University of Florida Journal of Law & Public Policy

Volume 16 | Issue 1 Article 2

2005

A Toothless Tiger in the Constitutional Jungle: The "Knock and Announce Rule" and the Sacred Castle Door

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A TOOTHLESS TIGER IN THE CONSTITUTIONAL JUNGLE:* THE "KNOCK AND ANNOUNCE RULE" AND THE SACRED CASTLE DOOR

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I. INTRODUCTION

Among the many lauded provisions of the U.S. Constitution, the Fourth Amendment stands out in the public eye as one of the more significant and

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* The "jungle" seems a particularly apt metaphor for describing Fourth Amendment law, see Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure?*, 20 HARV. J.L. & PUB. POL'Y 435, 437 (1997) (describing constitutional criminal procedure as a "fact-specific jungle"), and for the often Hobbesian streets in which it operates. WILLIAM CHAMBLISS, POWER, POLITICS, AND CRIME 68 (1999) (quoting an officer who states, "This is the jungle . . . we rewrite the Constitution every day down here").

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captivating of constitutional rights.[1] This is for good reason. The Fourth Amendment functions in the gritty, front-line police encounters we all experience either directly or vicariously though television or a newspaper's local section.[2] The various interests undergirding the Fourth Amendment, such as privacy, liberty, the sanctity of the home, lay at the core of the American ideal. The belief that we have not endowed the government with unrestrained investigatory power by ratifying our liberalistic social contract is resonant.[3] Indeed, it is a key characteristic separating us from the motley, "less-developed" governments beyond our shores.[4]

Given the many important safeguards recognized by the Fourth Amendment, few place much significance in one of its more recently recognized components, the "knock and announce" rule. This rule requires officers executing a search warrant to "knock and announce" their presence before forcing entry into the home. It is understandable that the "knock and announce" rule is overlooked among other constitutional rights considering the venerable status of its more-established Fourth Amendment cousins.

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1. Jonathan T. Skrmetti, *The Keys to the Castle: A New Standard for Warrantless Home Searches in* United States v. Knights, *122 S. Ct. 587 (2001)*, 25 HARV. J.L. & PUB. POL'Y 1201, 1201 (2002) (stating that "the technicalities of the Fourth Amendment have permeated popular culture"); Wayne R. LaFave, *The Fourth Amendment as a "Big Time" TV Fad*, 53 HASTINGS L.J. 265 (2001) (discussing popularity of the Fourth Amendment in entertainment media); *cf.* Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994) ("In the popular mind, the [Fourth] Amendment has lost its luster and become associated with grinning criminals getting off on crummy technicalities.").

2. *See* LaFave, *supra* note 1, at 265 (stating that the popularity of Fourth Amendment drama on television taught entertainment executives that "the success of any particular show . . . would depend, more than anything else, upon just how much Fourth Amendment gallimaufry could be heaped upon acquiescent viewers' plates").

3. The U.S. Supreme Court has recognized as much. *See* Weaver v. Graham, 450 U.S. 24, 29 (1981) (stating that the Ex Post Facto Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation"); United States v. Calandra, 414 U.S. 338, 354 (1974) ("The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life."); California v. LaRue, 409 U.S. 109, 135 (1972) (stating that First Amendment interests "have been thought so important as to provide an independent restraint on every power of Government"); Knapp v. Schweitzer, 357 U.S. 371, 377 (1958) ("Plainly enough the limitations arising from the manner in which the federal powers were granted were limitations on the Federal Government, not on the States.").

4. *Cf.* JAMES GWARTNEY ET AL., ECONOMIC FREEDOM OF THE WORLD, 1975-1995, at xxii (1996) (stating that citizens in wealthier countries enjoy greater protection for civil rights than those in poorer countries); Mary M. Shirley & Lixin Colin Xu, *Empirical Effects of Performance Contracts: Evidence from China*, 17 J.L. ECON. & ORG. 168, 170 (2001) ("[I]n developing countries the institutions that curb arbitrary actions by governments and bind administrations to the promises of their predecessors, such as checks and balances or reputation, are often weak.").

One would be justified in expressing greater concern with whether police officers possess probable cause and valid warrants or refrain from using excessive force, than with whether officers courteously announce their presence before entering a home. Especially where privacy, liberty, and physical integrity are at stake, substance trumps form.

Yet, the "knock and announce" rule is by no means trivial. The U.S. Supreme Court has recognized in recent years that the "knock and announce" rule is part of the common law tapestry that envelopes the U.S. Constitution.[5] At its heart, the "knock and announce" rule stands for the dignity of the individual: the ability to prepare your property and your mind for governmental intrusion of the most invasive sort. It is supported by the genteel ideal that even a criminal should be afforded the opportunity to compose herself, open the castle door, and inspect the search warrant before officers overrun the home. Such an opportunity only arises when officers announce their presence and wait for the occupant of the home to grant them entry.

Admittedly, the public perception of these dignity interests may be less than sanguine in the "knock and announce" rule's common procedural context, criminal suppression motions. A criminal defendant seeking to suppress inculpatory evidence on the basis of officers' failure to call on the occupant of the home in a mannerly fashion before conducting a search garners little sympathy.[6] The "knock and announce" rule appears more significant, however, when the factual scenario changes to a case of innocence, mistaken identity, or misinformation. Certainly, most Americans would answer affirmatively if asked whether they should be entitled to a respectful knock at the door by police officers seeking to enter their home, even if the officers possess a valid search warrant.

Although the "knock and announce" rule provides important theoretical safeguards to the occupant of a home, in practical terms, it is a largely unenforceable constitutional right. In the criminal context, it is doubtful that evidence can be suppressed for a pure "knock and announce" rule violation. As for a civil action, various legal hurdles and limitations make lodging a sustainable claim for breach of the "knock and announce" rule an arduous proposition. This Article illustrates these enforcement problems

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5. *See* Wilson v. Arkansas, 514 U.S. 927, 929 (1995).

6. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) ("One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all."); Akhil Reed Amar, *Three Cheers (And Two Quibbles) for Professor Kennedy*, 111 HARV. L. REV. 1256, 1267 n.36 (1998) (stating that the exclusionary rule "breeds popular contempt for the Fourth Amendment").

through the lens of a non-English speaking home occupant. The Article also considers a more banal problem: the futility of attempting to force compensation for a door destroyed by officers.

II. THE U.S. SUPREME COURT'S FOURTH AMENDMENT JURISPRUDENCE ON THE "KNOCK AND ANNOUNCE" RULE

The Fourth Amendment states:

> 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.[7]

The sanctity of the home is central to the Fourth Amendment. "At the very core" of the personal rights secured by the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[8] The adage, "A man's home is his castle,"[9] resonates constitutionally.[10] At common law, in *Semayne's Case*, an English court observed "the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose."[11] More recently, the U.S. Supreme Court has stated that "[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality."[12] Based on this common law

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7. U.S. CONST. amend. IV.

8. Silverman v. United States, 365 U.S. 505, 511 (1961).

9. The popular coining of this phrase is often attributed to Clarence Darrow's closing argument in the Henry Sweet case of 1926 in which Sweet, a black physician, was acquitted of murdering a member of a mob gathered to forcibly expel him from an all-white neighborhood in Detroit, Michigan. *See* Morris S. Dees, Jr., *A Passion for Justice*, 12 T.M. COOLEY L. REV. 547, 549-51 (1995) (recounting the story of the *Sweet* case and Darrow's involvement in it). In his closing argument, Darrow stated, "Every man's home is his castle, which even the King may not enter. Every man has a right to kill to defend himself or his family, or others, either in the defense of the home or in the defense of themselves." Closing Argument of Clarence Darrow in the Case of People v. Henry Sweet, May 11, 1926, *available at* http://www.law.umkc.edu/faculty/projects/ftrials/sweet/darrowsummation.html (last visited Sept. 13, 2004).

