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UNANNOUNCED ENTRY TO SEARCH: THE LAW AND THE 'NO-KNOCK' BILL (S. 3246)

At common law, and under present federal and state statutes, police officers must announce their identity and intent to enter before conducting a search of an occupied dwelling with or without a warrant. This rule has come under much criticism from persons urging stricter law enforcement, particularly of narcotic laws. They argue that prior notice allows suspects to dispose of evidence sought and thus to frustrate the police officers' search. In response to this criticism, the Ninety-first Congress considered legislation which would permit forceful entry by police officers, without prior announcement of purpose and authority, under certain specified circumstances. The legislation, popularly called the "no-knock" bill, is widely considered to represent a change in presently existing law on such forceful entries. This depends really on the liberality with which courts construe the bill's provisions. As will be seen in this review of the present law governing announcement prior to entry to search, literal judicial interpretation of the legislation may well impose more stringent controls on the power of police officers to enter unannounced, rather than expand it as intended.

Senate Bill S. 3246, officially entitled the "Controlled Dangerous Substances Act," was overwhelmingly approved by the United States Senate and sent to the House of Representatives for approval in February of this year.¹ The legislation, in part, sharply reduces penalties for drug users, expands the Attorney General's responsibilities for drug traffic control and law enforcement, and establishes a special search warrant to permit forceful entry by police officers without prior announcement of authority and purpose. The latter, Section 702, provides:

(b) Any officer authorized to execute a search warrant relating to offenses involving controlled dangerous substances the penalty for which is imprisonment for more than one year may, without notice of his authority and purpose, break open an outer or inner door or window of a building, or any part of the building, or anything therein, if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that (A) the property sought may, and if such

¹ The vote in the Senate was 82 to 0. See generally *Senate Drug Bill Alters Penalties, Authorizes Federal Marijuana Study*, 6 CRIM. L. REP. 2321 (1970).

notice is given, will be easily and quickly destroyed or disposed of, or (B) the giving of such notice will immediately endanger the life or safety of the executing officer or another person, and has included in the warrant a direction that the officer executing it shall not be required to give such notice: *Provided*, That any officer acting under such warrant, shall, as soon as practicable after entering the premises, identify himself and give the reasons and authority for his entrance upon the premises.²

The purpose of this provision, as stated in the Senate debates, is to deprive potential defendants of an early warning of police intrusion, if that warning might facilitate the quick disposal of contraband under their control.³

I. ANNOUNCEMENT-BEFORE-ENTRY LEGISLATION: HISTORY AND PURPOSE

The proposed "no-knock" section must be viewed against the background of the pre-existing statutory and common law it seeks to change. Statutory provisions requiring an announcement of identity and purpose by police officers before a forceful entry to arrest or search, with or without a warrant, were enacted in the great majority of states, and on the federal level as well, during the latter half of the nineteenth century.⁴ These statutes represented, for the most part, codifications of a long-standing common law rule derived from *Semayne's Case*,⁵ decided in 1603; rudiments of the rule established in that case were imposed on law officers as early as the twelfth century.⁶ Case law interpretations of prior statutory codifications of the common law rule can, and probably will, serve as guidelines for interpretation and construction of Section 702.

With only one exception,⁷ the announcement statutes on both the state and federal level are stated in absolute terms, providing no exceptions;⁸

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

3. For a critical appraisal of the Senate's deliberations on S. 3246, see *Krause, No-Knocking the Constitution*, Rolling Stone, March 19, 1970, at 23, col. 1.

4. See generally Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 560 (1964) [hereinafter cited as BLAKEY]. But see, e.g., *Condra v. Anderson*, 254 S.W.2d 528 (Tex. Civ. App. 1953); *Strader v. Commonwealth*, 302 Ky. 330, 194 S.W.2d 368 (1946).

5. [T]he sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make a request to open the doors. 5 Co. Rep. 91a, 91b, 11 E.R.C. 629, 77 Eng. Rep. 194, 195 (K.B. 1603); cf. *Deuteronomy* 24:10.

