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Knock and announce[1] requirements significantly restrict police ability to enter private premises.[2] Applicable in both search and arrest contexts,[3] announcement rules require police officers to gain the occupants'[4] attention and to identify their authority and purpose prior to forcibly[5] entering private premises. If an occupant denies police access or fails to respond within a reasonable time,[6] police may use reasonably necessary force to enter and effect a lawful search or arrest.[7] Evidence obtained in violation of announcement rules will be excluded from any subsequent trial.[8]

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1. "Knock and announce" is a common term describing the requirement that police officers give notice of their identity and purpose before entering private premises. In this Note, "announcement" and "notice" connote satisfaction of both requirements.

2. Most jurisdictions have statutes prescribing announcement prior to forcible police entries. *See* Comment, *The Concept of "Breaking" in Announcement Statutes*, 7 LOY. L.A. L. REV. 162, 162 n.3 (1974) (listing 32 state statutes) [hereinafter cited as LOYOLA COMMENT]. Typical is the federal statute, which provides:

> 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.

18 U.S.C. § 3109 (1976) [hereinafter referred to as § 3109].

Announcement is also required by the fourth amendment. *See* notes 54-59 *infra* and accompanying text.

3. Although the federal statute, *see* note 2 *supra*, expressly applies only to the execution of search warrants, announcement requirements extend to arrest entries. *See* notes 47-48 *infra* and accompanying text. Many states have separate statutes addressing arrest and search entries. For an extensive review of arrest and search announcement requirements in the states, see Sonnenreich & Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626, 654 app. (1970).

4. This Note is concerned solely with the announcement required prior to entry of *occupied* private premises. It appears settled that unannounced entry may be made of unoccupied premises. *See* Payne v. United States, 508 F.2d 1391, 1394 (5th Cir.), *cert. denied*, 423 U.S. 933 (1975); United States v. Gervato, 474 F.2d 40, 43-44 (3d Cir.), *cert. denied*, 414 U.S. 864 (1973).

Business premises are, of course, less likely to be occupied at certain times. But the erroneous belief, however reasonable, that the building to be searched is unoccupied does not justify dispensing with announcement. If the building is unoccupied, the government loses nothing by announcement; if it is occupied, their unannounced entry clearly implicates all the interests the notice requirement protects. *See Gervato*, 474 F.2d at 44 (no § 3109 issue where officers *did* knock and announce prior to search of building they believed to be unoccupied).

5. Announcement requirements apply in certain circumstances even absent "force" or a literal "breaking." *See* Sabbath v. United States, 391 U.S. 585 (1968) (holding unlawful an unannounced entry through a closed but unlocked door). For a thorough examination of the "breaking" concept, see LOYOLA COMMENT, *supra* note 2.

6. The amount of time considered reasonable is likely to vary according to the circumstances of each case. *See* 2 W. LAFAVE, SEARCH AND SEIZURE § 4.8(c) at 130 (1978).

7. *See* 18 U.S.C. § 3109 (1976) (quoted at note 2 *supra*).

8. *See* Sabbath v. United States, 391 U.S. 585 (1968); Miller v. United States, 357 U.S.

Announcement protection for private dwellings derives from two independent sources. The federal statute, 18 U.S.C. § 3109,[9] explicitly provides such protection. Courts have also recognized a fourth amendment right to announcement protection.[10] This Note addresses the question whether announcement rules apply when federal officers enter private business premises.[11]

The federal courts have divided on the issue of extending full announcement protection to business premises.[12] Courts extending

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301, 314 (1958); *cf.* Wong Sun v. United States, 371 U.S. 471 (1963) (where officer had not properly identified himself and his purpose, the occupant's flight was not sufficient to constitute probable cause; the arrest was thus illegal and its fruits had to be excluded).

9. The statute is set forth at note 2 *supra*.

10. *See, e.g.*, Ker v. California, 374 U.S. 23, 38-41 (1963) (implying constitutional announcement protection); United States v. Murrie, 534 F.2d 695, 698 (6th Cir. 1976); United States v. Bustamante-Gamez, 488 F.2d 4, 9 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); United States v. Manning, 448 F.2d 992, 1001 (2d Cir.), *cert. denied*, 404 U.S. 995 (1971); United States *ex rel.* Ametrane v. Gable, 401 F.2d 765, 766 (3d Cir. 1968). For a description of the origins of the constitutionally based announcement requirements, see note 54 *infra*.

11. This Note treats federal announcement protection for businesses as required by § 3109 and the fourth amendment. Fourth amendment announcement requirements, of course, apply equally to the states. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (extending the exclusionary rule for illegal searches and seizures to the states).

Whether there is any difference between § 3109 and constitutional announcement requirements is debatable. *See* United States v. Murrie, 534 F.2d 695, 698 (6th Cir. 1976) (§ 3109 "explicate[s] fundamental purposes of the Fourth Amendment"); United States v. Mapp, 476 F.2d 67, 75 (2d Cir. 1973) ("merger" of § 3109 and fourth amendment rules accomplished in *Sabbath*, 391 U.S. at 591); Sonnenreich & Ebner, *supra* note 3, at 646 ("Both section 3109 and the fourth amendment contemplate exceptions in exigent circumstances, but whether section 3109 is more stringent in application cannot yet be determined.").

Both fourth amendment and statutory announcement rules have common law origins. *See* Semayne's Case, 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603). For an excellent history of the common law announcement rule, see Blakey, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U. PA. L. REV. 499, 500-08 (1964). Section 3109 is universally regarded to have codified common law announcement rules. *See, e.g.*, Sabbath v. United States, 391 U.S. 585, 589 (1968). Similarly, the fourth amendment rule has grown out of the common law. *See* Ker v. California, 374 U.S. 23, 49 (1963) (Brennan, J., dissenting); note 56 *infra*. This historical background renders significant overlap between § 3109 and the fourth amendment inevitable.

Moreover, modern courts have incorporated a privacy element, which was not a basis for common law announcement rules, into their discussions of § 3109's application. *See, e.g.*, Sabbath v. United States, 391 U.S. 585, 589-90 (1968); Miller v. United States, 357 U.S. 301, 313 (1958); Accarino v. United States, 179 F.2d 456, 464 (D.C. Cir. 1949); Blakey, *supra*, at 554; note 58 *infra* and accompanying text. Since the fourth amendment also serves to protect privacy expectations, one can expect that, to the extent the rules continue to develop in the courts, announcement requirements will have parallel evolutions under the statute and the fourth amendment.

For purposes of this Note, it is not critical that any technical differences between the statutory and the fourth amendment rules be resolved. In the context of either rule, a distinction between homes and businesses is unjustified.

12. *Compare* United States v. Phillips, 497 F.2d 1131, 1133 (9th Cir. 1974) (applying § 3109 to police entry of business premises); United States v. Case, 435 F.2d 766, 770 n.1 (7th Cir. 1970) (applying § 3109 to police entry of business premises); United States v. Mullin, 329 F.2d 295, 298-99 (4th Cir. 1964) (§ 3109 does apply to smokehouse within curtilage of farm); *with* United States v. Francis, 646 F.2d 251, 256 (6th Cir.) (holding that § 3109 does not apply to businesses), *cert. denied*, 454 U.S. 1082 (1981); United States v. Agrusa, 541 F.2d 690, 700 (8th Cir. 1976) (expressing serious doubt that § 3109 applies to business premises), *cert. denied*, 429

section 3109 to businesses have relied on the policy justifications for announcement.[13] Courts denying section 3109 protection to businesses have reasoned that the statutory reference to "house" implicitly excludes businesses or nondwellings.[14] Courts also have invoked the common law as support for denying section 3109 protection to businesses.[15] These cases have recognized constitutional business announcement requirements, but have limited this protection by characterizing the expectations of business occupants as a "lesser" privacy interest.[16]

This Note argues that the courts should reject a home-business distinction in the application of announcement requirements. The Note concludes that announcement rules should apply whenever their underlying policies are served. This approach would apply announcement requirements to closed and occupied business premises.