10. Darrow's words carried constitutional force. The U.S. Supreme Court reaffirmed the principle that "a man's home is his castle" in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973), and in *Rowan v. U.S. Post Office Department*, 397 U.S. 728, 737 (1970).

11. 77 Eng. Rep. 194, 195 (K.B. 1603).

12. *Rowan*, 397 U.S. at 737.

inheritance, the Supreme Court has noted that the "Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."[13] The Court has gone so far as to say "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[14] Thus, the Framers of the U.S. Constitution took pains to protect the entryway to the home: "[T]he Fourth Amendment draws 'a firm line at the entrance to the house.'"[15]

The "knock and announce" rule logically extends from this entrenched legal reverence for the home. It requires officers to "knock and announce" their presence before forcing their way into a home, even if they possess a valid search warrant. It does so not merely by creating an idealistic rule of police etiquette, but by elevating to constitutional dimension the obligation that officers announce their presence when executing a search warrant. For some time now, various jurisdictions have statutorily required police officers to announce their presence in some manner before executing a warrant.[16] Yet the U.S. Supreme Court's precedential authority recognizing the Fourth Amendment footing for the "knock and announce" rule is of a vernal vintage.

The U.S. Supreme Court first recognized the "knock and announce" rule as a component of the Fourth Amendment in *Wilson v. Arkansas*.[17] There, the Court reversed the Arkansas Supreme Court's determination that the Constitution does not recognize the common law "knock and announce" rule. The Court held that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment."[18] Surveying English law at the time of the U.S. Constitution's drafting and ratification, the Court quoted *Semayne's Case*, stating that before the King's sheriff may break into an individual's home, "he ought to signify the cause of his coming, and to make request to open doors" in order to avoid "the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and

13. Wilson v. Layne, 526 U.S. 603, 610 (1999).

14. United States v. U.S. Dist. Ct., 407 U.S. 297, 313 (1972).

15. Kyllo v. United States, 533 U.S. 27, 40 (2001).

16. The "knock and announce" rule was first codified into federal law in 1917. *See* Act of June 15, 1917, ch. 30, tit. XI, §§ 8, 9, 40 Stat. 229 (providing specific requirements for officers who forcibly enter houses to execute warrants or to "liberate" others detained in the process of executing the warrant). The current federal "knock and announce" statute, 18 U.S.C. § 3109, which requires an officer to provide "notice of his authority and purpose" before breaking into a home, was enacted on June 25, 1948. *See* 62 Stat. 820.

17. 514 U.S. 927 (1995).

18. *Id.* at 929.

inconvenience might ensue."[19] After an exhaustive discussion of early common law and state cases, the Court opined, "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."[20] At the same time, the Court suggested that appropriate circumstances might warrant dispensing the rule, but declined to delineate those circumstances.[21]

The Court wasted little time in expanding on the constitutional contours of the "knock and announce" rule. In *Richards v. Wisconsin*,[22] the Court rejected the Wisconsin Supreme Court's blanket rule dispensing with the "knock and announce" rule's requirements in felony drug cases. The Court held the Wisconsin rule was an "overgeneralization" that "impermissibly insulates [felony drug] cases from judicial review."[23] Although the Court disapproved of the blanket exception, it opined that a "no-knock" entry may be justified under exigent circumstances. Such exigent circumstances arise if police "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."[24]

The Court was called upon to clarify this latter statement one year later in *United States v. Ramirez*.[25] On direct appeal, the Ninth Circuit held that the police officers' "no-knock" entry of Ramirez's home violated the Fourth Amendment because it was accomplished by destroying a window. The appellate court concluded more specific inferences of exigency were necessary to justify such destruction.[26] The U.S. Supreme Court disapproved of this approach. It held that reasonable suspicion alone is sufficient to justify a "no-knock" entry, even when such entry results in destruction of property.[27] "Whether such a 'reasonable suspicion' exists," the Court opined, "depends in no way on whether police must destroy property in order to enter."[28] According to the Court, the reasonable suspicion standard functioned adequately as the benchmark for all determinations of exigency.

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19. *Id.* at 931 (quoting *Semayne's Case*, 77 Eng. Rep. 194, 195-96 (K.B. 1603)).
20. *Id.* at 934.
21. *Id.* at 936.
22. 520 U.S. 385 (1997).
23. *Id.* at 393.
24. *Id.* at 394.
25. 523 U.S. 65 (1998).
26. United States v. Ramirez, 91 F.3d 1297, 1301 (9th Cir. 1996).
27. *Ramirez*, 523 U.S. at 68.
28. *Id.* at 71.

In its most recent "knock and announce" rule decision, the Court in *United States v. Banks*[29] addressed the question of what standards apply in determining how long officers executing a valid search warrant must wait before forcing their way into a home after knocking and announcing their presence. The Ninth Circuit established a categorical approach to this question, involving consideration of whether a preexisting exigency was present and whether entry was possible without employing force.[30] The Court disagreed with this categorical approach. Instead, the Court held that the determination of whether officers waited an adequate amount of time after announcement before forcing entry is governed by the general Fourth Amendment reasonableness standard, which turns on consideration of the totality of the circumstances.[31] In the instant case, where the defendant was suspected of distributing drugs and police officers sought to confiscate cocaine through the search, fifteen to twenty seconds was a reasonable period of time to wait before forcing entry.[32]

III. THE CONSTITUTIONAL INTERESTS REVEALED: SAFEGUARDING INDIVIDUAL DIGNITY

In assaying the rather recent legal history of the "knock and announce" rule, one cannot help but wonder whether such ado is warranted. With life and liberty hanging precariously in the balance, individual targets of a nonconsensual home entry by police may understandably place secondary value in whether officers knock at the door, announce their presence, and wait precious few seconds before forcing their way in. Moreover, given the relative ease with which officers can justify a "no-knock" entry under legal precedents, one would be pardoned for characterizing the "knock and announce" rule as mere constitutional window dressing.

In *Richards v. Wisconsin*, the Court acknowledged the apparent insignificance of the "knock and announce" rule in light of other, more well-known Fourth Amendment safeguards. At the same time, however, the Court stressed the important Fourth Amendment interests at work in the "knock and announce" rule:

> While it is true that a no-knock entry is less intrusive than, for example, a warrantless search, the individual interests implicated by

29. 124 S. Ct. 521 (2003).
30. United States v. Banks, 282 F.3d 699, 704 (9th Cir. 2002).
31. *Banks*, 124 S. Ct. at 525.
32. *Id.* at 527.

> an unannounced, forcible entry should not be unduly minimized.... [T]he common law recognized that individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential.
>
> Additionally, when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry. . . . The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.[33]

The Court's digression in *Richards* provides insight into its view of the "knock and announce" rule. The Court perceives the "knock and announce" rule, at its core, as a safeguard on individual dignity. While a "no-knock" entry is not the *most* pernicious sort of governmental privacy intrusion, it strikes at the individual's sense of security. Of further concern is the potential shame and fear resulting from an inability to prevent outsiders from breaching the castle door. The "knock and announce" rule recognizes the thoroughly distasteful effects of having unknown intruders enter the home.

