"Knock and Talk" and the Fourth Amendment

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One of the surprising things about the Republican Supreme Court’s criminal procedure jurisprudence is its concern for the privacy of the home. While the Court over 35 plus years of Republican domination has been generally pro-police when it comes to outdoor searches, as well as interrogations, it has been rather steadfast in protecting the home from warrantless intrusions by police. Even such minor intrusions into the home as the monitoring of a beeper inside a drum of chemicals, and the measuring of the heat emissions of a house from outside have required a search warrant. Likewise, arrests inside a dwelling must be performed pursuant to an arrest warrant.

But there is a large swath of police activity that intrudes into dwellings that has been widely allowed by the courts and that often renders the search and arrest warrant requirements nugatory. This is the “knock and talk” technique. Under “knock and talk,” police go to people’s residences, with or without probable cause, and knock on the door, to obtain plain views of the interior of the house, to question the residents, to seek consent to search and/or to arrest without a warrant, often based on what they discover during the “knock and talk.” When combined with such other exceptions to the warrant requirement as “plain view,” consent, and search incident to arrest, “knock and talk” is a powerful investigative technique.

This article, will explain how “knock and talk,” as approved by numerous United States Court of Appeals decisions, as well as many state courts, has severely limited the Fourth Amendment protection afforded to homes, despite the Supreme Court’s stance that homes are heavily protected. Indeed, the “knock and talk” doctrine, even though there is considerable disagreement among lower courts as to its extent, has never directly been discussed by the Court. However, what was, essentially a “knock and talk” was considered, and disapproved of, in the often quoted, but no longer fully adhered to, 1948 case of Johnson v. United States.

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1 The Court has had a Republican majority since Lewis Powell was sworn in in January of 1972.
3 Kyllo v. United States, 533 U.S. 27 (2001)
5 This article is based largely on recent circuit court decisions, but there are many more federal district and state court decisions that deal with this issue as well.
6 333 U.S. 10.
This article argues that the lower courts, as well as the Supreme Court, should return to the principles that *Johnson* announced. It proposes three possible solutions to the intrusiveness that the knock and talk technique imposes on the home, in descending order of severity. The first is to ban “knock and talk” entirely when a particular home or suspect is the focus of police investigation. The second is to allow “knock and talk,” but forbid the police from using it as a means of avoiding the search and arrest warrant requirements. The third is to require warnings before police can seek consents to search homes or to arrest people at home without warrants. The details, and relative merits of these proposals will be discussed in the last section.

I SPECIAL PROTECTION FOR THE HOME

One of the Supreme Court’s favorite Fourth Amendment pronouncements is that:

(S)earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.\(^7\)

But as Justice Scalia, concurring in the judgment in *California v. Acevedo*,\(^8\) pointed out in 1991 “even before today’s decision, the ‘warrant requirement’ has become so riddled with exceptions that it was basically unrecognizable.”\(^9\) *Acevedo* itself exacerbated the trend by holding that a piece of personal luggage, or any other container found in a vehicle, could be searched on probable cause with no warrant.

In addition to the vehicle search exception to the warrant requirement, no warrant is required to arrest someone in a public place,\(^10\) to fully search them incident to that arrest, including any containers they might be carrying,\(^11\) to “stop and frisk” them,\(^12\) etc. In fact, after *Acevedo*, there is nothing left of the search warrant requirement for outdoor searches except for the perishingly small group of individuals who are carrying a container which

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\(^11\) The combined impact of *United States v. Robinson*, 414 U.S. 218 (1973), (search incident to arrest includes “full body search” of arrestee as well as search of a cigarette pack found on his person and *Illinois v. Lafayette*, 462 U.S. 640 (1983) (backpack of arrestee may be fully searched at the police station) lead to this conclusion.
\(^12\) *Terry v. Ohio*, 392 U.S. 1 (1968).
police have probable cause to search, but as to whom they lack probable cause to arrest, and who don’t put that container in a vehicle. These containers alone are still subject to the search warrant requirement.\textsuperscript{13}

Moreover during the 1970s and 1980s, the Court was vigorous in declaring various police activities, which could only be described as “searches” in common parlance, as not being “searches” at all under the Fourth Amendment. Thus a search of a fenced and posted “open field,”\textsuperscript{14} a helicopter flyover looking for marijuana growing in a yard,\textsuperscript{15} and a search of trash left at the curb for pickup,\textsuperscript{16} were all deemed “non-searches” and consequently not subject to Fourth Amendment regulation at all, much less a warrant requirement.

But throughout the same period, as the Court was whittling away at the warrant requirement, and at the scope of the Fourth Amendment itself, it remained protective of the home. As noted, in the 1984 case of \textit{United States v. Karo}\textsuperscript{17} the Court, somewhat surprisingly, held that for police to continue to monitor an electronic signal from a “beeper” concealed in a drum of chemicals, required a search warrant once the drum was taken inside a house. In the 1980 case of \textit{Payton v. New York},\textsuperscript{18} an arrest warrant was required to enter a home to arrest the occupant. In 1981, a search warrant was required to seek an arrestee in someone else’s home.\textsuperscript{19} The Court even held that the exigent circumstance exception to the warrant requirement would not apply to home entries involving “minor offenses,”\textsuperscript{20} and imposed a “knock and announce” requirement when police were executing search warrants for the home.\textsuperscript{21}

Finally, in a truly striking display of home protectiveness, in \textit{Kyllo v. United States},\textsuperscript{22} the Court held that beaming a thermal imaging device at a home required a warrant, even though the device only detected the heat emissions from a home, something that could also be determined by, for example, observing snowmelt on the roof if snow were present.

\textsuperscript{13} See, Craig Bradley, \textit{The Court’s “Two Model” Approach to the Fourth Amendment: Carpe Diem!}, 84 Jour. of Crim. L and Criminology, 429 (1993) discussing this development.
\textsuperscript{17} 468 U.S. 705 (1984).
\textsuperscript{18} 445 U. S. 573 (1980)
\textsuperscript{21} \textit{Wilson v. Arkansas}, 514 U.S. 927 (1995). However, in \textit{Hudson v. Michigan}, 126 S.Ct. 2159 (2006) the Court effectively “took back” this requirement by declaring that the exclusionary rule would not apply to violations of \textit{Wilson}. But these two cases were about the \textit{execution} of warrants and did not affect the warrant requirement itself.
\textsuperscript{22} 533 U.S. 27 (2001)
The dissenters disagreed only to the extent that the information disclosed about the inside of the house was extremely minimal and would also have upheld the warrant requirement for any significant intrusion. But the majority insisted that “obtaining by sense enhancing technology any information regarding the interior of the house that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search – at least where (as here) the technology in question is not in general public use.”

This concern for privacy in the home is of course at the root of the Fourth Amendment itself. It is reflected in the 1886 case of *Boyd v. United States*, holding that the Fourth Amendment’s prohibitions apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.

