier conduct shows that he may have been expecting the police).

58. *Id.* at 46 (Chief Justice Warren and Justices Douglas and Goldberg joined in Justice Brennan's dissent).

59. *Id.* at 60-64. Justice Brennan did not believe that the defendant was expecting the police. *Id.* at 60. The defendant's "furtive conduct in eluding"—the making of a U-turn in the middle of a street—was too ambiguous. *Id.* He argued that there was more evidence of the defendant's complete unawareness of an imminent police visit. *Id.* When the police entered the apartment, the defendant was sitting in his living room reading a newspaper with the marijuana in full view on a counter in the kitchen. *Id.* Justice Brennan also felt that the destruction of the evidence exception had not been met. *Id.* at 61. He was opposed to a "blanket rule" which would allow for entry in all cases where narcotics are suspected. *Id.* at 61-63. He wanted something more in order to preserve the full protection of the Fourth Amendment. *Id.* Justice Brennan felt that this requirement could have been satisfied by activity within the apartment which would have justified the officers' belief that someone was attempting to destroy evidence. *Id.* at 61.

60. *Id.* at 47.

(1) [W]here 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

tailed discussion of the development of the knock and announce principle, which he concluded was part of the Fourth Amendment.<sup>61</sup>

*America's Experience with the Federal Drug "No-Knock" Bill*

In 1970 President Nixon declared the "War on Drugs,"<sup>62</sup> and Congress passed the Comprehensive Drug Abuse, Prevention, and Control Act of 1970.<sup>63</sup> As a result of this legislation federal magistrates could issue "no-knock" warrants when they found probable cause to believe that notice might allow suspects to destroy evidence.<sup>64</sup> During the debates on the bill, many Congressmen expressed fear that the "no-knock provision" would greatly increase violations of the Fourth Amendment's protection against unreasonable search and seizures.<sup>65</sup> It was also feared that the provision would increase violence against police, as citizens might attempt to use force to protect themselves from these "unknown intruders" executing search warrants.<sup>66</sup>

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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 destruction of evidence is being attempted.

*Id.*

61. *Ker*, 374 U.S. at 49-59 (discussing the rule of announcement from its origin in *Semayne's Case*, treatment by noted authorities, and its history in America). The last time, prior to *Wilson*, the Court faced the knock and announce rule was in 1968, in *Sabbath v. United States*, 391 U.S. 585 (1968) (reviewing the failure of officers to comply with the federal knock and announce statute before entering the defendant's closed but unlocked door in order to arrest him). Justice Marshall wrote the Majority's opinion, which recognized that the "deeply rooted" knock and announce rule might have constitutional significance. *Id.* at 591 n.8.

62. *Garcia*, *supra* note 12, at 703.

63. Comprehensive Drug Abuse, Prevention, and Control Act of 1970, Pub. L. No. 91-513, § 509(b), 84 Stat. 1236, 1274 (1970) (§ 509(b) repealed in 1974) (codified as amended at 21 U.S.C. § 879 (1988)). Congress also enacted a provision authorizing no knock warrants for the District of Columbia. See District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 210(a), 84 Stat. 473, 630 (1970) (repealed by Appropriations-Controlled Substances Act of 1974, Pub. L. No. 93-481, § 4, 88 Stat. 1455, 14-56 (1974)). This legislation sharply reduced penalties for drug abusers, expanded the Attorney General's responsibilities for drug traffic control and law enforcement, and established a special search warrant to permit forceful entry by police officers *without* prior notice of authority and purpose. Note, *Unannounced Entry to Search: The Law and the "No-Knock" Bill* (S.3246), 1970 WASH. U. L. Q. 205 (1970).

64. *Garcia*, *supra* note 12, at 699-703. This principle, known as the "blanket approach," allows police to disregard notice requirements for warranted searches listing drugs, because these substances are easily destroyed by dumping into normal residential plumbing facilities, and it is assumed that suspects will destroy this evidence if police knock before executing a search. *Id.* at 699.

65. *Id.* at 703 n.129 (citing H.R. REP. NO. 907, 91st Cong., 2d Sess. 202 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4653-57).

66. *Id.* at 703 (citing 116 CONG. REC. 25,201) (1970) (statement of Senator McGovern).

The events which occurred throughout the country after the bill's enactment were a painful lesson of the dangers which resulted from discarding with the knock and announce rule.<sup>67</sup> During the four year period when "no-knock" warrants were issued, over 100 newspaper articles were reproduced in the Congressional Record recounting no-knock horror stories.<sup>68</sup> Finally, in 1974 Congress voted to repeal the no-knock provision of the 1970 Act by a two-to-one margin.<sup>69</sup> America's experience with no-knock warrants had been a disaster.<sup>70</sup> As a result these warrants were once again illegal under federal law.<sup>71</sup>

### III. STATEMENT OF THE CASE

#### *Facts*

During November and December of 1992, on three occasions the petitioner, Sharlene Wilson, sold marijuana and methamphetamine to a confidential informant for the Arkansas State Police.<sup>72</sup> Two of the sales occurred at Wilson's residence, while the other occurred in the parking lot of a local store.<sup>73</sup> During this latter sale, Wilson brandished a pistol, waved it in the informant's face and threatened to kill her if she was a police informant.<sup>74</sup>

Based on these incidents, the police obtained warrants to search Wilson's residence and arrest her.<sup>75</sup> The police officers arrived at the resi-

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67. See *infra* note 78 and accompanying text.