Concerns of protecting the private sphere from outsiders, especially a powerful central government, were prominent in the Framers' minds. One can see these fears at work in the Second Amendment's "right of the people to keep and bear Arms,"[34] the Third Amendment's restriction on soldiers "quarter[ing] in any house, without the consent of the Owner,"[35] and the Fourth Amendment.[36] This is not surprising given the paramount

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33. Richards v. Wisconsin, 520 U.S. 385, 393 n.5 (1997).

34. U.S. CONST. amend. II.

35. U.S. CONST. amend. III.

36. Commentators have pointed out that popular fear of a strong central government was the central impetus for attaching the Bill of Rights to the U.S. Constitution. *See, e.g.*, Alex Glashausser, *Citation and Representation*, 55 VAND. L. REV. 59, 103 (2002) ("Like the Establishment Clause, much of the Bill of Rights stemmed from Americans' fear of a distant national government."); Kevin J. Worthen, *The Right to Keep and Bear Arms in Light of* Thornton*: The People and Essential Attributes of Sovereignty*, 1998 BYU L. REV. 137, 144 ("The vast majority of modern scholars agree that the central purpose of the Second Amendment was to assuage fears that the increased powers vested in the newly created central government . . . would be used by ambitious tyrants to assert despotic control over the people."). Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 830 (1997) (stating that the first eight amendments to the U.S. Constitution "stemmed from a general fear that the national government was empowered by the Constitution to invade well-established rights of importance to the people").

role of classic liberalistic teachings to the nation's founding[37] and liberalism's philosophical focus on the individual and the individual's inherent right to liberty and dignity.[38] Indeed, the individual's natural right to property and freedom of action within and with respect to property was a key aspect of eighteenth-century Lockean liberalism.[39] English — and later American — common law readily absorbed liberalistic theory into workable legal principles.[40] It is plain that the Fourth Amendment's indefatigable guarding of the home is an outcropping of the liberalistic tradition.

Thus, the "knock and announce" rule logically flows from this liberalistic inheritance as a constitutional mechanism for tempering the evils of governmental intrusion into the sacred home. At the same time the "knock and announce" rule harkens to genteel notions of etiquette and proper conduct by requiring that police officers properly call upon the occupant of a home before breaching the castle door. In this vein, the "knock and announce" rule accurately reflects the English social mores from which it originated.[41] It has been noted that the uninvited guest was

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37. JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 162-63 (1992) (stating that "American constitutionalism is largely built of the same materials as" Blackstone's Commentaries, which incorporated liberalism); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 206-14 (1969) (arguing that the Framers rejected the republican notion that the self should be sacrificed for the common good and embraced liberalism); *cf.* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 823 (1995) (stating that there is "now a near consensus that both republican and liberal ideas powerfully influenced American politics during the 1780s and 1790s").

38. *See* IAN SHAPIRO, THE EVOLUTION OF RIGHTS IN LIBERAL THEORY 277 (1986) (stating that "the view of man's negative freedom, of a private sphere surrounding him that cannot be entered (first by other individuals and eventually by the state) without his consent, became the standard view of freedom in the liberal tradition"); FRIEDRICH A. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 119-20 (1978) (stating that classic liberalism carried a demand for freedom of the individual, and a respect for the individual personality).

39. *See* PIERRE MANENT, AN INTELLECTUAL HISTORY OF LIBERALISM 43-44 (Rebecca Balinski trans., 1994) (stating that John Locke "solidly established" the individual's right to property, and created an analysis under which "the individual has a natural right to a property that has no natural limits.").

40. *See* STONER, *supra* note 37, at 163 (stating that William Blackstone's *Commentaries* attempted to "reconcile not just in theory but in detail the principles of liberal political theory and the practices of English common law"); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 44-45 (discussing the influence of liberalism on Blackstone); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 216-17 (noting that liberalism became "a mode of legal thought" through Blackstone and others).

41. PENELOPE JOAN FRITZER, JANE AUSTEN AND EIGHTEENTH-CENTURY COURTESY BOOKS 52 (1997) (stating that "one's conduct and conversation were of significant consequence" in Jane

a particularly unpalatable imposition on English domesticity in the eighteenth and nineteenth centuries, the formative time period for our common-law inheritance.[42] Thus, it seems rather fitting that the U.S. Constitution, through the "knock and announce" rule, would contain a means of ensuring that governmental authorities accord due respect to domestic tranquility even in the case of suspected criminals.

Although from this perspective one might dismiss the "knock and announce" rule as an antiquated formality, a vestige of our liberalistic English heritage, to do so would ignore the important role of the "knock and announce" rule in the Constitution's overarching protective scheme. In essence, the "knock and announce" rule guards individual dignity.[43] More specifically, as the Court in *Richards* explained, the "knock and announce" rule allows the target of a search at least two important modicums of self-respect: 1) the opportunity to prevent damage to the home and 2) a brief period of time to compose oneself and prepare for an intrusion into the home.[44]

Of these interests, concern for the integrity of the castle door lies at the core of the U.S. Supreme Court's "knock and announce" rule doctrine. The Court in *United States v. Ramirez*, while authorizing dispensation with the duty to announce under exigent circumstances, did caution that in theory, "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression."[45] The Court thus suggested that Fourth Amendment protection of the castle door

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Austen's time); MARJORIE MORGAN, MANNERS, MORALS AND CLASS IN ENGLAND, 1774-1858, at 91-95 (1994) (discussing etiquette as a means of social mobility in early Victorian England).

42. PAUL LANGFORD, ENGLISHNESS IDENTIFIED: MANNERS AND CHARACTER 1650-1850, at 119 (2000) ("The Englishman dined out by appointment and received formal company by appointment, but could not tolerate ease of access to his home. He expect[ed] to be in enjoyment of his drawing-room, without fear of interruption from uninvited guests. . . .") (internal quotation marks omitted).

43. Although not identified by the circuit court as a reason for the "knock and announce" rule, there are important safety interests for both officers and the public supporting constitutionally mandated announcement beyond the ephemeral notions of dignity. If officers announce their presence before breaking through the door, the individuals inside the home are given an opportunity to give themselves up. Also, individuals will not mistake officers for burglars and erroneously shoot them. *See* United States v. Gallegos, 314 F.3d 456, 459 (10th Cir. 2002) (stating that one of the purposes of the "knock and announce" rule is to permit "individuals to comply with the law by peaceably permitting officers to enter their homes"); United States v. Contreras-Ceballos, 999 F.2d 432, 435 (9th Cir. 1993) (stating that the "knock and announce" rule's requirement of a reasonable waiting period before forcing entry "protects citizens and law enforcement officers from violence").

44. *See* Richards v. Wisconsin, 520 U.S. 385, 392 n.5 (1997).

45. United States v. Ramirez, 523 U.S. 65, 71 (1998).

extends beyond, or even from, criminal defense strategy and the exclusionary rule.

The Court's doctrinal theme of reverence for the entryway continued in *United States v. Banks*.[46] There, the Court unequivocally identified protection of the castle door as the paramount interest involved in the "knock and announce" rule. Pointing to language from *Semayne's Case* stating that the law "abhors the destruction or breaking of any house . . . by which great damage and inconvenience might ensue to the party,"[47] the Court stated that "[o]ne point in making an officer knock and announce, then, is to give a person inside the chance to save his door."[48] In applying a Fourth Amendment reasonableness analysis, the Court instructed "the need to damage property in the course of getting in is a good reason to require more patience than it would be reasonable to expect if the door were open."[49]

Thus, at the heart of the lofty, genteel dignity interests undergirding the "knock and announce" rule lies a strikingly prosaic concern: protecting the castle door. Although protecting one's door seems rather trivial when compared with the more weighty concerns generated by the prospects of a confrontation with the police and potential governmental prosecution, preserving one's door is by no means a minor concern. The door symbolizes the integrity of the home and ensures that activities within it remain private. At the same time, the door conveys power to the occupant of a home; it is the means by which the occupant may exclude or include others in activities occurring within. Furthermore, the door provides safety. Whereas an open door allows unwanted others to penetrate the home for whatever nefarious purposes they may harbor in their minds, a latched door presents a physically and symbolically significant obstacle to intruders. This interest is paramount in the present political climate where the public's desire for security is at a premium.[50]

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46. United States v. Banks, 124 S. Ct. 521 (2003).