6. BLAKEY at 501.

7. N.Y. CODE CRIM. PROC. tit. 2, § 799 (McKinney Supp. 1970).

8. E.g., MICH. ANN. STAT. § 28.880 (1954); OKLA. ANN. STAT. tit. 22, § 194 (1969).

they define neither what constitutes adequate notice nor what degree of force constitutes a "breaking."⁹ For example, the current federal statute, Section 3109, provides:

The officer may break open any outer or inner door . . . 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.¹⁰

The absence of explicit definitions in such statutes, together with the recurrent use of the motion to suppress evidence as a means of enforcing the announcement requirement, has required courts to interpret and refine the statutory language with great particularity.¹¹

For example, "break open" as a condition precedent to an announcement has been interpreted by the Supreme Court in *Sabbath v. United States*¹² to involve some physical force, albeit slight, similar to that required to commit a common law burglary.¹³ Thus, "lifting a latch, turning a doorknob, unhooking a chain or hasp . . . or pushing open a closed door of entrance to the house—even a closed screen door . . . is a breaking. . . ." ¹⁴ At least one federal court has held that any entry without permission is a breaking,¹⁵ but a majority of decisions on the question have held that entry through an open door or window is not a breaking requiring prior notice to the occupants of the building.¹⁶ The

9 Cf. *Hadley v. State*, 238 N.E.2d 888 (Ind.), cert. denied, 394 U.S. 1012 (1969).

10 18 U.S.C. § 3109 (1958).

11 See, e.g., *Reyes v. United States*, 417 F.2d 916 (1969); *Wittner v. United States*, 406 F.2d 1165 (5th Cir. 1968); *Garza-Fuentes v. United States*, 400 F.2d 219 (5th Cir.), cert. denied, 394 U.S. 963 (1968); *United States v. Harris*, 391 F.2d 384 (6th Cir. 1968); *United States v. Ramos*, 380 F.2d 717 (2d Cir. 1967); *Commonwealth of Massachusetts v. Painter*, 368 F.2d 142 (1st Cir. 1966); *United States ex rel. Manduchi v. Tracy*, 350 F.2d 658 (3d Cir.), cert. denied, 382 U.S. 943 (1965); *Dickey v. United States*, 332 F.2d 773 (9th Cir.), cert. denied, 379 U.S. 948 (1964); *Polk v. United States*, 314 F.2d 837 (9th Cir.), cert. denied, 375 U.S. 844 (1963); *Cognetta v. United States*, 313 F.2d 870 (9th Cir. 1963); *United States v. Viale*, 312 F.2d 595 (2d Cir.), cert. denied, 373 U.S. 903 (1963); *United States v. Burruss*, 306 F. Supp. 915 (E.D. Pa. 1969); *United States v. Perkins*, 286 F. Supp. 259 (D.D.C. 1968); *United States ex rel. Carafas v. LaVallee*, 275 F. Supp. 91 (N.D.N.Y. 1966); *United States v. St. Clair*, 240 F. Supp. 338 (S.D.N.Y. 1965).

12 391 U.S. 585 (1968).

13 See, e.g., *Sabbath v. United States*, 391 U.S. 585 (1968); *People v. Rosales*, 66 Cal. Rptr. 1, 437 P.2d 489, 492 (1968); *Wilgus, Arrest Without a Warrant*, 22 MICH. L. REV. 798, 806 (1924).

14 *Wilgus, Arrest Without a Warrant*, 22 MICH. L. REV. 798, 806 (1924); cf. *Munoz v. United States*, 325 F.2d 23 (9th Cir. 1963). *Contra Williams v. United States*, 273 F.2d 781 (9th Cir. 1959); *United States v. Bowman*, 137 F. Supp. 385 (D.D.C. 1956).

15 *Hair v. United States*, 289 F.2d 894 (D.C. Cir. 1961).

16 *Sabbath v. United States*, 391 U.S. 585 (1968); *People v. Rosales*, 66 Cal. Rptr. 1, 437 P.2d 489 (1968) *But cf. Hadley v. State*, 238 N.E.2d 888 (Ind.), cert. denied, 394 U.S. 1012 (1968).

applicability of the statutory announcement requirement can depend, therefore, on whether a police officer is thin enough to squeeze through a partially open door,¹⁷ or jumps over a garden gate rather than opening it,¹⁸ or, presumably, pushes aside draped beads rather than waiting for the occupant to hold them aside for him.¹⁹ Undoubtedly, this construction can be difficult for a police officer to understand and to comply with.²⁰ The only assured course of conduct for an executing officer seems to be to give an announcement under all circumstances; to this extent, the number of legal, yet silent, entries by the police is limited substantially.²¹