68. Garcia, *supra* note 12, at 705. The New York Times conducted an investigation consisting of interviews with victims of "no knock raids," finding "[i]nnocent Americans around the country have been subject to dozens of mistaken, violent and often illegal police raids by local, state and Federal narcotics agents in search of illicit drugs and their dealers." *Id.* (citing Andrew H. Malcolm, *Violent Drug Raids Against Innocent Found Widespread*, N.Y. TIMES, June 25, 1973, at A1). An innocent woman who had previously been the victim of a burglary, shot and killed an officer; an innocent man was shot through the head as he sat in his living room cradling his infant son. *Id.*

69. Garcia, *supra* note 12, at 705 (citing Appropriations-Controlled Substance Act of 1974, Pub. L. No. 93-481, § 3. 88 Stat. 1455, 1456 (1974)).

70. See *supra* note 68.

71. See *supra* note 69.

72. Wilson v. Arkansas, 115 S. Ct. 1914, 1915 (1995).

73. *Id.* Wilson shared the residence with Bryson Jacobs. *Id.*

74. *Id.* A police officer followed Wilson from her residence to the store and witnessed this last meeting. Wilson v. State, 878 S.W.2d 755, 757 (Ark.), *cert. granted*, 115 S. Ct. 571 (1994). The officer observed a transaction between Wilson and the informant, but did not see the incident with the pistol. *Id.*

75. Wilson, 115 S. Ct. at 1915. The police also obtained a warrant to arrest Bryson Jacobs. *Id.* The affidavits in support of the warrants detailed the narcotics transactions between Wilson and the informant, including the incident with the pistol, along with the fact that Jacobs had previously been convicted of arson and firebombing. *Id.*

dence to execute the warrants and found the main door open.<sup>76</sup> As the police opened an unlocked screen door and entered the residence, they identified themselves as police officers and stated that they had a warrant.<sup>77</sup> The officers found Wilson in a bathroom flushing marijuana down the toilet.<sup>78</sup> A subsequent search uncovered marijuana, methamphetamine, Valium, narcotics paraphernalia, a gun and ammunition.<sup>79</sup>

### *Procedural History*

Wilson filed a pretrial motion to suppress the evidence seized during the search.<sup>80</sup> She argued that the evidence should be suppressed because of the officers' failure to knock and announce their identity before they entered the residence.<sup>81</sup> The trial court denied Wilson's suppression motion.<sup>82</sup> A jury convicted Wilson on all charges and she was sentenced to thirty-two years in prison.<sup>83</sup>

The Arkansas Supreme Court granted *certiorari* to hear Wilson's appeal on the issue of whether or not there had been outrageous police conduct<sup>84</sup> and on the denial of the motion to suppress the evidence seized in the search.<sup>85</sup> The

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Wilson*, 115 S. Ct. at 1915-16. Both Wilson and Jacobs were charged with delivery of marijuana, delivery of methamphetamine, possession of drug paraphernalia and possession of marijuana. *Id.* at 1916.

80. *Id.* at 1916.

81. *Wilson v. State*, 878 S.W.2d 755, 758 (Ark.), *cert. granted*, 115 S. Ct. 571 (1994). Wilson also alleged that the affidavit used to obtain the warrants was faulty because it contained omissions of fact which were material to the finding of probable cause. *Id.* at 758. She cited three allegedly exculpatory items which were omitted from the affidavit: first, the affidavit failed to disclose that the informant and her husband had been arrested and that she had agreed to cooperate in order to help herself and her husband; second, the affidavit failed to disclose that Wilson declined to sell drugs to the informant on prior occasions; and third, the affidavit failed to disclose that when a buy allegedly occurred, the drugs did not come directly from Wilson's home. *Id.*

82. *Id.* at 758.

83. *Id.* at 756. The evidence in question at the pretrial suppression hearing was used to convict Wilson of charges which resulted in a one year prison sentence and an \$11,000 fine. Brief for the Respondent at 4 n.2, *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995) (No. 94-5707).

84. *Wilson*, 878 S.W.2d at 757 (raising the issue of a violation of her Sixth Amendment right to counsel). While Wilson was represented by counsel, the police sent a wired informant into her cell in order to get information about a possible escape attempt by Bryson Jacobs. *Id.* Other testimony revealed a dual purpose, indicating that the police also planned to get information to use directly against Wilson. *Id.* The court denied Wilson's Sixth Amendment claim, but stated their outrage with the conduct of the police. *Id.* at 757.

85. *Id.* at 756-57.