Likewise, in *Weeks v. United States* in 1914, the Court declared that evidence seized unconstitutionally could not be used in a federal criminal trial. “If letters and private documents could be unlawfully seized from a home (without a warrant) and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and... might as well be stricken from the Constitution.”

This protective view of privacy in the home (including a hotel room) is further reflected in the 1948 decision of *Johnson v. United States*, a case that is particularly germane to this discussion. In *Johnson*, Seattle police received a tip from an informant that unknown persons were smoking opium in the Europe Hotel. Lt. Belland and four federal narcotics agents went into the hallway of the hotel and smelled the distinctive odor of burning opium emanating from Room 1. Belland knocked and a voice asked who was there. “Lt. Belland” was the reply. The defendant opened the door and Belland said “I want to talk to you a little bit.” She “stepped back acquiescently” and admitted them. The officer then told her that she was under arrest and the police searched the room, finding opium and smoking apparatus.

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23 Id. at p.34(emp. added).
25 116 U.S. 616, 630 ((1886).
26 232 U.S. 383 (1914).
27 Id. at p. 393.
28 Supra n. 28
29 Id. at p. 12
The lower courts upheld the admission of the evidence, but the Supreme Court reversed.\textsuperscript{30} First, the consent, suggested by the defendant’s opening of her door and stepping back “acquiescently” was no good: “entry to defendants living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.”\textsuperscript{31}

The Court, per Justice Jackson, conceded that the police had probable cause,\textsuperscript{32} but in a famous passage declared,

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. It’s protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of parroting out crime. Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.\textsuperscript{33}

The Court further rejected an “exigent circumstance” argument by the government, observing that “no reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate.”\textsuperscript{34} The Court finally rejected a search incident to arrest argument noting that prior to the opening of the door, the police lacked probable cause that any particular individual was violating the law inside the room. Only when they illegally discovered that Johnson was the sole occupant did they have probable cause to arrest her.\textsuperscript{35}

\begin{itemize}
  \item \textsuperscript{30} Id.
  \item \textsuperscript{31} Id. at p. 13.
  \item \textsuperscript{32} Thus giving rise to “plain smell” as the basis for probable cause.
  \item \textsuperscript{33} Id. While the Court was clearly talking about a search warrant in Johnson, this passage was quoted at length in Payton v. New York, 445 U.S. 573, 586 n. 24 (1980) when the Court required arrest warrants for arrests in dwellings. Since an arrest warrant, which doesn’t authorize a full search of the home, (and will allow only a limited search if the suspect comes to the door) is a lesser intrusion than a search warrant, the reasoning of Johnson would apply equally to arrests effected without warrants.
  \item \textsuperscript{34} Id. at p. 15.
  \item \textsuperscript{35} Id. at p. 16. This view of probable cause to arrest has essentially been rejected by Maryland v. Pringle, 540 U.S. 366 (2003) which held that when police had probable cause to believe that the felony of drug possession had been committed by at least one of three occupants of a car, it was enough to arrest all three under a “common enterprise” theory. Id. at pp. 372-73. The same could be said of any and all occupants of Johnson’s room (though it
Thus Johnson stands for two propositions: First, that a consent to search a home cannot be valid if it is granted in “submission to authority rather than as an understanding and intentional waiver of a constitutional right,” even though the police made no threats or demands. Second, that police cannot get people to open their doors without a warrant and then use evidence obtained as a result of that opening as the basis for a valid search or arrest. Thus the Court, in effect, disapproved of a number of aspects of the “knock and talk” technique decades before the term came into general use.

As noted, the Supreme Court has not addressed the scope of the “knock and talk” doctrine in the years since it was rejected in Johnson. However, the lower courts have largely ignored the dictates of Johnson in granting broad approval to knock and talk tactics employed by the police.

II. KNOCK AND TALK

The phrase “knock and talk” has been used in hundreds of cases, to approve the police going up to someone’s door, knocking on it, and then asking questions of the occupant, obtaining a “plain view” or smell of the interior, walking around the outside of the house, looking in windows, seeking consent to search, or arresting him. The approval of this sort of police activity is based on the notion that police, in going up and knocking on someone’s door, are merely doing what anyone else could do, and consequently are not breaching the occupant’s expectations of privacy. Only when police employ “overbearing...

is not clear how Pringle would apply to all the occupants of a house). I would concede that Johnson’s view of probable cause to arrest is unduly narrow, but the arrest in that case was nevertheless invalid because of the lack of meaningful consent or exigent circumstances to enter the room.

36 But see, Schneckloth v. Bustamonte, discussed infra, TAN.

37 See, Fern Kletter, “Construction and Application of Rule Permitting Knock and Talk Visits under Fourth Amendment State Constitutions, 15 A.L.R. 6th 515 (2006). This annotation does not include cases where the phrase “knock and talk” is not used, though there are undoubtedly many such cases.

Davis v. United States, 327 F2d 301 (9th Cir., 1964) is often cited as the origin of the doctrine, though it does not explicitly use the phrase “knock and talk:” Anyone may “openly and peaceably at high noon, walk up the steps and knock on the front door of any man’s ‘castle’ with the honest intent of asking questions of the occupant thereof....” Id. at p. 303

38 1 W. LaFave, Search and Seizure, (4th ed.) §2.3 (c) p.575. “If police utilize ‘normal means of access to and egress from the house’ for some legitimate purpose, such as to make inquiries of the occupant... it is not a Fourth Amendment search for the police to see or hear or smell from that vantage point what is happening inside the dwelling.” Id., (citations omitted).
tactics” such as “drawn weapons, raised voices, or coercive demands,” have they been faulted.\footnote{United States v. Thomas, 430 F.3d 274, 277. (6th Cir., 2005).}

In my view, this blanket approval of “knock and talk” for a variety of purposes, is incorrect. Rather, it should depend upon the nature of the inquiry. It is certainly appropriate for police to canvass a neighborhood following a crime to ascertain whether anyone has knowledge about the crime. It is similarly appropriate for the police, acting in their protective capacity, to knock on doors in response to noise complaints, reports of fighting or violence, etc. And should the police observe evidence in plain view during such encounters, it is correct to seize it.\footnote{Brigham City v. Stuart, 126 S.Ct. 1943 (2006) is an example of such a case. In Stuart, when their knock was ignored, the police had to enter to break up a fight. See also, Rogers v. Pendleton, 249 F3d 279 (4th Cir. 2001) (knock and talk to investigate noise complaints generally approved).}

But the phrase “knock and talk” in police jargon, generally does not refer to such unexceptionable encounters. Rather it is a technique employed with calculation to the homes of people suspected of crimes. The police use “knock and talk” to gain access to a home without a search warrant by getting the occupant to consent, to arrest without warrant, or to either gather further evidence of a crime already suspected, or, possibly, to dispel such suspicion. As one court put it, “‘knock and talk’ might as well be called ‘knock and enter’ because (that) is usually the officer’s goal...”\footnote{Hayes v. State, 794 N.E. 2d 492, 497 (Ind. App., 2003). The court further declared that “The knock and talk procedure pushes the envelope and can easily be misused.”Id.}

This article will consider each type of case separately, though frequently, of course, the police have more than one motive and often end up achieving more than one of their possible objectives.