Likewise the precise form of the required announcement has been interpreted with varying strictness.²² Although the common law did not establish a "precise form of words,"²³ most decisions have required officers to announce more than just their identity.²⁴ At the very least, it would seem that police must knock or call out, identify themselves, and request admittance for the purpose of searching.²⁵ But a major stumbling

17. See, e.g., *United States ex rel. Dyton v. Ellingsworth*, 306 F. Supp. 231, 236 (D.C. Del. 1969) (pushing open a door already 6-8 inches ajar); *United States v. Ramos*, 380 F.2d 717 (2d Cir. 1967) (pushing open partially closed door while occupant resisted). Where, however, the door is opened by the occupant, the entry is not forceful. *Reyes v. United States*, 417 F.2d 916, 919 (1969); *Dickey v. United States*, 332 F.2d 773 (9th Cir.) cert. denied 379 U.S. 948 (1964); *Keiningham v. United States*, 287 F.2d 126 (D.C. Cir. 1960).

18. Cf. *Wittner v. United States*, 406 F.2d 1165 (5th Cir. 1968); *Sabbath v. United States*, 391 U.S. 585 (1968).

19. Cf. *United States v. Burruss*, 306 F. Supp. 915, 920 (E.D. Pa. 1969).

20. The highest frequency of violation by the police of announcement requirements apparently does occur in gambling and narcotics cases. See *Hadley v. State*, 238 N.E.2d 888, 900 (Ind.) (Lewis, C.J., concurring), cert. denied, 394 U.S. 1012 (1969).

21. The overall effect on police activity has not gone unnoticed. The following recommendations on prior announcement by the police in drug searches appears in a legal manual published, it says, for members of the "movement":

If you have drugs in the house *always keep your door locked* and ask who it is before you open it. If they say it is the police, ask them if they have a warrant. If they say no, don't open the door. If they say yes, ask them to slip the warrant under the door . . . They might slip it under or they might just bust down the door; they might butt it in even if they don't have a warrant. *But the harder you make it for them to get in, the more time you have to get rid of the dope.*

K. BOUDIN, B. GLICK, E. RASKIN & G. REICHBACH, *THE BUST BOOK-WHAT TO DO UNTIL THE LAWYER COMES* 31-2 (1970).

22. Compare *Miller v. United States*, 357 U.S. 301 (1958) with *United States v. Freeman*, 144 F. Supp. 669 (D.D.C. 1956).

23. *Case of Richard Curtis*, Fost. 135, 168 Eng. Rep. 67 (K.B. 1757).

24. *Miller v. United States*, 357 U.S. 301 (1958); accord, *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). But Cf., *United States ex rel. Dyton v. Ellingsworth*, 306 F. Supp. 231, 236 (D.C. Del. 1969).

25. E.g., *Miller v. United States*, 357 U.S. 301 (1958); *Masiello v. United States*, 317 F.2d 121 (D.C. Cir. 1963); *Work v. United States*, 243 F.2d 660 (D.C. Cir. 1957).

block for effective searches, at least in narcotics and gambling cases, is not primarily compliance with this form of notice; rather it is the delay it entails and the advance alert it guarantees a suspect.

In this regard, most announcement statutes expressly require both an announcement *and* a refusal of admittance.²⁶ While the refusal of admittance need not be an affirmative gesture by occupants believed inside the dwelling, there must be a knocking and announcement, and the officer must wait a reasonable amount of time for a reply before he can interpret the silence to be a refusal.²⁷ Clearly, a “reasonable” delay as a standard for performance is at best ambiguous for police, and invites unintended, technical non-compliance with the demands of the statute. Moreover, decisions under this condition of the announcement statutes fail to pin down any minimum. The Ninth Circuit, for example, has approved a delay of only three or four seconds before the breaking;²⁸ but the Eastern District of Pennsylvania has suggested as a general guideline a few minutes (and has proposed that executing officers might time with a stopwatch the amount of time delayed—to establish a clearer record for appeals).²⁹ To complicate matters further for law officers, the courts have held that the absence of occupants in a dwelling excuses all announcements, but that lack of a response to knocking (without an announcement of identity) is insufficient to raise an inference that no one is inside.³⁰

Hypothetically, it must seem ludicrous to a narcotics agent that he must stand outside a screened porch connected with a home’s main entrance; yell out his identity as a plainclothes narcotics agent and his intent to enter and search; request admission, and then wait a few minutes for the occupant to refuse to open the door.³¹ Although this

26 *E.g.*, IND ANN. STAT. § 9-1001 (1956). *But see* CAL. PEN. CODE § 844 (Deering 1956).