Court affirmed the convictions and held that “[t]here is no authority for Ms. Wilson’s theory that the knock and announce principle is required by the Fourth Amendment.”<sup>86</sup> The Court further stated that Arkansas law did not contain a knock and announce rule.<sup>87</sup>

### *United States Supreme Court’s Opinion*

The Supreme Court granted *certiorari*<sup>88</sup> in order to resolve a split among the lower courts as to whether or not the knock and announce principle was part of the Fourth Amendment’s reasonableness inquiry.<sup>89</sup> Justice Thomas wrote the Court’s opinion, which held that the common law knock and announce principle formed a part of the Fourth Amendment’s reasonableness inquiry.<sup>90</sup>

Thomas stated that in evaluating the scope of the Fourth Amendment’s protections against unreasonable searches and seizures, the Court has looked to the “traditional protections” afforded by the common law at the time of the framing.<sup>91</sup> He concluded that an examination of the common law of search and seizure left no doubt that the reasonableness of a search depended in part on whether or not the knock and announce principle had been followed.<sup>92</sup>

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86. *Id.* at 758.

87. *Id.* (citing Ark. R. Crim. P. 13.3 (detailing the manner of executing a search warrant), and *Dodson v. State*, 626 S.W.2d 624 (Ark.) (Glaze, J., concurring), *cert. denied*, 457 U.S. 1136 (1982)).

88. 115 S. Ct. 571 (1994) (granting Wilson’s petition for *certiorari*).

89. *Wilson v. Arkansas*, 115 S. Ct. 1915, 1916 (1995). *See supra* note 16. Because there had only been a plurality opinion in *Ker*, the constitutionality of the knock and announce rule remained uncertain. *See Sabbath v. United States*, 391 U.S. 585, 591 n.8 (1968) (“[e]xceptions to any possible constitutional rule . . .”) (emphasis added); *People v. Condon*, 592 N.E. 2d 951 (Ill. 1992) *cert. denied*, 113 S. Ct. 1359 (1993) (White, J., dissenting). “The state courts are particularly divided over whether the presence of illegal drugs alone will justify unannounced police entry on the theory that pausing to announce will enable the destruction of the evidence.” *Condon*, 113 S. Ct. at 1360. *See also* LAFAVE, *supra* note 4; Blakey, *supra* note 10; Garcia, *supra* note 12; Sonnenreich & Ebner, *supra* note 21.

90. *Wilson*, 115 S. Ct. at 1916 (Thomas, J., writing for a unanimous Court).

91. *Id.* (citing numerous Supreme Court decisions on the Fourth Amendment). Justice Thomas also looked to the fact that most of the States that ratified the Fourth Amendment had enacted constitutional provisions or statutes incorporating the common law. *Id.* at 1917. Accordingly, in those States, adoption of the English common law meant adoption of the common law knock and announce rule. *See id.*

92. *Id.* at 1918. He rested his reasoning on a thorough discussion of the development of the common law knock and announce rule. *Id.* at 1916-18. Justice Thomas traced the rule back to *Semayne’s Case* (which he recognized was based on a statute from 1275) and other old English cases (e.g., *Case of Richard Curtis* and *Lee v. Gansell*). *Id.* at 1916-17. He next cited “several prominent founding era commentators” (Hale, Hawkins and Blackstone) as further support for the common law rule. *Id.* at 1917.

In the next portion of his opinion Thomas stated that there are exceptions to the knock and announce principle.<sup>93</sup> He stated that the Fourth Amendment's "flexible" requirement of reasonableness should not be read to require a rigid rule of announcement which ignored the countervailing law enforcement interests.<sup>94</sup> He also cited the plurality opinion in *Ker*<sup>95</sup> as further proof that the common law rule was never stated as an inflexible rule which required announcement under all circumstances.<sup>96</sup>

Thomas then discussed the cases which created the exceptions to the common law rule.<sup>97</sup> He acknowledged the fact that the rule of announcement had not always been extended to felonies;<sup>98</sup> that there had always been exceptions to the rule in cases where there was a threat of physical violence to the officers executing the warrant;<sup>99</sup> that there were exceptions in cases where a prisoner escaped and retreated to his home.<sup>100</sup> Thomas also adopted the destruction of evidence exception.<sup>101</sup> The discussion of exceptions to the rule ended with Thomas holding that some unannounced entries were reasonable under the Fourth Amendment.<sup>102</sup> Thomas left the decision of determining when unannounced entries were reasonable to the lower courts.<sup>103</sup>

The Court reversed the judgment of the Arkansas Supreme Court and remanded the case for the court to determine the sufficiency of the State's claim that the unannounced entry was justified in this case.<sup>104</sup> The Supreme

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93. *Id.* at 1918, ("This is not to say . . . that every entry must be preceded by an announcement.").

94. *Id.*

95. 374 U.S. 23 (1963).

96. *Wilson*, 115 S. Ct. at 1918 ("[T]he common-law principle of announcement was never stated as an inflexible rule requiring announcement under all circumstances.").

97. *Id.* at 1918-19.