A. Knock and Talk for Investigative Purposes

What might seem to be the most reasonable application of knock and talk doctrine is where police, with suspicion of criminal activity at a given residence, but without probable cause to arrest or search, go there for the purpose of conducting further investigation, to either develop probable cause, or, perhaps, to dispel their suspicion.\footnote{In all of the reported cases, police used the “knock and talk” to lead to an arrest. But if the “knock and talk” causes suspicion to be dispelled or the police to walk away empty-handed while remaining suspicious, the case would not be reported. There is the possibility of a civil suit if the police did more than just knock and talk. See, e.g. Rogers v. Pendleton, supra.(Search of the curtilage for underage drinkers following a noise complaint disapproved.).}
A typical such case is United States v. Thomas.\textsuperscript{43} In that case, police strongly suspected Thomas of stealing anhydrous ammonia, a chemical used in the manufacture of methamphetamine. Five officers went to Hopper’s house, where Thomas was staying, to question Thomas. Upon arrival they deployed to the front and rear entrances of the house. They saw a handgun and a silver canister in his truck, parked behind the house.\textsuperscript{44} The canister was similar to canisters that were used in other thefts of anhydrous ammonia. Two officers knocked on the back door, the entrance used by the residents, but not necessarily by the public. When Thomas came to the door they asked him to come out of the residence which he did. He was immediately arrested. His person was searched incident to the arrest. Methamphetamine and a handwritten recipe for making more were found. They also searched the truck and found more evidence.\textsuperscript{45}

The district court suppressed the evidence on the ground that the police behavior constituted a “constructive entry” into the house without a warrant.\textsuperscript{46} The district court apparently did not consider the propriety of the police trespass into the back yard of the house, where the plain view into the truck was obtained.

The Sixth Circuit reversed. They noted that “the law has long permitted officers to engage in consensual encounters with suspects without violating the Fourth Amendment:”\textsuperscript{47}

Consensual encounters do not lose their propriety, moreover, merely because they take place at the entrance of a citizen’s home. A number of courts, including this one have recognized “knock and talk” consensual encounters as a legitimate investigative technique at the home of a suspect or an individual with information about an investigation.\textsuperscript{48}

The appropriateness of this sort of police behavior depends upon the homeowner’s “expectations of privacy.”\textsuperscript{49} As one court put it:

In the course of urban life, we have come to expect various members of the public to enter upon (driveways, front porches, etc.) e.g., brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, friends. Any one

\textsuperscript{43} 430 F3d 274 (6th Cir., 2005).
\textsuperscript{44} Whether they had a right to look in a truck parked in the curtilage is not discussed in the case. Supposedly both the gun and the canister were visible through the open door of the truck. Also not discussed, but presumed, is that, after looking in the truck, if not before, the police had probable cause to arrest Thomas.
\textsuperscript{45} Id. at p. 276.
\textsuperscript{46} This issue is discussed further in the “Arrest” section of this article.
\textsuperscript{47} Id. at p. 277.
\textsuperscript{48} Id.
\textsuperscript{49} Katz v. United States, 389 U.S. 347(1967)
of them may be reasonably expected to report observations of criminal activity to the police.... If one has a reasonable expectation that various members of society may enter the property in their personal and business pursuits, he should find it equally likely that the police will do so.50

This is certainly true. But there is a limit to what we may reasonably expect these people to do. We don’t expect them, having knocked on the door, to demand that we come out, or to interrogate us about suspected crimes. We don’t expect them to peer into the house in an exploratory manner when we open the door or go around to the back and look in the windows or in vehicles parked there if we don’t answer the door.51 Yet this is exactly what the courts have permitted.

In United States v. Daust52 the police, believing that the homeowner might have “useful information” about drug sales, approached his house and knocked on the (front) cellar door because the front door was “inaccessible.” 53 Upon receiving no answer, the police proceeded to the back, looked through the kitchen window and saw a gun.54 The First Circuit held that “if the front doors are inaccessible, there is nothing unlawful or unreasonable about going to the back of the house to look for another door all as part of a legitimate attempt to interview a person.”55

In United States v. Hammett 56 the Ninth Circuit found it appropriate for police to “walk (completely) around the house and attempt to locate someone with whom they could speak... and for ‘officer safety reasons.’”57 In United States v. Wheeler58 the court approved of the police standing on tires to look over the fence into the back yard to see if anyone was there to question.

50 State v. Corbett, 516 P2d 487 (Or. App.,1973). Quoted in LaFave, supra, at §2.3(f) p. 599 as setting forth the general principle.
51 This is not to say that such people would never do such a thing, but it is certainly not within our reasonable expectations that they would.
52 916 F2d 757 (1st Cir., 1990)
53 Id. at p. 758.
54 They then got a search warrant based on the viewing of the gun and the fact that Daust was a convicted felon. Id. at 757.
55 Id.at p. 759. Accord, United States v. Anderson, 552 F. 2d 1296, 1300 (8th Cir., 1977) (Agents attempting to question suspect went around back and saw contraband through basement window). See also, Estate of Smith v. Marasco, 318 F. 3d 497 (3rd Cir., 2003) and Rogers v. Pendleton, 249 F.3d 279 (4th Cir., 2001) generally agreeing with these cases while expressing concern that the police behavior in the cases before them may have gone too far.
56 641 F2d 1321, 1327 (9th Cir., 1981).
In *Young v. City of Radcliffe*, the police went to question Young about a shoplifting. While two police knocked on the front door, two others went around to the back. While standing in the curtilage and looking in the back door, they could see that Young had a gun. When Young, hearing a commotion in the back, went to the back door, he failed, because of a hearing impairment, to respond to their command to drop the gun, and they shot him. While the court found that the police’ trespass on the curtilage violated the Fourth Amendment, it upheld qualified immunity for the police in the case because it was “not unreasonable” for the police to believe they were outside the curtilage.

In none of these cases were the police acting like a member of the public who might approach one’s house. Rather, they were aggressively pursuing investigations and intruding on the homeowner’s property in a way that violated his reasonable expectation of privacy.

Girl Scouts, postmen and brush salesmen don’t do this sort of thing. They knock on your front door, and if nobody answers, they go away, even if they have reason to believe that someone might be there. And, if such people become too intrusive, we can always call the police! The courts have taken the unexceptionable behavior that ordinary citizens might engage in and turned it into a right of police to question people at their home which in turn gives them the authority to trespass on private areas of the curtilage, look around, and peer in the windows. What protection does the curtilage afford if it is not to guard against just this sort of thing? “Knock and talk” has become a “talisman in whose presence the Fourth Amendment fades away and disappears.”