27. *E.g.*, United States v. Harris, 391 F.2d 384, 388 (6th Cir. 1968); United States *ex rel.* Manduchi v. Tracy, 350 F.2d 658 (3d Cir.), *cert. denied*, 382 U.S. 943 (1965); Masiello v. United States, 317 F.2d 121 (D.C. Cir. 1963).

28. McClure v. United States, 332 F.2d 19 (9th Cir.) *cert. denied*, 380 U.S. 945 (1964) (heard footsteps); *cf.* United States v. Aldrete, 414 F.2d 238 (5th Cir. 1969) (15 seconds); United States v. Harris, 391 F.2d 384, 388 (6th Cir. 1968) (delay ignored on appeal). *But see* Wong Sun v. United States, 371 U.S. 471 (1963).

29 United States *ex rel.* Ametrane v. Gable, 276 F. Supp. 555, 557 (E.D. Pa. 1967); *cf. e.g.*, Masiello v. United States, 317 F.2d 121 (D.C. Cir. 1963).

30 Woods v. United States, 240 F.2d 37 (D.C. Cir.), *cert. denied*, 354 U.S. 926 (1957); *cf.* Wong Sun v. United States, 371 U.S. 471 (1963)g Good man v. State, 178 Md. 1, 11 A.2d 635 (1940); Jones v State, 4 Ala. App. 159, 58 So. 1011 (1912). *Contra* People v. Baca, 197 Cal. App.2d 362, 17 Cal Rptr. 204 (1961); *cf.* Williams v. United States, 273 F.2d 781 (9th Cir.), *cert. denied*, 362 U.S. 948 (1959).

31. *See* Hadley v. State, 238 N.E.2d 888, 903-11 (Ind.), *cert. denied*, 394 U.S. 1012

states an extreme situation, it is not implausible; such complex, technical interpretations of the prior announcement statutes impose significant limitations on the power of the police to enter a building or curtilage to search by surprise.

The divergent views on the interpretation of the "breaking" element and on the required form of the notice and refusal of admittance probably stem from a more fundamental disagreement over the basic rationale for requiring prior notice by police officers. *Semayne's Case* asserted that the rule was to prevent unnecessary property damage from the breaking where, had a demand for entry been made, the door would have been opened.³² However, the vast number of common law and statutory decisions in the United States have mechanically enforced the rule, explaining its imposition only as traditionally fair procedure.³³ Why notice before entry is "fair" when notice serves primarily to alert occupants that contraband should be destroyed, as in narcotics cases, is not clear. The Supreme Court decisions under the present federal announcement statute fail for the most part to shed light on the question.³⁴ The Court squarely considered Section 3109 requirements for the first time in 1958, in *Miller v. United States*.³⁵ In that case, the trial court refused to suppress certain narcotics following a forceful entry by officers who had announced: "Police!" but had failed to state their purpose. In reversing, the Supreme Court stated: "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."³⁶ Similarly Justice Brennan, dissenting in *Ker v. California*,³⁷ postulated that *fundamental liberty* required protection from unannounced police intrusions. But the court has only twice specified the reasons behind these general statements of principle. The rule is said to be intended to prevent embarrassing circumstances³⁸ and

(1969) (Hunter, J., dissenting); *cf. United States v. Harris*, 391 F.2d 384, 388 (6th Cir. 1968) (court apparently would require notice at both the screen and weather doors).

32. 77 Eng. Rep. 194, 196 (1603): "for the law without a default in owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, it is to be presumed that he would obey it . . ."; *cf. Aga Kurboolie Mahomed v. The Queen*, 4 Moore P.C. 239, 247, 13 Eng. Rep. 293, 296 (K.B. 1843).

33. *See, e.g., Commonwealth v. Reynolds*, 120 Mass. 190 (1876).

34. *Compare Ker v. California*, 374 U.S. 23 (1963) with *Wong Sun v. United States*, 371 U.S. 471 (1963).

35. 357 U.S. 301 (1958).

36. *Id.* at 313.

37. 374 U.S. 23, 47 (1963).

