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No-Knock Warrants: Protective or Predatory for North Carolinians?

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No-Knock Warrants: Protective or Predatory for North Carolinians?

ABSTRACT

Much ink has been spilled on arguments for restraining law enforcement's use of no-knock warrants. In 2020, the issue was thrust into the national spotlight with the tragic death of Breonna Taylor at the hands of the Louisville Metro Police Department. While national attention focused on the federal response, Oregon, Florida, Virginia, and other states sprang into action by critically reexamining the justifications offered for the use of no-knock warrants and, in some cases, finding these justifications wanting. The Comment suggests that the justification of safety that no knock warrants share with their predecessor, the venerable knock-and-announce rule, is not borne out in practice. Accepting that law enforcement must have adequate discretion with which to root out crime, North Carolina need not tether its law on exigent circumstances to the federal "floor." Instead, with constitutional liberties and lives themselves at stake, North Carolina should join Oregon, Florida, and Virginia in banning no knock warrants outright or by limiting their use through heightened pre-issuance requirements.

ABSTRACT	269
INTRODUCTION.....	270
I. THE BACKGROUND OF THE KNOCK-AND-ANNOUNCE DOCTRINE.....	271
A. <i>The Common Law</i>	271
B. <i>American Case Law and Constitutional Reconciliation</i>	273
C. <i>North Carolina's Adoption and Application</i>	277
II. LOGICAL FALLACIES, SUBJECTIVE GUIDELINES, AND SOCIETAL	
HARMS	278
A. <i>Dangerous Situations</i>	278
B. <i>Situations Where Announcing Would Be Futile</i>	280
C. <i>Situations Where Announcing Would Lead to the Destruction of Evidence</i>	281
III. WHAT HAS BEEN DONE	283
IV. WHAT NEEDS TO BE DONE.....	284
CONCLUSION	287

INTRODUCTION

Shortly after midnight, on March 13, 2020, the Louisville Metro Police Department barged into the apartment of Breonna Taylor and Kenneth Walker, Breonna's boyfriend.¹ Startled awake by the sound of a nighttime intruder, Walker instinctively reached for his gun to defend himself and his girlfriend from the threat.² Not knowing that the intruders were the police, Walker fired a warning shot in their direction.³ Officer Johnathan Mattingly was hit by this warning shot, prompting the police officers to return fire.⁴ Shots were fired through both a side window and a closed door, and though Walker remained unscathed, Taylor was shot five times and died that night.⁵

The police did not uncover the suspect, the evidence, nor any criminal activity by executing the search warrant.⁶ The warrant used by the police in this case was a "no-knock" warrant, obtained by an affidavit which stated that a detective had verified that the target—Breonna Taylor's ex-boyfriend—had received packages at her address.⁷ A U.S. Postal inspector has since contradicted that statement, which has led to conspiracy indictments and guilty pleas within the Louisville Metro Police Department.⁸

A similar situation occurred on February 2, 2022. Amir Locke was sleeping on a couch in a Minneapolis apartment when law enforcement entered the apartment unannounced pursuant to a no-knock warrant issued by the local magistrate.⁹ Having been startled awake by the intrusion,

1. Richard Oppel et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Aug. 23, 2020, 6:54 PM), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/7AL9-4Z2C>].

2. *See id.*

3. *See id.*

4. *Id.*

5. *Id.*

6. *See* David Sklansky, *Stanford's David Sklansky on the Breonna Taylor Case, No-Knock Warrants, and Reform*, STAN. L. SCH. (Sept. 28, 2020), <https://law.stanford.edu/2020/09/28/stanfords-david-sklansky-on-the-breonna-taylor-case-no-knock-warrants-and-reform/> [<https://perma.cc/CDL4-LCBG>].

7. Hassan Kanu, *Breonna Taylor Case Shows Cops Can Be Charged for Lying in Search Warrants*, REUTERS (Aug. 22, 2022, 4:48 PM), <https://www.reuters.com/legal/government/breonna-taylor-case-shows-cops-can-be-charged-lying-search-warrants-2022-08-22/> [<https://perma.cc/HKX5-X349>].

8. *Id.*

9. *See* Arwa Mahdawi, *No Charges for Minneapolis Officer Who Killed Amir Locke During No-Knock Raid*, THE GUARDIAN (Apr. 6, 2022, 12:26 PM), <https://>

Amir Locke reached for his weapon to defend himself and was promptly shot and killed by Minneapolis police.¹⁰

Closer to home, the Raleigh Police Department is currently being sued for two no-knock raids performed in 2020.¹¹ Operating on bad information from a criminal informant, the officers barged in, frisked, and searched two separate families and ordered them to sit on the floor for over an hour inside their homes.¹² One of the men who the police searched during the raids was “paralyzed on his left side and wheelchair bound[,]” and at least four others there were minors.¹³ The same informant provided false information to the Raleigh Police at least fifteen separate times, leading to fifteen separate bogus arrests.¹⁴

Given the tragic outcomes of the use of no-knock warrants for both officers and civilians, this Comment argues that North Carolina lawmakers should no longer sanction their use. Part I will look to the background of the doctrine of knock-and-announce, and the reasons courts and legislatures deviated from the knock-and-announce standard. Part II will evaluate the harms imposed against the benefits alleged. Part III will examine what North Carolina has done and what other states are doing. Finally, Part IV will recommend what North Carolina still needs to do to ensure the protection and security of their civilians and police alike.