These decisions are inconsistent, not only with *Johnson*, but with the Supreme Court’s decision in *Bond v. United States*. Bond was riding on a bus. A Border Patrol agent

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60 Id. p.2.
61 Id. at p. 13. In *Barenbaugh v. City of Tiffin*, 150 F3d 594 (6th Cir., 1998) the Sixth Circuit, somewhat inconsistently with *Thomas*, held that going to the back door for a “knock and talk” about stolen goods, after there was no answer at the front door, was a trespass on the curtilage and when the police obtained a plain view of stolen goods in the separate garage it was invalid.
62 While, as Orin Kerr observes, what “reasonable expectation of privacy” means is the subject of considerable uncertainty, *Four Models of Fourth Amendment Protection*, 60 Stan. L.R. 503, 505 (2007) and articles cited therein, I think most will agree that the police behavior in the cited cases violated it.
63 As noted earlier, they *could*, but one doesn’t reasonably expect them to.
65 529 U.S. 334 (2000). Interestingly, *Bond*, a 7-2 decision, was written by Chief Justice Rehnquist, one of very few times in his 30 year career on the Court that he *voted*, much less wrote an opinion, for a defendant in a non-unanimous Fourth Amendment case. (See also, *Ornelas v. United States*, 517 U.S. 690 (1996) holding, 8-1, per Rehnquist, that
came on the bus to check the immigration status of the passengers. Then he went back through the bus, squeezing the soft luggage which passengers had placed in the overhead storage space above the seats. When the agent squeezed the defendant’s bag he felt a “brick like object,” which turned out to be a “brick” of methamphetamine.

The government, similarly to the “knock and talk” cases, argued that “by exposing his bag to the public, petitioner lost a reasonable expectation that his bag would not be physically manipulated.” But the Court rejected this, accepting the petitioner’s argument that the agents “physical manipulation of his luggage ‘far exceeded the casual contact (petitioner) could have expected from other passengers.’” While the Court conceded that “a bus passenger clearly expects that his bag may be handled, he does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.”

Similarly, while one expects that members of the public may come to his front door, he certainly does not expect that if there is no answer to their knock, they will continue to examine his house and curtilage “in an exploratory manner,” nor that they will ask or demand that he come out. Nor, just because neighbors can see into your back yard, does it mean that the police are entitled to do so by trespassing on your curtilage. (They could, however, get the neighbors to let them into their yard for a view).

Another type of investigative “knock and talk,” occurs when the suspect does come to the door and the police do talk to him. The courts agree that this is permissible so long as the police behavior is not so coercive as to turn this into a “custodial interrogation.” (Clearly it is “interrogation” in most cases, the only issue is whether it’s “custodial.”) This is closer to issues of probable cause and reasonable suspicion should be reviewed de novo by the Court of Appeals—a result that happened to favor the defendant in that case.)

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66 Id. at p. 335. The dissent in Bond was authored by Justice Breyer who had written the opinion for the First Circuit in Daust, supra, n. 6.
67 Id. at p. 337.
68 Id. at p. 338.
69 Id. at 339. Bond distinguished other cases where a visual inspection had been allowed, on the ground that they involved “only visual as opposed to tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection.” Id at p. 397, citing Terry v. Ohio, 392 U.S. 1(1968). The cases discussed herein involve physical trespass on suspects’ curtilage, not mere visual inspection from the street.
70 See, e.g. United States v. Titemore, 335 F.Supp. 502 (D. Vt., 2004)(“request” that suspect come outside approved).
72 Rhode Island v. Innis,446 U.S. 291 (1980): Interrogation is “any words or actions on the part of the police...that the police should know are reasonably likely to elicit an
what members of the general public, including religious proselytizers, salesmen, and politicians, might do. But these people do not come to interrogate the occupant about criminal activity, sometimes in the middle of the night. And, if you tell them to go, they leave. In fact the police’s physical presence is designed to put pressure on the suspect, as well as to allow the police to check for any physical evidence they may see, that’s why they don’t simply call on the phone. (So much easier and ecologically correct). They could also question people on the street. The notion that “a man’s home is his castle” would seem to encompass the principle that police can’t come there to interrogate you without legal authorization. (i.e. an arrest or search warrant).

**Exigent Circumstances**

Once knock and talk is allowed, the exigent circumstances issue arises. What happens if the door is opened and the police see either evidence of criminal activity or a person whom they have probable cause to arrest? Are the police entitled to rush in and seize him/it? On this there is confusion. In *United States v. Scroger*, the police went to Scroger’s residence to investigate reports of drug activity. When the defendant answered the door, it became obvious that he was engaged in manufacturing methamphetamine. The Tenth Circuit agreed that an exigent circumstance entry to arrest was appropriate, noting that the police didn’t feel that they had enough evidence to constitute probable cause prior to the knock and talk. No “emergency” other than the need to arrest the suspect was discussed. This is exactly the sort of behavior the Supreme Court disapproved of in *Johnson*.

Likewise, in *United States v. Charles*, the Third Circuit approved an exigent circumstance entry where the police, investigating a marijuana growing complaint, knocked on the door and smelled marijuana when the suspect opened the door. When the suspect denied them consent to enter and ran back into the house, locking the door behind her, the police broke down the door, obtained a “plain view” of the marijuana, and put this incriminating response.” Id. at p. 301.


74 The issue of exigent circumstances to arrest is discussed infra in Section C.

75 98 F.3d 1256 (10th Cir., 1996). Accord, *United States v. Milikan*, 404 F. Supp. 2d 924 (E.D. Tex., 2005) where police went to a hotel room to investigate weapons violations and spotted a gun case near an occupant of the room when another answered the door.

76 29 Fed.Appx. 892 (3rd Cir., 2002) But see, *United States v. Coles*, 437 F3d 361 (3rd Cir., 2006) where the 3rd Circuit seemed to agree with the courts that have held that the police cannot deliberately create exigent circumstances through “knock and talk.”
information in a search warrant.\textsuperscript{77}

In \textit{United States v. Jones}\textsuperscript{78} the Fifth Circuit was more leery of the police claim of exigent circumstances, but ultimately allowed it. In \textit{Jones}, the police went to an apartment house to investigate possible drug activity. The screen door of Jones’ apartment was shut. The defendant answered the door and as he did, the police, peering through the screen, noticed a gun on the kitchen table, so they entered and seized it because another resident was still inside. Ascertaining that Jones was a felon, they arrested him for possession of a gun. The court adhered to the rule of the circuit that police may not create their own exigent circumstances,\textsuperscript{79} but claimed that it was \textit{Jones}, not the police officers, who created the exigent circumstance by leaving a gun where it could be seen through the screen door, even though the door could only be reached by entering the apartment building.\textsuperscript{80}