38. *McDonald v. United States*, 335 U.S. 451, 459-61 (1948) (concurring opinion).

mistaken assaults by fearful householders believing the officer to be a prowler.³⁹ Otherwise, the courts have not yet explained what fundamental infringement occurs when an officer quietly gains entry to a place that he is, by warrant or on probable cause, entitled to enter.⁴⁰

A logical explanation incorporating these varying expressions of rationale seems difficult. For example, if the fundamental freedom is an absolute right of privacy,⁴¹ it is the entry and not the failure to announce which constitutes the basic infringement and would protect entries through open doorways. If the fundamental freedom is a more limited right to be informed prior to an invasion by the police,⁴² it is again inexplicable why the rule does not apply to an entry through an open window. If the freedom is the right to be protected against embarrassing encounters,⁴³ it is strange that calls of "Police!" and "Open up!" are not sufficient to put the occupant on guard.⁴⁴ Finally, if the right of the individual is to be free from unnecessary property damage,⁴⁵ there is no reason for condemning silent entry through a closed but unlocked door.⁴⁶ What does seem apparent, from the uneven and often illogical application of common law announcement standards, is that the rule serves primarily as a slight limitation⁴⁷ on the power of the police⁴⁸ rather than as an important protection of citizen's rights.

39. *Miller v. United States*, 357 U.S. 301, 313 n. 12 (1958).

40 " . . . [N]o basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied . . . ", *People v. Maddox*, 46 Cal.2d 301, 294 P.2d 6, *cert. denied*, 352 U.S. 858 (1956).

41 See *Hair v. United States*, 289 F.2d 894, 897 (D.C. Cir. 1961).

42 Compare *Ng Pui Yu v. United States*, 352 F.2d 626 (9th Cir. 1965) with *Sabbath v. United States*, 391 U.S. 585 (1968); *Wilgus, Arrest without a Warrant*, 22 MICH. L. REV. 798, 804-05 (1924)

43 *McDonald v. United States*, 335 U.S. 451, 460-61 (1948) (concurring opinion).

44 See *Wong Sun v. United States*, 371 U.S. 471 (1963); *Miller v. United States*, 357 U.S. 301 (1958)

45 *Semayne's Case*, 5 Co. Rep. 91a, 91b, 11 E.R.C. 629, 77 Eng. Rep. 194, 196 (K.B. 1603).

46 See *Sabbath v. United States*, 391 U.S. 585 (1968); *People v. Rosales*, 66 Cal. Rptr. 1, 437 P.2d 489 (1968).

47 "The burden of making an express announcement is certainly slight." *Miller v. United States*, 357 U.S. 301, 309 (1958).

48 "What a privilege will be allowed to sheriffs' officers if they are permitted to effect their search by violence, without making that demand which possibly will be complied with, and consequently violence will be rendered unnecessary." *Ratcliff v. Burton*, 3 Bos. & Pul. 223, 230, 127 Eng. Rep. 123, 127 (1802). See also Douglas, *The Means and the End*, 1959 WASH. U.L.Q. 101: " . . . I sometimes think that judges and lawyers often forget that the Anglo-American system of criminal law is designed to reduce police control and increase judicial control. . . . The theory of our system is that the interest of society in convicting the guilty does not justify the use of force . . . against the citizen who is presumed innocent." *Id.* at 110, 112.

The primary difficulty with the announcement decisions is their mechanical exclusion of evidence

II. EXIGENT CIRCUMSTANCES EXCUSING COMPLIANCE

Section 702 postulates two situations in which the prior announcement requirement could be dispensed with: likely destruction or disposal of evidence and danger to the life of an officer or of another. At common law at least five major exceptions were recognized which would excuse prior notice:⁴⁹ increased peril to the officer,⁵⁰ or to persons inside the dwelling or curtilage;⁵¹ destruction or disposal of evidence;⁵² increased possibility of escape;⁵³ and, hot pursuit.⁵⁴ Although not contained within the usual statutory language,⁵⁵ courts have nevertheless found these exceptions applicable to relieve compliance with the statutes.

The United States Supreme Court has, on four occasions, indicated that announcement before forceful entry *may* be required by the Fourth Amendment,⁵⁶ but the court has also suggested that each of the common

seized following a technically improper entry by the police. "[E]xclusion should surely not be demanded where the officer did not know and had no reason to know that in some minor technicality he was violating a rule." Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 77 (1966).