I. THE BACKGROUND OF THE KNOCK-AND-ANNOUNCE DOCTRINE

A. *The Common Law*

At common law, before officers could break and enter a premises, courts required officers to give notice of their office, authority, and purpose.¹⁵ The first case in which the knock-and-announce principle was

www.theguardian.com/us-news/2022/apr/06/amir-locke-death-no-charges-police-officer [https://perma.cc/8CGP-ZCFB].

10. *See id.*

11. *See* Maggie Brown, *Lawsuit Accuses Raleigh Police of Illegally Raiding Two Families’ Homes Using No-Knock Warrant*, WRAL NEWS (Feb. 22, 2022, 3:26 PM), <https://www.wral.com/lawsuit-accuses-raleigh-police-of-illegally-raiding-two-families-homes-using-no-knock-warrant/20153669/> [https://perma.cc/V6WM-TQ3P].

12. *Id.*

13. *Id.*

14. *Id.*

15. *See* Mark Josephson, *Fourth Amendment—Must Police Knock and Announce Themselves Before Kicking in the Door of a House?*, 86 J. CRIM. L. & CRIMINOLOGY 1229, 1236–37, 1249–50 (1996) (explaining the procedural and substantive history of the common-law principal of knock and announce).

formally recognized by an English court was *Semayne's Case* in 1603.¹⁶ The court stated:

In all cases when the King [] is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors[,] . . . for the law without a default in the 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, if he had notice, it is to be presumed that he would obey it¹⁷

While the holding of *Seymane's Case* left confusion about the circumstances under which breaking doors would be appropriate, treatise writers of the era were in consensus that announcement must precede the action of breaking down the door to enter.¹⁸

Over one hundred years later, the Court of the King's Bench applied the announcement requirements when officers executing a warrant broke down doors after demanding their admittance and giving due notice of their warrant.¹⁹ The court did not impose a duty to fulfill a certain recitation or formula of words. Instead, “[i]t is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority”²⁰ This holding suggested that the primary concern for the court was that officers might be mistaken for trespassers and be met with force from the dwellers therein.²¹

Lord Mansfield provided his own justification of the knock-and-announce rule in *Lee v. Gansel*.²² Writing for the court, Lord Mansfield said “the consequences would be fatal” if the law did not either force the police to seek another method of executing a court order or knock and announce, because to break in “would leave the family within, naked and exposed to thieves and robbers.”²³ Calling forced entry an “act

16. *See Semayne's Case* (1603) 77 Eng. Rep. 194, 195–96 (KB).

17. *Id.*

18. *See, e.g.,* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 138–39 (6th ed. 1738).

19. *See Case of Richard Curtis* (1757) 168 Eng. Rep. 67, 68 (Crown).

20. *Id.*

21. *See id.*

22. *Lee v. Gansel* (1774) 98 Eng. Rep. 935 (KB)

23. *Id.* at 938.

of violence,” the court suggested that “[i]t is much better therefore, says the law, that [the police] should wait for another opportunity”²⁴

A half-century later, the same court in *Launock v. Brown* took Lord Mansfield’s rationale a step further:

[I]f no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost.²⁵

After *Launock*, the justification for requiring officers to knock and announce their presence turned on the expectation—and seeming encouragement—of civilian “resist[ance] to the utmost” if the officers simply barged into private homes.²⁶ Taken together, the early common law cases suggest that the knock-and-announce doctrine was grounded on the idea that knocking and announcing was essential to the protection of both police officers and of the dwellers within.²⁷

B. *American Case Law and Constitutional Reconciliation*

The American colonies received the knock-and-announce rule and accepted it as the general principle for forcible entry in homes.²⁸ The foundational expression of American thought about warrant execution can be found in the Fourth Amendment to the United States Constitution, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²⁹

24. *Id.*

25. *Launock v. Brown* (1819) 106 Eng. Rep. 482, 483 (KB).

26. *See id.*

27. *Id.*

28. *See* G. Robert Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 504–08 (1964) (describing state-court decisions in the 17th and 18th centuries that required officers to knock-and-announce).