In \textit{United States v. Chambers}\textsuperscript{81} the Sixth Circuit was more restrictive. There, the police, with “overwhelming” evidence that the defendant was operating a meth lab, went to his home and knocked on the door. When the woman who answered the door retreated at the sight of the police and called out “Police!”\textsuperscript{82} they burst through the door, fearing that evidence would be destroyed. The Sixth Circuit suppressed the evidence that was found, rejecting the exigent circumstance claim and holding that an exigent circumstance entry must be in response to an “unanticipated emergency” rather than the police simply creating the exigency for themselves.\textsuperscript{83} This seems a clear conflict with the Tenth and Third Circuits, but a careful reading of \textit{Chambers} suggests that the Sixth Circuit’s “rule” is limited to situations where the police had basically determined in advance that they were going to search and thus “deliberately” sought to “evade the warrant requirement.”\textsuperscript{84} The Sixth Circuit did not take the position that no exigency that arises from a “knock and talk” could give rise to a legally sanctioned entry and seizure of persons or evidence.\textsuperscript{85}

\begin{footnotes}
\item[77] The Second Circuit also approves exigent circumstance entries following “knock and talk.” \textit{United States v. MacDonald}, 916 F2d 766 (2nd Cir., 1990).
\item[78] 239 F.3d 716 (5\textsuperscript{th} Cir., 2001)
\item[79] Id. at p. 19; Also citing \textit{United States v. Tobin}, 923 F2d 1506, 1511 (11\textsuperscript{th} Cir., 1991).
\item[80] The Fifth Circuit’s commitment to a rule that police may not create the exigent circumstances through a knock and talk is further undercut by \textit{United States v. Anderson}, 160 Fed. Appx. 391 (5th Cir., 2005) where the court approved a warrantless entry to seize narcotics and a gun which were seen when the suspect opened the door in response to a police knock.
\item[81] 395 F.3d 563 (6\textsuperscript{th} Cir., 2005)
\item[82] Id. at p. 568.
\item[83] Id. at p. 565.
\item[84] Id. at p. 569.
\item[85] See, Bryan Abramske, Note, \textit{It Doesn’t Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in “Knock and Talk”}
\end{footnotes}
How to deal with the exigent circumstance problem will be discussed in the last section of this article.

B. “Knock and Talk” for the Purpose of Getting a Consent to Search

The police perform knock and talks both when they do have probable cause and when they don’t, for the purpose of getting consent to search. In the first case it saves them the trouble of getting a warrant, and in the second, the trouble of both getting a warrant and probable cause. So much for the “special protection” of the home. It is not surprising that the lower courts have approved this behavior because it is directly encouraged by the 1973 auto search case of *Schneckloth v. Bustamonte*:

\[86\]

in situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence....And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to a consent may result in considerably less inconvenience for the subject of the search....

\[87\]

Thus, to hear the Court tell it, consent searches are a great thing for police and citizens alike. The Court went even further in *United States v. Drayton*, suggesting that waiving one’s rights and consenting to search was practically a civic duty:

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place it dispels inferences of coercion.

\[89\]

As I, and other commentators, have previously observed, this is nonsense. As Prof. Investigations, 41 Suffolk U. L.R. 561, 573-76 (2008) discussing the approach of various circuits.

\[86\] 412 U.S. 218.
\[87\] Id. at pp. 227-28.
\[88\] 536 U.S. 194 (2002).
\[89\] Id. at p. 208.
\[90\] “United States v. Drayton: the Court’s Curious Consent Doctrine” in Craig
Marcy Strauss puts it:91

Every year I witness the same mass incredulity. Why, 100 criminal procedure students jointly wonder, would someone “voluntarily” consent to allow police officers to search the trunk of his car, knowing that massive amounts of cocaine are easily visible there? The answer, I’ve come to believe, is that most people don’t willingly consent to police searches. Yet absent extraordinary circumstances, chances are that a court nonetheless will conclude that the consent was valid and the evidence admissible under the Fourth Amendment.92

Prof. Tracey Maclin points out that police consider consent searches extremely easy to get, and one detective estimated that as many as 98% of searches are by consent. Even if police are initially refused consent that can often cajole the homeowner into giving it.93

The only limitation imposed by the Court on consent searches is that the consent must be “voluntary,”94 though Schneckloth held that the concept of voluntariness did not include either a warning, or a showing, that the suspect knew that he had a right to refuse, thus seeming to back away from the “understanding and intentional waiver”95 standard of Johnson.

Schneckloth and Drayton should be distinguished on the ground that neither of those cases involved consent to search a home,96 and that the standard should be higher for this given the Supreme Court’s often stated special regard for the privacy of the home.97 In fact, this appears to be the only meaningful distinction between Johnson and Schneckloth.

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Bradley, Criminal Procedure: Recent Cases Analyzed (2007) p. 75.: “Consent searches are the black hole into which Fourth Amendment rights are swallowed up and disappear.” Id.

92 Id. at pp. 271-72. Strauss thus proposes abolishing consent searches altogether.
94 E.g., Schneckloth at pp. 222-223.
95 333 U.S. at p. 13.
96 Schneckloth, however, made it clear in dictum that its reasoning applied to homes. “Consent searches...normally occur on the highway, or in a person’s home or office.” Id. at p. 232.
97 The court did place a modest limit on home (and presumably other) consent searches in Georgia v. Randolph 547 U.S. 103 (2006) when it held that the consent of one occupant of a home is invalid if the other occupant is present and withholds consent. It is unclear how this would apply to consent to the search of a car.
Johnson is repeatedly cited with approval in Schneckloth as an example of an invalid consent search where the prosecutor failed to meet his “burden of proving that the consent was freely and voluntarily given.”

But what was the difference in the consents in Schneckloth and Johnson? In neither case were guns displayed nor threatening language used. In neither case did the suspect demur in any way when asked for consent. And in neither case was the suspect warned of any right to refuse. The main difference seems to be that, whereas in Schneckloth the suspect, detained pursuant to a legitimate traffic stop, was asked consent to search his car, in Johnson the police had asked the suspect to open the door of her dwelling.

The lower courts have generally approved the practice of avoiding warrant and/or probable cause requirements through “knock and talk” consents. The 2007 case of United States v. Crapser from the Ninth Circuit is typical. In that case police, after receiving information that the suspect may have been involved in meth cooking, and also may have had an arrest warrant outstanding (though it turned out he didn’t) determined to go to the motel where he was staying to “knock and talk (their) way into obtaining consent to search the room.”