Part I examines the arguments offered by some courts for a restrictive interpretation of announcement protections in the business context. Part I suggests that these arguments are unpersuasive and that the courts' application of announcement rules should correspond to the policies behind them. Part II argues that the policy justifications for announcement are served in the business context to a degree that justifies full announcement protection. Part III contends that reduced announcement protection for businesses does not advance legitimate police interests.

I. Arguments Against Announcement Protection for Business Premises: *United States v. Francis*

The Sixth Circuit's opinion in *United States v. Francis*[17] offers the

U.S. 1045 (1977); United States v. Johns, 466 F.2d 1364, 1365 (5th Cir. 1972) (holding that § 3109 does not apply to business); Fields v. United States, 355 F.2d 543 (5th Cir.) (per curiam) (building constructed for commercial purposes and outside curtilage not protected), *cert. dismissed*, 384 U.S. 935 (1966); United States v. Hassell, 336 F.2d 684, 686 (6th Cir. 1964) (a pre-*Francis* Sixth Circuit case observing that § 3109 applied only to dwellings but decided on other grounds), *cert. denied*, 380 U.S. 965 (1965).

For examples of this conflict at the trial level, *compare* United States v. La Monte, 455 F. Supp. 952, 966-67 & n.16 (E.D. Pa. 1978) (although holding § 3109 announcement requirements were satisfied, the court noted that § 3109 appeared to apply to commercial establishments as well as houses), *with* United States v. Giacalone, 455 F. Supp. 26, 36 n.3 (E.D. Mich. 1977) (notes that § 3109 does not apply to nondwellings but validates the entry on exigent circumstances grounds).

13. *See, e.g.*, United States v. Phillips, 497 F.2d 1131, 1133-34 (9th Cir. 1974).

14. *See* United States v. Francis, 646 F.2d 251, 256 (6th Cir.), *cert. denied*, 454 U.S. 1082 (1981); United States v. Johns, 466 F.2d 1364, 1365 (5th Cir. 1972); Fields v. United States, 355 F.2d 543 (5th Cir.) (per curiam), *cert. dismissed*, 384 U.S. 935 (1966).

15. *See* United States v. Francis, 646 F.2d 251, 255-56 (6th Cir.), *cert. denied*, 454 U.S. 1082 (1981); United States v. Agrusa, 541 F.2d 691, 700 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

16. *See Francis*, 646 F.2d at 258; *Agrusa*, 541 F.2d at 700.

17. 646 F.2d 251 (6th Cir.), *cert. denied*, 454 U.S. 1082 (1981).

most thorough judicial discussion of announcement protection for businesses.[18] The court concluded that the unannounced entry of a locked, occupied barbershop did not violate either section 3109 or the fourth amendment. In reaching this result under the statute, the court thought itself bound to "continue to restrict the application of § 3109 to dwellings and buildings within the curtilage, the extent of the rule as it existed at common law."[19] The court justified the constitutional result by concluding that "[t]here is much less of a privacy interest in business premises than exists in a private home."[20]

The *Francis* court separately addressed the statutory and constitutional questions of announcement protection for business. Following this division, Part A looks at the conclusion in *Francis* that section 3109 is limited to dwellings, and concludes that the common law did not permit unannounced entry of nondwellings. The statute, furthermore, has undergone considerable judicial development and accordingly should not be limited by a mechanical reading of the statutory language or a restrictive interpretation of common law authority. Part B discusses the constitutional question and argues that a general home-business distinction is unjustified in light of applicable fourth amendment precedent.

A. *Section 3109*

The *Francis* court's reliance on the common law is misplaced because the common law never condoned unannounced entry of nondwellings. The accepted source of announcement requirements is *Semayne's Case*.[21] The court held that where the sheriff was executing the King's process forcible entry into homes was allowed, but announcement was required.[22] The court also proscribed any entry

18. Most opinions treat the issue extremely cursorily. *See, e.g.*, United States v. Case, 435 F.2d 766, 770 n.1 (7th Cir. 1970) (treating issue in one sentence footnote); Fields v. United States, 355 F.2d 543 (5th Cir.) (two-paragraph per curiam opinion), *cert. dismissed*, 384 U.S. 935 (1966). There is also a brief discussion of the issue in United States v. Agrusa, 541 F.2d 690, 697-700 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977). Only one commentator has treated the issue at all. *See* Comment, *The Permissibility of Forcible Entries by Police in Electronic Surveillance*, 57 B.U. L. REV. 587, 596 (1977) (concluding the home-business distinction drawn in *Agrusa* is unjustified) [hereinafter cited as B.U. COMMENT]. In spite of the lack of serious treatment by courts or commentators, the question arises not infrequently and has spawned a significant conflict of authority. *See* note 12 *supra*.

19. 646 F.2d at 256. The "curtilage" includes those buildings in close proximity to a dwelling.

20. 646 F.2d at 258.

21. 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603).

22. *See* Semayne's Case, 5 Coke's Rep. at 91b, 77 Eng. Rep. at 195.

> [T]he sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors . . . .

For a description of how the common law announcement requirements for the execution of civil process evolved as constraints on criminal process, see generally Blakey, *supra* note 11.

of a home, but not a business, whether announced or not, by a private person or by the sheriff at the suit of a private creditor.[23]

Other cases reinforce the notion that the proscription against entry by a private suitor did not apply to nondwellings at common law. The common law did approve forcible entries of barns,[24] stores,[25] warehouses[26] and railroad stations[27] to execute civil process. Although the *Francis* court cited these cases as establishing the lawfulness of unannounced entry into nondwellings outside the curtilage,[28] careful reading reveals that the common law did not necessarily condone unannounced entry of nondwellings.

Most cases did not discuss announcement at all.[29] Where the facts indicate that unannounced entries occurred, the involved nondwellings were *unoccupied*,[30] a condition that still excuses noncompliance with announcement requirements.[31] In a rare nondwelling case discussing the announcement requirement, the court, having acknowledged the right to enter forcibly, wrote: "[The defendant sheriff] was therefore justified in breaking into the warehouse in question, to serve an attachment on the goods of any person

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23. *See* Blakey, *supra* note 11, at 500.

24. Penton v. Brown, 1 Keble 698, 83 Eng. Rep. 1193 (K.B. 1644).

25. Haggerty v. Wilber, 16 Johns. 287 (N.Y. Sup. Ct. 1819).

26. Burton v. Wilkinson, 18 Vt. 186 (1846).

27. Androscoggin R.R. v. Richards, 41 Me. 233 (1856).

28. *Francis*, 646 F.2d at 256 (citing *Penton v. Brown* and *Burton v. Wilkinson*); *see* Blakey, *supra* note 11, at 501 & n.16, 505 & n.58 (citing *Penton v. Brown*, *Hodder v. Williams*, *Haggerty v. Wilbur* and *Burton v. Wilkinson*).

29. Of the cases cited by *Francis* and Blakey, *see* note 28 *supra*, only *Wilkinson* discusses announcement. *See* note 32 *infra*. In Hodder v. Williams, [1895] 2 Q.B. 663 (C.A.), the sheriff had requested admittance before breaking down the door of a workshop outside the curtilage. Lord Esher relies on Penton v. Browne, 1 Keble 698, 83 Eng. Rep. 1193 (K.B. 1644), and Lee v. Gansel, 1 Cowp. 1, 98 Eng. Rep. 935 (K.B. 1774), for the proposition that the privilege against forcible entry extends only to the dwelling-house "and does not include other buildings such as barns or outhouses not connected with a dwelling-house . . . ." [1895] 2 Q.B. at 666. It is unclear, however, whether forcible entry of such buildings would be permitted where no announcement had been made.