98. *Id.* at 1918 (citing *Launock v. Brown*, 106 Eng. Rep. 482 (K.B. 1819); W. MURFREE, *LAW OF SHERIFFS AND OTHER MINISTERIAL OFFICERS* § 1163, 631 (1st ed. 1884); *Blakey*, *supra* note 10, at 503).

99. *Wilson*, 115 S. Ct. at 1919 (citing *Read v. Case*, 4 Conn. 166, 170 (1822); *Mahomed v. The Queen*, 13 Eng. Rep. 293, 296 (P.C. 1843)).

100. *Id.* (citing *Allen v. Martin*, 10 Wend. 300, 304 (N.Y. Sup. Ct. 1833)). Justice Thomas' referral to announcement as being a "senseless ceremony" is another formulation of the "useless gesture" exception. *Id.*

101. *Wilson*, 115 S. Ct. at 1919. "[U]nannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." *Id.* (citing *Ker v. California*, 374 U.S. 23 40-41 (1963) (plurality opinion); *People v. Maddox*, 46 Cal. 2d 301, 305-06 (1956)).

102. *Wilson*, 115 S. Ct. at 1919. ("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 the reasonableness of an unannounced entry.").

103. *Id.* at 1919.

104. The State claimed that the entry fell under the "peril" exception. *Id.* The police

Court passed on the opportunity to hold that exclusion of evidence is not a constitutionally compelled remedy where the unreasonableness of a search stems solely from the failure to announce.<sup>105</sup>

#### IV. ANALYSIS

##### *The Precedential Value and Effect of the Supreme Court's Decision*

The Supreme Court's failure to address the constitutionality of unannounced entries in the cases preceding *Wilson* led to uncertainty in the state courts on this issue.<sup>106</sup> The most valuable aspect of the *Wilson* decision is that the Court finally confronted the constitutionality of the knock and announce principle.<sup>107</sup> Even though this issue had never been addressed prior to *Wilson*, since *Ker* it was the general sentiment among commentators that the rule was already part of the Fourth Amendment's reasonableness inquiry.<sup>108</sup> Seen in this light, *Wilson* can be viewed as the Supreme Court's attempt to clarify the

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officers reasonably believed that a prior announcement would have placed them in peril, based on Bryson Jacobs' prior convictions for arson and firebombing and Wilson's threat to the government informant with the semiautomatic pistol. *Id.* In the alternative, the state also claimed the "destruction of evidence" exception, because prior announcement would have produced an unreasonable risk that Wilson would destroy easily disposable narcotics evidence. *Id.*

105. *Id.* at 1919 n.4. The State and its *amici* claimed that the evidence gained from an unannounced entry should not be suppressed because it is "causally disconnected from the constitutional violation and that exclusion goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation." *Id.*

106. See LAFAYE, *supra* note 4, at § 6.2(a) (discussing uncertainty among the courts on the constitutionality of the knock and announce principle). There are reasons the Court avoided this issue in the previous knock and announce cases of *Miller*, *Wong Sun*, *Ker* and *Sabbath*. *Miller* and *Wong Sun* were decided on statutory grounds. See *Wong Sun v. United States*, 371 U.S. 471 (1963) (announcing decisions based on the federal knock and announce statute, 18 U.S.C. § 3109); *Miller v. United States*, 357 U.S. 301 (1958). The plurality in *Ker* excused notice based solely on the existence of exigent circumstances. See *Ker v. California*, 374 U.S. 23, 40-41 (1963) (plurality opinion) (stating only that under the particular circumstances of the case, the unannounced entry was not unreasonable under the Fourth Amendment, and not stating that announcement was required under the Fourth Amendment). The *Sabbath* decision, although based on statutory grounds, alluded to the "possible" existence of a constitutional rule of announcement. See *Sabbath v. United States*, 391 U.S. 585 (1968) (deciding the issue under 18 U.S.C. § 3109).

107. See *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995).

108. See Blakey, *supra* note 10, at 551 (arguing that the rule of announcement is of constitutional dimension); Garcia, *supra* note 12, at 685 (asserting that in *Ker*, the knock and announce rule was elevated to a constitutional right); Sonnenreich & Ebner, *supra* note 21, at 643 (determining that the rule of announcement is a constitutional requirement implicit in the Fourth Amendment proscription against unreasonable searches and seizures); *Announcement*, *supra* note 4, at 146 (stating that the Fourth Amendment incorporated the rule of announcement as an essential element of a reasonable search). The fact that the *Wilson* decision was unanimous lends further support to this notion. See *Wilson*, 115 S. Ct. 1914 (1995).