49. See generally BLAKEY at 500-05.

50. *E.g.*, Read v. Case, 4 Conn. 166 (1822) (the leading American case); Gilbert v. United States, 366 F.2d 923, 931 (9th Cir.), *cert. denied*, 388 U.S. 922 (1966); People v. Maddox, 46 Cal.2d 301, 294 P.2d 6, *cert. denied*, 352 U.S. 858 (1956); *cf.* Ker v. California, 374 U.S. 23, 39-40 (1963). *Contra* United States v. Sims, 231 F. Supp. 251 (D. Md. 1964). Compliance with the announcement rule was fatal to one officer. See Commonwealth v. Phelps, 209 Mass. 396, 95 N.E. 868 (1911).

51. Henderson v. State, 235 Ind. 132, 131 N.E.2d 326 (1955); see People v. Maddox, 46 Cal.2d 301, 294 P.2d 6, *cert. denied*, 352 U.S. 858 (1956), Read v. Case, 4 Conn. 166 (1822).

52. *E.g.*, Ker v. California, 374 U.S. 23 (1963); Dagampat v. United States, 352 F.2d 245 (Cir. 1965); People v. Maddox, 46 Cal.2d 301, 294 P.2d 6, *cert. denied*, 352 U.S. 858 (1956). See generally BLAKEY, at 516.

53. People v. Russell, 223 Cal. App.2d 733, 36 Cal. Rptr. 27 (1963).

54. Hadley v. State, 238 N.E.2d 888 (Ind.), *cert. denied*, 394 U.S. 1012 (1968). People v. Gilbert, 63 Cal.2d 690, 47 Cal. Rptr. 909, 408 P.2d 365 (1965); see Vanella v. United States, 371 F.2d 50 (9th Cir., *cert. denied*, 386 U.S. 920 (1966)).

55. See text accompanying n.8, *supra*.

56. Sabbath v. United States, 391 U.S. 585 (1968); Wong Sun v. United States, 371 U.S. 471 (1963); Ker v. California, 374 U.S. 23 (1963); Miller v. United States, 357 U.S. 301 (1958); *cf.* Woods v. United States, 240 F.2d 37 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 941 (1957); Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949).

In each of these decisions, however, there was a prior notice statute regulating the method of execution by the police, and the Court was not required to articulate any specific standard of conduct required under the Constitution apart from the statute before it. Although the majority opinion in *Ker, supra*, is unclear, it can be strongly argued that the decision held that the restrictions on unannounced entries by federal officers result from the statute, not the Fourth Amendment, and that those restrictions are not, therefore, apposite "for state prosecutions where admissibility is governed by constitutional standards." *Id.* at 39. *Cf.* Sabbath v. United States 391 U.S. 585, 591, n. 8 (1968).

law exceptions would apply to any constitutionally-mandated rule of prior announcement.⁵⁷ While the Supreme Court has not yet been presented with a case raising a sufficient exigency under federal standards, lower federal and state court opinions have frequently applied the exceptions to sustain the legality of unannounced intrusions to search.⁵⁸ With this background, the enactment of the “easy disposal” and “immediate peril” exceptions by Congress in Section 702, linked with the requirement that probable cause for the exigency be shown to a judge or magistrate, probably will sustain the statute against constitutional challenge.⁵⁹

Thus, the effectiveness of Section 702 in the enforcement of drug laws will hinge not on the constitutionality of the statute, but rather on what evidentiary showing the courts will require to constitute “probable cause.” To that end, prior decisions interpreting the common law exceptions will probably become a judicial springboard for interpreting the “no-knock” statute.

The common law development in the United States of the “increased peril” exception, as first announced in *Read v. Case*,⁶⁰ contemplated some *actual* knowledge that a suspect was armed and dangerous. Several recent California decisions have indicated, however, that an offender’s past criminal record, if known, might suffice.⁶¹ Only rarely has a court ventured to suggest that a general course of conduct by a particular class of lawbreakers, can raise a presumption of exigency.⁶² The crucial

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

58. *E.g.*, *United States v. Aldrete*, 414 F.2d 238 (5th Cir. 1969); *United States v. Harris*, 391 F.2d 384, 388 (6th Cir. 1968); *People v. Russell*, 223 Cal. App.2d 733, 36 Cal. Rptr. 27 (1963); *Henderson v. State*, 235 Ind. 132, 131 N.E.2d 326 (1955). *Ker v. California*, 374 U.S. 471 (1963) did sustain the validity of a “disposal” exception under the Fourth Amendment as applied by the California Supreme Court under the California statute.