29. U.S. CONST. amend. IV.

Flowing from the text is the central theme that permeates all Fourth Amendment law: the notion of the protection of privacy. One outworking of this general principle is that a person's home is their "castle," and the government should only invade the privacy of that castle when it is reasonable to do so.³⁰ The Supreme Court gave this constitutional guarantee teeth in the landmark 1961 decision in *Mapp v. Ohio*, where the Court held that evidence produced by searches and seizures performed in violation of the Fourth Amendment is inadmissible in a criminal trial.³¹

But "knock and announce" is absent from the express language of the Fourth Amendment.³² Instead of its adoption at the founding elsewhere in the federal Constitution or through legislation by Congress, the knock-and-announce rule found its way into American jurisprudence through judicial interpretation of the phrase "unreasonable searches and seizures"³³

Principally built upon the same reasoning as the early English courts, American courts recognized the knock-and-announce rule because of overriding safety concerns. For instance, in 1860, a Massachusetts court held that a warrantless entry was illegal in part because of an officer's failure to give notice prior to entry under circumstances where no "immediate intervention of legal authority" existed.³⁴ And even in cases involving treason, officers were still required to announce their presence and a request to enter.³⁵

But in the late nineteenth century, courts began to shift the grounding of the principle from a rationale of safety to that of officer efficiency. In *Hawkins v. Commonwealth*, the officers did not knock and announce, but instead barged into a home in order to execute an arrest warrant because they believed that knocking and announcing would have given the offenders time to escape.³⁶ The Kentucky Court of Appeals agreed with the officers' reasoning and held that the warrant was duly executed and that no Fourth Amendment rights were violated.³⁷

30. See *Fourth Amendment*, CORNELL L. SCH., https://www.law.cornell.edu/constitution/fourth_amendment [<https://perma.cc/278B-PHU5>] (last visited Mar. 28, 2023).

31. *Mapp v. Ohio*, 367 U.S. 643, 655–57 (1961). However, in 2006 the Supreme Court held that violations of the knock-and-announce rule do *not* perforce implicate the exclusionary rule. *Hudson v. Michigan*, 547 U.S. 586, 599 (2006).

32. See U.S. CONST. amend. IV.

33. See *id.*; Blakey, *supra* note 28, at 504–08.

34. See *McLennon v. Richardson*, 81 Mass. 74, 77 (1860).

35. *Id.*; see *Kelsey v. Wright*, 1 Root 83, 83–84 (Conn. Super. Ct. 1783).

36. See *Hawkins v. Commonwealth*, 14 B. Mon. 318, 320–21 (Ky. 1854).

37. *Id.*

And in 1917, the federal government codified the knock-and-announce rule in the Espionage Act.³⁸ The Act provided that an officer could make a forced entry to execute a warrant “if, after notice of his authority and purpose, he is refused admittance.”³⁹ This proviso, now codified at 18 U.S.C. § 3109, applies against federal officers.⁴⁰ The Supreme Court has said that the statute simply “codif[ies] a tradition embedded in Anglo-American law,” and is subject to the same exceptions as the Fourth Amendment itself.⁴¹ For example, Section Nine of the Act expressly provides that notice of authority and purpose is not necessary “for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.”⁴²

But both the codified knock-and-announce rule in § 3109 and the same principle judicially implied in the Fourth Amendment are subject to certain exceptions.⁴³ The most significant here is the doctrine of exigent circumstances,⁴⁴ which includes situations where officers suspect that announcing their presence would be either (1) dangerous, (2) futile, or (3) result in the destruction of evidence.⁴⁵ In a telling illustration of the substantial discretion provided to law enforcement, of these three situations

38. See Espionage Act of 1917, ch. 30, § 8, 40 Stat. 217, 229 (1917) (current version at 18 U.S.C. §§ 792–99).

39. *Id.*

40. See *United States v. Gatewood*, 60 F.3d 248, 249 (6th Cir. 1995); *cf. United States v. Kennedy*, 32 F.3d 876, 882 (4th Cir. 1994) (noting that the statute’s framework perforce applies to state officers because it contains the same constitutional elements as does the Fourth Amendment.). Of course, the Fourth Amendment’s provisions apply against *state* officers through the Fourteenth Amendment. See *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961) (the Fourth Amendment, state officers cannot conduct unreasonable searches and seizures); *Mapp*, 367 U.S. at 657 (violations of the Fourth Amendment by state officers are subject to the exclusionary rule); *Ker v. State of Cal.*, 374 U.S. 23, 34 (1963) (warrantless searches by state officers subject to the Fourth Amendment’s reasonableness requirements).

41. *United States v. Banks*, 540 U.S. 31, 42–43 (2003) (quoting *United States v. Ramirez*, 523 U.S. 65, 72 (1998)).

42. *Id.* § 9.

43. Consent is a common exception. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

44. The term “exigent circumstances” was defined in *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984). The Ninth Circuit stated that exigent circumstances are “circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.” *Id.* at 1199.

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

where law enforcement is thought to be justified in departing from the practice of knocking and announcing, two are rationales offered *for* the practice.