*Ker*<sup>109</sup> decision and settle the knock and announce issue once and for all.<sup>110</sup>

Although not cited in *Wilson*, the influence of Justice Brennan's dissent in *Ker* is evident.<sup>111</sup> Justice Thomas' development of the common law rule of announcement flows logically from the cases, authorities, and statutes he uses for support.<sup>112</sup>

A strength of the *Wilson* decision is the protection it provided to the competing interests on which the knock and announce principle rests.<sup>113</sup> The rule serves three interests: "(1) [I]t reduces the potential for violence to both police officers and the occupants of the house into which entry is sought; (2) it guards against the needless destruction of private property; and (3) it symbolizes the respect for individual privacy summarized in the adage that 'a man's house is his castle.'"<sup>114</sup>

The rule serves to protect both citizens and police from the risk of harm and a potential for violence incident upon an unannounced entry.<sup>115</sup> Compliance with notice protects officers by insuring that they are not "mistaken for prowlers and . . . shot down by a fearful householder."<sup>116</sup> It also protects the innocent citizens from law enforcement officers who might shoot armed occupants in order to defend themselves.<sup>117</sup>

The knock and announce principle also avoids the destruction of property by allowing persons to open their homes before they are subjected to an unannounced forcible entry which may cause damage to their property.<sup>118</sup> The rule serves to protect individuals from the needless destruction of their prop-

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109. 374 U.S. 23 (1963).

110. See *supra* notes 16, 89, 106 and accompanying text.

111. See *Wilson*, 115 S. Ct. at 1916-19. The cases and authorities used to establish the common law rule in *Wilson* can all be found in Justice Brennan's dissent in *Ker v. California*, 374 U.S. 23 (1963) (plurality opinion), which he in turn borrowed heavily from *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949).

112. See *Wilson*, 115 S. Ct. at 1916-19 (discussing development of common law rule of announcement).

113. See *id.* at 1918-19.

114. LAFAVE, *supra* note 4, at § 6.2(a) (citing *United States v. Bustamante-Gamez*, 488 F.2d 4 (9th Cir. 1973)).

115. See *Sabbath v. United States*, 391 U.S. 585 (1968); *Ker*, 374 U.S. at 57 (Brennan, J., dissenting).

116. *Ker*, 374 U.S. at 58 (Brennan, J., dissenting). Justice Brennan cited *Launock v. Brown*, 106 Eng. Rep. 482, 483 (K.B. 1819), for the proposition that the protection of officers was one of the principal objectives of the announcement requirement. *Ker*, 374 U.S. at 58.

117. See BOVARD, *supra* note 13 (documenting incidents of innocent persons who were shot by police officers while attempting to defend themselves from these unknown intruders).

118. See *Semayne's Case*, 77 Eng. Rep. 194, 196 (K.B. 1603) (finding that announcement would avoid the destruction or breaking of any house and the ensuing damage it might cause).



erty, such as doors or windows, which may be broken in the course of an unannounced entry.<sup>119</sup>

The privacy interests protect individuals from suffering shock, fright or embarrassment, upon an unannounced police entry.<sup>120</sup> The knock and announce principle provides all persons with a feeling of psychological security, knowing that one need not fear an unexpected intrusion.<sup>121</sup> Announcement “affords an occupant [the] opportunity to admit police in a dignified manner.”<sup>122</sup>

### *Inconsistencies in the Supreme Court's Reasoning*

The Court's decision in *Wilson* may be left open to criticism based on the contradictions inherent in its reasoning.<sup>123</sup> Justice Thomas stated that the Court must look to the common law for guidance when assessing Fourth Amendment protections.<sup>124</sup> He used strong language to declare that the common law rule of announcement is “embedded in our Anglo-American law.”<sup>125</sup> However, when Thomas set forth the exceptions to the rule, he contradicted this statement by declaring that since its inception the proper scope and application of the rule was uncertain.<sup>126</sup>

Thomas used both the common law authorities and case law to establish that the knock and announce principle had been a long-standing part of the

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119. Note, “*Knock, Knock*” Is No Joke: Announcement Rules for Business Premises, 81 MICH. L. REV. 1666, 1683 (1983) [hereinafter “*Knock, Knock*”].

120. *Ker v. California*, 374 U.S. 23, 57 (1963) (Brennan, J., dissenting). But see Sonnenreich & Ebner, *supra* note 21, at 647 (stating that the protection of privacy is somewhat tenuous).

121. *Announcement*, *supra* note 4, at 153.

122. “*Knock, Knock*,” *supra* note 119, at 1680. “Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.” *Miller v. United States*, 357 U.S. 301, 313 (1958).

123. See *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995).

124. *Id.* at 1916 (“In evaluating the scope of [the Fourth Amendment], we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing.”).

125. *Id.* at 1918 (quoting *Miller v. United States*, 357 U.S. 301, 313 (1958)). Justice Thomas also stated that “[a]n examination of the common law of search and seizure leaves no doubt 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.” *Id.* at 1916 (emphasis added). It is the use of this strong language and the court's unwavering adherence to the notion that the common law foundations of the rule are beyond debate, as expressed in the first half of the opinion, which leads to the contradiction in the second half of the opinion. See *id.* at 1916-19.