59 The Court of Appeals of New York in *People v. DeLago*, 16 N.Y.2d 289, 213 N.E.2d 659, *cert denied*, 383 U.S. 963 (1965), sustained the constitutionality of a special warrant statute which permitted waiver of announcement requirements terms similar to those of § 702. The New York statute allows a magistrate to issue a special warrant excusing announcement compliance “. . . only upon proof under oath, to his satisfaction, that the property sought may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer, or another may result, if such notice were to be given.” N.Y. CODE CRIM. PROC. § 799 (McKinney 1970 Supp.). See *Comment, The Right to Privacy and New York’s Rule of No-Announcement*, 31 ALBANY L. REV. 88 (1967).

60 4 Conn. 166 (1822).

61 *E.g.*, *People v. Potter*, 144 Cal. App.2d 350, 300 P.2d 889 (1956).

62 See *People v. Manriquez*, 42 Cal. Rptr. 157, 160 (1965). *Contra* *People v. Rosales*, 66 Cal. Rptr. 1, 437 P.2d 489 (1968).

question under Section 702 is whether a showing of general experience and knowledge that narcotics and other drugs in small quantities can be, and often are, easily destroyed on short notice, will be considered sufficient to support the issuance of the special warrant. If so, the practical result under the statute would be an automatic authorization for specially warranted, unannounced entries in all drug searches. If not, then the burden on the police of presenting evidence sufficient to raise an inference of probable cause *before* a raid may be impossible.⁶³

The decisions under current statutes, as might be expected, are in conflict. In *People v. Gastelo*,⁶⁴ the Attorney General of California argued that unannounced, forcible entry to execute a search warrant is always reasonable in narcotics cases, on the ground that narcotics violators normally are on the alert to destroy the easily disposable evidence quickly at the first sign of an officer's presence. Rejecting this argument, the California Supreme Court speaking through Justice Traynor stated: "Neither this court nor the United States Supreme Court has held that unannounced forcible entries may be authorized by a blanket rule based on the type of crime or evidence involved."⁶⁵ Agreeing with that statement, the Ninth Circuit in 1967 held that it would excuse compliance with Section 3109, in accordance with common law exceptions, only when the specific circumstances known to the officer at the time of the entry demonstrated an exigency.⁶⁶ That reasoning narrows considerably the "disposal of evidence" exception. For example, if the officer has approached a door unnoticed, any noises such as sudden movements away from the door are ambiguous and meaningless unless coupled with the assumptions that the occupants *may* have seen him and that they would more likely than not destroy evidence if a police officer were approaching. Even if the officer entertains both presumptions, his entry without notice would not be acceptable under

63. See text at nn.65-66 *infra*.

64. 63 Cal. Rptr. 10, 432 P.2d 706 (1967).

65. *Id.* at 708.

Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard—the requirement of particularity—would be lost. Just as the police must have sufficiently particular reasons to enter at all, so must they have some particular reason to enter in the manner chosen.

Id. at 708.

66. *Meyer v. United States*, 386 F.2d 715, 717 (9th Cir. 1967).

Section 3109.⁶⁷ The officer must be aware of some *actual facts at the time of execution* which would lead him reasonably to believe that the occupants were aware of his presence or knew that he was coming;⁶⁸ only then could an exigency reasonably be assumed. In reality, the occupants will normally become aware of an officer's presence only if he announces himself. Therefore, the most that the Ninth Circuit's ruling can mean is that if the officer hears or otherwise senses suspicious activities *after* he announces, he need not wait a lengthy period for a refusal of admittance.⁶⁹ The problem with this result is obvious: it still guarantees in all but the most unusual of circumstances an advance alert and some delay.

On the other hand, the New York Court of Appeals, deciding *People v. DeLago*⁷⁰ under a warrant statute which waives prior notice in a manner not unlike Section 702,⁷¹ held that the issuing judges may take judicial notice that gambling contraband can be easily destroyed if an advance notice of entry by police is given. This noticed fact was in turn considered sufficient to raise an inference that gambling paraphernalia sought under the specific warrant would in all likelihood be destroyed if notice were given. This type of reasoning would apparently sanction *a priori* the issuance of a warrant excusing notice compliance in all gambling and *a fortiori* narcotics cases, at least when the nature of the contraband sought is known. This construction is perhaps closer to the intent of the Senate in its passage of Section 702 than to the California court's instruction. The question is whether the Supreme Court would approve use of that series of presumptions to find probable cause to invoke Section 702, either under the Fourth Amendment or as a matter of general construction.