In Lee v. Gansel, 1 Cowp. 1, 98 Eng. Rep. 935 (K.B. 1774), Lord Mansfield held that the privilege applied only to the outer door of a dwelling house. The sheriff in *Lee* had been peacefully admitted to the building, but had had to break down the door of a lodger. As to this second door, Lord Mansfield noted "that after notice the officers broke it open; though nothing turns upon the notice or mode of breaking." 1 Cowp. at 5, 98 Eng. Rep. at 937.

30. The courts noted the fact that the nondwellings were unoccupied in approving the contemplated entries. *See Haggerty*, 16 Johns. at 288 ("[T]he sheriff had a right, *no person being in the actual occupation of* [the store] . . . to open it for the purpose of sale . . . .") (emphasis added); *Penton*, 1 Keble at 698, 83 Eng. Rep. at 1193 ("there being no particular place where the sheriff may make demand"); *see also Androscoggin R.R.*, 41 Me. at 238 ("There was no person in the depot, or around it, at the time of its entry by the officer, from whom he could have demanded admission.").

31. *See, e.g.*, Payne v. United States, 508 F.2d 1391, 1394 (5th Cir.), *cert. denied*, 423 U.S. 933 (1975); United States v. Gervato, 474 F.2d 40, 44 (3d Cir.), *cert. denied*, 414 U.S. 864 (1973).

therein; — but he must first demand admittance."[32] Since the defendant had, in fact, requested the warehouse key, the court upheld the entry.[33]

In all likelihood, the dearth of discussion of announcement protection for occupied nondwellings results from the fact that the officers almost always announced themselves.[34] This, of course, does not necessarily imply that common law judges, if faced with the issue, would have required announcement in the nondwelling context. It does demonstrate that reliance on the proposition that the common law denied nondwelling announcement protection is misplaced. With the question thus at least left open by the common law, modern courts must resolve the issue through other devices.[35]

Accordingly, the *Francis* court's conclusion depends on the proposition that since announcement was not affirmatively required by the common law prior to entry of nondwellings, it cannot be required under section 3109. This implies that Congress intended to freeze judicial development of announcement rules by codifying only those required at common law. In line with this type of reasoning, the *Francis* court, as well as other courts,[36] observed that "[b]y its terms § 3109 applies only to 'houses.' "[37] This reasoning is subject to two grounds of attack. First, the statute does not even expressly address the ability of police officers to enter business premises, much less abandon the possibility of an announcement requirement prior to entry. Second, a "freeze" on judicial development of announcement rules conflicts with the liberal application that courts have previously given section 3109.

The preliminary problem with finding congressional intent[38] to limit announcement protection to dwellings is the failure of section

32. Burton v. Wilkinson, 18 Vt. 186, 190 (1846). *Burton v. Wilkinson* is cited by the *Francis* court, *see* 646 F.2d at 256, as holding that unannounced entry of nondwellings was permissible. In fact, the sheriff involved had requested admittance, so the question of unannounced entry was not before the court. In dictum, however, the court relied on *Penton* and *Haggerty* for the statement that "[a] barn in the field [*i.e.*, outside the curtilage] may be opened without request." 18 Vt. at 189. *See* Blakey, *supra* note 11, at 505 & n.58.

33. 18 Vt. at 190.

34. *See* Note, *Announcement in Police Entries*, 80 YALE L.J. 139, 143-44 & nn.20-22 (1970).

35. The *Francis* court also relied on the statutory language. *But see* notes 43-53 *infra* and accompanying text.

36. *See, e.g.*, United States v. Johns, 466 F.2d 1364, 1365 (5th Cir. 1972); Fields v. United States, 355 F.2d 543, 543 (5th Cir.) (per curiam), *cert. dismissed*, 384 U.S. 935 (1966).

37. 646 F.2d at 255.

38. Nothing in the limited legislative history of § 3109 reveals an intent to limit announcement to dwellings. Section 3109 was based on the Espionage Act, ch. 30, tit. XI, §§ 8, 9, 40 Stat. 217, 229 (1917). The original report of that statute states that the law was "based upon the New York law on this subject and follows generally the policy of that law." 55 CONG. REC. 3307 (1917). New York search warrant rules generally reflected the common law. *See* People *ex rel.* Robert Simpson Co. v. Kempner, 208 N.Y. 16, 20-23, 101 N.E. 794, 796-97 (1913); Blakey, *supra* note 11, at 513 n.98.

3109 to describe police entry of businesses at all. The statute authorizes police to "break open . . . any part of a house," and conditions this authority on the giving of "notice of . . . authority and purpose."[39] Congress evidently thought it proper that police, in possession of a valid search warrant, be allowed to enter private dwellings if they announce their presence and their purpose.

This structure does not suggest the extreme conclusion that Congress intended to sanction unannounced police entries of business premises.[40] Given the uncertain status of business announcement protection at common law,[41] and the sparse legislative history of section 3109,[42] it is unlikely that Congress ever considered whether announcement should be made prior to entry of business premises.

Given the statute's failure to speak directly to the issue, and the ambiguity surrounding its common law ancestry, the courts must inquire more deeply into the purposes of section 3109.[43] Facile reliance on the statutory language or on the limits of judicial authority offers little guidance when either plausible interpretation risks contravening an unclear legislative intention. A more searching analysis of the policies underlying announcement requirements better comports with sound principles of statutory construction,[44] the evolving

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39. 18 U.S.C. § 3109, *supra* note 2.

40. Note the similar question in Dalia v. United States, 441 U.S. 238 (1979). There, despite the lack of an express statutory authorization, the Court ruled that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976), implicitly granted power to forcibly enter unoccupied private premises for the purpose of installing surveillance equipment. 441 U.S. at 249-54. In *Dalia*, the Court expressly recognized that the "manner of execution" of the implicit Title III power of forcible entry "is subject to later judicial review as to its reasonableness." 441 U.S. at 258. Similarly, since § 3109 implied the power to enter business premises forcibly, the manner of its execution must be subject to applicable restraints. Although it was argued (*see* Brief for Government at 31-32), the Court in *Dalia* significantly did not rely on a home-business distinction in approving the entry. The Court did reject the defendant's § 3109 claim, as well as the constitutional claim, noting that the involved premises were unoccupied and that announcement would have precluded gathering any evidence by covert electronic surveillance. 441 U.S. at 247-48.

41. *See* notes 21-35 *supra* and accompanying text.

42. *See* note 38 *supra*.

43. *See* McGill v. EPA, 593 F.2d 631, 636 (5th Cir. 1979) ("It would be sophistry for us to divine a congressional intent on a subject it did not consider."). John Gray's words apply quite clearly here:

> Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises to what its intention was. If that were all that a judge had to do with a statute, interpretation of statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.

J. GRAY, THE NATURE AND SOURCES OF THE LAW 165 (1909).

44. *See* Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd.*, 326 U.S. 404 (1945) (L. Hand, J.) ("[I]t is one of the surest indexes of a mature and developed jurisprudence not to

merger of statutory and constitutional standards in this area,[45] and the Supreme Court's admonition that fundamental protections against police intrusion should be given more than "grudging application."[46]

Past judicial freedom in the application of announcement rules further undermines the assumption that Congress intended to limit, by passage of section 3109, the evolution of announcement rules to those in force at common law and expressly required by statute. The courts have extended the statute, in other cases, to situations plainly beyond the scope of the statutory language or the requirements of common law. For example, section 3109 requirements routinely restrict entries made to effect arrests or searches incident to arrest,[47] although the statute expressly applies only to the execution of search warrants.[48] Similarly, although the statute expressly requires announcement only prior to a "breaking," the Supreme Court, in *Sabbath v. United States*,[49] interpreted section 3109 to forbid peaceful, unannounced entries. *Sabbath* applies announcement requirements to peaceful entries in spite of the common law requirement of force,[50] controverting the notion that section 3109 requires announcement only where explicitly compelled by the common law.[51]

Sabbath provides a good illustration of the fundamental problem with the *Francis* court's analysis of section 3109. The *Francis* court took an unjustifiably narrow view of judicial ability to apply the congressional mandate provided by section 3109 to situations not necessarily governed by the common law or the statutory language. The Court's language in *Sabbath* is instructive: "To be sure, the statute uses the phrase 'break open' and that connotes some use of force.