47. *Semayne's* Case, 77 Eng. Rep. 194, 195-96 (K.B. 1603).

48. *Banks*, 123 S. Ct. at 528.

49. *Id.*

50. It should be disclosed that I have a particular interest in the "knock and announce" rule. During my adolescence, my family was the target of a "no-knock" entry. Waking up in the room I shared with my brother, I remember being awoken by a thunderous booming sound and the beeping of our house alarm. Every other time the house alarm was activated, one of my family members was the culprit. Therefore, my mother instinctively deactivated the alarm from her room and ran to the front door to see what had happened. My brother and I stayed in our beds, frozen. I remember being paralyzed with fear, believing that a burglar had entered the home and hoping that the intruder would leave without harming my family.

IV. ENFORCING DIGNITY INTERESTS

The U.S. Supreme Court's Fourth Amendment case law makes clear that the "knock and announce" rule is a significant constitutional principle. Indeed, in its decisions the U.S. Supreme Court has eloquently expressed the hallowed dignity interests furthered by the "knock and announce" rule and instructed that the rule's importance "should not be unduly minimized."[51] One cannot help but recognize and be impressed by the Court's almost innocent reverence for the castle door and its championing of an occupant's opportunity to freely and independently grant entry to the home.

Yet, upon closer examination the promise of the Court's "knock and announce" rule doctrine rings hollow. Notwithstanding the Court's noble "knock and announce" rule verbiage, the doctrine provides little with respect to enforcement. In fact, in all of its Fourth Amendment "knock and announce" rule decisions, from *Wilson* to *Banks*, the Supreme Court has never ruled a forced police entry unreasonable.[52] Unlike other Fourth Amendment rights, such as the warrant requirement or the rule requiring reasonable suspicion for a *Terry* stop,[53] the cases have not laid out a clear method for enforcing violations of the "knock and announce" rule.[54] If anything, the Court has distanced the "knock and announce" rule from its Fourth Amendment cousins. In effect, what has emerged is a mass of constitutional surplusage with little muscle packed in its punch.

As it turned out, after receiving an emergency call for an ambulance from an elderly woman who lived across the street, the police had gotten the address wrong. My parents were furious with the police, shouting at the officers as they turned to leave. By the time I had mustered the courage to join my parents at the threshold, a deep sense of vulnerability set in. As my family stood around our now prostrate door, our thoughts turned to a more immediate concern: how to go about replacing the door. This episode anecdotally affirms the Supreme Court's acknowledgment in *Banks* that the opportunity to save the castle door afforded by the "knock and announce" rule and its attendant dignity aspects is of no small import. *See id.*

51. Richards v. Wisconsin, 520 U.S. 385, 393 n.5 (1997).

52. *See Banks*, 124 S. Ct. at 523, 527; United States v. Ramirez, 523 U.S. 65, 71 (1998); *Richards*, 520 U.S. at 388; Wilson v. Arkansas, 514 U.S. 927, 936 (1995).

53. In *Terry v. Ohio*, 391 U.S. 1 (1968) the U.S. Supreme Court held that a police officer's reasonable suspicion that a person is involved in criminal activity is enough to allow the officer to stop the person for a brief time in order to investigate.

54. *See Banks*, 124 S. Ct. at 523, 527; *Ramirez*, 523 U.S. at 71; *Richards*, 520 U.S. at 388; *Wilson*, 514 U.S. at 936.

A. *Enforcing the "Knock and Announce" Rule in the Criminal and Civil Contexts: Our Toothless Tiger Grins*

1. The Exclusionary Rule

One of the above quoted phrases from *Ramirez* is illustrative of the enforcement gap in the U.S. Supreme Court's "knock and announce" doctrine. The Court in *Ramirez* cautioned that "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, *even though the entry itself is lawful and the fruits of the search are not subject to suppression.*"[55] This caveat is significant. One could reasonably interpret it to indicate that in a criminal case, so long as the search is otherwise lawful — carried out pursuant to a valid search warrant — excessive or unnecessary destruction of property through a forced entry would not permit a defendant to successfully move to suppress the fruits of the search.[56] It also intimates that the Court does not necessarily link violations of the "knock and announce" rule with evidence suppression.

There are solid doctrinal bases for believing that the Court would not approve of applying the exclusionary rule to "knock and announce" rule violations. The Court has carved out significant exceptions to the exclusionary rule, which could preclude suppressing evidence obtained following a "knock and announce" rule violation. For instance, the "inevitable discovery" exception to the exclusionary rule provides that evidence obtained through unlawful police conduct may be admitted at trial "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means."[57] "Circumstances justifying application of the 'inevitable discovery' rule are most likely to be present if these investigative procedures were already in progress prior to the discovery via illegal means . . . ."[58]

In the case of a "knock and announce" rule violation assuming there is no other constitutional complication in the search, it is logical to surmise that the "inevitable discovery" exception would be implicated since evidence seized in the home would more than likely have been properly discovered had the violation not occurred. Unlike an unlawful search of property (e.g., officers opening a car trunk without probable cause or

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55. *Ramirez*, 523 U.S. at 71 (emphasis added).

56. *See id.*

57. Nix v. Williams, 467 U.S. 431, 444 (1984).

58. WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(a), at 249 (3d ed. 1996).

reasonable suspicion and uncovering contraband), or an illegal seizure of a defendant (e.g., officers detaining an individual solely on the basis of her race and discovering contraband in her wallet), a "knock and announce" rule violation will rarely be a necessary predicate to the discovery of incriminating evidence. A "knock and announce" rule violation will normally occur once "investigative procedures [are] already in progress" and when probable cause sufficient to justify issuance of a search warrant is present.[59] This is a situation ripe for application of the "inevitable discovery" exception.

Furthermore, the Court has generally stated that evidence should not be suppressed if suppression would do little to further the purposes of the exclusionary rule. Additionally, the Court has been reluctant in recent cases to expand the scope of the exclusionary rule. In *Brown v. Illinois*[60] Justice Powell pointed out that the Court "recognizes that in some circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes."[61] Based on this view, lower courts have developed an amorphous attenuated basis/connection exception, similar to proximate causation in tort law.[62] Under the cost-benefit balancing approach of the attenuated basis/connection exception to the exclusionary rule, the Court would be loath to exclude otherwise admissible evidence from trial based merely on a technical violation of the "knock and announce" rule. Doing so would provide little benefit in terms of coercing officers to respect the minimal requirements imposed by the "knock and announce" rule, yet impose significant societal costs by allowing a criminal act to go unpunished.[63]

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59. *See id.*

60. 422 U.S. 590 (1975).

61. *Id.* at 608-09 (Powell, J., concurring).

62. *E.g.*, United States v. Reinholz, 245 F.3d 765, 779 (8th Cir. 2001) ("Under the 'attenuated connection doctrine,' the challenged evidence is admissible if the causal connection between the constitutional violation and the discovery of the evidence is so attenuated as to rid the taint."); United States v. Smith, 155 F.3d 1051, 1060 (9th Cir. 1998) (stating that the attenuated basis exception applies when the "relationship between the unlawful search or seizure and the challenged evidence becomes sufficiently weak to dissipate any taint resulting from the original illegality"); *see also* LAFAVE, *supra* note 58, at 235 ("[T]he underlying purpose of the 'attenuated connection' test is to mark 'the point of diminishing returns of the deterrence principle.'") (quoting Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 390 (1964)).

