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TO KNOCK OR NOT TO KNOCK? NO-KNOCK WARRANTS AND CONFRONTATIONAL POLICING

BY BRIAN DOLAN[†]

Police are left to instigate violence as a means of resolving any social deadlock, to add violence to situations they feel to be ambiguous. But if we can really see, and see through, police, we may see that this becomes a way of injecting *testing* violence [or domination] into the heart of society in a *public* way. Police test what violence we, as citizens, will allow, and against whom. Small comfort, perhaps, since there is no guarantee that we will oppose the wicked things that police may show us. Our neighbors may support that wickedness. We may have no idea how to fix it. Still, police violence differs from forms of violence and domination that have no visible presence or public check. The police measure out in public what the society will tolerate, even to our shame.¹

INTRODUCTION

Around 4 a.m. on December 5, 2017, a team of New York City police officers, armed with a no-knock search warrant, broke down ninety-two year-old Natalio Conde's front door without warning and began methodically searching his Bronx apartment.² Waking to the sound of people moving around his home, Mr. Conde, in poor health and in no condition to tussle

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¹ Mark Greif, *Seeing Through Police*, N+1 FOUNDATION, Spring 2015, <https://nplusonemag.com/issue-22/police/seeing-through-police/> (second emphasis added).

² James C. McKinley Jr., *After Police Raids Kills Man, 69, Family Asks Why Trigger Was Pulled*, N.Y. TIMES (Dec. 13, 2017), https://www.nytimes.com/2017/12/13/nyregion/nypd-police-shooting-bronx-mario-sanabria-lawsuit.html?smid=tw-share&_r=1&mtref=t.co.

with intruders, became frightened and remained in bed, motionless.³ From his bed, Mr. Conde saw a man pushing his brother-in-law, 69-year-old Mario Sanabria, into the room.⁴ Mr. Conde heard his brother-in-law ask, “What’s happening?” and then heard a shot.⁵ The shot hit Mr. Sanabria in the chest and killed him.⁶

A few months earlier, during the predawn hours of July 26, 2017, federal agents, armed with a no-knock search warrant, picked the lock on the front door of former Trump campaign chairman Paul Manafort’s home in Alexandria, Virginia, and raided the house.⁷ In the wake of the raid, a number of commentators expressed concern about the use of no-knock warrants in connection with white-collar investigations.⁸ Since the Manafort raid, these commentators have described no-knock warrants as a “shock and awe” tactic,⁹ as a tool that strikes terror in people’s hearts,¹⁰ and as more appropriate for going after organized crime syndicates than white-collar criminals.¹¹ Echoing these sentiments, Jonathan Turley, a professor at George Washington University Law School, described the Manafort raid as “gratuitous” and “excessive,” and stated that “no-knock warrants were designed primarily for dangerous drug dealers.”¹² Moreover, he went on to say, “what did they think he

³ *Id.*

⁴ *Id.* The police alleged that Sanabria confronted them with a machete; Mr. Conde said that he did not see a machete in Sanabria’s hand. *Id.* There was a machete in the apartment, but Mr. Conde said it was a souvenir that belonged to him, and that he did not think Sanabria knew it was there. *Id.*

⁵ *Id.*

⁶ *Id.* The police were looking for Mario Sanabria’s nephew, Miguel Conde, and had information that there was a gun and narcotics in the apartment. *Id.* Miguel Conde had not lived in the apartment for several months, and aside from the stub of a marijuana cigarette and a pocketknife, the police found no weapons or narcotics. *Id.*

⁷ Sharon LaFraniere et al., *With a Search Warrant and a Threatened Indictment, Mueller’s Inquiry Sets a Tone*, N.Y. TIMES (Sep. 18, 2017), https://www.nytimes.com/2017/09/18/us/politics/mueller-russia-investigation.html?_r=0.

⁸ Carol D. Leonnig et al., *FBI Conducted Predawn Raid of Former Trump Campaign Chairman Manafort’s Home*, WASH. POST (Aug. 9, 2017), https://www.washingtonpost.com/politics/fbi-conducted-predawn-raid-of-former-trump-campaign-chairman-manafort-s-home/2017/08/09/5879fa9c-7c45-11e7-9d08-b79f191668ed_story.html?tid=a_inl&utm_term=.0991546db134.

⁹ *Id.*

¹⁰ LaFraniere et al., *supra* note 7.

¹¹ *Id.*

¹² *Law Scholar Says Manafort No-Knock Warrant ‘Excessive’*, MSNBC, <http://www.msnbc.com/morning-joe/watch/law-scholar-says-manafort-no-knock-warrant-excessive-1022455363688>.

was going to do? Try to flush his laptop down the toilet or meet them at the door with a Glock?”¹³ Others expressed the belief that obtaining a no-knock search warrant is particularly difficult and that magistrates subject search warrant applications to a great deal of scrutiny.¹⁴ Finally, some suggested that no-knock warrants are typically only used in the most serious criminal investigations.¹⁵

It is puzzling that the use of a no-knock warrant against Manafort drew such condemnation because the only remarkable thing about the raid is how smoothly it went. There was no property damage, nobody was injured or killed, and no shots were fired.¹⁶ While the relatively tame Manafort raid garnered widespread attention from various corners of the legal profession¹⁷—no doubt because Manafort is a powerful, well-connected member of the Washington establishment—the Conde raid primarily drew condemnation from family members of the victim.¹⁸

The above comments thus raise several issues regarding the use of no-knock search warrants, which this Note discusses in detail. First, no-knock warrants are, in general, gratuitous and excessive, regardless of whether the target of the search is a member of our society’s elite class like Manafort, or is an ordinary citizen like Conde, because their execution involves a substantial risk of violence to both homeowners and law enforcement.¹⁹ Between 2010 and 2016, at least ninety-four people died during the execution of no-knock search warrants,

¹³ *Id.*

¹⁴ Radley Balko, *No-Knock Raids Like the One Against Paul Manafort are More Common Than You Think*, WASH. POST (Aug. 10, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/08/10/no-knock-raids-like-the-one-against-paul-manafort-are-more-common-than-you-think/?utm_term=.f49b264d28b4 [hereinafter Balko, *No-Knock Raids*] (quoting author and legal analyst Jeffrey Toobin, who said, “Magistrate judges don’t give authorizations for searches of people’s homes lightly. I mean, this is a big deal.”); *see also* Leonnig et al., *supra* note 8 (“A federal judge signing this warrant would demand persuasive evidence of probable cause that a serious crime has been committed.”).

¹⁵ *Id.* (quoting Sen. Richard Blumenthal).

¹⁶ *Compare* LaFraniere et al., *supra* note 7, *with* McKinley Jr., *supra* note 2.

¹⁷ *Supra* notes 8–15 and accompanying text.

¹⁸ McKinley Jr., *supra* note 2 (“It was an injustice,” his sister said).

¹⁹ *McDonald v. U.S.*, 335 U.S. 451, 460–61 (1948) (Jackson, J., concurring) (describing forcible entry without announcement as “a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves”).

thirteen of whom were police officers.²⁰ Nevertheless, the comments above suggest no-knock warrants are only gratuitous and excessive when used against well-heeled individuals suspected of white-collar crimes, such as Manafort, but that the risks are justified when investigating drug dealers and other more “dangerous” criminals. Second, Professor Turley’s comments directly conflate drug dealers with violence and danger to police—a relationship that is not supported by empirical evidence.²¹ Despite the lack of empirical support, the presumption that drugs and violence are directly related is deeply rooted in our society,²² and this partially explains why no-knock warrants are frequently used when police search for drugs.²³ Finally, the above comments suggest that applications for no-knock warrants are put under much greater judicial scrutiny than is actually the case.²⁴

²⁰ 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> [hereinafter Sack, *Door-Busting Drug Raids*].

²¹ Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 278–279 (2015) (discussing the lack of empirical evidence of a direct relationship between drugs and violence, and summarizing research suggesting that drug-related violence is more closely related to other factors such as environment, personality, or age).

²² *Id.* at 246–252, 255–264 (describing politicians’ “War on Drugs” rhetoric and its effect on public perception of linking drugs and violence, and also discussing case law and statutes that rely on the perceived link between drugs and violence).

²³ *See id.* at 267–268 (noting that, in the context of no-knock warrants, courts readily assume officer safety is threatened in drug cases); Radley Balko, Opinion, *Little Rock’s Dangerous and Illegal Drug War*, WASH. POST (Oct. 14, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/10/14/little-rocks-dangerous-and-illegal-drug-war/?utm_term=.41d32be5732c [hereinafter Balko, *Little Rock’s Drug War*] (“[T]he narcotics unit appears to be routinely violating the Fourth Amendment by serving nearly all of its warrants with no-knock raids.”); AMERICAN CIVIL LIBERTIES UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 33 (2014) [hereinafter ACLU, WAR COMES HOME] (reporting findings that “[n]o-knock warrants were used (or probably used) in about 60 percent of incidents in which SWAT teams were searching for drugs”); Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1, 8 n.8 (1997) (“Courts are more than willing to issue ‘no-knock if necessary’ warrants, particularly in cases characterized as drug-related.” (quoting *Moss v. City of Colorado Springs*, 871 F.2d 112, 133 (10th Cir. 1989))).