Four officers, of whom three were visibly armed and in uniform, knocked on the door of the motel room. When a woman pulled back the curtains and viewed them, a policeman asked her to open the door so he could speak with her. After two minutes she did, and she and the defendant stepped outside and closed the door behind them. The police moved them into two groups, (two cops and one suspect per group) 10 to 25 feet from each other on the sidewalk to the parking area. According to the court, “during this initial part of the contact, the officers did not block or physically keep defendant or (the woman) from walking away or returning to their room nor did the officers assert authority over the movements of (the suspects).” After about five minutes of questioning, the defendant voluntarily produced a syringe from his pocket saying “this is all I have on me.” Shortly thereafter, both the defendant and the woman consented to a search of the room. Drugs and drug paraphernalia

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98 E.g. 412 U.S. at pp. 222,233, 234, and 243 n.31
99 Id. at p. 222.
100 See, Schneckloth, 412 U.S. at p. 220. However, Schneckloth does describe the police behavior in that case as “ask(ing)” Id. and in Johnson as “demanded under color of office.” Id. at p. 243 n. 31, quoting Johnson. But all the police did in Johnson was state their identity prior to the suspect opening her door, and say “I want to talk to you” prior to her “stepping back acquiescently.”
101 472 F3d 1141
103 Id. at p. 1143.
104 Id. at p. 1144.
were found on the defendant and a gun was found in the room.\textsuperscript{105}

In a two to one decision, the Ninth Circuit upheld the search, finding that the initial contact with the defendant, as well as the consent to search, was voluntary. The court noted that there was a “single polite knock on the door,” the officers “made no effort to draw attention to their weapons, nor did they use any form of physical force.” “The encounter occurred in the middle of the day, on a sidewalk in public. The entire event, up to the time the defendant produced the syringe, lasted about five minutes.... The police did not block defendant or (the woman), suggest that they could not leave and return to their room, give them orders or affirmatively assert authority over their movements.”\textsuperscript{106} Moreover the court concluded that, “even if the initial encounter was a seizure, it was a \textit{Terry} stop supported by reasonable suspicion,” justified because the suspect “voluntarily” exited the motel room.\textsuperscript{107}

In dissent, Judge Reinhardt declared that “the majority opinion further weakens our Fourth Amendment protections–whatever is left of them.”\textsuperscript{108} He noted that the test as to the voluntariness of a consent, according to \textit{Florida v. Bostick},\textsuperscript{109} is whether a reasonable person approached by police would have believed that he was “free to ignore the police presence and go about his business.”\textsuperscript{110} The Ninth Circuit,\textsuperscript{111} has elaborated on \textit{Bostick} by considering five factors: “(1) the number of officers involved, (2) whether the officers’ weapons were displayed,(3) whether the encounter occurred in a public or nonpublic setting,(4) whether the officers officious or authoritative manner would imply that compliance would be compelled and (5) whether the officers advised the detainee of his right to terminate the encounter.”\textsuperscript{112}

Considering all of this, Judge Reinhardt concluded that the defendant was not “free to ignore the police presence and go about his business.” Indeed it is difficult to imagine a situation in which one would feel free to ignore the presence of police banging on your door

\begin{itemize}
\item \textsuperscript{105} Id. at p. 1145.
\item \textsuperscript{106} Id. at p. 1146.
\item \textsuperscript{107} Id. at p. 1149.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} 501 U.S. 429, 437 (1991)
\item \textsuperscript{110} Id. at p. 437, quoting \textit{Michigan v. Chesternut}, 486 U.S. 567, 569 (1998). The Court, while treating these as equivalent formulations, also stated the test another way in \textit{Bostick}: “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” Id. at p. 436.
\item \textsuperscript{111} In \textit{Orhorhaghe v. INS}, 38 F3d 488 (9\textsuperscript{th} Cir., 1994)
\item \textsuperscript{112} \textit{Crapser}, 472 F3d at p.1150(dissenting opinion). Judge Reinhardt accurately quoted \textit{United States v. Washington}, 387 F3d 1060, 1068 (9\textsuperscript{th} Cir. 2004) describing the \textit{Orhorhaghe} factors whereas the majority quoted an older case which described the five factors significantly differently. 472 F3d at p. 1149. \textit{Orhorhaghe} itself contains a more extensive discussion that could be summarized in various ways, but, presumably the summary from \textit{Washington} represents the law of the circuit.
\end{itemize}
and “go about your business.” As the Second Circuit put it, in finding no consent where the suspect opened the door in response to a knock from three armed agents:

> to hold otherwise would be to present occupants with an unfair dilemma to say the least: to either open the door and thereby forfeit cherished privacy interests or refuse to open the door and thereby run the risk of creating the appearance of an “exigency” sufficient to justify a forcible entry.\(^\text{113}\)

Some courts have approved even more aggressive police tactics in obtaining “consent.” In *United States v. Dickerson*\(^\text{114}\) four police with guns drawn knocked on the defendant’s door. After repeated knocking the defendant, naked, came to the door and opened it 1 foot. The policeman stuck his foot in the opening and requested entry. Defendant responded by saying needed to get dressed, whereupon the police asked if they could come in while he did so and he admitted them.\(^\text{115}\) The Seventh Circuit found this consent “voluntary.”\(^\text{116}\)

Moreover, once consent is obtained, courts approve the use of a “protective sweep” to allow police to go into areas not authorized by the consent. For example, in *United States v. Gould,*\(^\text{117}\) the police went to defendant's trailer. His roommate admitted them and told them that the defendant was asleep in the master bedroom. While the court held that the police lacked real or apparent consent to enter the master bedroom, it upheld the entry of the bedroom anyway on the ground that this was a “protective sweep” authorized by *Maryland v. Buie,*\(^\text{118}\) even though *Buie* was limited to searches incident to arrest.\(^\text{119}\)

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\(^\text{113}\) *United States v. Reed,* 572 F3d 419, 423 fn.9 (2nd Cir., 1978). However, in *United States v. Gori,* 230 F3d 44, 53 (2nd Cir., 2000) the Second Circuit held that by opening the door to a delivery person’s knock, the suspect sacrificed his expectations of privacy and could be ordered out of the apartment and arrested without a warrant.

\(^\text{114}\) 975 F2d 1245 (7th Cir., 1992)

\(^\text{115}\) See also, *Nash v. United States,* 117 Fed. Appx. 992 (6th Cir., 2004) in which the Sixth Circuit held that the defendant’s being handcuffed and surrounded by police did not invalidate consent to search, noting that “no testimony in the present case indicates drawn weapons, raised voices or coercive demands on the part of the police.”

\(^\text{116}\) To be fair, the court recognized that on their face, the facts of this case seemed to require that the police behavior be struck down, but noted that the police were investigating a very recent bank robbery, had strong evidence that the suspect was the perpetrator, and believed that his nakedness was an attempt to establish an “I was in bed with my girlfriend” alibi.


\(^\text{119}\) 364 F.3d at p. 590. The police did have a reasonable suspicion of danger in *Gould.*
Some courts have disallowed such aggressive behavior as in *Crapser* and *Dickerson*. For example in *United States v. Jerez*[^120] a different panel of the Seventh Circuit struck down a consent search when the police had knocked on a hotel room door and window for three minutes “in the middle of the night” and called out “Police. Open up the door. We’d like to talk to you.”[^121] The court held that the occupant was “seized,” under *Terry v. Ohio*[^122] when he complied with this request and that the seizure was illegal because not based on reasonable suspicion. He could not “reasonably have believed that he was... free to disregard the police presence and go about his business”[^123] While I agree with the outcome of this case, I reject the court’s suggestion that the police conduct would have been allowed if they had had reasonable suspicion[^124] as discussed below. In dissent, Judge Coffey vigorously argued that the police behavior was acceptable and also based on reasonable suspicion.