63. *See* Loly Garcia Tor, Note, *Mandating Exclusion for Violations of the Knock and Announce Rule*, 83 B.U. L. REV. 853, 871-73 (2003) (discussing similar government arguments for not applying the exclusionary rule to "knock and announce" rule violations based on disproportionateness of sanction compared to constitutional harm).

In this sense, a "knock and announce" rule violation is similar to the unconstitutional use of excessive force in that its harms are generally divorced from any subsequent criminal prosecution. In the civil rights context, the lower courts have held that an excessive force violation is sufficiently distinct from any corollary criminal proceedings to allow for consideration of the excessive force claim apart from the outcome of the criminal prosecution.[64] Similarly, because a Fourth Amendment excessive force violation occurs during an investigation and does not normally generate evidence, courts have held the exclusionary rule's purposes would not be furthered if applied based solely on officers' use of excessive force.[65]

This principle is also seen with a "knock and announce" rule violation. An unannounced forced entry into a home will rarely itself result in the production of relevant evidence. Any evidence seized through the subsequent search of the home would have been discovered regardless of whether officers properly announced their presence and presented the warrant for inspection. Hence, it would run counter to the purposes underlying the exclusionary rule to suppress evidence based merely on a "knock and announce" rule violation.

Lower courts disagree as to whether a "knock and announce" rule violation is a sufficient basis for suppressing evidence under the exclusionary rule. Of the post-*Wilson* cases to address the issue, the Seventh Circuit held in *United States v. Langford* that exclusion of evidence is an improper remedy for a violation of the "knock and announce" rule.[66] Judge Posner, writing for the Court, applied the "inevitable discovery" exception, and opined that "it is hard to understand how the discovery of evidence inside a house could be anything but

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64. *See, e.g.*, Robinson v. Doe, 272 F.3d 921, 923 (7th Cir. 2001) ("[A] claim of excessive force in making an arrest does not require overturning the plaintiff's conviction even though the conviction was based in part on a determination that the arrest itself was lawful."); Jackson v. Suffolk County Homicide Bureau, 135 F.3d 254, 257 (2d Cir. 1998) (stating that an excessive force civil claim does not necessarily implicate the validity of a related criminal conviction); Nelson v. Jashurek, 109 F.3d 142, 145 (3d Cir. 1997) (same as to a related criminal conviction for resisting arrest).

65. *See* State v. Sundberg, 611 P.2d 44, 51-52 (Alaska 1980) (holding that the exclusionary rule is not triggered by excessive force violations since suppressing evidence would not have a sufficient deterrent effect and other remedies were available).

66. *E.g.*, United States v. Langford, 314 F.3d 892, 895 (7th Cir. 2002) (holding that "there is no logic to using [the "knock and announce" rule] to exclude evidence obtained by a search"); United States v. Espinoza, 256 F.3d 718, 728 (7th Cir. 2001).

'inevitable' once the police arrive with a warrant."[67] The "knock and announce" rule, the Court continued, "is not a rule that, like the Fourth Amendment itself, is intended to provide a privilege to withhold evidence. Therefore, there is no logic to using it to exclude evidence obtained by a search."[68] Other post-*Wilson* cases have held that evidence may be suppressed based on a violation of the "knock and announce" rule, largely because the "knock and announce" rule would be "emasculated" if it could not be enforced.[69] Certainly this latter point is persuasive. However, in light of *Ramirez*'s caveat, the "inevitable discovery" exception to the exclusionary rule, and the Court's balancing approach to application of the exclusionary rule, the emasculation rationale may prove too little to carry the day before the Court. Moreover, the Court's recent trend has been toward narrowing the scope of the exclusionary rule,[70] and there is no reason to think the "knock and announce" rule would cause the Court to shift direction.

2. Civil Rights Actions

Those able to avoid criminal prosecution and seek civil relief may take greater comfort in *Ramirez*'s concern for property destruction, but such comfort should be tempered. A civil rights action under 42 U.S.C. § 1983[71] or *Bivens v. Six Unknown Named Agents*[72] may be a more effective mechanism for enforcing violations of the "knock and announce" rule for both defendants and bystanders.[73] In many jurisdictions, however, prospective civil complainants must first defeat any criminal charges or convictions entered against them as a prerequisite to filing a civil rights action. In *Heck v. Humphrey*, the U.S. Supreme Court held that to recover

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67. *Langford*, 314 F.3d at 894 (quoting United States v. Jones, 149 F.3d 715, 716-17 (7th Cir. 1998)).

68. *Id.* at 895.

69. *E.g.*, United States v. Dice, 200 F.3d 978, 986 (6th Cir. 2000); United States v. Moore, 91 F.3d 96, 99 (10th Cir. 1996)); *see also Recent Cases*, 115 HARV. L. REV. 709, 716 (2001) (criticizing the Seventh Circuit's approach and stating that "police misconduct will not be deterred if courts are unwilling to punish the police when the evidence is 'too good to lose'").

70. *E.g.*, United States v. Patane, 124 S. Ct. 2620, 2626 (2004) (holding that violation of *Miranda* rule does not warrant suppression of physical evidence obtained through suspect's tainted statements).

71. Section 1983 provides that any state actor who causes a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983 (1994).

72. 403 U.S. 388, 394-95, 397 (1971) (providing a private right of action against federal officials for deprivations of civil rights).

73. 2 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 3.1(k) (2d ed. 1999).

civil damages for a constitutional deprivation linked to a criminal conviction or prosecution, a claimant's charges or conviction must be "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."[74] Based on *Heck*, appellate courts have held that any civil rights action for illegal search and seizure of evidence upon which criminal charges are based cannot be maintained unless the criminal charges have first been dismissed or the conviction overturned.[75] Others, though disagreed with such a sweeping application of *Heck* and held *Heck* does not bar such suits.[76] Of course, in a jurisdiction adopting the former position, the corollary might be that the "knock and announce" rule violation is sufficiently tied to the related criminal prosecution to permit application of the exclusionary rule.[77] This might offer some consolation.

Even if a claimant is able to overcome *Heck*'s procedural hurdle, setting forth a valid claim for relief based on a "knock and announce" rule violation may yet prove elusive. The U.S. Supreme Court has greatly circumscribed the breadth of the "knock and announce" rule's protections. Under *Richards*, if officers are able to establish exigent circumstances — that is, a reasonable suspicion that knocking and announcing their presence would create danger, jeopardize evidence, or even be futile — a "no knock" entry will be justified.[78] While the exigency requirement is not entirely pro forma,[79] few experienced officers will encounter difficulty rationalizing a "no-knock" search,[80] especially where there are indications

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74. Heck v. Humphrey, 512 U.S. 477, 487 (1994).

75. *E.g.*, Harvey v. Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000); Shamaeizadeh v. Cunigan, 182 F.3d 391, 399 (6th Cir. 1999); Woods v. Candela, 47 F.3d 545, 546 (2d Cir. 1995).

76. *E.g.*, Beck v. City of Muskogee Police Dep't, 195 F.3d 553, 559 n.4 (10th Cir. 1999); Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998); Simmons v. O'Brien, 77 F.3d 1093, 1095 (8th Cir. 1996); Datz v. Kilgore, 51 F.3d 252, 253 n.1 (11th Cir. 1995).