126. *Id.* at 1918-19. This assertion only manages to cast doubt on the status of the rule at the common law, the very basis on which Justice Thomas relied in order to develop the rule. *Id.*

common law.<sup>127</sup> In contrast, when he restated the exceptions to the rule later in the opinion, he used a variety of sources to show that it hadn't even been extended to felonies.<sup>128</sup>

Thomas also stated that the knock and announce principle was "woven quickly into the fabric of early American law."<sup>129</sup> Oddly, he failed to mention the early American case of *Hawkins v. Commonwealth*,<sup>130</sup> which clearly stated that notice *was not* required in criminal cases.<sup>131</sup> He rested his generalization on statutes and provisions in state constitutions which adopted the English common law.<sup>132</sup> However, the strength of this support is undermined because the very common law which Thomas claimed to staunchly support the rule, was itself not yet settled as to the proper scope of the rule.<sup>133</sup> As was so aptly stated by two noted commentators, "[p]roponents of a strict announcement requirement have created a constitutional certainty from a common law uncertainty."<sup>134</sup>

### *The Lack of Guidance on Application of the Reasonableness Inquiry to Unannounced Entries*

A consequence of the Supreme Court's reasoning is its failure to provide

127. *Id.* at 1918. Justice Thomas presented *Semayne's Case* as the definitive authority on the irrefutable common law knock and announce requirement. *Id.* at 1916-17. This conclusion is stated without ever mentioning that *Semayne's Case* dealt solely with the execution of a civil writ, and then only in dicta. See *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1603).

128. *Wilson v. Arkansas*, 115 S. Ct. 1914, 1918 (1995) (citing *Launock v. Brown*, 106 Eng. Rep. 482, 483 (K.B. 1819); *MURFREE*, *supra* note 98; *Blakey*, *supra* note 10, for the proposition that the full scope of the knock and announce principle had not yet been settled).

129. *Id.* at 1917.

130. 53 Ky. (14 B. Mon.) 395 (1854) (holding that announcement was not required in criminal cases because it would give the defendant an opportunity to escape).

131. *Id.* at 397. The holding in *Hawkins* was acknowledged in *Commonwealth v. Reynolds*, 120 Mass. 190, 196 (1876), without criticism.

132. *Wilson*, 115 S. Ct. at 1917 (citing N.J. CONST. OF 1776, § 22, in 5 FEDERAL AND STATE CONSTITUTIONS 2598 (F. Thorpe ed. 1909); N.Y. CONST. OF 1777, art. 35, in 5 FEDERAL AND STATE CONSTITUTIONS 2635; ACT OF NOV. 8, 1782, ch. 15, Par. 6, in ACTS AND LAWS OF MASSACHUSETTS 193 (1782); ACT OF JUNE 24, 1782, ch. 317, § 18, in ACTS OF THE GENERAL ASSEMBLY OF NEW JERSEY (1784) (reprinted in THE FIRST LAWS OF THE STATE OF NEW JERSEY 293-94 (J. Cushing comp. 1981); ACT OF APR. 13, 1782, ch. 39, § 3, in 1 LAWS OF THE STATE OF NEW YORK 480 (1886); ); ACT OF DEC. 23, 1780, ch. 925, § 5, in 10 STATUTES AT LARGE OF PENNSYLVANIA 255 (J. Mitchell & H. Flanders comp. 1904); ORDINANCES OF MAY 1776, ch. 5, § 6, in STATUTES AT LARGE OF VIRGINIA 127 (W. Hening ed. 1821)).

133. See *Blakey*, *supra* note 10 (containing a well-detailed and thorough discussion of the development of the "rule of announcement"); *Sonnenreich & Ebner*, *supra* note 21 (discussing the uncertainties regarding the proper scope of the knock and announce principle).

134. *Sonnenreich & Ebner*, *supra* note 21, at 646.

guidance in determining what is a reasonable unannounced entry.<sup>135</sup> Instead, the Court left this decision to the lower courts.<sup>136</sup> Without a clear legal framework to decipher the boundaries of a “reasonable search,” the courts will be unable to uniformly reconcile the competing policy goals of effective law enforcement and protection of individual liberty.<sup>137</sup> Prior to *Wilson*, this has resulted in a split among the state courts as to the correct formulation of the knock and announce principle.<sup>138</sup>

In *Wilson*, Justice Thomas acknowledged that there might be exigent circumstances which allowed unannounced entries.<sup>139</sup> Thomas never attempted to elaborate on when these circumstances were “reasonable.”<sup>140</sup> Before *Wilson*, in the absence of clear direction from the Court, the federal and state courts left to this task produced a wide split as to the appropriate application of the exceptions.<sup>141</sup> Why should the situation suddenly change after *Wilson*, which provided no further guidance on the application of the exceptions?<sup>142</sup>

Thomas’ limited treatment of the exceptions arose first in regard to his formulation of the useless gesture exception.<sup>143</sup> His discussion limited this exception to instances which dealt solely with the recapture of escaped prisoners.<sup>144</sup> However, there are other exigent circumstances in which courts have stated that announcement would be a useless gesture.<sup>145</sup> After *Wilson*, the

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135. See *Wilson*, 115 S. Ct. at 1918-19 (establishing that it is the job of the lower courts to decide what is a “reasonable” unannounced entry).

136. *Id.* at 1919 (“For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.”).