In *Richards v. Wisconsin*, a landmark decision by the Supreme Court, these exceptions are clearly set forth.⁴⁶ After tracking a suspected drug dealer named Richards to a motel room, a state police officer acting under the guise of a maintenance worker coaxed Richards into opening his motel door.⁴⁷ But when he did so, Richards observed another uniformed officer waiting outside and immediately slammed the door shut.⁴⁸ The officers then kicked the door down and entered the motel room, finding cocaine and other drug paraphernalia therein.⁴⁹ In response to Richards's motion to suppress the evidence of the search, the officers relied on a blanket exception to the knock-and-announce rule laid down by the Wisconsin supreme court that "police in Wisconsin do not need specific information about dangerousness, or the possible destruction of drugs in a particular case, in order to dispense with the knock-and-announce requirement in felony drug cases."⁵⁰

The Supreme Court held that Wisconsin's blanket exception violated the Fourth Amendment because it (1) allowed for "considerable overgeneralization[.]" and (2) "permit[ed] a criminal-category exception[.]" which would open the door for exceptions in other categories, eliminating the effect of knocking and announcing entirely.⁵¹ Although the Court rejected Wisconsin's blanket exception, it ultimately held "that the officers' no-knock entry into Richards' motel room did not violate the Fourth Amendment . . . [because] the officers had a reasonable suspicion that Richards might destroy evidence if given further opportunity to do so."⁵² Thus, the Court reiterated its earlier holding in *Wilson v. Arkansas* that as a matter of constitutional law the common-law knock-and-announce rule was merely a presumption that yields under various circumstances.⁵³

46. *See id.*

47. *Id.* at 388.

48. *Id.*

49. *Id.* at 388–89.

50. *See id.* at 390; *see also* *State v. Stevens*, 511 N.W.2d 591, 598 (Wis. 1994).

51. *See Richards*, 520 U.S. at 393–94.

52. *Id.* at 395.

53. *Wilson v. Arkansas*, 514 U.S. 927, 937 (1995) ("[A]lthough a search or seizure of a dwelling might be constitutionally defective if police officers enter without a prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.").

Though the Supreme Court prevented blanket exceptions from destroying the knock-and-announce rule, the exceptions articulated by the Court in *Richards* gave law enforcement significant discretion.

C. North Carolina's Adoption and Application

Like the federal government, North Carolina has chosen to codify the knock-and-announce rule.⁵⁴ N.C. Gen. Stat. § 15A-249 requires an officer executing a search warrant to “give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched.”⁵⁵ Even “[i]f it is unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present.”⁵⁶ This statute has been in effect since 1973,⁵⁷ and has been cited innumerable times in North Carolina case law.⁵⁸

The knock-and-announce rule was explained by the North Carolina Court of Appeals “(1) to protect law enforcement officers and household occupants from potential violence; (2) to prevent the unnecessary destruction of private property; and (3) to protect people from unnecessary intrusion into their private activities.”⁵⁹ To qualify the rule set forth in this statute, however, the North Carolina legislature enacted N.C. Gen. Stat. § 15A-251, which provides that:

54. Though cast in terms of “general warrants,” Article I, § 20 of the North Carolina Constitution contains analogous protections against unreasonable searches and seizures to the Fourth Amendment. Differences in language notwithstanding, the North Carolina Supreme Court has held that the rights protected by the state constitution are coterminous with those rights protected by the Fourth Amendment. *State v. Garner*, 417 S.E.2d 502, 510 (N.C. 1992); *but see Jones v. Graham Cnty. Bd. of Educ.*, 677 S.E.2d 171, 178 (N.C. Ct. App. 2009) (suggesting that dicta by the North Carolina Supreme Court in which it construed the protections of Article I, § 18 as conveying *greater* rights than the federal constitution may perforce apply to Article I, § 20). Thus, although the state supreme court has not explicitly ruled on the matter, North Carolinians likely are protected by the knock-and-announce rule under Article I, § 20 of the state constitution as well. *See State v. Harris*, 551 S.E.2d 499, 506 (N.C. Ct. App. 2001).

55. *See* N.C. GEN. STAT. § 15A-249 (2021).

56. *Id.*

57. *Id.*

58. *See, e.g., State v. Robinson*, 881 S.E.2d 260, 265 (N.C. 2022); *State v. Winchester* 818 S.E.2d 306, 312 (N.C. Ct. App. 2018); *State v. Gaines*, 234 S.E.2d 42, 44 (N.C. Ct. App. 1977); *State v. Tate*, 294 S.E.2d 16, 20 (N.C. Ct. App. 1982).

59. *State v. Sumpter*, 563 S.E.2d 60, 61 (N.C. Ct. App. 2002) (quoting *State v. Harris*, 551 S.E.2d 499, 506 (N.C. Ct. App. 2001)).

An officer may break and enter any premises or vehicle when necessary to the execution of the warrant if: (1) The officer has previously announced his identity and purpose as required by G.S. 15A-249 and reasonably believes either that admittance is being denied or unreasonably delayed or that the premises or vehicle is unoccupied; or (2) The officer has probable cause to believe that the giving of notice would endanger the life or safety of any person.⁶⁰

The second disjunctive condition of this statute utilizes the reasoning provided by the court in *Sumpter*—namely, the protection of officers and persons from potential violence.⁶¹ But the reasoning is somewhat unclear: how can both knocking and announcing and *not* knocking and announcing promote officer and civilian safety? The answer bottoms on the police’s assessment of the situation.

The three exceptions to the Fourth Amendment’s requirement that police knock and announce their presence announced by the Supreme Court in *Richards* are a matter of federal constitutional law. Thus, because principles apply to North Carolinians and because two of these exceptions mirror the exceptions enumerated in North Carolina law, this Comment considers and critiques the rationale behind each justification. At bottom, these rationales do not justify the wide latitude given to law enforcement to avoid the knock-and-announce rule.