77. *See supra* text accompanying notes 51-63.

78. Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

79. For instance, courts have held that the mere presence of firearms in a home does not permit officers to forego compliance with the "knock and announce" rule. *E.g.*, United States v. Bynum, 362 F.3d 574, 581-82 (9th Cir. 2004); United States v. Moore, 91 F.3d 96, 98 (10th Cir. 1996) ("The mere statement that firearms are present, standing alone, is insufficient."); United States v. Marts, 986 F.2d 1216, 1218 (8th Cir. 1993) ("The reasonable belief that firearms may have been within the residence, standing alone, is clearly insufficient."); *cf.* United States v. Stowe, 100 F.3d 494, 499 (7th Cir. 1996) ("Guns and drugs together distinguish the millions of homes where guns are present from those housing potentially dangerous drug dealers — an important narrowing factor.").

80. Various commentators have discussed the prevalence of police officers adroitly describing — or worse, manipulating — facts in order to justify a search. *E.g.*, Christopher Slobogin,

that the target is potentially dangerous or able to swiftly destroy relevant evidence.[81] Moreover, a judge or magistrate need not approve exigent circumstances beforehand, but exigencies may contemporaneously develop at the scene of the search.[82] Because officers execute a search warrant by entering unfamiliar ground in search of criminal activity, evidence, and suspects, a court will unlikely restrictively apply *Richard*'s exigency requirement after the fact.

Furthermore, even where there is no existing exigency before the fact an exigency may develop after officers knock.[83] In *Banks*, the Court held that officers announcing their presence and intent to execute a valid search warrant may construe silence as a refusal to admit.[84] Thus, once officers knock and announce their presence, the Court explained, the length of time

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Testilying: Police Perjury and What to Do about It, 76 U. COLO. L. REV. 1037, 1040 (1996) ("[L]ying intended to convict the guilty — in particular, lying to evade the consequences of the exclusionary rule — is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: 'testilying.'"); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1321, 1321-24 (1994) (stating that "experienced officers know that no matter what they do, judges often will look the other way, or bend over backwards to approve the officers' testimony and to avoid suppressing evidence," and outlining reasons judges rarely grant motions to suppress based on police perjury); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992) (reporting results of survey in which "[r]espondents, including prosecutors, estimate[d] that police commit perjury between 20% and 50% of the time they testify on Fourth Amendment issues").

Whether or not this practice is widespread is subject to dispute. *See* D. Lowell Jensen & Rosemary Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM L. & CRIMINOLOGY 916, 935 (1982) (stating that association of police perjury to searches is "completely unfounded" and is "unfair, a gratuitous slur upon the integrity of police").

Without entering the fray, it is worth mentioning that with the bar to establishing exigency having been set so low by *Richards*, officers would encounter little difficulty exaggerating their way into a valid "no-knock" search.

81. United States v. Banks, 124 S. Ct. 521, 527 (2003) (stating that "the opportunity to get rid of cocaine" is highly relevant to the determination of whether officers' forced entry was reasonable under the circumstances).

82. *E.g.*, United States v. Peterson, 353 F.3d 1045, 1049 (9th Cir. 2003) (stating that "no-knock" entry was justified since two of the three *Richards* factors presented themselves at the scene when the suspect opened the door, spotted the officers, and closed the door); United States v. Cooper, 168 F.3d 336, 339 (8th Cir. 1999) (ratifying "no knock" entry based on knowledge acquired by officers at the scene).

83. "In fact, an actual physical knock may not even be necessary in effecting a constitutional "knock and announce." *See* United States v. Combs, 2005 U.S. App. LEXIS 400 (9th Cir. 2005) stating that although "[t]he general practice of physically knocking at the door and announcing law enforcement's presence and purpose, and receiving an actual refusal or waiting a sufficient amount of time to infer refusal is the preferred method of entry," an actual physical knock is not necessary in complying with the constitutional "knock and announce" rule).

84. *Banks*, 124 S. Ct. at 527.

officers wait at the door for a response can create an exigency justifying forced entry.[85] At least where cocaine is at issue, fifteen to twenty seconds is a reasonable interlude between announcement and forced entry.[86] "Absent exigency," the Court qualified, "the police must knock and receive actual refusal or wait out the time necessary to infer one."[87]

The Court in *Banks* cautioned that, in determining the degree of patience officers are reasonably expected to expend, a court should consider the need to damage property and the type of evidence sought:

> Suffice it to say that the need to damage property in the course of getting in is a good reason to require more patience than it would be reasonable to expect if the door were open. Police seeking a stolen piano may be able to spend more time to make sure they really need the battering ram.[88]

In most instances, however, an exigency will swiftly develop *after* officers announce their presence. For example, where officers seek to search a home for evidence that can be easily destroyed or tampered with, such as narcotics or firearms, or where officers fear for the safety of a person in the home, a court applying *Banks* would likely rule a brief waiting period is sufficient to create an exigency justifying forced entry.[89]

Finally, although the Court has held out the possibility that "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment,"[90] it is hard to imagine that this phrase will lead to relief in any but the most egregious sorts of "knock and announce" violations. For a court to find property destruction "excessive or unnecessary" even when the officers' entry was otherwise lawful, mere

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85. *Id.*

86. *Id.*

87. *Id.* at 529.

88. *Id.* at 528.

89. *E.g.*, United States v. Combs, 2005 U.S. App. LEXIS 400 (9th Cir. 2005) (holding that officers did not violate the "knock and announce" rule by forcing entry after announcing their presence over a loud speaker where the home "was equipped with security cameras and floodlights, [w]indows were papered over," and the investigation involved methamphetamine production); United States v. Bennett, 368 F.3d 1343, 1349 (11th Cir. 2004) (holding that officers investigating a drug offense acted reasonably in breaking down the suspect's door after knocking and seeing movement in the home given the "close relationship between guns and drug trafficking"); United States v. Pinson, 321 F.3d 558, 566-68 (6th Cir. 2003) (holding that officers did not violate the "knock and announce" rule in breaking down the door a few seconds after an announcement since the search was conducted during daytime and the offense involved narcotics).

90. United States v. Ramirez, 523 U.S. 65, 71 (1998).

damage to an entryway, i.e., a door or window, would likely not suffice. Such damage is logically "necessary" to execute a legal forced entry.[91]

No doubt, a home occupant who has suffered a forced entry will find setting forth a viable claim for relief based on a "knock and announce" rule violation to be an onerous enterprise.[92]

B. *An Illustration: the "Knock and Announce" Rule from the Immigrant's Perspective*

The immigrant's perspective lucidly illustrates the enforcement problems latent in the "knock and announce" doctrine. For many immigrants language barriers present a significant obstacle to understanding the officer's announcement.[93] Given linguistic barriers, one might ask: does the "knock and announce" rule afford a non-English speaker the same opportunity to save her door that is bestowed upon an English speaker? At first blush, this may seem a rather inconsequential nuance. However, this inquiry becomes far more significant when considered against the backdrop of evolving American demographics, which are moving toward increased numbers of foreign-born residents, and the increasing militarization of police tactics. With substantial numbers of migrants flowing into the United States from Mexico, China, Central American and other non-English speaking countries,[94] it becomes statistically more likely that some members of these groups will experience police contact. Many of these foreign-born residents lack proficiency in English.[95] At the same time, the substantial amounts of money and risk

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91. *Cf. id.* at 68 (rejecting a rule requiring that officers be held to a standard higher than "reasonable suspicion" when making "no-knock" entries that result in the destruction of property).