137. Garcia, *supra* note 12, at 697.

138. See *id.*

139. *Wilson*, 115 S. Ct. at 1918. Justice Thomas set forth three such possible circumstances: (1) where there was a threat of physical violence (i.e., the “peril” exception); (2) when announcement would be a “senseless ceremony” (i.e., a “useless gesture”); and (3) when officers have reason to believe that evidence would be destroyed if advance notice was given (i.e., the “destruction of evidence” exception). *Id.* at 1918-19.

140. *Id.* at 1919 (leaving that task to the lower courts).

141. Garcia, *supra* note 12, at 685. See also *supra* notes 16, 108, 126 and 132 (showing that the split among the lower courts was caused by the fact that the Supreme Court had left them with little or no guidance on deciding the proper application of the exceptions to the knock and announce principle).

142. *Wilson v. Arkansas*, 115 S. Ct. 1914, 1918-19 (1995).

143. *Id.* at 1919. While Justice Thomas refers to the “useless gesture” exception as the “senseless ceremony” exception, both exceptions have the same meaning. *Id.*

144. *Id.* (“[I]t would be a ‘senseless ceremony’ to require an officer in pursuit of a recently escaped arrestee to make an announcement prior to breaking the door to retake him.”).

145. See *Miller v. United States*, 357 U.S. 301, 310-13. In *Miller* the Supreme Court recognized that announcement was not required where there exist facts known to the police that make them “virtually certain” the occupant already knows their presence and purpose.

status of these exceptions remains uncertain.

Perhaps the most critical failure of the Court's opinion is its lack of guidance on the destruction of the evidence exception.<sup>146</sup> There is a great division among the state courts as to when and how this exception applies.<sup>147</sup> There are two competing rules for determining what circumstances trigger the exception.<sup>148</sup> The courts use either a "blanket approach"<sup>149</sup> or a "particularity approach."<sup>150</sup>

Evidence of the split on this subject is clearly apparent: five circuit courts accept the blanket approach,<sup>151</sup> three circuit courts reject the blanket approach,<sup>152</sup> while the other four circuits have yet to decide the issue.<sup>153</sup> Among the state courts addressing these approaches, thirteen prefer the particularity approach, while seven favor the blanket approach.<sup>154</sup> The *Wilson* decision has done nothing to address this important issue.

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*Id.* The requirement of notice has also been dispensed with when no one was present to hear it. *See Howe v. Butterfield*, 58 Mass. (4 Cush.) 302 (1849).

146. *See Wilson*, 115 S. Ct. at 1919. "[C]ourts have indicated that unannounced entry *may* be justified where . . . evidence would likely be destroyed . . ." (emphasis added). *Id.*

147. *See People v. Condon*, 592 N.E.2d 951 (Ill. 1992) *cert denied*, 113 S. Ct. 1359 (1993) (White, J., dissenting) ("The state courts are particularly divided over whether the presence of illegal drugs alone will justify unannounced police entry . . ."). *See supra* note 16 (citing the cases Justice Thomas cited in *Wilson* to show the split among the lower courts).

148. *Garcia, supra* note 12, at 686.

149. *Id.* "Under the blanket approach, courts hold that the mere fact that drugs are involved in a search creates a *per se* exception to the announcement requirement." *Id.* The existence of probable cause to search a home for drugs alone satisfies the exigency requirement and excuses compliance with the knock and announce rule. *Id.* at 697. *See also supra* note 64.

150. *Id.* at 697. The courts applying this approach require the police to have probable cause to believe that drugs will be destroyed, based on other factors uniquely present in the particular circumstances. *Id.* at 699.

151. *Id.* at 699 n.93 (citing *United States v. Moore*, 956 F.2d 843, 849 (8th Cir. 1992); *United States v. One Parcel of Real Property*, 873 F.2d 7, 9 (1st Cir.), *cert denied*, 493 U.S. 891 (1989); *United States v. Tolliver*, 665 F.2d 1005, 1008 (11th Cir.), *cert denied*, 456 U.S. 935 (1982); *United States v. Jackson*, 585 F.2d 653, 662 (4th Cir. 1978); *Rodriguez v. Butler*, 536 F.2d 982, 987 (2d Cir.), *cert denied*, 429 U.S. 943 (1976)).

152. *Garcia, supra* note 12, at 699 n.93 (citing *United States v. Stewart*, 867 F.2d 581, 585 (10th Cir. 1989); *United States v. Wulferdinger*, 782 F.2d 1473, 1476 (9th Cir. 1986); *United States v. Likas*, 448 F.2d 607, 609 (7th Cir. 1971)).