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make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.").

45. *See* note 11 *supra*.

46. Sabbath v. United States, 391 U.S. 585, 589 (1968); *see* notes 47-53 *infra* and accompanying text.

47. *See, e.g.*, Miller v. United States, 357 U.S. 301, 306 (1958); United States v. Murrie, 534 F.2d 695 (6th Cir. 1976); United States v. Agrusa, 541 F.2d 690, 701 n.25 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977). For a full description of this development, see Blakey, *supra* note 11, at 510-526.

48. *See* 18 U.S.C. § 3109 (quoted at note 2 *supra*).

49. 391 U.S. 585 (1968). For a discussion of this development, see LOYOLA COMMENT, *supra* note 2.

50. *See* United States v. Bowman, 137 F. Supp. 385, 388 (D.D.C. 1956); Walker v. Fox, 32 Ky. 290 (2 Dana *404) (1834); Welsh v. Wilson, 34 Minn. 92, 24 N.W. 327 (1885); Blakey, *supra* note 11, at 501, 505.

51. The Court, significantly, approved this departure from the common law while simultaneously taking occasion to announce that § 3109 codified the common law. 391 U.S. at 591 n.8. *See also* People v. Bradley, 1 Cal. 3d 80, 87, 460 P.2d 129, 133, 81 Cal. Rptr. 457, 461 (1969) (citing *Sabbath* for the proposition that codification of common law announcement rules does not necessarily "freeze" those rules).

But linguistic analysis seldom is adequate when a statute is designed to incorporate fundamental values and the ongoing development of the common law."[52] The Supreme Court plainly did not view either the common law or the statutory language as a bar to judicial extension of announcement rules to situations implicating announcement values. Accordingly, courts should evaluate the question of announcement protection for businesses with an eye toward the interests served, invoking section 3109 whenever its policies so require.[53]

B. *Constitutional Announcement Protection*

The recognition that announcement protects fundamental values has recently led courts to conclude that announcement, at least prior to police entry of dwellings, is constitutionally required.[54] The acknowledged source of announcement's constitutional stature is Justice Brennan's dissenting opinion in *Ker v. California*.[55] Since Justice Brennan finds the source of the constitutional announcement rule in

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52. 391 U.S. at 589 (footnote omitted). This language undercuts the observation in *Francis* that "it is not the place of the courts to extend a statute's application to all situations where a similar policy might be desirable." 646 F.2d at 256.

53. *See* United States v. Phillips, 497 F.2d 1131, 1133-34 (9th Cir. 1974).

54. The Supreme Court initially faced the question whether announcement is constitutionally required in Ker v. California, 374 U.S. 23 (1963). *Ker* involved an apartment rather than business premises and the discussion centered on whether announcement is constitutionally required prior to entry of a private dwelling. Although a plurality of the Court approved the constitutionality of the unannounced entry in *Ker*, the Court relied on exigent circumstances. The Court's reliance on exigent circumstances, rather than the lack of a constitutional rule, implies that announcement is constitutionally required absent exigent circumstances. *See* 2 W. LAFAVE, *supra* note 6, § 4.8 at 132 (1978).

It is arguable that this conclusion misreads *Ker*. The *Ker* plurality opinion never explicitly acknowledges a constitutional announcement rule. Also, in a *post-Ker* announcement case involving section 3109, the Court noted in dicta that "[e]xceptions to *any possible constitutional rule* relating to announcement and entry have been recognized . . . ." Sabbath v. United States, 391 U.S. 585, 591 n.8 (emphasis supplied). The italicized language seems inconsistent with the conclusion that *Ker* conclusively established a constitutional announcement rule.

On the whole, however, the implication of a constitutional basis for announcement appears well founded. Justice Brennan, in his *Ker* dissent, extensively reviewed the rule's common law history and wrote:

> The requirement is no mere procedural nicety or formality attendant upon the service of a warrant. Decisions in both the federal and state courts have recognized, as did the English courts, that the requirement is of the essence of the substantive protections which safeguard individual liberty.

374 U.S. at 49 (footnote omitted) (Brennan, J., dissenting). Justice Clark's plurality opinion did not address Brennan's constitutional analysis, reasoning that exigent circumstances had justified noncompliance with announcement rules. The force of Brennan's opinion in the face of Clark's silence (or tacit approval) had led the overwhelming weight of authority to conclude that *Ker* established a constitutional announcement rule. *See, e.g.*, United States v. Murrie, 534 F.2d 695 (6th Cir. 1976); United States v. Bustamante-Gamez, 488 F.2d 4, 9 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); United States v. Manning, 448 F.2d 992, 1002 (2d Cir.), *cert. denied*, 404 U.S. 995 (1971); United States *ex rel.* Ametrane v. Gable, 401 F.2d 765 (3d Cir. 1968); Sonnenreich & Ebner, *supra* note 3; B.U. COMMENT, *supra* note 18; Note, *supra* note 34.

55. 374 U.S. 23, 46 (1963).

its extensive application at common law,[56] many of the same considerations that govern application of section 3109 naturally inform the sound development of a constitutional rule.[57] Moreover, modern application of section 3109 has often pursued the important policy of protecting the privacy of individuals who occupy premises during police entry.[58] This strengthens the parallel between the two rules, since the question of whether privacy expectations are protected constitutes a conventional fourth amendment inquiry as to the reasonableness of a search.[59]

Although the Supreme Court has never treated the business protection issue in an announcement case,[60] it has applied the fourth

56. 374 U.S. at 47-60. Beginning with Semayne's Case, 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603), Brennan traces common law announcement requirements to the point when the Bill of Rights was passed and beyond. He concludes that the requirement was established and confirmed in England long before the passage of the Bill of Rights and that early American courts continued to apply it. 374 U.S. at 47-50. Brennan argues that the Framers intended to carry forward in the fourth amendment those protections afforded under English law. 374 U.S. at 51. Moreover, he argues that announcement was usually given prior to execution of the dreaded general warrants and writs of assistance. Since the colonial experience under these writs was the prime motivation for the fourth amendment, Brennan concludes that it is untenable that common law announcement requirements are not embraced by the fourth amendment. 374 U.S. at 52.

57. The Supreme Court's seminal statutory and constitutional announcement decisions reveal this parallel. In Miller v. United States, 357 U.S. 301 (1958), the Court (per Justice Brennan) undertook historical examination of announcement requirements similar to Brennan's *Ker* analysis in deciding that § 3109 principles invalidated an unannounced police entry. In arguing that the *Miller* result ought to control the facts in *Ker*, Brennan concluded that "the history adduced in *Miller* in support of the nonconstitutional ground persuasively demonstrates that the Fourth Amendment's protections include the security of the householder against unannounced invasions by the police." 374 U.S. at 53. *See also* note 56 *supra*.

58. *See* Sabbath v. United States, 391 U.S. 585 (1968); Wong Sun v. United States, 371 U.S. 471 (1963); Miller v. United States, 357 U.S. 301 (1958); Blakey, *supra* note 11, at 554; Note, *supra* note 34, at 152. Indeed, the ultimate dispute about whether announcement protection should be extended to business premises under both rules may center on whether privacy interests in business premises are sufficient to warrant the extension. Although the *Francis* court appeared to agree that similarities between dwellings and businesses might justify as good policy extension of § 3109 to business, the court criticized such an extension of the statute for failure to account for the difference in privacy interests. 646 F.2d at 256. Similarly, the court concluded that a difference in privacy interests warranted application of "reduced" constitutional announcement protection for business. 646 F.2d at 258. This Note concludes that privacy interests in a business are protected by announcement to a degree that justifies application of both rules to business premises. *See* notes 84-95 *infra* and accompanying text.