92. Interestingly, Judge Posner, in writing that the exclusionary rule does not apply to "knock and announce" rule violations, suggested that section 1983 actions are sufficient alternative means of deterring such violations. United States v. Langford, 314 F.3d 892, 894-95 (7th Cir. 2002).

93. This illustration might hold for others unable to understand communications in English, such as the hearing impaired.

94. U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: MARCH 2002, at 1-2 (Feb. 2003) (stating that of the 32.5 million foreign-born in the United States in 2002, 36.4% were from Mexico and Central America, and 25.5% were from Asia); STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, IMMIGRANTS IN THE UNITED STATES — 2000: A SNAPSHOT OF AMERICA'S FOREIGN-BORN POPULATION 1 (2001) (stating that the number of immigrants in the United States has more than tripled since 1970), *available at* http://www.cis.org/articles/2001/back101.html (last visited Nov. 1, 2004).

95. *See, e.g.*, David Pierson, *New Law Aims to Protect Asians*, L.A. TIMES, May 3, 2004, sec. B (stating more than 12 million Californians primarily speak a language other than English, with approximately 8.1 million speaking Spanish and 1.8 million speaking one of four major Asian languages).

surrounding drug trafficking have given rise to more sophisticated and lethal criminals.[96] Building on fears of organized drug cartels, police departments have, in turn, developed more advanced, military-like methods of executing search warrants.[97] It is not uncommon for officers to perform a search in the darkness of night, wearing unmarked or poorly marked clothing, with guns drawn.[98] Certainly, then, the issue of how language impacts Fourth Amendment "knock and announce" procedures merits attention.

In approaching enforcement from the immigrant's perspective, the foremost inquiry is whether the Fourth Amendment accommodates an immigrant at all. The answer here is almost certainly "yes." It would seem logical, based on the rationale articulated by the U.S. Supreme Court in support of the "knock and announce" rule, that if officers know the occupant of a home speaks only a particular language they must announce their presence and demand entry into the home in a manner that the occupant can understand.

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96. Illegal drug trafficking is used as an example because it constitutes the largest basis for criminal convictions in the United States. *See* Douglas B. Marlowe, *Effective Strategies For Intervening With Drug Abusing Offenders*, 47 VILL. L. REV. 989, 993 (2002) ("Indeed, the lion's share of the growth in the U.S. inmate population, which has increased roughly three-fold since the early 1980s, is attributable to drug law violators." (footnotes omitted)); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1167 (2001) ("Drug defendants make up the largest class of federal criminals, amounting to more than a third of federal defendants and more than half of all federal inmates.").

The prevalence of drug convictions has particular meaning for immigrants. *See* U.S. Sentencing Commission Hearing, Statement of Charles Kamasaki, 14 Fed. Sent. R. 204, at 9 (Feb. 25, 2002) (stating that "nearly three-quarters of Latino federal prison inmates are incarcerated for drug offenses, by far the largest proportion of any group").

97. *See* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381, 405 (2002) (stating that "SWAT units have provided a conduit for the transfer of military techniques and materials into the hands of ordinary police departments," and more than 90% of cities with populations over 50,000 have SWAT teams); David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619, 651 (1997) (stating that "[t]he federal government actively works to militarize local law enforcement").

98. In one recent "no-knock" search trial ending in a verdict for the plaintiffs, officers, in executing a search of the home of a suspected cocaine dealer with no prior criminal convictions, wore unmarked, "ninja-style" black outfits and masks and tossed a "flash-bang" device into the home which set off a blinding flash and loud noise before they shoot the occupant. Maryclaire Dale, Associated Press, *"No Knock" Death Sparks Lawsuit* (Sept. 25, 2003), *available at* http://www.cbsnews.com/stories/2003/09/25/national/main575007.shtml (last visited Nov. 1, 2004); Elliot Grossman, *Jury to Judge Police Role in Deadly Raid*, MORNING CALL (Allentown, Pa.), Sept. 6, 2003, at A1. The "flash-bang" device caused a fire that burned down the home and prevented officers from saving the occupant. *Id.*

In *Wilson*, the Court noted that the "knock and announce" rule is "justified in part by the belief that announcement generally would avoid 'the destruction or breaking of any house . . . by which great damage and inconvenience might ensue.'"[99] Furthermore, in *Richards*, the Court highlighted the dual interests underlying the "knock and announce" rule: avoiding destruction of property and allowing the occupants of the home a brief moment to prepare themselves for a lawful home invasion.[100] The justification for the "knock and announce" rule set forth in *Wilson* and the interests identified in *Richards* would be frustrated if the occupant of a home did not understand the content of the announcement. A home occupant certainly cannot save her door or prepare for officers to enter her home if she does not comprehend the demands for entry of the strangers outside her door.[101] Surely courts would not find an occupant unreasonable for refusing to open her home to unidentified callers merely because they shout authoritatively at her door.

At the same time, officers cannot be expected to announce their presence and intent to search the home in every conceivable language or dialect that the occupants of the home might speak. Such a requirement would be far more burdensome than the Court contemplated in promulgating the "knock and announce" rule especially given the many multicultural, immigrant-rich population centers in the United States. Therefore, only where officers know or should know the occupant of a home understands only a particular non-English language would it be reasonable under the Fourth Amendment to expect officers to "knock and announce" their presence in that language.[102]

Such a rule would strike the proper balance between allowing officers to efficiently and effectively enforce the law and protecting the rights of the individual under the Fourth Amendment. The U.S. Supreme Court stated in *Wilson*: "The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests."[103] In fact, it appears

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99. Wilson v. Arkansas, 514 U.S. 927, 935-36 (1995) (quoting *Semayne's* Case, 77 Eng. Rep. 194, 196 (K.B. 1603)).

100. Richards v. Wisconsin, 520 U.S. 385, 393 n.5 (1997).

101. One might note that an immigrant will generally need little time to learn the meaning of the word "police." Comprehension of the other words and phrases that could be uttered during execution of a warrant (*e.g.*, warrant, arrest, search), however, might not be as forthcoming.

102. Of course, if the target of the search is known to speak only a particular language in which officers have no reasonable means of communicating, it is unlikely that a court would penalize them for using some other means, such as signs, of communicating their presence.

103. *Wilson*, 514 U.S. at 934. The notion that the privacy rights of individuals must be balanced against the needs of law enforcement is a common theme in Fourth Amendment law. *Cf.*

that some law enforcement organizations, perhaps anticipating such a requirement, are already using non-English announcements where there is reason to believe the occupant of a home does not understand English.[104]

What happens, then, if officers "knock and announce" their presence, the occupant of the home does not understand the announcement, and officers have no reason to know the home occupant does not understand their announcement? Here we arrive at the gray area of the "knock and announce" rule's protection of the castle door. As discussed above, if officers do not know or do not have reason to know the occupant of the home to be searched does not understand English, it would be unreasonable to impose on them the burden of announcing their presence in a panoply of other languages solely because it is *possible* the home occupant does not comprehend English. Thus, under such circumstances and absent other relevant factors — e.g., ability to show a badge though a window — the officers' English-language announcement would be constitutionally adequate.