²⁴ Richard Van Duizend, L. Paul Sutton, Charlotte A. Carter, NATIONAL CENTER FOR STATE COURTS, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 26-27 (1984) (“The average length of the magisterial review in the proceedings we observed was two minutes and forty-eight seconds. The median time was two minutes and twelve seconds[,]” and ten percent were approved in less than a minute. In addition, of the proceedings observed, only eight percent of warrant applications were denied.); Balko, *Little Rock’s Drug War*, *supra* note 23 (“[The narcotics unit is] asking for no-knock warrants without demonstrating why

This Note proceeds in three parts. Part I begins by explaining what no-knock warrants are and why they are used. Part I then addresses recent state legislative efforts to reform no-knock warrant use and argues that these efforts, however well-intentioned, are insufficient. Part I will also provide a brief history of how no-knock warrant use developed and gives an overview of the current status of state law regarding no-knock warrants. Part II argues that, contrary to the arguments of no-knock proponents, elimination of no-knock warrants and strict adherence to the knock-and-announce requirement is a more effective way to ensure the safety of both law enforcement officers and civilians. Part III proposes comprehensive legislation that state legislatures can adopt to protect the safety of law enforcement officers and civilians and to ensure that citizens' civil liberties are respected. Part III argues that the most effective solution is for states to prohibit the use of no-knock warrants, require execution of traditional search warrants during daylight hours, and apply the exclusionary rule to knock-and-announce violations.²⁵

I. NO-KNOCK WARRANT USE BY STATE & LOCAL LAW ENFORCEMENT

A. *What are No-Knock Warrants and Why are They Used?*

A no-knock search warrant authorizes the executing officer's entrance of premises to be searched without giving notice of his authority and purpose, usually upon reasonable suspicion that knocking and announcing would be dangerous or would result in the destruction of evidence.²⁶ No-knock warrants differ from

each suspect merits a no-knock entry, as required by federal law. Worse yet, Little Rock judges are then signing off on these warrants.”); *see also* Jessica Miller & Aubrey Wieber, *Warrants Approved in Just Minutes: Are Utah Judges Really Reading Them Before Signing Off?*, SALT LAKE TRIB. (Jan. 16, 2018), <https://www.sltrib.com/news/2018/01/14/warrants-approved-in-just-minutes-are-utah-judges-really-reading-them-before-signing-off/>; Editorial, *Getting a Warrant Should Be Harder Than It Is*, SALT LAKE TRIB. (Jan. 16, 2018), <https://www.sltrib.com/opinion/editorial/2018/01/16/tribune-editorial-getting-a-warrant-should-be-harder-than-it-is/> [hereinafter Editorial, *Getting a Warrant*].

²⁵ *See infra* Part III.

²⁶ *See, e.g.*, N.Y. CRIM. PROC. LAW § 690.35(4)(b) (McKinney 2017). *See also* Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (“In order to justify a ‘no-knock’ entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or

traditional search warrants because they authorize law enforcement to dispense with the common-law “knock-and-announce” requirement. The knock-and-announce requirement mandates that, before forcibly entering a private residence to execute a search warrant, police must provide prior notice of their authority and purpose, usually by knocking on the door and announcing that they are police who are present to execute a search warrant.²⁷ Historically, the knock-and-announce requirement was viewed as an indispensable protection for both citizens and police, for homeowners against unreasonable searches and seizures,²⁸ and for law enforcement officers against fearful homeowners who might mistake them for burglars or prowlers.²⁹ Other concerns underlying the knock-and-announce requirement include protecting the individual’s right to privacy, giving the homeowner the chance to redirect police officers at the wrong address in cases of mistaken identity,³⁰ providing an opportunity for persons to comply with the law, avoiding property damage,³¹ and giving people the chance to put on clothes or get out of bed.³²

that it would inhibit the effective investigation of crime by, for example, allowing the destruction of evidence.”).

²⁷ *Miller v. United States*, 357 U.S. 301, 313 (1958) (holding that “petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose”). The knock-and-announce requirement has a long, established history at common law, both in the United States and in England, and dates back to the thirteenth century. *See Hudson v. Michigan*, 547 U.S. 586, 605–06 (2006) (Breyer, J., dissenting); *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995) (holding that the principle of announcement is an element of the reasonableness inquiry under the Fourth Amendment); *Ker v. State of California*, 374 U.S. 23, 54–55 (1963) (Brennan, J., concurring in part and dissenting in part) (finding that “no English decision which clearly recognizes any exception to the requirement that the police first give notice of their authority and purpose before forcibly entering a home”). The requirement is codified at 18 U.S.C. § 3109 (2012).

²⁸ U.S. CONST. amend. IV; *Wilson*, 514 U.S. at 929.

²⁹ *Miller*, 357 U.S. at 313 n.12; *McDonald v. United States*, 335 U.S. 451, 460–61 (1948) (Jackson, J., concurring).

³⁰ *Ker*, 374 U.S. at 57–58; Craig Hemmens & Chris Mathias, *United States v. Banks: The “Knock-and-Announce” Rule Returns to the Supreme Court*, 41 IDAHO L. REV. 1, 7–8 (2004).

³¹ *Richards*, 520 U.S. at 393 n.5.

³² *Id.*; *see also* Charles Patrick Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 COLUM. L. REV. 685, 690–691 (1993) (describing four important purposes served by the knock-and-announce rule); Hemmens & Mathias, *supra* note 30, at 8.

B. Where We Are Now: State-Level Efforts to Reform No-Knock Warrant Use

In recent years, there has been growing public recognition that no-knock raids are an unnecessarily aggressive and intrusive law enforcement practice,³³ and a couple of states, most notably Utah and Georgia, have made legislative efforts to address these concerns.³⁴ For example, a pair of Georgia bills proposed in 2015 would have required execution of no-knock warrants between 6 a.m. and 10 p.m. and would have required a higher showing of proof before such warrants could be issued.³⁵ In addition, the legislation would have required police to have an “operational plan” for executing no-knock warrants and create a training program related to applying for and executing no-knock warrants.³⁶

³³ See, e.g., Sack, *Door-Busting Drug Raids*, *supra* note 20; McKinley, *supra* note 2; Editorial, *Risks Often Outweigh Benefits of No-Knock Search Warrants*, ST. LOUIS POST-DISPATCH (Mar. 20, 2017), http://www.stltoday.com/opinion/editorial/editorial-risks-often-outweigh-benefits-of-no-knock-search-warrants/article_6f6219d1-defe-57b0-8ea0-a8668159b88a.html; Editorial, *State Should Address No-Knock Raids*, CONCORD MONITOR (Mar. 22, 2017), <http://www.concordmonitor.com/The-danger-of-no-knock-raids-8822918>; Dave Faherty, *Channel 9 Investigates Controversial Use of No-Knock Search Warrants*, W-SOC TV (May 1, 2017), <http://www.wsocvtv.com/news/9-investigates/channel-9-investigates-controversial-use-of-no-knock-search-warrants/518161168>; Editorial, *Our View: Review Police Raids*, OGDEN STANDARD-EXAMINER (Mar. 6, 2014), <http://www.standard.net/stories/2013/08/05/our-view-review-police-raids>; David Koon, *Shot in the Dark*, ARKANSAS TIMES (Apr. 24, 2008), <https://www.arktimes.com/arkansas/shot-in-the-dark/Content?oid=948430>.

³⁴ UTAH CODE ANN. § 77-23-210(8) (West 2015); UTAH CODE ANN. § 77-7-8 (3) (West 2015); S.B. 45, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015); H.B. 56, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015); S.B. 94, 154th Gen. Assemb., Reg. Sess. (Ga. 2017). Maryland is considering legislation designed to increase transparency regarding no-knock warrant use. See Radley Balko, *Maryland Legislature Mulls New SWAT Transparency Bill*, WASH. POST (Mar. 19, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/03/19/maryland-legislature-mulls-new-swat-transparency-bill/> (noting that the Maryland legislature is currently considering a bill that would require state and local law enforcement agencies to report “the legal authority, including type of warrant, if any, for each activation and deployment [of a tactical team]”).

³⁵ S.B. 45, No. LC 29 6124, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015); H.B. 56, No. LC 29 6134, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015).

³⁶ S.B. 45, No. LC 29 6124, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015); H.B. 56, No. LC 29 6134, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015). The Georgia bills did not pass but have since been reintroduced. S.B. 94, No. LC 29 7163, 154th Gen. Assemb., Reg. Sess. (Ga. 2017). However, the revised bill only raises the standard of proof for obtaining a no-knock warrant to probable cause; it does not require execution of no-knock between 6 a.m. and 10 p.m. *Id.*

Utah, for its part, amended its search warrant statute by prohibiting no-knock warrants when the only crime suspected is drug use, drug possession, or possession of drug paraphernalia.³⁷ Utah also enacted a statute in 2014 that set forth reporting requirements regarding the use of tactical groups and forcible entry to execute search warrants, making Utah the only state with a law requiring all law enforcement agencies to report all instances of forced entry into a private residence.³⁸ That statute also requires law enforcement agencies to report the type of warrant obtained and the name of the magistrate who authorized the warrant, among other information, each time a tactical group is deployed or police officers use forcible entry.³⁹

While these legislative efforts are laudable, they miss the mark and fail to adequately respond to concerns about no-knock warrants in ways that will make a practical difference for civilians and law enforcement officers. For instance, the Georgia proposals would have been far more meaningful if they required the execution of *traditional* search warrants between 6 a.m. and 10 p.m. because that would increase the likelihood that residents actually hear the police when they knock and announce their presence, giving residents a real opportunity to answer the door and comply.⁴⁰ On the other hand, requiring execution of no-knock warrants between 6 a.m. and 10 p.m. misses the point entirely. Indeed, it is not farfetched to imagine that this

³⁷ UTAH CODE ANN. § 77-23-210(8) (West 2018). Utah Representative Marc Roberts plans to introduce H.B. 83 in 2018, which would require judges to place no-knock warrant applications under stricter scrutiny. Jessica Miller & Aubrey Wieber, *Utah Cops Would Have to Answer More Questions Before Getting a No-Knock Warrant, Under New Proposal*, SALT LAKE TRIB. (Jan. 14, 2018), <https://www.sltrib.com/news/2018/01/14/utah-cops-would-have-to-answer-more-questions-before-getting-a-no-knock-warrant-under-new-proposal/>. The bill would also prohibit using force to enter a home if the suspect is only accused of possession with the intent to distribute, but would still allow for forcible entry upon a showing of probable cause that a suspect was actually selling drugs. *Id.*

³⁸ UTAH CODE ANN. § 77-7-8.5 (West 2014); Radley Balko, *Data Show That in Utah, SWAT-Style Tactics Are Overwhelmingly Used to Serve Drug Warrants*, WASH. POST (Aug. 17, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/08/17/data-show-that-in-utah-swat-style-tactics-are-overwhelmingly-used-to-serve-drug-warrants/?utm_term=.990b2cf8005a [hereinafter Balko, *Utah Data*].