*Johnson* should be recalled at this point. All that the policeman did there was knock on the door, reply “Lt. Belland” when asked who was there, and then express a desire to talk to her when Johnson opened the door. Her acquiescence in the police’ entry was held to be in “submission to authority” and therefore not a valid consent. The requirement of aggressive police behavior by the courts of appeal before consents will be invalidated, while arguably true to *Schneckloth*, is inconsistent with *Johnson* and *Bostick*, as well as with any notion that “a man’s home is his castle.” Whatever may be said of consents to search luggage and cars, consents to search homes, offices and hotel rooms should be more tightly regulated.

A number of courts have suggested, as did *Jerez*, that reasonable suspicion may be the key to these cases: if the police have reasonable suspicion they can “seize” the defendant

[^120]: 108 F3d 684 (7th Cir., 1997)
[^121]: Id. at p. 687.
[^124]: Prof. Stuntz has pointed out that “the real standard applied in (consent) cases... is not the ‘reasonable person’ tests that courts cite but rather a kind of Jeopardy rule: if the officer puts his command in the form of a question consent is deemed voluntary and the evidence comes in. Stuntz, *Privacy’s Problem in the Law of Criminal Procedure*, 93 Mich. L.R. 1016, 1064 (1995).

Accord, Weinreb, *Generalities of the Fourth Amendment*, 42 U. Chi.L.R. 47,57 (1974): “The product of *Schneckloth* is likely to be still another series of fourth amendment cases in which the courts provide a lengthy factual description followed by a conclusion (most likely, in the current climate, that consent was voluntarily given), without anything to connect the two.” This has proved to be prescient.
and then obtain a valid consent to search.\textsuperscript{125} The Ninth Circuit, however, has rejected this suggestion:

*Terry*’s twin rationales for a brief investigatory detention--the evasive nature of the activities police observe on the street and the limited nature of the intrusion--appear to be inapplicable to an encounter at a suspect’s home. Officers on the beat may lose a suspect before the officers have gathered enough information to have probable cause for an arrest. In contrast, officers who know where a suspect lives have the opportunity to investigate until they develop probable cause, all the while knowing where to find the suspect. Because “[n]owhere is the protective force of the fourth amendment more powerful than [within] the sanctity of the home,” the second rationale for a *Terry*-stop seems almost absent by definition when the intrusion is at a suspect’s home.\textsuperscript{126}

Moreover, the fact that police had reasonable suspicion to detain someone at his residence would make the consent no more “voluntary” than if they lacked it, and if they grabbed or frisked him prior to seeking consent, it would seem to make any such consent considerably less voluntary.

Other courts have suggested, though not held, that approaches to houses for the purpose of obtaining consent, or for “knock and talk” in general, may only be justified in the first place if the police have reasonable suspicion.\textsuperscript{127} This would be a reasonable limitation on consent searches of automobiles, where police, having stopped a car for a traffic violation, often seek consents for no articulable reason. But when police go to a house seeking consent to search, they ordinarily have a substantial suspicion before they bother to make the trip. Consequently any “reasonable suspicion” limitation would not offer much further protection for the privacy of the home.

**C. Knock and Talk for the Purpose of Arrest**

Arrests in the home are governed by *Payton v. New York*\textsuperscript{128} which held that in order for the police to arrest someone in their home they must have an arrest warrant and reason to believe the suspect is within. Nevertheless the police constantly use “knock and talk” to get

\textsuperscript{125} Accord, *United States v. Jones*, 239 F3d 716, 720 (5\textsuperscript{th} Cir., 2001), *Crapser*, supra.

\textsuperscript{126} *United States v. Washington*, 387 F3d 1060, 1067-68 (9\textsuperscript{th} Cir., 2004) (Internal citations omitted). *Crapser* distinguished *Washington* on the ground that in *Crapser* the suspect had voluntarily exited the motel before he was “seized.”

\textsuperscript{127} *United States v. Tobin*, 923 F3d 1506, 1511 (11\textsuperscript{th} Cir., 1991): “Reasonable suspicion cannot justify the warrantless search of a house, but it can justify the agents approaching the house to question the occupants.” Accord, *Jones*, supra n.125.

\textsuperscript{128} 445 U.S. 573 1980).
around this requirement. These tactics have created considerable confusion among the lower courts as to just what police behavior is allowed. There are conflicts in the circuits as to whether the initial knock can give rise to exigent circumstances which then allow the warrant requirement to be waived, as previously discussed. There are further conflicts as to whether the police standing outside and demanding or asking that the suspect come out constitutes an arrest, and whether, if the suspect comes to the door, the police may step or reach over the threshold in order to arrest him.

One type of situation has been clearly resolved. In *United States v. Santana*129 the police arrived at Santana’s house with probable cause that she had in her possession marked money used to make a recent heroine “buy.” As they pulled up in front of Santana’s house, they saw her standing on the threshold of the front door. As soon as she saw them, she ran into the house. The police followed in hot pursuit and arrested her in the vestibule. The Court held that by standing on the threshold, Santana was “not merely visible to the public but was exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house.”130 Consequently, her flight into the house created an exigent circumstance which allowed the police to follow in hot pursuit.131

In the usual case, however, the suspect is not standing outside when the police arrive and police lack exigent circumstances to make a warrantless entry. Rather, they seek to avoid the warrant requirement through “knock and talk”, even though they may have probable cause, hoping that either the suspect will submit to arrest, exit the house, or that exigent circumstances will arise. For example, in *Thomas*,132 discussed previously, five police, having gone to the place where Thomas lived to investigate the theft of anhydrous ammonia, knocked on the door. When they saw Thomas inside, they asked him to come out, and then immediately arrested him. The District Court ruled that this was a “constructive entry” in violation of the arrest warrant requirement of *Payton*. But the Sixth Circuit reversed on the ground that this was a “consensual encounter.” “No testimony indicated drawn weapons, raised voices, or coercive demands on the part of the police.”133 Where there is such a show of force, courts are more likely to consider the opening of the door involuntary and the arrest invalid.134

129 427 U.S. 38 (1976)
130 Id. at p. 42.
131 Id. at p. 43.
132 Supra TAN .
133 Id. at p. 278.
134 E.g. *United States v. Morgan*, 743 F2d 1158 (6th Cir., 1984)(‘ten officers surrounded the house, blocked the suspect’s car, “flooded the house with spotlights and summoned Morgan from his mother’s house with the blaring call of a bullhorn.”’)Id. at p. 1161; *Sharrar v. Felsing*, 128 F3d. 810 (3rd Cir., 1997)(“No reasonable person would have believed that he was free to remain in the house” when the police surrounded the house, pointed machine guns at the windows and ordered the occupants out.”)Id. at p. 819.
But whether or not the police engaged in extremely aggressive behavior is not the point. *Payton* requires a warrant to arrest someone at his home, period. Whether the police arrest him by standing at the door and asking, ordering, or insisting with drawn guns that he come out is irrelevant.