II. LOGICAL FALLACIES, SUBJECTIVE GUIDELINES, AND SOCIETAL HARMS

A. *Dangerous Situations*

The ultimate policy question is whether exceptions to knock-and-announce rule—such as no-knock warrants—are an acceptable compromise between the goals of effective crime control and respect for individual privacy.⁶² The North Carolina General Assembly has erred towards the former, holding that exceptions to the knock-and-announce rule should turn on probable cause standard.⁶³ But even if law enforcement

60. N.C. GEN. STAT. § 15A-251 (2021).

61. See *Sumpter*, 563 S.E.2d at 61.

62. This is true in both the legislative and judicial spheres. See, e.g., *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (“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.”)

63. This is a higher standard than the standard set forth by the Supreme Court in *Richards v. Wisconsin* for overriding Fourth Amendment protection. There, the Court held that

should possess the considerable discretion that it does, the content of an officer's justification based on safety should be more clearly defined prior to issuance of the no-knock warrant. The *Richards* Court elaborated its concerns about situations where officers would be endangered by announcing their presence and intent to execute a warrant.⁶⁴ But the Court only offered that the standard "showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged."⁶⁵

But the core of the problem is the same as it was in 18th Century England. While it is true that not announcing may give officers the element of surprise in confronting law breakers and hardened criminals, it does the same work on law-abiding citizens. In response to a knock-and-announce, most law-abiding citizens would answer the door, listen to the officer's request, and comply to the best of their ability. But, when the police decide to break in the door and infiltrate a private citizen's home in raid-like fashion in reliance on a no-knock warrant, there is no time for the denizens of the home to distinguish friend from foe. As courts have long recognized, this increases the odds of a violent confrontation between officers and civilians and the concomitant risks of injury and, in some cases, death.

The dilemma has remained more or less at the forefront of critiques of the legality of police intrusion into private homes. Consider Justice Jackson's concurrence in *McDonald v. United States*:

[T]he method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.⁶⁶

reasonable suspicion of harm is all that is necessary to justify invoking the exception. *Richards*, 520 U.S. at 394.

64. See *Richards v. Wisconsin*, 520 U.S. 385, 395 (1997).

65. *Id.* at 394–95.

66. *McDonald v. United States*, 335 U.S. 451, 460–61 (1948) (Jackson, J., concurring).

Unfortunately, the “luck” has run out. Taylor was a law-abiding citizen asleep in her bed, and Walker legally owned the firearm he used in an attempt to defend himself and a loved one.⁶⁷ There were no drugs, and the suspect the police were looking for was not present; there were only two people who wanted to live and who were willing to defend themselves.⁶⁸ A 911 Operator testified that Walker called 911 soon after discovering Taylor was shot, and “believe[ed] that someone was trying to break into the home.”⁶⁹ Even after Taylor was shot and dying, Walker had no idea who had breached and entered the residence, so he called the police. Unfortunately for Walker, the police could not help him. They were the perpetrators.

Luck was not on the side of officers either. Sergeant Jonathan Mattingly was also shot that night.⁷⁰ There is no robust, comparative empirical dataset on total police-civilian fatalities in the absence of no-knock warrants. However, a New York Times investigation that “relied on dozens of open-record requests and thousands of pages from police and court files, found that at least 81 civilians and 13 law enforcement officers died in [no-knock] raids from 2010 through 2016.”⁷¹ Though these reported fatalities occurred over the course of “thousands” of warrant executions each year, it is nevertheless unclear as an empirical matter that not knocking and announcing actually reduces risk to officers and civilians—the two groups that the common law principle was designed to protect.⁷² Ultimately, without guidance as to what situations impose a greater threat than not announcing, law enforcement and magistrates have even wider discretion to leap over a bar that the Supreme Court itself has stated “is not high”⁷³

B. Situations Where Announcing Would Be Futile

The Supreme Court held in *Miller* that announcement would be futile when the officers are “virtually certain” that occupants of the residence

67. See Opper et al., *supra* note 1.

68. See *id.*

69. *Id.*

70. *Id.*

71. Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017), <https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html?smid=pl-share&mtref=counciloncj.foleon.com&assetType=PAYWALL> [<https://perma.cc/5M2F-ZK2V>].

72. *Id.*

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

already have notice of the officers' purpose and identity.⁷⁴ The logic here stems from the fact that the whole purpose of knocking and announcing is to put occupants on notice that the police are there to execute a warrant.⁷⁵ If the occupants already know that, then why announce?