³⁹ UTAH CODE ANN. § 77-7-8.5 (West 2014).

⁴⁰ Balko, *Utah Data*, *supra* note 38 (noting that knock-and-announce raids at night are, in effect, indistinguishable from no-knock raids); *see also* Jacob Sullum, *Hasty Drug Warriors Are a Menace*, REASON (Jan. 28, 2015), <http://reason.com/archives/2015/01/28/hasty-drug-warriors-are-a-menace> (arguing that the proposed Georgia legislation might not have prevented the tragedy that inspired its introduction).

requirement could actually increase the risk of violent confrontation because homeowners are more likely to be alert and awake. Such a requirement also makes little difference for people who sleep past 6 a.m. or go to sleep before 10 p.m.—who are just as likely to be asleep as others would be in the middle of the night.⁴¹

Reform efforts calling for increased training and operational planning are sound in theory, but it is unlikely that any amount of training and operational planning can eliminate the potential for violent confrontations when police crash through the front door of private residences and frighten the people inside.⁴² The reporting and transparency requirements are a welcome development, but eliminating the use of no-knock warrants would be a far more helpful measure than simply gathering data on their use.

One other noteworthy development out of Utah is a bill introduced in the House earlier this year. The bill would require that, before seeking a warrant, a supervisory official perform an independent risk assessment using the officer's affidavit and other relevant information to "evaluate the totality of the circumstances and ensure reasonable intelligence gathering efforts have been made."⁴³ The bill would also require that the relied-upon affidavit describe all investigative activities undertaken to ensure that the correct address is identified and that potential harm to innocent third-parties, the property, and the officers is minimized.⁴⁴

The Utah Legislature's decision to prohibit no-knock warrants in drug possession cases is the most significant of the reform efforts to date. No-knock warrants have become a regular feature of serious and not-so-serious drug investigations alike.⁴⁵ However, this reform falls short because it still leaves open the possibility that no-knock warrants will be used against those

⁴¹ See, e.g., Jessica Miller, *Police Detail What Went Wrong in Fatal Shootout with Matthew David Stewart*, SALT LAKE TRIB. (Jul. 17, 2014), <http://archive.sltrib.com/article.php?id=58190599&itype=CMSID> [hereinafter Miller, *Fatal Shootout*] (describing violent confrontation resulting from no-knock warrant executed around 8:30 p.m. while suspect, who worked the overnight shift, was sleeping).

⁴² See *infra* Section II.A.

⁴³ H.B. 83, 2018 Leg., 62nd Sess. (Utah 2018).

⁴⁴ *Id.*

⁴⁵ Balko, *Utah Data*, *supra* note 38; see also sources cited *supra* note 23; Sack, *Door-Busting Drug Raids*, *supra* note 20; Koon, *supra* note 33; Miller, *Fatal Shootout*, *supra* note 41.

suspected of selling drugs, even if they are small-time, as well as scores of other nonviolent suspects.⁴⁶ There is grave danger to both civilians and police officers whenever no-knock entries are executed.⁴⁷ While more transparency is generally welcomed in the realm of policing and increased training is a step in the right direction, neither of these solutions addresses the reality that no-knock warrants are inherently dangerous for both police and civilians. No amount of after-the-fact review can undo the damage occasioned by no-knock raids that go sideways.

If states wish to create meaningful reform, state legislatures should prohibit no-knock warrants, mandate strict compliance with the knock-and-announce requirement, require execution of traditional search warrants during daylight hours, and authorize application of the exclusionary rule for knock-and-announce violations.⁴⁸ Unfortunately, legislative efforts thus far have been largely reactive and state legislators have been too reluctant to take action until tragedy strikes.⁴⁹ It is imperative that states begin to take proactive legislative measures to rein in the use of no-knock warrants.

⁴⁶ See, e.g., Sack, *Door-Busting Drug Raids*, *supra* note 20 (reporting use of no-knock warrants in investigations of illegal poker games, brewing moonshine, and neglecting pets); Sarah Fenske, *City to Change "Nuisance Property" Policy After No-Knock Raid on Wrong House*, RIVERFRONT TIMES (Aug. 20, 2018), <https://www.riverfronttimes.com/newsblog/2018/08/20/city-to-change-nuisance-property-policy-after-no-knock-raid-on-wrong-house> (describing St. Louis's "Project 87," which used no-knock warrants to enter "nuisance properties," whose residents were typically cited for minor code violations).

⁴⁷ See *infra* Part II.A.

⁴⁸ See *infra* Part III.

⁴⁹ The Georgia bills were precipitated by a botched raid in which a flash-bang grenade was thrown into the crib of a nineteen-month-old infant, severely injuring him and requiring him to be placed in a medically induced coma. Jon Richards, *HB 56 Hopes to Regulate No-Knock Warrants*, PEACH PUNDIT (Feb. 26, 2015), <http://www.peachpundit.com/2015/02/26/hb-56-hopes-to-regulate-no-knock-warrants/>; Alecia Phonesavanh, *A SWAT Team Blew a Hole in my 2-Year-Old Son*, SALON (Jun. 24, 2014) https://www.salon.com/2014/06/24/a_swat_team_blew_a_hole_in_my_2_year_old_son/. The Utah amendments and statutes were largely a response to a 2012 incident in Ogden, Utah, during which one officer was killed and five others were wounded while executing a no-knock warrant on the home of a small-time marijuana grower named Matthew David Stewart, a military veteran suffering from PTSD, who did not even sell his product. Radley Balko, *How a Drug Raid Gone Wrong Sparked a Call for Change in the Unlikeliest State in the Nation*, HUFFINGTON POST (Oct. 24, 2013), https://www.huffingtonpost.com/2013/10/24/utah-drug-raid-matthew-david-stewart_n_4138252.html. See also Miller, *Fatal Shootout*, *supra* note 41.

C. *The Early Federal Experience with No-Knock Warrants*

The origins of no-knock warrants can be traced to the Nixon administration and the early days of the War on Drugs.⁵⁰ In 1970, Congress authorized federal magistrates to issue no-knock warrants to federal law enforcement officers. According to proponents, strict adherence to the knock-and-announce rule allowed drug dealers to destroy evidence and denied police the element of surprise, thereby increasing the danger officers face when executing search warrants in drug investigations.⁵¹ However, no-knock warrants proved so problematic that Congress repealed the statute authorizing their use four years later based on extensive newspaper reporting describing mistaken, violent, and often illegal raids carried out by law enforcement officers searching for drugs.⁵² This is unsurprising, since the use of no-knock warrants, like the War on Drugs itself, was always more about politics than effectiveness.⁵³ However, a number of War on Drugs policies created significant incentives for state and local law enforcement to participate in counter-drug activities⁵⁴ and drastically increased the number of state and local police departments with SWAT teams and similar paramilitary-style units.⁵⁵ The rise of SWAT teams and similar

⁵⁰ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 509, 84 Stat. 1236, 1274, (previously codified at 21 U.S.C. § 879(b) (1970)). See RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* 83–84, 90 (2014) [hereinafter BALKO, *RISE OF THE WARRIOR COP*]; DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 6–7 (1996).

⁵¹ Garcia, *supra* note 32, at 703.

⁵² *Id.* at 705.

⁵³ BALKO, *RISE OF THE WARRIOR COP*, *supra* note 50, at 104–05 (discussing the creation of a new federal agency “to show off the . . . administration’s showpiece crime tools,” such as no-knock raids, and “generate empty but impressive-sounding arrest statistics Nixon could tout”). See also generally BAUM, *supra* note 50.

⁵⁴ See generally BALKO, *RISE OF THE WARRIOR COP*, *supra* note 51, at 157. See also, e.g., National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. 101–189, § 1208 (1989) (authorizing transfer of military hardware from the Department of Defense to federal and state agencies for use in counter-drug activities); National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104–201, 110 Stat. 2422, § 1033 (1996). President Barack Obama attempted to rein in this program, albeit only very slightly. See Exec. Order No. 13688, 80 Fed. Reg. 3451 (Jan. 16, 2015) (blocking transfer of armored vehicles, large-caliber weapons, ammunition, and other heavy equipment). However, President Obama’s executive order was revoked by President Donald Trump. Exec. Order No. 13809, 82 Fed. Reg. 41499 (Aug. 28, 2017).

⁵⁵ Kraska & Kappeler, *supra* note 23, at 6 (reporting that between the early-1980s and mid-1990s, the percentage of cities with “police paramilitary unit[s]” increased by approximately thirty to thirty-eight percent). Other research indicates

paramilitary units is important because these units are frequently used to execute no-knock warrants,⁵⁶ and they are typically armed with equipment that increases the confrontational nature of no-knock warrant execution and increases the danger inherent in the execution of such warrants.⁵⁷ It is also not unusual for members of SWAT teams to wear plain clothes that fail to clearly identify them as police officers, further adding to homeowners' confusion when they come crashing through the door.⁵⁸

D. *The End of the Knock-and-Announce Requirement*

A series of United States Supreme Court cases in the 1990s and early 2000s played an important role in clearing the way for state and local law enforcement to use no-knock warrants. In *Wilson v. Arkansas*, the Supreme Court held that, while the common law principle of announcement is an element of the Fourth Amendment reasonableness inquiry, countervailing law enforcement interests, such as reasonable suspicion that knocking and announcing would create danger for officers or result in the destruction of evidence, may sometimes justify an

that by the mid-2000s, almost eighty percent of small towns had a SWAT team. ACLU, *WAR COMES HOME*, *supra* note 23, at 19.