59. The landmark decision in Katz v. United States, 389 U.S. 347, 351-53 (1967), focused subsequent fourth amendment inquiry on whether a "reasonable expectation of privacy" is jeopardized. Robbins v. California, 453 U.S. 420 (1981) (plurality opinion) (reasonable expectation of privacy in brick-shaped packages wrapped in opaque plastic and stored in trunk of car), *overruled in* United States v. Ross, 102 S.Ct. 2157 (1982) ("automobile exception" to warrant requirement extends to closed containers in vehicle that police have probable cause to believe may contain contraband); Smith v. Maryland, 442 U.S. 735, 742-46 (1979) (defendant had no reasonable expectation of privacy in the phone numbers he dialed); United States v. Chadwick, 433 U.S. 1 (1977) (reasonable expectation of privacy in a locked footlocker in trunk of automobile required police to obtain a warrant before searching it).

60. In Wong Sun v. United States, 371 U.S. 471 (1963), involving a laundry, the Court invalidated an arrest-related entry on announcement grounds without distinguishing between houses and commercial premises. However, the laundry was apparently "within the curtilage"

amendment to businesses in several other settings.[61] In *United States v. Francis*[62] and *United States v. Agrusa*,[63] however, the courts denied constitutional announcement protection to the involved businesses, relying on assertions that business premises generally implicate "lesser" privacy expectations.[64] The *Francis* court, quoting the Supreme Court, observed that " 'physical entry of the home is the chief evil against which the working [sic] of the fourth amendment is directed.' "[65] The Court has made similar observations in the context of business premises.[66]

As a constitutional matter, the conclusion that businesses as a class receive reduced fourth amendment protection is questionable. In fact, the weight of authority suggests that businesses receive full fourth amendment protection. The Supreme Court has found that warrantless searches of shared offices,[67] warehouses,[68] and plants[69]

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of a dwelling, and consequently the case has only slight significance. *See Francis*, 646 F.2d at 256-57. Some interesting dicta have recently been uttered by Justice Rehnquist in an opinion concurring in the Court's judgment upholding warrantless inspections authorized by the Federal Mine Safety and Health Act of 1977, § 103(a), 30 U.S.C. § 813(a) (Supp. III 1979). Donovan v. Dewey, 452 U.S. 594, 608 (1981) (Rehnquist, J., concurring). The Court upheld searches, in part, because the mining industry had been pervasively regulated. 452 U.S. at 605-06. Justice Rehnquist rejected this ground for decision because he had "no doubt that had Congress enacted a criminal statute similar to that involved here— authorizing, for example, *unannounced* warrantless searches of property reasonably thought to house unlawful drug activity—the warrantless search would be struck down under our existing Fourth Amendment line of decisions. . . . despite the fact that Congress . . . has in fact pervasively regulated such crime . . . ." 452 U.S. at 608 (emphasis added). Justice Rehnquist also noted that while not all warrantless administrative searches of commercial property violate the fourth amendment, "the proprietor of commercial property is protected from unreasonable intrusions by governmental agents . . . ." 452 U.S. at 608. The significance of this dicta stems in part from the fact that its author has narrowly construed the fourth amendment in other contexts. *See, e.g.*, Steagald v. United States, 451 U.S. 204, 223-31 (1981) (Rehnquist, J., dissenting); Payton v. New York, 445 U.S. 573, 621 (1980) (Rehnquist, J., dissenting).

61. *See, e.g.*, Mancusi v. DeForte, 392 U.S. 364 (1968); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

62. 646 F.2d 251 (6th Cir.), *cert. denied*, 454 U.S. 1082 (1981).

63. 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

64. *See Francis,* 646 F.2d at 258 ("There is much less of a privacy interest in business premises than exists in a private home."); *Agrusa,* 541 F.2d at 697 ("Business premises, while entitled to protection under the Fourth Amendment, are not entitled to the same protection which is afforded a home.").

65. 646 F.2d at 258 (quoting Payton v. New York, 445 U.S. 573, 585 (1980)); *see* note 91 *infra* (criticizing use of *Payton*). Although the *Francis* court quoted *Payton* as interpreting the "working" of the fourth amendment, the original language referred to the "wording" of the fourth amendment.

66. "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." See v. Seattle, 387 U.S. 541, 543 (1967), *quoted in* Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978).

67. *See, e.g.*, Mancusi v. DeForte, 392 U.S. 364 (1968); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

68. *See, e.g.*, See v. Seattle, 387 U.S. 541 (1967).

69. *See* Marshall v. Barrows, Inc., 436 U.S. 307 (1978).

all violate the fourth amendment. The Court was not troubled by the amendment's reference to "houses,"[70] concluding that this language should not be taken literally.[71] No Supreme Court case has relied on a general distinction between homes and business premises.[72] Though an especially egregious privacy intrusion occurs during unannounced entry of the home, it does not follow that unannounced entry of private business premises is not an intrusion, or that there is less than full fourth amendment protection against one.

Any home-business distinction acknowledged by the Court responds to "relatively unique circumstances" that are "carefully defined."[73] The Court has held that a strong regulatory interest, coupled with a reduced privacy expectation due to a history of pervasive governmental oversight, justifies warrantless inspection of certain businesses.[74] The warrantless searches approved by the Court were statutorily[75] required to be made during business hours and

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70. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

71. Mancusi v. DeForte, 392 U.S. 364, 367 (1968).

72. *See* B.U. COMMENT, *supra* note 18, at 596.

73. Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978).

74. *See* United States v. Biswell, 406 U.S. 311, 314-17 (1972) (firearms dealers); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (liquor industry). Both the liquor and firearms industries had historically been subject to government regulation and oversight. Thus, the Court observed in *Biswell*:

> It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.

406 U.S. at 316.

The home-business distinction that the *Francis* and *Agrusa* courts employed to justify "reduced" constitutional announcement protection for businesses is not limited in any of these respects. Their distinction applied to businesses generally, not simply those in which the government has a special interest. Nor was the distinction conditioned on any advance knowledge that occupants of business premises may have that they are subject to unannounced police entries. Significantly, even though the Court acknowledged a "reduced" privacy interest in *Colonade,* the Court invalidated the government agent's destruction of a lock in order to seize contraband liquor. In *Colonade* the owner of the premises was aware of the agent's authority and still refused to open a locked storeroom. 397 U.S. at 73. The Court concluded that since Congress failed expressly to authorize forceful entry in the event of such a refusal, the search was unreasonable. 397 U.S. at 77. The Court similarly softened its approval of the warrantless inspection scheme in *Biswell* with the observation that the owner of the premises "was on notice as to [the officers'] identity and the legal basis for their action." 406 U.S. 314-15.

75. In *Biswell*, the Court approved a provision of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921-928 (1976)), which allows official entry "during business hours, [into] the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises." 18 U.S.C. § 923(g) (1976). *See Biswell*, 406 U.S. at 311-13. The procedure for inspection of liquor dealers, validated in *Colonnade*, is nearly identical. *See* 26 U.S.C. §§ 5146(b), 7606 (1976); *Colonnade*, 397 U.S. at 73-74. Note, however, that while

were limited to specific times. This *limited* ability to search without a warrant satisfied the Court that, given the strong public interest in supervising gun and liquor dealers, fourth amendment requirements were fulfilled.[76] The absence of such careful legislative tailoring to a particularly strong public purpose led the Court to strike down on constitutional grounds a municipal ordinance that provided a warrantless inspection scheme applicable to all types of business premises.[77]

In *Francis* and *Agrusa*, the courts merely asserted that business premises received fourth amendment announcement protection in some lesser, but unarticulated, degree.[78] The general home-business distinction described in those cases sweeps across a broad range of business premises without any attempt to specify why fourth amendment protection is lesser in all of them than in a private home. It is difficult to understand how this vague formulation can be carefully circumscribed to avoid encroachment on protected privacy interests.[79] The absence of an ability to support the distinction with careful reasoning and identifiable limits suggests that the *Francis* and

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the Court upheld the liquor inspection procedure, it also held that the fine for refusal to permit inspection was an exclusive remedy, precluding forcible entries unless a warrant was obtained. *Colonnade*, 397 U.S. at 76-77.