While the futility standard still relies on police discretion, it is less malleable than an assessment of "dangerousness," and thus cabins that discretion. The "virtual certainty" doctrine excuses officers from complying with the knock-and-announce principle when "the facts known to officers would justify them in being virtually certain that the [dweller] already knows their purpose so that an announcement would be a useless gesture."⁷⁶ Certainly, there are conceivable sets of facts will create difficult choices for police officers. But as a matter of simplicity—a virtue in high-stakes situations where assessments are made under pressure—the virtual certainty standard has stronger guardrails on police discretion baked in. For one thing, the assessment will generally require only a single assessment by the police,⁷⁷ while dangerousness has at least two.⁷⁸ Relatedly, the decision is binary, rather than a judgment made on a continuum: no holistic evaluation of all aspects of relative dangerousness is required. Justice Brennan wrote that the virtual-certainty test would serve as a threshold requirement before the futility exception could be applied.⁷⁹

Thus, the common-law purpose of providing the citizenry with notice that it is law enforcement, not a criminal intruder, kicking in their door remains largely served. Additionally, the higher standard of "virtual certainty" set by *Miller* has the potential to dissuade prudent officers from using it consistently, thus encouraging the practice of knocking and announcing.⁸⁰

C. *Situations Where Announcing Would Lead to the Destruction of Evidence*

The third exception announced by the *Richards* Court simply states that officers may fail to announce when "it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."⁸¹ While acquiring evidence is a critical goal of the justice system,

74. *Miller v. United States*, 357 U.S. 301, 310 (1958).

75. *See Wilson*, 514 U.S. 927, 936–37.

76. *Miller*, 357 U.S. at 310.

77. The question is, is it virtually certain that the occupants know the police are there?

78. The questions are whether the situation is dangerous, and if so, *how* dangerous?

79. *See Miller*, 357 U.S. at 310–13.

80. *See id.*

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

many have looked askance at the proposition that this interest outweighs the risks of a practice that since its inception intrinsically increases risk of fatal officer-civilian interaction.⁸²

Law enforcement necessarily must deal with probabilities when they execute warrants. Absent omniscient revelation, officers cannot know everything that is going to be on the other side of the door nor what events will transpire when they enter. Similarly, they do not know what evidence they will find on the other side. While there might be evidence to convict a murderer on the other side, there could also be a family of four in the sanctity of their home.

The Taylor case provides a stark example of the costs that must be weighed against the interest in acquiring evidence. The Louisville Metro Police Department was looking for two things when they executed the search warrant at the Taylor residence: (1) Jamarcus Glover, Taylor's former boyfriend and an alleged low-level drug dealer; and (2) illegal drug paraphernalia.⁸³ The police did not uncover either.⁸⁴ But even if Glover and his drug paraphernalia were present, would arresting him and confiscating his drugs be an equitable exchange for Taylor's life? What if Taylor and Walker had children with them in the room when their door was kicked in and Walker fired in defense of his loved ones? One death is far too many, but multiple deaths cannot be an equitable exchange for a potential drug arrest and confiscation, especially considering that same evidence could possibly have been obtained by simply knocking and announcing.

Moreover, there are workable alternatives for acquiring and preserving admissible evidence. In situations where officers are afraid the suspect may flee, the police should bring more officers to surround the exits. When drugs or other contraband are flushed, the police should pump the septic tanks. When files need to be recovered, the police can wait until the occupants are not home or knock on the door and wait a reasonable period before entry. All of these things consume scarce resources. However, those resources are vastly inferior to the expense of human life.

While Fourth Amendment protection is subject to evidentiary justifications as a matter of "reasonableness," North Carolina law does not permit no-knock warrants solely on the basis of preservation of evidence. N.C. Gen. Stat. § 15A-251 only provides a caveat to the knock-and-announce rule when "[t]he officer has probable cause to be-

82. *Cf. McDonald v. United States*, 335 U.S. 451, 460–61 (1948) (Jackson, J., concurring).

83. *See Opper et al.*, *supra* note 1.

84. *See id.*

lieve that the giving of notice would endanger the life or safety of any person.”⁸⁵ Construing that statute, the North Carolina Court of Appeals held in *State v. Brown* that a mere probability of evidence destruction does not justify a forcible, unannounced entry into a residence.⁸⁶

Thus, while the *Richards* exceptions apply to the Fourth Amendment’s protection via knock-and-announce, only the first exception has been explicitly recognized in North Carolina search-and-seizure law. But because the exception fails to put any outer limits on what qualifies as a dangerous situation, it creates the same longstanding risks for officers-civilian interactions.

III. WHAT HAS BEEN DONE

Most concrete actions regarding reform of no-knock warrants have occurred at the local level.⁸⁷ In North Carolina, for example, the Raleigh Police Department has decided to stop using no-knock warrants in response to growing criticism from local civil-rights groups concerning failed drug raids.⁸⁸ Police Chief Stella Patterson stated that “[a]s far as I am concerned and where I stand, that will be the position of this organization, that we do not seek or utilize no-knock warrants.”⁸⁹ The Chief reemphasized that no-knock warrants are dangerous for officers because they “[do not] know who or what is on the other side of that door. There could be individuals lying in wait. You never know.”⁹⁰

85. N.C. GEN. STAT. § 15A-251 (2021).

86. *State v. Brown*, 242 S.E.2d 184, 185–86 (N.C. Ct. App. 1978).