⁵⁶ See Balko, *Little Rock's Drug War*, *supra* note 23; Kraska & Kappeler, *supra* note 23, at 7 (reporting that, in 1995, 75.9 percent of the activity SWAT-style units engaged in was drug raids, consisting almost exclusively of no-knock entries).

⁵⁷ Balko, *Little Rock's Drug War*, *supra* note 23 (“[T]he [Little Rock Police Department] is serving many of these [no-knock] warrants by using explosives that SWAT veterans I’ve interviewed say are reckless, dangerous and wholly inappropriate for use in drug raids.”); Kraska & Kappeler, *supra* note 23, at 3 (noting that police paramilitary units commonly possess “an array of ‘less-than-lethal’ technology for conducting ‘dynamic entries,’ (e.g., serving a search warrant). These include percussion grenades (explosive devices designed to disorient residents), stinger grenades (similar devices containing rubber pellets), CS and OC gas grenades (tear gas), and shotgun launched bean-bag systems (nylon bags of lead shot). ‘Dynamic entries’ require apparatuses for opening doors, including battering rams, hydraulic door-jamb spreaders, and C4 explosives. Some [police paramilitary units] purchase and incorporate a range of ‘fortified tactical vehicles,’ including military armored personnel carriers and specially equipped ‘tactical cruisers.’”). However, this “less-than-lethal” equipment has resulted in death, injury, and extensive property damage during no-knock raids. See ACLU, *WAR COMES HOME*, *supra* note 23, at 21; Phonesavanh, *supra* note 49.

⁵⁸ Radley Balko, *A South Carolina Anti-Drug Police Unit Admitted it Conducts Illegal No-Knock Raids*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/news/the-watch/wp/2018/05/31/a-south-carolina-anti-drug-police-unit-admitted-it-conducts-illegal-no-knock-raids/?utm_term=.8ba8f5800596 (“The officers are permitted to wear what they like on raids, and often mix official gear with personal items, and there’s no uniformity.”).

unannounced entry.⁵⁹ Two years later, in *Richards v. Wisconsin*, the Court explicitly approved of states giving magistrates the authority to issue no-knock warrants.⁶⁰ Before long, courts nationwide began relying on *Richards* in upholding searches conducted pursuant to no-knock warrants.⁶¹ And, despite the Court's rejection of a blanket exception to the knock-and-announce requirement for felony drug investigations,⁶² no-knock warrants are, to this day, primarily used in drug investigations.⁶³ Finally, in 2006, the Supreme Court held that the exclusionary rule is inapplicable to evidence obtained as a result of knock-and-announce violations,⁶⁴ thereby removing the only real insurance of police compliance with the knock-and-announce requirement.⁶⁵

E. The Legal Status of No-Knock Warrants Among the States Today

Most states have a knock-and-announce statute on the books requiring that police give notice of their authority and purpose and be refused admittance before they may forcibly enter a

⁵⁹ 514 U.S. 927, 934 (1995).

⁶⁰ 520 U.S. 385, 396 n.7 (1997) (stating that the practice of states giving magistrates the authority to issue no-knock warrants is reasonable when officers provide reasonable suspicion that entry without prior announcement would be appropriate).

⁶¹ Memorandum Opinion from Patrick F. Philbin, Deputy Assistant Att'y. Gen. Off. of Legal Couns., *Re: Authority of Fed. Judges and Magistrates to Issue "No-Knock" Warrants* for the Chief Couns., Drug Enforcement Admin. 49 (June 12, 2002) (listing post-*Richards* cases upholding no-knock search warrants issued by state court magistrates).

⁶² *Richards*, 520 U.S. at 395.

⁶³ Jessica Pishko, *How A No-Knock Raid in Austin Turned Into a Lethal Shootout*, The Appeal (Feb. 5, 2019), <https://theappeal.org/how-a-no-knock-raid-in-austin-turned-into-a-lethal-shootout/> ("No-knock raids – in which SWAT teams arrive with armored personnel carriers and forcefully enter a residence wearing body armor and using flash-bang grenades – have become a signature of the so-called war on drugs."); Balko, *Utah Data*, *supra* note 38. *See generally supra* note 23.

⁶⁴ *Hudson v. Michigan*, 547 U.S. 586, 594 (2006).

⁶⁵ *Id.* at 609 (Breyer, J., dissenting) ("Without such a rule . . . police know that they can ignore the Constitution's requirements without risking suppression of evidence discovered after an unreasonable entry."); *see also* Christopher Totten & Sutham Cobkit, *The Knock-and-Announce Rule and Police Arrests: Evaluating Alternative Deterrents to Exclusion for Rule Violations*, 48 UNIV. OF S.F. L. REV. 71, 102 (2013) (reporting that the majority of police chiefs perceive exclusion as having a substantial impact in preventing knock-and-announce violations and suggesting that courts may want to reconsider the role that exclusion can serve in deterring knock-and-announce violations).

residence.⁶⁶ These statutes are generally modeled on the federal knock-and-announce statute.⁶⁷ However, both state and federal courts generally interpret the statutory knock-and-announce codifications as incorporating the common law exceptions to the rule, including destruction of evidence and danger to officers.⁶⁸ A small minority of state legislatures have enacted statutes expressly granting magistrates the authority to issue no-knock warrants upon reasonable suspicion that announcement would endanger the safety of any person or result in the destruction of evidence.⁶⁹ In addition, because many state courts interpret their knock-and-announce statutes as incorporating the common law exceptions, many state courts have held that magistrates may issue no-knock warrants in the absence of explicit statutory authority upon an appropriate showing that exigent circumstances exist.⁷⁰ Therefore, whether by statute or as a result of the common law exceptions to the knock-and-announce requirement, state magistrates have the authority to issue no-knock search warrants in a significant majority of states.⁷¹

⁶⁶ Garcia, *supra* note 32, at 691 n.39; *see also* Michael R. Sonnenreich & Stanley Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626, 654–59 (1970) (compiling state knock-and-announce statutes).

⁶⁷ Garcia, *supra* note 32, at 691 n.39; *see also* 18 U.S.C. § 3109 (2012) (“The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.”)

⁶⁸ G. Todd Butler, Note, *Recipe for Disaster: Analyzing the Interplay Between the Castle Doctrine and the Knock-and-Announce Rule after Hudson v. Michigan*, 27 MISS. C. L. REV. 435, 438 (2009).

⁶⁹ *See, e.g.*, N.Y. CRIM. PROC. LAW § 690.35 (McKinney 2017); N.D. CENT. CODE ANN. § 29-29-01 (West 2017); WYO. STAT. ANN. § 35-7-1045 (West 1981); NEB. REV. STAT. § 29-411 (2019); ARIZ. REV. STAT. ANN. § 13-3915 (2017).

⁷⁰ *See, e.g.*, Commonwealth v. Scalise, 439 N.E.2d 818, 822 (Mass. 1982) (“[T]he decision whether to dispense with the requirement of announcement should be left to judicial officers, whenever police have sufficient information at the time of application for a warrant to justify such a request.”); State v. Lien, 265 N.W.2d 833, 838 (Minn. 1978); State v. Henderson, 629 N.W.2d 613, 622 (Wis. 2001) (“In Wisconsin, judicial officers are authorized to issue no-knock warrants.”); Poole v. State, 596 S.E.2d 420, 422 (Ga. Ct. App. 2004); White v. State, 746 So. 2d 953, 956 (Miss. Ct. App. 1999) (upholding issuance of a no-knock warrant despite repeal of statute authorizing no-knock warrants because “Mississippi has no statute which specifically prohibits ‘no-knock’ warrants, and our case law has never prohibited the issuance of ‘no-knock warrants.’”); State v. Johnson, 775 A.2d 1273, 1278–79 (N.J. 2001).

⁷¹ *See* Sack, *Door-Busting Drug Raids*, *supra* note 20 (pointing out that no-knock warrants are routinely granted in a majority of states).

Estimates of the number of no-knock warrants issued each year range from 20,000 to 80,000.⁷²

At the time of this writing, only Oregon and Florida have expressly denied magistrates the authority to issue no-knock warrants.⁷³ In addition to the severe risk of violence to both occupants and police⁷⁴ and the disastrous results of the federal experiment with no-knock warrants,⁷⁵ the Supreme Court of Florida noted that no-knock warrants are strongly disfavored because whether or not an exigency justifying a no-knock entry exists must necessarily be assessed on the scene at the time the warrant is executed.⁷⁶ The Court of Appeals of Oregon expressed similar concerns in holding that state magistrates cannot validly issue no-knock warrants.⁷⁷ Some states that authorize magistrates to issue no-knock warrants, such as Massachusetts and Minnesota, require officers to “make a threshold reappraisal” of whether the relevant exigency still exists before executing a no-knock warrant, and if the exigency no longer exists, the no-knock authorization is void.⁷⁸

⁷² See Dara Lind, *Cops Do 20,000 No-Knock Raids a Year. Civilians Often Pay the Price When They Go Wrong.*, VOX (May 15, 2015), <https://www.vox.com/2014/10/29/7083371/swat-no-knock-raids-police-killed-civilians-dangerous-work-drugs>; Brad Petrishen, *SWAT Raids, “No-Knocks” on Rise in Frequency and Profile*, WORCESTER TELEGRAM & GAZETTE (Aug. 29, 2015), <http://www.telegram.com/article/20150829/NEWS/150829129>.

⁷³ OR. REV. STAT. § 133.575 (West 2018); *State v. Arce*, 730 P.2d 1260, 1261 n.3 (Or. Ct. App. 1986) (holding that “the purported authorization in [the] warrant for a ‘no-knock entry was necessarily void’” because Oregon has a statutory knock-and announce rule and “[a] magistrate may not authorize the police—or anyone else—to perform an illegal act”); *State v. Bamber*, 630 So. 2d 1048, 1050–51 (Fla. 1994) (“No statutory authority exists under Florida law for issuing a no-knock search warrant.”). In addition, the chief of the Houston Police Department in Houston, Texas, announced in February 2019 that the department would “largely end the practice of forcibly entering homes to search them without warning.” Mihir Zaveri, *Houston Police to End Use of ‘No-Knock’ Warrants After Deadly Drug Raid*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/us/no-knock-warrant-houston-police.html>. This announcement came after a drug raid that “might have been based on faulty information,” during which “two civilians were killed and four officers were shot[.]” *Id.*

⁷⁴ *Bamber*, 630 So.2d at 1050.