76. United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

77. *See* See v. Seattle, 387 U.S. 541 (1967) (fire code inspections). In Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978), the Court reaffirmed *See*, and observed that the *Colonnade-Biswell* exceptions to fundamental fourth amendment protections "are indeed exceptions, but they represent responses to relatively unique circumstances."

78. *See Francis,* 646 F.2d at 258 ("Assuming some fourth amendment rule of announcement for a business, we do not need to decide the full extent of such a rule here."); *see also* note 64 *supra*.

79. The requirement that exceptions to fourth amendment protection be carefully tailored to the rationale for applying reduced protection stems from the notion that "unbridled discretion" of executive officers will undermine fourth amendment values. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338, 357 (1977) ("[O]ne of the Court's critical concerns in *Camara* and *See* was the discretion of the seizing officers."). In announcement contexts, the broad *Francis-Agrusa* home-business privacy distinction is susceptible to similar dangers. Since all business premises, even the most private, receive diminished constitutional protection under this standard, police will have discretion to subvert announcement values. *See* notes 84-110 *infra* and accompanying text (describing the values of announcement protection for business).

The facts of Zurcher v. Stanford Daily, 436 U.S. 547 (1978), admirably illustrate the defects with so sweeping a distinction between the fourth amendment protection of homes and that of businesses. The Court held that a police search of a newspaper office for evidence of crime committed by third parties did not offend the fourth amendment when executed pursuant to a valid warrant. An unreflective approach to the home-business distinction would not even require a warrant in this case, since the place to be searched is not a dwelling. Indeed, Justice Stewart's powerful dissent in *Zurcher* advanced the conclusion that the nature of the business conducted at the premises to be searched could give rise to *greater* protection than that afforded private homes. The sweeping label of "business premises" includes not only newspaper offices, but the offices of lawyers, psychiatrists, accountants, and other fiduciaries. Minimal fourth amendment protection of repositories of sensitive information, such as these, presents a grave risk to individual privacy.

Agrusa courts' resolution of the issue does not conform to fourth amendment precedent.[80]

A careful look at the circumstances of unannounced police entry onto business premises is warranted and required before approving reduced constitutional protection. This Note concludes that no unique characteristics are presented, *a priori*, simply because police are searching business premises as opposed to a dwelling. The reasons that announcement requirements have attained constitutional status in the dwelling context apply with sufficient force to business premises so that a general home-business distinction cannot operate to ensure the protection of fundamental announcement values.

II. Policies for Extending Announcement Protection to Business Premises

Courts that have not adopted a restrictive interpretation of their authority to extend announcement requirements to business premises have concluded that the policies underlying announcement justify such an extension,[81] an approach which the Supreme Court has upheld as an appropriate exercise of judicial authority.[82] Common law announcement rules have undergone substantial judicial development in response to the dictates of their underlying policies.[83] Since most announcement cases involve dwellings, announcement policies have been described almost exclusively in that context. An examination of the policies that justify announcement protection for dwellings, however, reveals that protection for business premises is warranted also.

A. *Privacy*

The court in *United States v. Francis* concluded that privacy protection was the most critical announcement policy.[84] In denying announcement protection to business, the court concluded that cases involving business premises as opposed to dwellings implicated lesser privacy interests.[85] The court based this conclusion on the "precept that 'a man's home is his castle.' "[86] It is, of course, intui-

80. *See* note 74 *supra*.

81. *See, e.g.*, United States v. Phillips, 497 F.2d 1131, 1133 (9th Cir. 1974).

82. *See* Sabbath v. United States, 391 U.S. 585, 588 (1968); notes 47-53 *supra* and accompanying text.

83. *See* notes 47-53 *supra* and accompanying text.

84. 646 F.2d at 258. The *Francis* court may have found privacy the most critical announcement policy because it apparently agrees that other announcement values apply equally to business premises. 646 F.2d at 256.

85. 646 F.2d at 258.

86. 646 F.2d at 256. The famous maxim "Every man's house is his castle" received its classic expression in William Pitt's remarks during a Parliamentary debate on a proposed cider tax. *See* Blakey, *supra* note 11, at 500 n.7.

tively obvious that the greatest sense of privacy may exist in the home. But a careful look at the realities surrounding unannounced police entry of private premises suggests that the particular privacy expectations at stake are similar in the dwelling and business contexts.

The privacy interests that announcement protects are the interests of occupants in not being shocked or embarrassed when private premises are subjected to an unexpected intrusion.[87] If police enter private premises unannounced, and possibly forcibly, it is natural for occupants to be frightened and embarrassed. The fear and shock caused by unannounced police entry arise at the point when an occupant realizes an unexpected intrusion is taking or has taken place. These fleeting, though intense, emotions will dissipate when occupants become aware that the intruders are police conducting an authorized investigation. Embarrassment created by unannounced police entry results from an occupant's lack of notice and consequent inability to prepare for intruders who may become privy to embarrassing facts or circumstances.[88]

Announcement affords an occupant an opportunity to admit police in a dignified manner. An unannounced entry of closed business premises is likely to expose occupants to the same possibility of trauma as occupants of a home. Once an occupant has secured his business premises and holds an expectation that the premises will not be entered by intruders, he is likely to be fearful when that expectation is breached.[89] Similarly, an occupant of business premises who is engaged in compromising activities[90] will be as unable to avoid embarrassment as an occupant of a dwelling when police unexpectedly enter.

Announcement requirements do not protect the principle that "a

87. *See* Ker v. California, 374 U.S. 23, 57 (1963) (Brennan, J., dissenting).

88. Some observers have suggested that announcement may prevent police from barging into private premises while occupants are undressed or are engaged in sexual activity. *See* Payton v. New York, 445 U.S. 573, 617 (1980) (White, J., dissenting); Sonnenreich & Ebner, *supra* note 3, at 647.

89. Some commentators have criticized the constitutional stature of the privacy element in announcement cases. *See* Sonnenreich & Ebner, *supra* note 3, at 647; Blakey, *supra* note 11, at 525-26. However, the psychological security retained by an occupant in control of private premises is also an important element of privacy. *See* Note, *supra* note 34, at 153.

90. It might be argued that embarrassing circumstances are more likely to arise if a dwelling, as opposed to a business, is entered unannounced. Certainly at night it is more likely that sexual activity will take place in a dwelling than in a business. However, there is no assurance that occupants who have secured their private business premises will not indulge in sexual conduct. Although this scenario seems less likely, it is still a contingency. The simple fact that sexual activity is less likely to take place during the daytime does not justify an unannounced daytime entry of a dwelling. Moreover, other situations can be imagined which are equally as likely to occur in a business as in a home. Consider the possibility that an occupant might be conducting a sensitive, private phone conversation. Unannounced police officers might be able to eavesdrop if the occupants are unaware of their intrusion. This situation seems at least as likely to occur in an office, for example, as in a home.

man's home is his castle." Announcement prescribes only the manner in which an authorized entry will occur.[91] Police authority to enter private premises is neither reduced nor enhanced[92] by requiring that police entries be announced. If an occupant fails to respond to announcement, police may enter by whatever means necessary.

Announcement, rather, protects the threshold expectation that unannounced intruders will not enter private premises. Plainly, in the home, where there is a high intuitive sense of privacy, this threshold test is met. The same expectation, however, may exist in premises with a lesser intuitive sense of privacy. Consider the barbershop involved in *Francis*. During business hours, much of the premises is open to general public view and ingress and egress.[93] Af-

91. The distinction between authority and means is never discussed in *Francis* and *Agrusa*. *Francis* cited Payton v. New York, 445 U.S. 573 (1980), for the proposition that the fourth amendment is designed to protect against unauthorized entry of the home. *Francis*, 646 F.2d at 258. *Payton* overturned the warrantless entry of a home for the purpose of effecting an arrest. The Court stressed that the "Fourth Amendment has drawn a firm line at the entrance to the house." 445 U.S. at 590. The *Francis* court implied that the line is not as firm for businesses. 646 F.2d at 258. This reasoning is questionable, however, in light of other language in *Payton*. *See* 445 U.S. at 587 (" 'It is one thing to seize without a warrant property resting in an open area . . . and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer.' ") (quoting G.M. Leasing Corp. v. United States, 429 U.S. 338, 354 (1977)).