87. Since 2021, several bills have been proposed in North Carolina to reform the no-knock warrant process, but none have been enacted into law. *See, e.g.*, S.B. 656, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021) (proposal of requiring greater specificity in no-knock warrants); H.B. 656, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021) (proposing complete ban on no-knock warrants unless the entry is for the purpose of “rescu[ing] . . . a hostage that there is probable cause to believe is located on the premises”). Most recently, as will be discussed below, in April of 2023, a bill was introduced in the North Carolina House of Representatives by Representative Cecil Brockman that includes amendments to N.C. Gen. Stat. § 15A-244 requiring that for the safety exception in § 15A-251(2) to apply, the warrant application must include the factual basis for the exception. H.B. 731, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023).

88. *Brown*, *supra* note 11.

89. Joe Fisher, *RPD Says They Don’t Use No-Knock Warrants Amid Criticism from Civil Rights Groups*, WRAL NEWS (Feb. 23, 2022, 6:46 PM), <https://www.wral.com/rpd-says-they-don-t-use-no-knock-warrants-amid-criticism-from-civil-rights-groups/20155737/> [<https://perma.cc/UVY7-35Y7>].

90. *Id.*

And in Buncombe County, the Sheriff instituted a similar administrative policy. Sheriff Miller argued that a complete ban on no-knock warrants serves as “both an officer safety and public safety measure” because “[e]ntering a residence or business without giving notification is a high-risk endeavor . . . [and] th[e] level of risk is not warranted.”⁹¹ The administrative policy reads:

Before entering, deputies must knock and give appropriate notice of their identity and purpose to the person in apparent control of the premises to be entered. After announcing their identity and purpose, and if the deputies believe that admittance is being denied or unreasonably delayed, the force necessary to complete the entry may be used.⁹²

These local actions demonstrate a welcome commitment to officer and civilian safety. As will be discussed, however, their durability and staying power as a permanent policy position leaves much to be desired.

IV. WHAT NEEDS TO BE DONE

The administrative changes undertaken by the Raleigh Police Department and the Buncombe County Sheriff’s Department has prompted other jurisdictions, such as the Charlotte-Mecklenburg Police Department, to examine their no-knock warrant policies and procedures.⁹³ While banning no-knock warrants has been an important step for North Carolina’s law-enforcement agencies, reliance on administrative policy is problematic.

The problem is that although these law-enforcement agencies have exercised their discretionary authority to not employ no-knock warrants now, this does not mean they will not use them later. The goodwill of law-enforcement agencies may run out whenever the national spotlight moves on from no-knock warrants, or when a new administration takes over. Given this fact, the North Carolina General Assembly should take

91. Kristy Kepley-Steward & Lauren Brigman, *Buncombe County Sheriff Bans No-Knock Warrants in Policy*, ABC13 NEWS (Apr. 26, 2022), <https://wlos.com/news/local/buncombe-county-bans-no-knock-warrants-in-policy-sheriff-quentin-miller-search-warrant-asheville> [<https://perma.cc/74JZ-Q2YV>].

92. *Id.*

93. See Lana Harris, *Are ‘No-Knock’ Warrants Allowed in the Carolinas?*, WCNC (Feb. 7, 2020, 7:15 PM), <https://www.wcnc.com/article/news/state/status/no-knock-warrants-north-south-carolina/275-ad2ae0a2-a0ed-4710-830d-3dd3f1e1f44a> [<https://perma.cc/FRH9-7UAW>].

the affirmative step of removing or cabining the discretionary use of no-knock warrants by magistrates and law-enforcement agencies.

To do this, the legislature could look to other states who have banned or limited these warrants. For example, Oregon, Florida, and Virginia have already implemented a full ban on no-knock warrants.⁹⁴ The relevant statute in Oregon reads: “The executing officer shall, before entering the premises, give appropriate notice of the identity, authority[,] and purpose of the officer to the person to be searched, or to the person in apparent control of the premises to be searched, as the case may be.”⁹⁵ Thus, this statute simply removes any exceptions.⁹⁶ North Carolina could easily adopt a similar scheme.

Other states, such as Utah, have implemented outright bans on no-knock warrants for misdemeanor investigations.⁹⁷ And Utah has added additional conditions to obtain no-knock warrants for certain felony investigations.⁹⁸ Some of these added conditions include performing a “threat assessment” on the person or building, “ensur[ing] reasonable intelligence gathering efforts have been made[,]” and independently performing assessments from “the totality of the circumstances”⁹⁹ If North Carolina magistrates hold law enforcement to a higher standard before approving a no-knock warrant, fewer will issue; in this way, the opportunities for deadly altercations between officers and civilians will be reduced.

An approach that has already been explored in North Carolina is an increase in the judicial scrutiny required for the issuance of a no-knock warrant. This tack has been most recently taken in Congressman Brockman’s proposed legislation.¹⁰⁰ The proposed changes to the issuance of no-knock warrants in N.C. Gen. Stat. § 15A-244 reads as follows:

“(b) For an officer to be able to break and enter any premises or vehicle in the execution of a search warrant pursuant to [N.C.] G[en]. [S]tat. [§] 15A-251(b) [sic], the application for a search warrant under subsection (a) of this section must also contain:

94. See Nathan Diller, *Virginia Becomes Third State to Ban No-Knock Search Warrants*, NPR (Oct. 29, 2020), <https://www.npr.org/local/305/2020/10/29/929108657/virginia-becomes-third-state-to-ban-no-knock-search-warrants> [https://perma.cc/VB86-FX77].