⁷⁵ *Id.* at 1050 n.4.

⁷⁶ *Id.* at 1050 (noting that circumstances may change dramatically after a search warrant is issued but before it is executed).

⁷⁷ *Arce*, 730 P.2d. at 1262 (stating that the constitutional exceptions to the knock-and-announce requirement necessarily depend on the circumstances existing at the time a warrant is executed).

⁷⁸ *Commonwealth v. Scalise*, 387 Mass. 413, 421 (1982); *State v. Lien*, 265 N.W.2d 833, 839 (Minn. 1978).

The next section of this Note will analyze the risks and dangers associated with the use of no-knock warrants. Further, the next section will argue that, contrary to the arguments no-knock proponents set forth, no-knock warrants likely increase the danger to both civilians and law enforcement when compared to traditional search warrants executed in compliance with the common law knock-and-announce requirement.

II. THE PROBLEMS WITH NO-KNOCK WARRANTS

As previously discussed, the knock-and-announce requirement was historically viewed as indispensable for a variety of reasons, such as ensuring the safety of both homeowners and law enforcement personnel, avoiding property damage, providing homeowners with the opportunity to voluntarily comply with the law, allowing the homeowner to redirect police who are at the wrong address, and protecting the right to privacy.⁷⁹ This section will address each of these concerns and argue that the best way to ensure the safety of both police officers and civilians, as well as to protect individuals' civil liberties, is for states to eliminate the use of no-knock warrants and require strict adherence to the knock-and-announce requirement.

A. *No-Knock Warrants Fail to Truly Ensure the Safety of Civilians & Officers*

The danger of no-knock search warrants is best illustrated by a hypothetical. Under cover of complete darkness, police officers dressed in dark, tactical gear and armed with military-grade weapons execute a no-knock search warrant by smashing in the front door of a private residence and charge in, guns raised.⁸⁰ The homeowner, waking from his slumber, frightened, and believing the intruders are burglars or people wishing to harm his family, retrieves a weapon and confronts the intruders. Sometimes the police fire first, sometimes the homeowner fires first, and sometimes the manner of entry itself causes injury, but too often, someone ends up wounded or dead.⁸¹

⁷⁹ See discussion *supra* Part I.A and accompanying notes.

⁸⁰ See Sack, *Door-Busting Drug Raids*, *supra* note 20.

⁸¹ This hypothetical is an amalgam of common elements present in the execution of no-knock warrants. See, e.g., Sack, *Door-Busting Drug Raids*, *supra* note 20; see also Kolby K. Reddish, Comment, *A Clash of Doctrines: The Castle Doctrine and the Knock-and-Announce Rule*, 25 WIDENER L.J. 171, 173–174 (2016).

Even when no one is hurt, there is usually property damage,⁸² not to mention the lingering trauma that such an event can produce.⁸³

One significant reason no-knock warrants are so dangerous is that they clash with the castle doctrine and other defense of habitation statutes.⁸⁴ The castle doctrine, adopted in nearly all fifty states, authorizes a person attacked in his or her home to use force in self-defense without retreating⁸⁵ and creates a presumption that a homeowner's use of force against intruders is justified to protect the homeowner's safety.⁸⁶ As noted earlier, magistrates also have the authority to issue no-knock warrants in a majority of states.⁸⁷ Therefore, in many jurisdictions, state law simultaneously authorizes police to forcefully intrude into private residences without warning and allows homeowners to use force against a person or persons they reasonably believe to be unlawful intruders committing a forcible felony.

In addition, the Second Amendment protects the right of individuals to keep guns in the home for the purpose of immediate self-defense.⁸⁸ Approximately forty percent of Americans either currently own a gun or live with someone who does, and nearly two-thirds of gun owners cite personal protection as a major reason for owning a gun.⁸⁹ The conflict between no-knock warrants, the castle doctrine, and the rate of gun ownership is a dangerous cocktail that creates an inherent

⁸² See ACLU, *WAR COMES HOME*, *supra* note 23, at 37.

⁸³ See Phonesavanh, *supra* note 49.

⁸⁴ See, e.g., Reddish, *supra* note 81, at 172–73; Dimitri Epstein, Note, *Cops or Robbers? How Georgia's Defense of Habitation Statute Applies to No-Knock Raids by Police*, 26 GA. ST. U. L. REV. 585, 587–88 (2010); Butler, *supra* note 68, at 435.

⁸⁵ See Reddish, *supra* note 81, at 175, 177.

⁸⁶ See Butler, *supra* note 68, at 449. Some states, such as Florida, revoke the presumption of necessary force when the intruder is a police officer, even when the homeowner subjectively believes the person entering is an intruder. *Id.* at 450. However, Florida recognizes the presumption of necessary force when a homeowner uses force against an officer who violates the knock-and-announce rule. *Id.* As discussed *supra* Part I.D, Florida is one of two states that has thus far refused to authorize no-knock warrants.

⁸⁷ See *supra* Part I.D.

⁸⁸ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). See also John D. Castiglione, *Another Heller Conundrum: Is It a Fourth Amendment "Exigent Circumstance" to Keep a Legal Firearm in Your Home?*, 59 UCLA L. REV. DISCOURSE 230, 234 (2012); SpearIt, *Firepower to the People! Gun Rights & The Law of Self-Defense to Curb Police Misconduct*, 85 TENN. L. REV. 189, 229 n.217 (2017).

⁸⁹ Kim Parker et al., *The Demographics of Gun Ownership*, PEW RESEARCH CENTER (June 22, 2017), <http://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/>.

risk of harm any time police force entry into a private residence without first knocking and announcing their authority and purpose. The principles underlying the castle doctrine, like those underlying the knock-and-announce rule, are based upon the sanctity of the home as a place where individuals should be free from unlawful intrusion.⁹⁰ Because the knock-and-announce rule and the castle doctrine are based on similar legal and historical principles, the most harmonious way to resolve the tension between them and reduce the risk of violence created by no-knock warrants is for states to eliminate the use of no-knock warrants and require strict adherence to the knock-and-announce requirement.

The clash between the castle doctrine and the knock-and-announce rule is not the only reason no-knock warrants are dangerous. When executing a no-knock warrant, the manner of entry itself can result in injury or death to persons inside the house.⁹¹ This is, in part, a result of the militarization of America's state and local forces, a trend that has been comprehensively documented by a number of scholars.⁹² Today, as a result of this trend, state and local police departments have near unfettered access to surplus military equipment,⁹³ and it is not uncommon for police to use devices like flash-bang grenades while executing no-knock warrants.⁹⁴ These devices, designed to

⁹⁰ See U.S. CONST. amends. III, IV, V; see also Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 654, 667 (2003) (“[S]tanding one’s ground is allowed to protect the sanctity of [the] home, which has been violated by someone who intends great bodily harm or death to the resident.”); sources cited *supra* note 32.

⁹¹ See, e.g., Phonsavanh, *supra* note 49; Sack, *Door-Busting Drug Raids*, *supra* note 20; William K. Rashbaum, *Woman Dies After Police Mistakenly Raid Her Apartment*, N.Y. TIMES (May 17, 2003), <http://www.nytimes.com/2003/05/17/nyregion/woman-dies-after-police-mistakenly-raid-her-apartment.html>.

⁹² See generally, e.g., BALKO, *RISE OF THE WARRIOR COP*, *supra* note 50; Cadman R. Kiker III, *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, 71 WASH. & LEE L. REV. ONLINE 282 *passim* (2015); Kraska & Kappeler, *supra* note 23, at 3–4. See also Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 641–47 (2016). The militarization trend is relevant to the no-knock warrant discussion because military equipment is often used during the execution of no-knock warrants and the introduction of military culture into policing informs the attitude of police officers during warrant execution. See, e.g., ACLU, *WAR COMES HOME*, *supra* note 23, at 22–23; Kraska & Kappeler, *supra* note 23, at 11–14.

⁹³ Kiker III, *supra* note 92, at 287.

⁹⁴ ACLU, *WAR COMES HOME*, *supra* note 23, at 21. See also Balko, *Little Rock’s Drug War*, *supra* note 23 (noting that the Little Rock Police Department routinely served no-knock warrants by using explosives described by SWAT veterans as “a

disorient persons inside the home, have burned small children, set fire to houses, and caused fatal heart attacks.⁹⁵ In addition to the risk of injury to persons inside, executing a no-knock warrant frequently involves extensive property damage, and it is unlikely that residents of homes damaged during no-knock entries will ever be reimbursed for necessary repairs.⁹⁶

Proponents of no-knock warrants argue that rapidly entering a residence and catching suspects by surprise is the best way to simultaneously ensure both the safety of officers and others and ensure that evidence is not destroyed.⁹⁷ Others argue that the privacy protections afforded by strict adherence to the knock-and-announce requirement are “tenuous” when compared to the potential for destruction of evidence and public harm, especially in light of the growth of organized crime and drug trafficking.⁹⁸ Moreover, proponents of no-knock warrants argue that knocking and announcing is a mere formality because entry must always be permitted after police knock and announce their presence.⁹⁹ Finally, law enforcement officials tend to dismiss concerns about botched no-knock raids as isolated incidents rather than as examples of how dangerous the tactic is.¹⁰⁰

First, proponents of no-knock warrants underestimate the danger to both officers and civilians associated with no-knock

threat to anyone inside the targeted residence,” as well as “reckless, dangerous, and wholly inappropriate” for drug raids and quoting a retired police officer who stated, “If [the suspect] had heard someone outside the door and gotten up to see who was there, he might well be dead.”). Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 257 n.222 (2017) (“No-knock warrants, . . . are often executed using ‘dynamic entry’ tactics,” in which officers use specialized battering rams and explosives, such as flash-bang grenades, with the goal of disorienting people inside the location).