153. *Garcia, supra* note 12, at 697-99. However, *Garcia* states that, based on a reading of their opinions, the Third, Fifth and D.C. Circuits would probably adopt a blanket approach and establish an exception to the knock and announce principle for execution of search or arrest warrants in all cases involving drugs. *Id.* The Sixth Circuit would favor the particularity approach and allow for an exception to the knock and announce principle only where the particular facts and circumstances of the case leave reason to believe that drugs will be destroyed if notice is given prior to the execution of an arrest or search warrant. *Id.*

154. *Id.* at 699 (stating Colorado, Maryland, Nebraska, New Hampshire, New York, North

Another matter of concern with the Court's opinion in *Wilson* is its failure to discuss the issue of whether exclusion is a constitutionally compelled remedy where the unreasonableness of a search stems solely from the failure to knock and announce.<sup>155</sup> The Court does not discuss what remedy exists for the failure to announce.<sup>156</sup> Once more, this matter is left in the hands of the state courts with no guidance whatsoever from the Supreme Court.<sup>157</sup>

## V. CONCLUSION

In *Wilson v. Arkansas*, the Supreme Court handed down a decision which finally settled the constitutional status of the knock and announce principle.<sup>158</sup> The Court's holding was the logical result of following the reasoning in the

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Dakota, and Utah favor a blanket approach. Alabama, Arizona, California, Connecticut, Illinois, Indiana, Massachusetts, Minnesota, Pennsylvania, Rhode Island, Virginia, Washington, and Wisconsin favor a particularity approach).

155. *Wilson*, 115 S. Ct. at 1919 n.4. The State of Arkansas argued that even if the police officers' failure to knock and announce was unreasonable under the Fourth Amendment, the exclusionary rule did not require the suppression of the evidence seized because the evidence seized was not the product of the failure to knock and announce. Brief for Respondent at 30, *Wilson*, 115 S. Ct. 1914 (1995) (No. 94-5707). They reasoned that the failure to knock and announce is not an illegal but-for cause for the discovery of evidence under a proper search warrant that mandates exclusion to enforce the Fourth Amendment. *Id.* The State analogized the situation in *Wilson* to the "independent source" doctrine of *Segura v. United States*, 468 U.S. 796, 805, 813-816 (stating that before evidence is excluded from a criminal trial because of allegedly illegal government conduct, the courts must ask "whether the challenged evidence was come at by exploitation of the initial illegality or instead by means sufficiently distinguishable to be purged of the primary taint"), and the "inevitable discovery" rule adopted in *Nix v. Williams*, 467 U.S. 431, 440-48 (1984) ("[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by a lawful means. . . then the deterrence rationale has so little basis that the evidence should be received."). *Wilson*, 115 S. Ct. at 1919 n.4. Analogizing to the independent source doctrine, the State claimed that, "[w]here the failure to knock and announce is the purportedly illegal conduct and the evidence is seized subject to a valid warrant, the evidence never comes by exploitation of the illegality and is always by a means (a valid warrant) patently distinguishable from the illegality so as to bear no taint that would require exclusion." Brief for Respondent at 30, *Wilson*, 115 S. Ct. 1914 (1995) (No. 94-5707). Analogizing to the inevitable discovery rule, the State claimed that because the police had a valid warrant that allowed them to search *Wilson*'s residence, there was no doubt that the evidence would have inevitably been discovered and that the search would have taken place regardless of whether the police knocked and announced their presence. *Id.* The State concluded that "[i]f the Fourth Amendment requires a knock and announce rule so that the failure to knock and announce can later be judged unreasonable and sanctionable, the remedy should speak to the illegal entry, not the legal seizure pursuant to a valid warrant." *Id.*

156. *See Wilson*, 115 S. Ct. at 1919 n.4. On the issue of exclusion, the Court stated that "[b]ecause this remedial issue was not addressed by the court below and is not within the narrow question on which we granted certiorari, we decline to address these arguments." *Id.*

157. *Id.* at 1919. This issue will undoubtedly come before the Court in the near future.

158. *See supra* notes 90-118 and accompanying text.

*Miller* decision<sup>159</sup> and its progeny.<sup>160</sup> The real value and strength of *Wilson* is that after thirty years of uncertainty a *unanimous* Court stated that the knock and announce principle was part of the Fourth Amendment.<sup>161</sup> Justice Thomas' opinion presented a clear and logical use of tradition and the common law to develop the rule's historical roots.

However, Thomas' reasoning is flawed because of the contradictions it created. He established a solid common law foundation on which the rule rested, only to later state the common law uncertainty surrounding the rule. The decision of the Court to leave the reasonableness analysis to the lower courts cannot be criticized. However, the lack of guidance the Court provided in resolving the reasonableness evaluation and the application of the "destruction of the evidence exception" poses great concerns for the future. The Court ignored a great division among both the federal and state courts as to whether or not a "blanket approach" or a "particularity approach" should be used. This case presented the Court with the perfect opportunity to provide clear standards for both the courts and law enforcement personnel to follow in the ever increasing number of forcible entries which are an inevitable by-product of the "War on Drugs." The Court's failure to address this issue in *Wilson* will most certainly come back to haunt them one day.

**TODD WITTEN**

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159. 357 U.S. 301 (1958).

160. See *supra* notes 45-61, 106-113 and accompanying text.

161. *Wilson*, 115 S. Ct. at 1917.

Given the long-standing 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 . . . . [W]e hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

*Id.*