95. OR. REV. STAT. § 133.575 (2022).

96. See *id.*

97. See UTAH CODE ANN. § 77-7-8.1(6) (West 2022).

98. See *id.* § 77-7-8.1(3).

99. *Id.*

100. See H.B. 731, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023).

(1) A statement that there is probable cause to believe that the giving of notice of the execution of the search warrant would endanger the life or safety of any person.

(2) Allegations of fact particularly setting forth the facts and circumstances establishing probable cause to believe that the giving of notice of the execution of the search warrant would endanger the life or safety of any person.”¹⁰¹

Mirroring earlier proposed North Carolina bills, Congressman Brockman’s more moderate approach has two advantages. First, it can reduce the danger occasioned by these warrants. As suggested above, a more exacting judicial review by an issuing magistrate will likely reduce the issuance of these dangerous warrants and channel law enforcement’s implementation of other, less hazardous, tactics. Second, given likely political headwinds, a moderate change is more likely to engender sufficient support in both chambers than an outright ban. Of course, such a change would not affect a voluntary decision by law enforcement to entirely forgo the use of no-knock warrants; but it would create a protective floor for the rights of North Carolinians above the lower standards of the Fourth Amendment.

Aside from legislative action, other states’ judicial branches have decided to act. For example, the Supreme Court of South Carolina issued an order which placed a moratorium on issuing no-knock warrants until judges are given more concrete criteria on when they should be issued.¹⁰² According to the order, a survey of the South Carolina magistrate judges “revealed that most do not understand the gravity of no-knock warrants and do not discern the heightened requirements for issuing a no-knock warrant.”¹⁰³ The order stated further that it “appears that no-knock search warrants are routinely issued upon request without further inquiry.”¹⁰⁴ Interestingly, further instruction is to come from the South Carolina judiciary, not the South Carolina legislature, despite it being the legislature’s duty to provide laws for the courts to look to.¹⁰⁵

Ultimately, even though it originated in the judiciary, this administrative decision poses the same issues as the law-enforcement decisions to

101. *Id.*

102. See Donald Beatty, *Issuance of No-Knock Search Warrants by Circuit and Summary Court Judges*, S.C. JUD. BRANCH (July 10, 2020), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2020-07-10-01> [<https://perma.cc/4W3Y-ZBEJ>].

103. *Id.*

104. *Id.*

105. *See id.*

suspend no-knock warrants. The courts in South Carolina are not waiting for legislative action; rather, they are waiting for the South Carolina Supreme Court to hand down further intelligible principles to guide magistrate judges concerning no-knock warrants.¹⁰⁶ The South Carolina legislature's reluctance to act has paved the way for the practice to continue whenever the South Carolina Supreme Court deems the practice safe again for magistrates to issue.

Until the North Carolina legislature is able to pass a law restricting the issuance of no-knock warrants, more fatal officer-civilian interaction is likely. The all-too-real examples of Taylor and Locke illustrate the substantial cost in human life associated with the use of these warrants by law enforcement. And with other states making strides to limit the use of these risky tools, North Carolina is increasingly isolated in reliance only on the goodwill of its law-enforcement administrators. Instead, it should pass legislation that respects and protects both its officers and its civilians from what is by all accounts a long-understood source of danger.

CONCLUSION

The knock-and-announce principle has deep roots in both English and American common law and was founded on the belief that it promotes both officer and civilian safety. The departure from that principle has led to the creation of the no-knock warrant. Purportedly justified by officer and civilian safety, American courts have allowed officers to forgo the sound practice of knocking and announcing in the face of exigent circumstances that include danger to police officers or to others.

Although the United State Supreme Court set forth three exigent circumstances exceptions to the Fourth Amendment's knock-and-announce requirement, this Comment has argued that under North Carolina law, a higher standard for what constitutes a dangerous situation where safety is at risk should be employed. If the existence of exigent circumstances that justify departure from knocking and announcing based on safety of officers and civilians are determined by discretion of the police, the circumstances that trigger the exception must be cabined by more exacting judicial review prior to the issuance of the warrant.

There is always a risk factor involved with executing a warrant because officers do not know what is on the other side of a door when they break it in. But when no announcement is made, occupants are unaware of who is breaking into their home. And since the early days of the Eng-

106. *See id.*

lish common law, a defensive response from occupants who are unaware of the intruder's identity has been acknowledged and expected.

Reliance on administrative policy eschewing the use of no-knock warrants is not enough. While some law-enforcement agencies within North Carolina have chosen this route as a matter of policy, that same discretion permits later rescission of the policy. Instead, the North Carolina General Assembly must act. In this way, the General Assembly can act to prevent North Carolina families from experiencing the pain and loss that the families of Breonna Taylor and Amir Locke have endured.

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