⁹⁵ Garrett and Stoughton, *supra* note 94 at 257 n.222.

⁹⁶ ACLU, *WAR COMES HOME*, *supra* note 23, at 21–22 (reporting that, at minimum, fifty percent of incidents studied involved property damage and none of the incident reports suggested homeowners would be reimbursed for repairs).

⁹⁷ Wesley E. Nunn, Opinion, *No-Knock Warrants a Valuable Tool*, ATLANTA JOURNAL-CONSTITUTION (June 18, 2014), <https://www.ajc.com/news/opinion/knock-warrants-valuable-tool/Tcl4g5l8uJZgwixfhANnjJ/>; Donald B. Allegro, Note, *Police Tactics, Drug Trafficking, And Gang Violence: Why the No-Knock Warrant is an Idea Whose Time Has Come*, 64 NOTRE DAME L. REV. 552, 553 (1989).

⁹⁸ Sonnenreich & Ebner, *supra* note 66, at 647.

⁹⁹ *Id.*

¹⁰⁰ RADLEY BALKO, *OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA* 51 (2006) [hereinafter BALKO, *OVERKILL*].

entries.¹⁰¹ The argument that no-knock warrants ensure the safety of officers and civilians is strange given that history and precedent have repeatedly recognized the contrary assertion: that compliance with the knock-and-announce requirement protects officers by ensuring they are not mistaken for burglars or trespassers, and minimizes the likelihood of violent confrontations between homeowners and police by making homeowners aware of the officers' presence.¹⁰²

In recent years, time and time again, police have frightened homeowners while executing no-knock warrants in the middle of the night with the homeowners responding violently and predictably.¹⁰³ The way most no-knock warrants are executed increases the likelihood of violent confrontation, reflected in the growing evidence of no-knock warrants' danger,¹⁰⁴ and the body of evidence demonstrating the danger of using no-knock warrants has been growing for years.¹⁰⁵ Between 2010 and 2016, at least ninety-four people died during the execution of no-knock search warrants, thirteen of whom were police officers.¹⁰⁶ However, the number is likely much higher because until 2015, no state required police agencies to report incidents of forced entry into private residences or what type of warrant was used; to date, only one state requires this information.¹⁰⁷ Therefore, even though they are probably under-reported,¹⁰⁸ instances of no-knock warrants resulting in injury or death to civilians and law enforcement are demonstrably not isolated incidents, and

¹⁰¹ *Id.* at 63–81 (providing a non-exhaustive list of no-knock raids between 1995 and 2006 that resulted in the injury or death of innocent bystanders or law enforcement officers, or both).

¹⁰² *See, e.g.,* *McDonald v. U.S.*, 335 U.S. 451, 460–61 (1948) (Jackson, J., concurring) (“Many home-owners 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 . . . [b]ut an officer seeing a gun being drawn on him might shoot first.”).

¹⁰³ *See* Sack, *Door-Busting Drug Raids*, *supra* note 20; Reddish, *supra* note 81; Epstein, *supra* note 84; Butler, *supra* note 68 at 449–50; Kevin Sack, *Murder or Self-Defense if Officer is Killed in Raid?*, N.Y. TIMES (Mar. 18, 2017), https://www.nytimes.com/interactive/2017/03/18/us/texas-no-knock-warrant-drugs.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region®ion=top-news&WT.nav=top-news&_r=0 [hereinafter Sack, *Murder or Self-Defense?*].

¹⁰⁴ BALKO, *OVERKILL*, *supra* note 100, at 32.

¹⁰⁵ *See, e.g., id.* at 63–81.

¹⁰⁶ Sack, *Door-Busting Drug Raids*, *supra* note 20.

¹⁰⁷ Balko, *Utah Data*, *supra* note 38.

¹⁰⁸ *See supra* Part I.A discussing the lack of laws requiring police to report how often no-knock warrants are used.

more importantly, it is far from clear that no-knock warrants actually ensure the safety of officers.

At the same time, proponents of no-knocks overestimate the danger of complying with the knock-and-announce requirement and the necessity of no-knock warrants.¹⁰⁹ No-knock warrants are primarily used in drug investigations.¹¹⁰ This is due, in part, to the fact that the general public strongly associates drugs with violence.¹¹¹ In the context of no-knock warrants, courts presume officer safety is threatened in drug-related investigations.¹¹² Indeed, after police used a no-knock warrant against Paul Manafort,¹¹³ one commentator was quick to suggest that no-knock warrants were “‘gratuitous’ and ‘excessive’” in white-collar investigations but appropriate for “dangerous drug dealers” who might “meet [officers] at the door with a Glock[.]”¹¹⁴ The exceptions to the Fourth Amendment and expansion of police power that ultimately led states to authorize the use of no-knock warrants were based, in large part, on these kinds of assumptions about the relationship between guns, drugs, and violence.¹¹⁵ However, empirical support for a direct, causal relationship between drugs and violence is decidedly lacking.¹¹⁶ Research shows that there is less violence associated with drug trafficking than is typically assumed.¹¹⁷ Moreover, the

¹⁰⁹ See generally Baradaran, *supra* note 21.

¹¹⁰ Balko, *Utah Data*, *supra* note 38. One journalist laid this problem bare in stark terms:

Every no-knock affidavit I reviewed included boilerplate language about exigent circumstances. Word for word, the detectives included the same verbiage about how drug dealers typically have access to guns and are inherently dangerous, and how the surprise tactics of a no-knock, dynamic entry will make it safer for the officers serving the warrant and everyone inside. And again, in 95 of the 103 no-knock warrants granted, the boilerplate language was *all* that the police relied upon to request – and receive – a no-knock warrant.

Balko, *Little Rock’s Drug War*, *supra* note 23.

¹¹¹ Baradaran, *supra* note 21, at 235–64; see also Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173, 2200–01 (2016) (“This rhetorical link between drug crime and violent crime has effectively elided the distinction, practically rendering it moot.”).

¹¹² Baradaran, *supra* note 21, at 253 n.153, 267–68; Balko, *Little Rock’s Drug War*, *supra* note 23.

¹¹³ See *supra* Introduction.

¹¹⁴ *Law Scholar says Manafort No-Knock Warrant ‘Excessive’*, *supra* note 12.

¹¹⁵ Levin, *supra* note 111, at 2201–02 (arguing that the perceived violence of the drug trade and a concern for officer safety have shaped courts’ approval of aggressive police practices).

¹¹⁶ Baradaran, *supra* note 21, at 278–79.

¹¹⁷ *Id.* at 281.

overwhelming majority of inmates in jail on drug charges do not have a violent criminal record¹¹⁸ and are among the least likely to be rearrested for a violent crime while on pretrial release.¹¹⁹ Therefore, the use of no-knock warrants in drug investigations is based on strongly held assumptions about the violent nature of drug users and drug dealers rather than on actual evidence that such suspects are likely to be dangerous to officers. Since no-knock search warrants are primarily used in drug investigations,¹²⁰ and it is not clear that they are actually necessary or serve the purpose their proponents claim they serve in that context, no-knock warrants are an unnecessary and dangerous tool that should be abandoned.

Finally, while it is true that a homeowner must always permit police to enter after officers knock and announce their presence and present a valid search warrant, it is also completely beside the point. The knock-and-announce requirement serves many purposes, all of them important. The one purpose it decidedly does *not* serve is keeping police out of the house, as history and precedent have made clear.¹²¹ Knocking and announcing may be a mere formality, but it is a formality that should be respected and observed if states are serious about ensuring the safety of civilians and police officers and respecting civil liberties. Proponents of no-knock warrants have thus failed to present a convincing explanation for why their continued use is necessary or even desirable.

B. *No-Knock Warrants & The Presumption of Innocence*

Another important principle underlying the knock-and-announce requirement is that the suspect should be given the opportunity to voluntarily comply with the law.¹²² This principle is rooted in the presumption of innocence, one of the hallmarks of

¹¹⁸ *Id.* at 287.

¹¹⁹ *Id.* at 291.

¹²⁰ Balko, *Utah Data*, *supra* note 38; Balko, *Little Rock's Drug War*, *supra* note 23.

¹²¹ *See supra* Part I.A and accompanying notes. Most knock-and-announce statutes explicitly state that an officer may force entry if he or she is refused admittance after providing notice of his or her authority and purpose. *See, e.g.*, 18 U.S.C. § 3109 (2012) (“The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance . . .”).

¹²² Garcia, *supra* note 32, at 690–91.

our legal system.¹²³ No-knock warrants are necessarily based on the assumption that the person inside will refuse to comply with the search warrant, attempt to forcibly resist the officer's entry into the house, attempt to escape, or attempt to destroy evidence.¹²⁴ No-knock warrants go one step further than assuming that the person has incriminating evidence to destroy; they assume that, if the police knock and announce their presence, then the person will commit the additional crime of destroying the evidence or violently resisting the officer's efforts to execute the search warrant.¹²⁵

C. Mistaken Identity, Inaccurate Information, and Insufficient Judicial Scrutiny

In addition to providing an opportunity to comply with the law, the knock-and-announce requirement enables police to ensure they have the right address and, if they don't, it gives residents a chance to inform the police they have the wrong address and redirect them before the police crash through their front door.¹²⁶ After the Manafort raid, author and legal analyst Jeffrey Toobin expressed the belief that magistrate judges put search warrant applications under a great deal of scrutiny.¹²⁷ Senator Richard Blumenthal expressed a similar belief¹²⁸ and further suggested that no-knock warrants are reserved for "the most serious criminal investigations."¹²⁹

Unfortunately, magistrate judges give no-knock authorization lightly and routinely,¹³⁰ sometimes when the police

¹²³ *Ker v. California*, 374 U.S. 23, 56 (1963) (Brennan, J., concurring in part and dissenting in part) ("It need hardly be said that not every suspect is in fact guilty of the offense of which he is suspected, and that not everyone who is in fact guilty will forcibly resist arrest or attempt to escape or destroy evidence.").