As to police *authority* to enter homes, the *Payton* court observed: "[Warrantless search and arrest entries] share this fundamental characteristic: the breach of the entrance to an individual's home." 445 U.S. at 589. Since police may not enter homes without a warrant, occupants' intuitive privacy expectations are protected. However, once a warrant is obtained, announcement requirements, which prescribe only the *means* of entry, provide little additional protection to these privacy expectations. Even where announcement is made, an individual's privacy, in the sense that his premises are a "castle" from which he can exclude the state, can be breached by forcible police entry whether a home or business is involved. Thus, *Payton* speaks only to the authority necessary to enter certain premises, not to the means by which that authority may be exercised.

The other support offered in *Francis* and *Agrusa* fails for similar reasons. United States v. Clayborne, 584 F.2d 346 (10th Cir. 1978), *cited in Francis*, 646 F.2d at 258, involved the warrantless use of an electronic beeper. See v. Seattle, 387 U.S. 541 (1967), *cited in Agrusa*, 541 F.2d at 697, involved warrantless safety inspections. The inquiry as to whether a warrant is required involves the justifications needed for authorizing police entry onto an individual's premises. This says nothing about the manner in which an authorized breach is to be executed.

92. It might be possible for an occupant of private premises, if announcement is made, to better ensure that police conduct their search according to the terms of the warrant as the Constitution requires. *See generally* Marron v. United States, 275 U.S. 192 (1927) (while acting pursuant to a search warrant, police may seize only those things particularly described in the warrant). If police are greeted at the door and the search warrant is examined by the occupant, it seems less likely that police will unobtrusively exceed the limits of their authority under the warrant than if an occupant is subjected to the flurry of activity that may accompany an unannounced entry. Accordingly, the ability of police to enter and search intuitively private areas of the home may be slightly enhanced by unannounced entry. However, occupants of business premises also have a strong and protected interest in seeing that a police search is limited to that authorized. *See* Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

93. Of course, commercial premises during ordinary business hours are not protected to the same degree as a private home. This is due, however, to the fact that the general public is invited to enter. Fourth amendment protection for any premises, dwelling or nondwelling, is

ter the shop is locked for the day, however, occupants have a reasonable expectation that the premises will not be entered. When this expectation is breached, occupants will be surprised and shocked; a search will expose their private activities to the police. Thus, a home-business distinction based on a recognition of the greater intuitive sense of privacy in the home is unjustified. The particular privacy interests threatened by unannounced police entry are also at stake for occupants of business premises.

This suggests a closed-open premises distinction rather than a general home-business distinction.[94] The distinction turns on whether an occupant expects that the premises are closed to unannounced intruders. Where such an expectation exists, announcement will protect against the surprise occasioned by unannounced entry. Absent such an expectation, announcement does not implicate privacy interests. Accordingly, if a private business is of such a nature that an expectation of closure is unreasonable, the announcement policy of protecting privacy will not apply. It is obvious, however, that such an expectation is indeed reasonable in many business premises.[95]

B. *Other Policies*

Announcement serves two additional functions besides protecting privacy. First, it protects police officers against physical resis-

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reduced when entry occurs as the result of an invitation. *Cf.* Lewis v. United States, 385 U.S. 206, 211 (1966) ("When, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant."); *see also* 1 W. LAFAVE, *supra* note 6, § 2.4(b) at 338-39, and cases cited therein. No announcement need be made prior to an invited entry. *See, e.g.*, United States v. Blalock, 578 F.2d 245, 248 (9th Cir. 1978). Accordingly, this Note only concerns occupied business premises to which police have not been impliedly or expressly invited to enter.

94. *Cf.* State v. Myers, 601 P.2d 239, 244 (Alaska 1979) (warrantless search of theater pursuant to routine security check valid provided premises unlocked):

> Accordingly, we hold that law enforcement personnel may enter commercial premises without a warrant only when, pursuant to a routine after-hours security check undertaken to protect the interests of the property owner, it is discovered that the security of the premises is in jeopardy, and only when there is no reason to believe that the owner would not consent to such an entry. In the context with which we are immediately concerned, locked premises must be taken as indicating that no warrantless entry is authorized. Any search conducted incident to a legitimate entry must be brief and must be limited and necessary to the purpose of ensuring that no intruders are present on the premises. In addition, someone responsible for the premises must be informed, as soon as is practicable, of the protective measures taken.

The notice requirement obviously speaks to announcement when the premises are occupied.

95. For example, consider the proprietor's expectation in his bar after it has closed for the evening. It certainly seems unlikely that the occupants of the barbershop in *Francis* expected unannounced intruders. Police had to go through two different sets of locks to accomplish their entry, one with a battering ram. 646 F.2d at 254.

tance by surprised occupants who believe them to be trespassers.[96] Second, announcement prevents the needless destruction of property,[97] such as doors or windows that may be broken in the course of an unannounced entry. Both of these additional interests are as important in the business as in the dwelling context.[98]

At common law, the most frequently cited announcement policy was the officer's safety. Courts recognized that "defense of [a man's] house may extend even to death, and it is not a felony."[99] Announcement was viewed by courts as necessary to minimize violent breaches of the King's peace.[100] Modern courts continue to recognize the significant danger to police officers posed by unannounced entry.[101]

These dangers are not confined to dwellings.[102] An occupant, placed in fear of his safety and property by an unexpected intrusion, is likely to repel the intrusion forcibly whether a business or home is involved. A private individual is legally entitled to repel unexpected intrusions onto business premises with as much force as when a dwelling is involved. There is no basis for suggesting that occupants of closed business premises are less likely to exercise their right to defend forcefully against intrusions. In fact, unannounced entries of some business premises may be more likely to engender retaliatory violence than similar entries of residential premises. Business premises may contain valuable goods or papers that might induce an oc-

96. *See, e.g.*, Ker v. California, 374 U.S. 23, 57-58 (1963) (Brennan, J., dissenting); Miller v. United States, 357 U.S. 301, 313 n.12 (1958).

97. *See, e.g.*, Ker v. California, 374 U.S. 23, 58 (1963) (Brennan, J., dissenting); United States v. Phillips, 497 F.2d 1131, 1133 (9th Cir. 1974).

98. *See* United States v. Phillips, 497 F.2d 1131, 1133 (9th Cir. 1974). The *Francis* court seems to agree that these policies apply to business premises. 646 F.2d at 256 ("some of the same concerns exist in both situations").

99. Blakey, *supra* note 11, at 500, describing Semayne's Case, 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603). Consider also *The Case of Richard Curtis*, Fost. 135, 168 Eng. Rep. 67 (K.B. 1757), where the court recognized as a murder defense that a defendant was surprised by an officer's unannounced entry.

100. *See* Ratcliffe v. Burton, 3 Bos. & Pul. 223, 229, 127 Eng. Rep. 123, 126 (C.P. 1802); Lee v. Gansel, 1 Cowp. 1, 6, 98 Eng. Rep. 935, 938 (K.B. 1774).