In this hypothetical, once officers make their announcement in English, the unwitting immigrant must act quickly. Under *Banks*, a home occupant who does not know the identity of those demanding entry into her home will generally have precious few seconds to determine whether to open the door.[105] This places the immigrant in the position of having to choose between opening the door to a group of armed strangers and accepting the attendant security risks that come with that decision, or erring on the side of caution by leaving the door in place and, consequently, sacrificing the door. Of course, unless the home occupant is versed in constitutional "knock and announce" law, she will not know she is incurring any risk at all by leaving the door in place. The resulting decision thus becomes

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Kolender v. Lawson, 461 U.S. 352, 365 (1983) (Brennan, J., concurring) (stating that there is a "balance struck by the Fourth Amendment between the public interest in effective law enforcement and the public interest in safeguarding individual freedom and privacy from arbitrary governmental interference"); Park v. Shiflett, 250 F.3d 843, 850 (4th Cir. 2001) ("Through the years of Fourth Amendment jurisprudence, courts have attempted to strike a delicate balance between the needs of law enforcement officers who constantly place themselves in harm's way, and the sacred [Fourth Amendment] rights [of the individual]."); United States v. Rivera, 248 F.3d 677, 681 (7th Cir. 2001) ("[T]he Fourth Amendment . . . necessarily recognizes that a balance must be maintained between the needs of law enforcement and the right to privacy.").

104. *E.g.*, Mena v. City of Simi Valley, 226 F.3d 1031, 1035 (9th Cir. 2001) (stating that officers announced their presence in both English and Spanish); United States v. Gordils, 982 F.2d 64, 68 (2d Cir. 1992) (stating that officers announced in English and Spanish, "police, open up"); United States v. 116 Emerson Street, 942 F.2d 74, 76 (1st Cir. 1991) (stating that drug enforcement agents announced their presence both in English and Spanish).

105. *See* United States v. Banks, 124 S. Ct. 521, 523 (2003).

predictable. Even so, under *Richards*'s exigency exception to the "knock and announce" rule such an individual would be lucky to receive a knock and an announcement in the first place.[106] Therefore, under the situation described, the immigrant will eventually learn that it is likely officers would not be acting unreasonably in laying waste to her door.

C. *Recovering the Destroyed Door*

However banal this section's inquiry might appear, anyone who has experienced a forced police entry will not dismiss the question of what to do about the destroyed door. In light of the constitutional significance attached to the castle door, one is justified in expecting legal compensation following destruction of the entryway notwithstanding the results of the search. However, such an expectation is misplaced. Assuming one is fortunate enough to suffer only destruction of the door after officers force entry — as opposed to being shot at, arrested, or prosecuted — where forced entry is reasonable under the Fourth Amendment, it is unlikely that courts will provide relief for a destroyed door. This conclusion is best explained by exploring some of the more plausible, though ultimately fruitless, available legal claims.

The most plausible federal avenue for civil relief from the unlawful activities of police officers is 42 U.S.C. § 1983. However, a prerequisite to recovery under section 1983 is deprivation of a constitutional right.[107] If officers can establish a reasonable suspicion that knocking and announcing their presence would have created danger, jeopardized evidence, or been futile, under *Richards*, the occupants of a home will not be able to claim deprivation of a constitutional right due to the officers' forced entry.[108] Similarly, if officers knock and announce their presence only to be ignored by the home occupant, under *Banks*, an exigency justifying forced entry will swiftly develop so long as potentially inculpatory evidence can be easily destroyed or lives are in danger.[109] The silent occupant will find no legal recourse for her destroyed door in section 1983.

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106. *See* Richards v. Wisconsin, 520 U.S. 385, 387-88 (1997).

107. City of Oklahoma City v. Tuttle, 471 U.S. 808, 829 (1985) (stating that one of the elements of a section 1983 action "involves the question of whether there has been a violation of the Constitution or laws of the United States"); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978) (stating that in order to state a claim under section 1983, plaintiffs "are first bound to show that they have been deprived of a right 'secured by the Constitution and the laws' of the United States").

108. *See Richards*, 520 U.S. at 387-88.

109. *See Banks*, 124 S. Ct. at 523.

Moreover, a person whose door is destroyed by forced entry will similarly be frustrated in seeking legal recourse through state tort law. Using California law as an example, under a negligence theory, a court will not find liability unless officers have violated a duty owed to the plaintiff.[110] Breach of duty involves a reasonableness inquiry congruent with Fourth Amendment reasonableness analysis.[111] Hence, officers will not be found to have violated a duty to the occupant of the home under state law once their actions are deemed reasonable under the Fourth Amendment.[112] Furthermore, invasion of property torts such as trespass and conversion offer no relief since, under these torts, officers' actions are privileged where they act out of necessity, i.e., exigency.[113] All of this can be said without delving into the various governmental tort immunity schemes the States have established for themselves.[114]

Therefore, absent the unlikely happenstance that a court will find an officer's forced entry unreasonable under the Fourth Amendment, a person whose entryway has been destroyed during forced entry will likely have no legal means of forcing compensation from state agencies for her felled castle door. While the U.S. Supreme Court in *Ramirez* sustained the possibility that excessive destruction of property may violate the Fourth Amendment,[115] on the whole it is hard to imagine that a court will find destruction of the door following a knock and announcement excessive. As is often true in other circumstances, in many cases moral and political motivations may prove to be more effective than the legal process in obtaining compensation.[116]

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110. *E.g.*, Artiglio v. Corning Inc., 957 P.2d 1313, 1318 (Cal. 1998) (listing "the well-known elements of any negligence cause of action, viz., duty, breach of duty, proximate cause and damages").

111. *E.g.*, City of Simi Valley v. Super. Ct., 4 Cal. Rptr. 3d 468, 473 (Ct. App. 2003) (stating that state law negligence-based causes of action are not viable once defendants' actions have been determined to be objectively reasonable under federal law).

112. *See id.*

113. *See* People v. Roberts, 303 P.2d 721, 723 (Cal. 1956) ("Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose.").

114. *E.g.*, CAL. GOV'T CODE § 810 (West 2004) (California Tort Claims Act); N.J. STAT. ANN. § 59:1-2 (West 2004) (New Jersey Tort Claims Act); VA. CODE ANN. § 8.01-195.4 (Michie 2004) (Virginia Tort Claims Act).

115. United States v. Ramirez, 523 U.S. 65, 71 (1998).

116. Coming back to my personal anecdote, I should note that the police department was kind enough to provide my family with nominal compensation.

V. CONCLUSION

Through its jurisprudence, the U.S. Supreme Court has revealed that individual dignity interests are the focus of the constitutional "knock and announce" rule. Specifically, the "knock and announce" rule affords a home occupant the opportunity to save the castle door, compose oneself, and prepare for police officers to enter the home. Of these dignity interests, the Court's chief concern has been on the more tangible one, saving the castle door. Based on the Court's rhetoric, it appears that a key purpose of the "knock and announce" rule is to avoid unnecessary destruction of property regardless of the legality of an arrest or seizure of evidence following police entry.

This Article addressed the enforcement problems surrounding the "knock and announce" rule. As suggested by the U.S. Supreme Court[117] and held by the Seventh Circuit,[118] it is dubious that a "knock and announce" violation will serve as a basis for suppressing otherwise legally seized evidence. Furthermore, a host of legal obstacles and exceptions to the "knock and announce" rule will trip up all but the most robust claims for civil relief. As seen through the lens of the non-English speaking immigrant, the kinks in the armor become more apparent. Assuming officers act reasonably in not announcing their presence in the language of the home occupant, the door, if not more, will most certainly be sacrificed. Finally, a home occupant whose entryway has been destroyed by police executing a valid search warrant has little hope of attaining legal compensation for the felled door under either federal or state law. Hence, the "knock and announce" rule provides a noble yet largely unenforceable right. Accordingly, we see that while the "knock and announce" rule's toothless tiger pines passionately over the sacred castle door, it sits coyly when enforcement issues arise.

117. *See* Brown v. Illinois, 422 U.S. 590, 608-09 (1975) (Powell, J., concurring).

118. United States v. Langford, 314 F.3d 892, 895 (7th Cir. 2002).