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ Garcia, *supra* note 32, at 690–91.

¹²⁷ Balko, *No-Knock Raids*, *supra* note 14 ("Magistrate judges don't give authorizations for searches of people's homes lightly. I mean, this is a big deal.").

¹²⁸ Leonnig et al., *supra* note 8 ("[A] federal judge signing this warrant would demand persuasive evidence of probable cause that a serious crime has been committed."). *Id.*

¹²⁹ *Id.*

¹³⁰ *See, e.g.*, Balko, *Little Rock's Drug War*, *supra* note 23 (finding that out of 105 warrant requests, the Little Rock Police Department requested no-knock authorization in 103 and that criminal court judges granted the no-knock request in at least 101). Moreover, in 97 of those 105 cases, police did not provide *any* specific information for why a no-knock warrant was needed for that particular suspect. Radley Balko, *How Little Rock's Illegal Police Raids Validate the Exclusionary Rule*,

officers themselves have not even requested it.¹³¹ In practice, “probable cause is a pretty low bar”¹³² and warrants are generally issued on something more like “possible cause” than “probable cause.”¹³³ The average length of magisterial review of search warrant applications is approximately two minutes and forty-eight seconds, and some are approved in less than a minute.¹³⁴ Federal magistrates scrutinize warrants more carefully than state court judges, and the most scrutinized warrants are in complex white-collar cases.¹³⁵ Therefore, most no-knock warrants issued by state judges and magistrates to state law enforcement are likely put under much *less* scrutiny than the no-knock warrant in Manafort’s case. Moreover, magistrate-shopping is a common practice because police in a given jurisdiction know which judges are more liberal in approving search warrant applications.¹³⁶

Simply put, it is much easier to get a no-knock warrant than many believe. This reality helps to explain the myriad of

WASH. POST (Oct. 19, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/10/19/how-little-rocks-illegal-police-raids-validate-the-exclusionary-rule/?utm_term=.38a5e1086e15 [hereinafter Balko, *Little Rock and the Exclusionary Rule*]. In two cases, the police cited evidence of lawful gun ownership—the suspect’s concealed carry permit—as evidence of that suspect’s threat to officer safety. *Id.*

¹³¹ See, e.g., BALKO, OVERKILL, *supra* note 100, at 24–25, 35 (citing a Denver Post study, which found that no-knock warrant requests were rubber-stamped with little to no scrutiny).

¹³² Ken White, *We Interrupt This Grand Jury Lawsplainer For a Search Warrant Lawsplainer*, POPEHAT (Aug. 9, 2017), <https://www.popehat.com/2017/08/09/we-interrupt-this-grand-jury-lawsplainer-for-a-search-warrant-lawsplainer/>.

¹³³ Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 58 (2007); see also BALKO, OVERKILL, *supra* note 100, at 21–25 (discussing the problem of “notoriously unreliable” confidential informants and providing examples of informant corruption).

¹³⁴ See Van Duizend et al., *supra* note 24; Balko, *Little Rock’s Drug War*, *supra* note 23; Miller & Wieber, *supra* note 24; Editorial, *Getting a Warrant*, *supra* note 24.

¹³⁵ White, *supra* note 132.

¹³⁶ See Van Duizend et al., *supra* note 24, at 104-05 (“Judge shopping is practiced by search warrant applicants Again, the extent of the problem varies, but when the procedures permit selection of the magistrate who will review a warrant, judge-shopping occurs.”). Moreover, the authors of that report note that “police supervisory personnel frequently review warrant applications before they are presented to a magistrate[,]” and that “[t]he intensity of this preliminary involvement varies, in much the same way as the magisterial review itself, from a perfunctory review to actual drafting of the affidavit.” *Id.* at 50. Finally, the authors indicate that they “heard complaints that inexperienced assistant prosecutors who know comparatively little about the law concerning search warrants are assigned to conduct the reviews, resulting in “prosecutor shopping.” *Id.* at 51.

examples of no-knock warrants executed at the wrong address,¹³⁷ or executed at the right address, only for police to learn that their information was bad and the person they were looking for moved out long ago.¹³⁸ Nor are no-knock search warrants confined to the most serious criminal investigations. In fact, the majority of them are issued in connection with routine, low-level drug investigations.¹³⁹ That no-knock warrants are put under insufficient judicial scrutiny is also evidenced by the nearly one-third of investigations that turn up minimal quantities of drugs or none at all.¹⁴⁰ This suggests that no-knock warrants are regularly used in cases that are far from even the most serious *drug* investigations, let alone the most serious criminal investigations generally. Even when no-knock warrants are executed at the correct address and against the correct target, their use is hard to justify because of the high risk of danger to the suspect, to police officers themselves, and to any other innocent third-parties in the house or nearby.¹⁴¹ That they are subjected to insufficient judicial scrutiny and are often executed at the wrong address or based on flawed information further solidifies the argument that no-knock warrants have no legitimate place in law enforcement.

¹³⁷ BALKO, OVERKILL, *supra* note 100, at 43–63.

¹³⁸ See, e.g., Phonesavanh, *supra* note 49; McKinley Jr., *supra* note 2.

¹³⁹ Balko, *Utah Data*, *supra* note 38. A particularly damning review of Little Rock's use of no-knock warrants highlights this:

Of the 105 warrants I reviewed, the police claimed to have found some quantity of illicit drugs in 85, leaving 20 raids that turned up no contraband at all. But even among those 85, they rarely found a significant quantity of the drug they claimed their informant had purchased. In some, they claimed to have found “residue” of a “powder” or “leafy substance,” but it isn't clear whether those substances were ever tested. In others they claimed to have found a “pill bottle” or “pills,” without always revealing what the pills were, or whether the owner had a prescription for them. In 35 of the 105 no-knock raids, the police only had probable cause to search for marijuana. In eight others, they found only marijuana despite obtaining a search warrant for harder drugs.

Balko, *Little Rock's Drug War*, *supra* note 23.

¹⁴⁰ ACLU, WAR COMES HOME, *supra* note 23, at 34.

¹⁴¹ See BALKO, OVERKILL, *supra* note 100, at 63–71; Balko, *Little Rock's Drug War*, *supra* note 23 (“There were two 6-year-olds and a 13-year-old in that house, along with my mother, who's paralyzed from the waist down. They blew the front and back doors right off the wall. And I don't mean they blew the door open. I mean there was no door left.”).

D. No-Knock Warrants & Race

There is a large and growing body of scholarship detailing the disproportionate impact of the criminal justice system on people of color.¹⁴² No-knock warrants appear to be no different in that there is evidence that they are used disproportionately against people of color.¹⁴³ As one victim of a no-knock raid gone wrong put it, “This is about race. You don’t see SWAT teams going into a white-collar community, throwing grenades into their homes.”¹⁴⁴

As previously discussed, no-knock warrants began primarily as, and remain, a tool of the War on Drugs.¹⁴⁵ Viewed in this light, it is not especially surprising that no-knock warrants are disproportionately used against suspects of color because the War on Drugs, from its inception, has disproportionately impacted people and communities of color.¹⁴⁶ This has long been an open secret.¹⁴⁷ The disproportionate use of no-knock warrants against people of color means that minority communities bear the brunt of the death and property destruction associated with no-knock raids.¹⁴⁸ Especially in communities where relationships between

¹⁴² See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (revised ed. 2012); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); JAMES FORMAN JR., *LOCKING UP OUR OWN* (2017); MATT TAIBBI, *I CAN'T BREATHE: A KILLING ON BAY STREET* (2017).

¹⁴³ See Balko, *Little Rock's Drug War*, *supra* note 23 (“Nearly all the people raided that I spoke to were lower-income, and all but one were black. Of the 105 warrants I reviewed, 84 were for black suspects, 16 were for white and five were for Latinos. Little Rock as a whole is 46 percent white and 42 percent black. Hispanics and Latinos of any race make up just under 7 percent of the population.”); ACLU, *WAR COMES HOME*, *supra* note 23, at 35 (“According to the records that did contain race information, SWAT team deployment primarily impacted people of color.”).

¹⁴⁴ ACLU, *WAR COMES HOME*, *supra* note 23, at 14 (quoting Alecia Phonesavanh, whose nineteen-month-old baby was severely injured by a flash-bang grenade during a no-knock raid).

¹⁴⁵ *Supra* Part I.C.

¹⁴⁶ 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, 382 (2002) (arguing that African-Americans, and African-American males in particular, are the primary target of the government’s War on Drugs); see also Erik Luna, *Drug War and Peace*, 50 U.C. DAVIS L. REV. 813, 833–37 (2016); Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539, 1551–52 (2014).

¹⁴⁷ Nixon’s chief domestic policy advisor openly acknowledged that the administration “knew [they] couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, [they] could disrupt those communities.” ALEX S. VITALE, *THE END OF POLICING* 133 (2017).

¹⁴⁸ Nunn, *supra* note 146, at 404.

police and civilians are already strained, the use of no-knock warrants can create further tensions and give off the impression that police are something akin to a military occupational force.¹⁴⁹ There is also some evidence, albeit anecdotal, that black and white suspects who use weapons in self-defense during no-knock raids are treated differently by the legal system.¹⁵⁰

To be sure, prohibiting no-knock warrant use will not solve the many other race-based problems associated with drug enforcement specifically and the criminal justice system more generally. However, recognizing that no-knock warrants disproportionately impact people of color is important to a comprehensive understanding of why no-knock warrants are uniquely problematic.