101. *See, e.g.*, *Sabbath*, 391 U.S. at 589; *Miller*, 357 U.S. at 313 n.12; *Phillips*, 497 F.2d at 1134. It is not clear that the only danger presented by a failure to announce is to the police. Police, sensing danger, may open up all available firepower on occupants who resist an unannounced intrusion. *See* Note, *supra* note 34, at 153 & n.63. Consider the multiple, conflicting accounts of the raid on the Chicago Black Panther headquarters that resulted in the death of Panthers Fred Hampton and Matt Clark. *See* M. ARLEN, AN AMERICAN VERDICT 132-37 (1973). Police gave so many inconsistent reports of their announcement as to create the strong suspicion that there was none. Moreover, even the police who claimed announcement was made said they forced entry shortly after the occupants replied "Who's there" or "Just a minute." After the police forcibly entered the small house, gunfire ensued which killed Hampton and Clark and wounded four other Panthers. One police officer was shot, by another officer. A ballistics investigation recovered approximately ninety shots, only one of which was conclusively attributed to a Panther weapon.

102. *See* United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974).

cupant to defend against a perceived burglary.[103]

Announcement protection for business would also prevent destruction of property. Rather than suffer physical damages to private premises, a person ordinarily ought to be allowed the opportunity to admit the officer voluntarily.[104] The common law was preoccupied with the preservation of the outer door.[105] Common law courts deemed announcement necessary because "otherwise the consequences would be fatal: for it would leave the family within, naked and exposed to theives and robbers."[106] The case of forcible, unannounced entry also implicates strong property interests where business premises are involved.[107] Under certain circumstances the chance of property loss may be greater where a business is involved. In both business and residential premises, the door or window through which police entered will have been destroyed. In both, the natural protection against burglary will have been destroyed until the door or window is replaced. Where commercial premises contain valuable goods, the chance that the absence of meaningful barriers to thieves will result in property loss is correspondingly greater.[108]

The same principle for determining when entry offends privacy interests also determines whether these policies apply;[109] that is, when an occupant holds an expectation that intruders will not enter premises unannounced, announcement policies come into play. The gap between knowledge that an intrusion is occurring and the understanding that it is authorized creates a volatile tension between occupants and police. Doors may remain locked and consequently be broken. The uncertainty may create dangerous circumstances and the surprise entry may cause emotional trauma. Since these policies are the touchstone for identifying premises that deserve announcement protection, police should be required to announce prior to entry of any premises to which this principle applies.[110] Application of

103. Consider the barbershop involved in *Francis*. The shop undoubtedly contained valuable equipment and supplies, and possibly cash; *see also* Penn, *There is This Store in Queens That's Not the Best Place to Rob*, Wall St. J., Oct. 29, 1971, at 1, col. 4 (subhead "Felix Toro, a Grocer, Defends His Profits By Killing Three, Wounding Four in 11 Months;" Toro had received over 1500 letters from admirers *before* publication of the article).

104. *See* 2 W. LAFAVE, *supra* note 6, § 4.8(a), at 125.

105. *See* Lee v. Gansel, 1 Cowp. 1, 6, 98 Eng. Rep. 935, 938 (K.B. 1774).

106. Lee v. Gansel, 1 Cowp. at 6, 98 Eng. Rep. at 938.

107. *See* United States v. Phillips, 497 F.2d 1131, 1133 (9th Cir. 1974).

108. Although doors and locks were difficult to replace in seventeenth- and eighteenth-century England, it is not clear why this interest is no longer generally cited as justifying announcement rules. It would seem to be a pressing problem, particularly where the police entry was made for purposes of arresting the sole occupant. This would seem to be particularly true of business premises located where their open, unattended condition could be readily observed.

109. *See* notes 94-95 *supra* and accompanying text.

110. Some business premises, however, may experience such a great deal of ingress and

this principle creates an effective parity in announcement protection between residential and business premises, and yet permits differences in protection when the relevant facts so require. Such an inquiry offers a surer guide to the appropriate scope of announcement protection than indiscriminate reliance on commercial activity as a proxy for the diminished expectation of privacy.

III. Police Interest in Unannounced Entry

Police may, under certain circumstances, have an interest in effecting a search pursuant to an unannounced entry. Legitimate law enforcement interests have given rise to exceptions to announcement requirements even in the dwelling context. Thus, police are not required to announce if they are reasonably acting to prevent the destruction of evidence.[111] Another exception to announcement requirements, recognized at common law, eliminated the need for announcement if the peril to officers or to others would be increased if announcement were made.[112] Also, police are relieved of a duty to anounce if announcement would be a "useless gesture."[113]

The Sixth Circuit in *United States v. Francis*[114] found that these exceptions should be read more broadly when business premises rather than a home is involved.[115] This might justify distinguishing homes and businesses if a heightened police interest in unannounced entry of business premises overcame announcement policies.[116] Nothing suggests that a stronger police interest in unannounced en-

egress that there is not a reasonable expectation against unannounced entries. Consider the example of a busy but private warehouse during working hours. Many employees and members of the general public are likely to enter the warehouse unannounced a large number of times each day. It seems that this type of business should be exempted from announcement requirements because unannounced police entry of such a warehouse is not likely to implicate announcement policies. Unannounced police entry in this setting would cause no property damage, occasion little shock or embarrassment to the occupants, and would not create a danger of retaliatory violence. This is because there is no gap between the time an occupant realizes that someone is entering the premises and his formulation of a belief that the person is making an authorized visit. The "intruding" officer from the start will be regarded as simply another unannounced visitor likely to be transacting legitimate business.

111. *See* Ker v. California, 374 U.S. 23, 40 (1963); Wong Sun v. United States, 371 U.S. 471, 483-84 (1963); 2 W. LaFave, *supra* note 6, § 4.8(e).

112. *See* Ker v. California, 374 U.S. 23, 58 (1963) (Brennan, J., dissenting) (citing Launock v. Brown, 2 B. & Ald. 592, 594, 106 Eng. Rep. 482, 483 (K.B. 1819)); 2 W. LaFave, *supra* note 6, § 4.8(e).

113. *See* 2 W. LaFave, *supra* note 6, § 4.8(f), at 137.

114. 646 F.2d 251 (6th Cir.), *cert. denied*, 454 U.S. 1082 (1981).

115. 646 F.2d at 258.

116. Law enforcement interests have justified reduced protections against police searches in the past. *See, e.g.*, United States v. Ross, 102 S.Ct. 2157 (1982) (the nature of an automobile in transit justifies a warrantless intrusion so that police can prevent the transportation of contraband); Donovan v. Dewey, 452 U.S. 594 (1981) (strong regulatory interest in safety of mines justifies their warrantless inspection); Terry v. Ohio, 392 U.S. 1, 27 (1968) (limited stop and frisk without probable cause is justified solely "for the protection of the police officer").

tries exists when business premises rather than dwellings are involved. It seems intuitive that police are just as interested in executing their jobs successfully in either case. Police, when determining whether circumstances exist that justify unannounced entry, must make a judgment concerning, for example, whether they will be imperiled as a consequence of announcement or whether evidence will be destroyed if notice is given. The *Francis* court, however, placed no conditions on the conclusion that police may put more emphasis on their safety or purpose in making this judgment whenever any business premise is involved.[117] Accordingly, the conclusion is nothing more than a license for police to impermissibly subvert announcement values simply because business rather than residential premises are involved.[118]

CONCLUSION

In the simplest sense, announcement requirements are means to ensure that authorized police intrusions on private premises are achieved in as dignified and peaceful a manner as possible. "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application."[119] Whether announcement is statutorily or constitutionally based, its underlying values suggest that principled application of announcement policy requires extension of both rules to many business premises.

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117. *See* G. M. Leasing Corp. v. United States, 429 U.S. 338, 354 (1977) ("[N]ormal enforcement of the tax laws" does not justify different treatment "simply because [petitioner] is a corporation."). Similarly, mere interest in normal law enforcement does not justify a home-business distinction in announcement cases.

118. Some premises may, by their character, suggest a police interest in unannounced entry. For example, announcement prior to entry of a gun shop might put a dangerous occupant on guard and consequently imperil police officers. Therefore, an unannounced entry might fall within an announcement exception. However, this is not due to the bare fact that a gun shop is a business rather than a home. Police would be equally justified in making an unannounced entry of a home that contained a dangerous and *known to be armed* occupant.

119. Miller v. United States, 357 U.S. 301, 313 (1958).