The Court has, on at least one occasion, sustained an invasion of privacy based on suspicion short of probable cause by taking what Kenneth Culp Davis calls legislative judicial notice of a general course of conduct on the part of lawbreakers as a class. In *Terry v. Ohio*⁷² an experienced officer observed the activities of several men, which, in light

67. See, e.g., *United States ex rel. Ametrane v. Gable*, 276 F. Supp. 555, 557 (E.D. Pa. 1967).

68. *People v. Rosales*, 66 Cal. Rptr. 1, 437 P.2d 489, 493 (1968); cf. *Ker v. California*, 374 U.S. 23 (1963).

69. See *McClure v. United States*, 332 F.2d 19 (9th Cir.), cert. denied, 380 U.S. 945 (1964) (heard footsteps apparently moving away from the doorway after being observed by an occupant and having made express announcement of identity—delay for refusal of admittance excused).

70. 16 N.Y.2d 289, 213 N.E.2d 659 (1965).

71. See note 61 *supra*.

72. 392 U.S. 1 (1968).

of his experience, he interpreted as preparation for a daytime robbery. In the course of an investigative encounter with the men, the officer "frisked" for concealed weapons; a pistol was in fact uncovered, and the Court affirmed the subsequent conviction for illegal possession of the firearm. The majority found the "frisk" conducted pursuant to the officer's reasonable concern for his safety, based on his suspicion (rather than probable cause) that the men were contemplating a daytime robbery, ". . . which it is reasonable to assume, would be likely to involve the use of weapons . . ." ⁷³ Thus, the presumption of "armed and dangerous" followed from the inherent nature of the offense suspected.

Section 702 does expressly authorize the magistrate to excuse prior notice when there is "probable cause to believe that . . . the giving of such notice will immediately endanger the life or safety of the executing officer or of another person. . . ." If the *Terry* reasoning were to be applied under this exception, the courts would construe the "probable cause" as meaning something less than probable cause—a result altogether unlikely to occur. Furthermore, it is clearly possible that the Court will be unwilling, without express Congressional direction, to extend this type of judicial notice to destruction of evidence in forceful entry situations, as contrasted with street encounters. Congress could merely have required a showing that the property sought *could* be easily destroyed (as the New York statute requires, instead of the actual language of Section 702: ". . . *will* be easily destroyed . . ."). Thus the Court would be forced to confront directly the Fourth Amendment issue of entry without notice. As passed by the Senate, however, Section 702 will provide law officers greater leverage in drug searches only if the courts can be persuaded to adopt a liberal interpretation of the bill's probable cause requirement.

III. CONCLUSION

S. 3246, Section 702, is in large measure a selective statutory enactment of the common law exceptions excusing notice before a forceful entry. As a result, disputes over the construction and meaning of the "no-knock" section will, for the most part, only continue arguments which remain unsettled under Section 3109 and other codifications of the common law. To this extent, the publicity the bill has received seems misplaced. If the statute is to expand the powers of forceful entry by the police, it must accomplish this through case law development, which is exactly what has been occurring under the present statutes.

Perhaps the statute, in its attempt to remove supposed obstacles to effective police investigations, will backfire. For example, the enactment of specific exceptions for prior notice in narcotics searches may be interpreted as an implied repeal of the other common law exceptions. This would mean that police would always be required to appear before a magistrate for a special warrant before any entry without notice. Moreover, if "probable cause" under Section 702 requires more than judicial notice of general conduct by suspects in possession of drugs, then the police may find themselves unable to produce any evidence—by observation of the suspect or otherwise—which would raise an inference that the suspect will, in fact, destroy the goods. As a result, the "no-knock" section would require prior notice with fewer exceptions than presently permitted. Furthermore, Section 702, as formulated by the Senate, may not avoid the technical and restrictive interpretations that have beset current federal and state statutes requiring announcement. As a practical matter, Section 702 may accomplish little more than to educate Congress in the difficulties of formulating both fair and *effective* procedures for law enforcement.