III. A NEW DIRECTION: LEGISLATIVE PRESCRIPTIONS FOR THE NO-KNOCK WARRANT PROBLEM

First, state legislatures should enact laws expressly prohibiting state magistrates from issuing no-knock warrants. Anything short of this, such as the Utah legislation eliminating no-knock warrants in drug possession cases,¹⁵¹ is a half-measure. Two states, Florida and Oregon, already completely prohibit the use of no-knock warrants.¹⁵² It is clear that no-knock warrants are a tool fraught with inherent danger¹⁵³ and, if states are serious about ensuring the safety of both civilians and police officers, are a tool that should be abandoned entirely. A return to the time-tested knock-and-announce requirement is the most meaningful way to accomplish these goals. Of course, proponents of no-knock warrants argue that they ensure officer safety.¹⁵⁴ However, the reality is that although no-knock warrants are a relatively recent development,¹⁵⁵ the danger associated with their use is already apparent.¹⁵⁶ The knock-and-announce requirement, which is also meant to ensure officer safety, has

¹⁴⁹ *Id.*

¹⁵⁰ See Sack, *Murder or Self-Defense?*, *supra* note 103 (describing the divergent stories of two suspects, one black and one white, who shot at and killed police officers during no-knock raids and whose cases played out very differently).

¹⁵¹ UTAH CODE ANN. § 77-23-210(8) (West 2015).

¹⁵² See relevant discussion *supra* Part I.E and accompanying notes.

¹⁵³ See Part II.A.

¹⁵⁴ Nunn, *supra* note 97; Allegro, *supra* note 97.

¹⁵⁵ See *supra* Parts I.C, I.D, & I.E.

¹⁵⁶ *Supra* Part II.A.

demonstrated its value and importance over several centuries.¹⁵⁷ Moreover, ending the use of no-knock warrants does not necessarily preclude police from making an unannounced entry when they determine *on the scene* that an appropriate exigency exists.¹⁵⁸ The on-the-scene assessment of circumstances is critical for police to determine if changed circumstances have obviated the need for a no-knock entry or suggest that a no-knock entry is unwise; however, in practice, police do not always make an on-the-scene assessment once they have obtained a no-knock warrant.¹⁵⁹ Eliminating the use of no-knock warrants, in connection with the two other legislative proposals discussed below, would ensure that police perform a complete, thorough assessment of the situation when they arrive on scene to execute a search warrant before deciding whether to dispense with knocking and announcing their presence.

Second, states should enact legislation requiring execution of traditional search warrants during daylight hours, roughly defined as between 6 a.m. and 10 p.m.¹⁶⁰ It is relatively common to execute traditional knock-and-announce search warrants at night.¹⁶¹ Serving traditional knock-and-announce warrants in the middle of the night undermines the entire purpose of the knock-and-announce requirement because it is unlikely that a person who is asleep will be able to wake up, get out of bed, and reach the front door in the very short amount of time that elapses before police force entry.¹⁶² In order for the knock-and-announce requirement to serve the purposes it was historically meant to serve, persons inside the home must have a real, meaningful opportunity to answer the door and comply with the lawful execution of the search warrant. The most effective way to

¹⁵⁷ See *Hudson v. Michigan*, 547 U.S. 586, 605–06 (2006) (Breyer, J., dissenting).

¹⁵⁸ *Id.* at 623 (noting that even without a no-knock warrant, police retain the authority to exercise their independent judgment regarding the wisdom of carrying out a no-knock entry at the time the warrant is executed); see also *supra* note 56 and accompanying text.

¹⁵⁹ Phonesavanh, *supra* note 49; Sack, *Door-Busting Drug Raids*, *supra* note 20 (police claimed not to have any evidence that children were in the house despite the presence of children's toys on the front lawn at the scene, suggesting police did not conduct any on-site review of the situation before executing the warrant).

¹⁶⁰ See, e.g., Fed. R. Crim. P. 41(2)(B) (defining "daytime" as between 6:00 a.m. and 10:00 p.m. local time).

¹⁶¹ Balko, *Utah Data*, *supra* note 38 (reporting that in Utah, 18.1% of search warrants executed by SWAT teams were knock-and-announce raids at night).

¹⁶² *Id.*; see also *United States v. Banks*, 540 U.S. 31, 38–39 (2003) (finding that forcing entry fifteen to twenty seconds after knocking and announcing was constitutionally reasonable).

guarantee that residents have such an opportunity is to require execution of all search warrants during daylight hours. This is when people are more likely to be both awake and able to get to the door, or out of the house altogether, substantially reducing the risk of a confrontation. Moreover, there is evidence that police typically comply with the warrant instructions when a judge signs off on a warrant requiring service during daytime hours.¹⁶³

Finally, in order to ensure meaningful compliance with the knock-and-announce requirement, state courts should apply the exclusionary rule to evidence obtained through knock-and-announce violations under their state constitutions, as a few state courts have already done.¹⁶⁴ In reaching its conclusion that suppression is not necessary in cases of knock-and-announce violations, the United States Supreme Court grossly underestimated the historical and practical importance of the knock-and-announce requirement and the purposes it serves.¹⁶⁵ These interests are far from inconsequential, and as recent history has made clear, no-knock warrants come with a significant risk to the safety of both police officers and persons inside the house,¹⁶⁶ not to mention people nearby who might be caught in the crossfire or hit by stray bullets.¹⁶⁷ In order to ensure meaningful compliance with the knock-and-announce rule, application of the exclusionary rule to evidence obtained through knock-and-announce violations is essential.¹⁶⁸ State courts can provide greater constitutional

¹⁶³ Balko, *Little Rock and the Exclusionary Rule*, *supra* note 130 (“[O]f the 80 instances in which a judge instructed Little Rock police to serve the warrant during the day, the officers complied with those instructions.”).

¹⁶⁴ *See, e.g.*, *State v. Jean-Paul*, 295 P.3d 1072, 1077 (N.M. Ct. App. 2013); *Berumen v. State*, 182 P.3d 635, 637 (Alaska Ct. App. 2008), *State v. Robinson*, 944 A.2d 718, 720–21 (N.J. Super. Ct. App. Div. 2008), *rev’d on other grounds*, 974 A.2d 1057 (2009) (holding that suppression of evidence is the appropriate remedy for violation of the knock-and-announce requirement under the respective state constitutions).

¹⁶⁵ *Supra* notes 41–45 and accompanying discussion. *See also Hudson v. Michigan*, 547 U.S. 586, 620–22 (2006) (Breyer, J., dissenting).

¹⁶⁶ *Supra* Part II. A.

¹⁶⁷ Sack, *Door-Busting Drug Raids*, *supra* note 20 (“Stray bullets have whizzed through neighboring homes, and in dozens of instances the victims of police gunfire have included the family dog.”).

¹⁶⁸ *Hudson*, 547 U.S. at 629 (2006) (Breyer, J., dissenting) (arguing that it is common sense that “without suppression there is little to deter knock-and-announce violations”); *see also id.* at 621 (arguing that failure to comply with the knock-and-announce rule renders a search unlawful and unlawful searches require suppression

protections for their citizens under their state constitutions than the federal Constitution requires, and state courts should take advantage of this power with regard to knock-and-announce violations.

Opponents of applying the exclusionary rule to knock-and-announce violations argue that alternatives to suppression, such as civil lawsuits, internal police discipline, and citizen review boards, are sufficient to deter knock-and-announce violations.¹⁶⁹ However, available data and experience suggest that these alternate remedies are grossly insufficient,¹⁷⁰ and that the exclusionary rule is the most effective way to deter police misconduct.¹⁷¹ Of course, there is a social cost that comes with suppressing evidence, but the social cost is no greater in the knock-and-announce context than when the exclusionary rule is applied to other Fourth Amendment violations.¹⁷² The deterrent value of exclusion outweighs the social cost of fewer convictions because of the very real risk to the safety of both police and civilians associated with no-knock entries. Therefore, to ensure meaningful compliance with the knock-and-announce requirement and deter violations, application of the exclusionary rule to knock-and-announce violations is indispensable.

Taken together, these three proposals provide a more comprehensive framework to end the use of no-knock warrants and usher in a return to strict compliance with the knock-and-announce requirement than current efforts to reform no-knock warrant use.

of the evidence obtained as a result); Balko, *Little Rock and the Exclusionary Rule*, *supra* note 130 (arguing that application of the exclusionary rule to evidence obtained after knock-and-announce violations significantly increases compliance with the knock-and-announce rule).

¹⁶⁹ *Hudson*, 547 U.S. at 596–99 (majority opinion).

¹⁷⁰ *Id.* at 607–11 (Breyer, J., dissenting).

¹⁷¹ Totten & Cobkit, *supra* note 65, at 101–02 (reporting that nearly sixty-five percent of police chiefs perceive exclusion as having a substantial impact in deterring knock-and-announce violations while only 14.3% perceived community oversight as having any substantial impact); Balko, *Little Rock and the Exclusionary Rule*, *supra* note 130 (“When Little Rock police and judges know that a rule will be enforced by suppression of evidence, they complied with that rule at least 76 percent of the time. . . . But when it’s a rule *not* enforced by suppressing evidence, they *at most* complied 8 percent of the time.”) (emphasis in original). See generally Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, HARV. J.L. & PUB. POL’Y 119 (2003).

¹⁷² *Hudson*, 547 U.S. at 629–30 (Breyer, J., dissenting).

CONCLUSION

“It would have been a lot easier if someone would have announced themselves, man,” said Marvin Guy, who is awaiting trial on capital murder and attempted capital murder charges for shooting at police executing a no-knock warrant because he believed he was being robbed.¹⁷³ In response, an officer explained to him that the purpose of no-knock entries is ensuring officer safety.¹⁷⁴ This disconnect cuts to the heart of the problem with no-knock warrants. Actors on both sides—the unsuspecting homeowner and police officers—believe their own safety is in danger. Although no-knock warrants are purportedly justified by concerns about officer safety, in practice, they create a substantial risk of violent confrontation between homeowners and law enforcement officers. No-knock warrants have already taken a substantial toll and the remedies states have proposed and adopted to date are insufficient. It is therefore imperative that states act to eliminate their use and shepherd a return to strict compliance with the knock-and-announce requirement.

¹⁷³ Sack, *Murder or Self-Defense?*, *supra* note 103.

¹⁷⁴ *Id.*