Several circuits have held that if the suspect opens the door in response to a police knock, it is not considered a *Payton* violation for the police to arrest him on the spot without a warrant. The reasoning is that, once the suspect comes to the door, he is in “plain view” as in *Santana*, and consequently the police have the right to seize him. Under this reasoning, it wouldn’t seem to matter whether the suspect voluntarily acceded to the arrest, or whether the police had to step in to the vestibule to arrest him. In *United States v. Vaneaton*, for example, the police had just obtained probable cause that a person they were seeking to arrest was staying at a nearby motel. They immediately repaired to the motel, knocked on the door, and, when Vaneaton answered the door, arrested him. The Ninth Circuit held that, “by opening the door as he did, Vaneatton exposed himself in a public place,” and approved the arrest, and the search incident thereto.

Other courts reject this approach, holding as the Seventh Circuit did, that “a person does not surrender reasonable expectations of privacy in the home by simply answering a knock at the door.” As Judge Posner explained,

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135 *McKinnon v. Carr*, 103 F3d 934 (10th Cir., 1996). *United States v. Gori*, 230 F.3d 44, 54 (2nd Cir., 2000); (In *Gori*, however, it was a delivery person, not the police, who knocked on the door. The police then ordered the residents out a gunpoint. The court placed weight on the fact that it was the knock of an “invitee” rather than police that caused the door to be opened.) *United States v. Peters*, 912 F2d 208 (8th Cir., 1990) (“When an individual voluntarily opens the door of his (dwelling) in response to a simple knock, the individual is knowingly exposing to the public anything that can be seen through the open door and thus is not afforded Fourth Amendment protection.” Id. at p. 210. *United States v. Carrion*, 809 F2d 1120 (5th Cir., 1987).

136 49 F3d 1423 (9th Cir., 1995); 137 Id. at p. 1427. The court seems to place some weight on the fact that Vaneaton knew, through looking out the window, that it was the police.

since few people will refuse to open the door to the police, the effect of the rule of (the second and ninth circuits) is to undermine, for no good reason that we can see, the principle that a warrant is required for entry into the home, in the absence of consent or compelling circumstances. Those cases equate knowledge (what the officer obtains from the plain view) with a right to enter, and by so doing permit the rule of Payton to be evaded.\textsuperscript{139}

Thus while the Seventh Circuit rejects the notion that simply coming to the door in response to a police knock creates both a plain view and an automatic right to enter under an exigent circumstance theory, it does not deny the right of the police to knock and obtain a plain view of the suspect or contraband if he/it can be seen when the door is opened. It simply requires an additional showing of exigent circumstances before the police can enter without a warrant,\textsuperscript{140} something that often will not be difficult for the police to show, depending upon what “exigent circumstances” means. Still the Seventh Circuit’s rule avoids the most blatant violation of the Payton principle.

It would seem that the dispute among the circuits on this point should be settled in favor of the Seventh, by New York v. Harris, decided by the Supreme Court in 1990.\textsuperscript{141} In Harris, the police, with probable cause to arrest, but no warrant, knocked on Harris’ door, “displaying their guns and badges. Harris let them enter.”\textsuperscript{142} There was no dispute that this arrest was illegal, and that Harris’ statement to the police immediately following the arrest was inadmissible, despite his receipt of Miranda warnings.\textsuperscript{143} It is clear that it was not the “display of guns and badges” that rendered this arrest illegal, but rather the failure of the police to come with an arrest warrant:

\textit{Payton}... drew a line at the entrance to the home. This special solicitude was necessary because ‘physical entry of the home is the chief evil against which the wording of the fourth amendment as directed.” The arrest warrant was required to “interpose the magistrate’s determination of probable cause” to arrest before the officers could enter a house to effect an arrest.\textsuperscript{144}

\textit{Harris} seems clear: police may not effect a valid arrest by coming to the door of a house with probable cause and, when the suspect comes to the door, arresting him. Yet the courts that permit this sort of thing ignore Harris, which is better known for its holding that

\begin{footnotes}
\footnote{139} Hadley v. Williams, 368 F3d 747, 750 (7th Cir., 2004).
\footnote{140} Id.
\footnote{141} 495 U.S. 14 (1990).
\footnote{142} Id. at p. 15.
\footnote{143} The only dispute was whether a subsequent statement made at the police station was admissible. The court held that it was. Id. at p. 23.
\footnote{144} Id. at p. 18 (citations omitted.)
\end{footnotes}
the illegal arrest does not invalidate subsequent statements made outside the house after proper Miranda warnings.

It is likewise manifest from Payton’s companion case, Riddick v. New York,\(^{145}\) that if someone else in the household opens the door in response to the police knock, and the defendant is spotted through the door, the police are not entitled to enter and arrest him without a warrant or some showing of exigent circumstances beyond the mere desire to arrest the suspect. Why should it matter who opens the door?

Many courts that adhere to what has been termed the “sanctity of the home” approach, disallowing this sort of police conduct,\(^{146}\) further hold that it is not necessary for the police to cross the threshold to violate Payton: If the suspect comes to the door in response to the police knock, and the police inform him that he is under arrest this is also a violation, even if he then comes out willingly.\(^{147}\)

But Prof. Lafave argues that this is both contrary to the language of Payton, which holds only that the “threshold may not reasonably be crossed without a warrant”\(^{148}\) and also contrary to its rationale.\(^{149}\) Lafave points out that the warrant requirement makes sense only in terms of the entry, rather than the arrest; the arrest itself is no “more threatening or humiliating than a street arrest.” This certainly means that if the arrest can be accomplished without entry, it should be deemed lawful notwithstanding the absence of a warrant even if the arrestee was just inside rather than on the threshold at the time.\(^{150}\)

LaFave bolsters this argument by pointing out that these cases should not be resolved by such “metaphysical subtleties” as whether the defendant was “‘in’ the doorway rather than ‘at’ it or ‘on” the threshold rather than ‘by’ it.\(^{151}\) Since, “in the vast majority of such confrontations the person will submit to the police” this will relieve the police “from having to obtain arrest warrants in a large number of cases in advance, and the warrant process is therefore not overtaxed (thus giving greater assurance that will not become a mechanical

\(^{145}\) 445 U. S. 573, 578 (1980)
\(^{146}\) Citron, supra n. at p.2762.
\(^{147}\) See cases summarized in Lafave, supra n. at §6.1(e) p. 301 fn. 156..
\(^{148}\) Harris, supra TAN 135.
\(^{149}\) A proposition with which the Seventh Circuit agreed in United States v. Berkowitz, 927 F2d 1376 (7th Cir., 1991) [“if the person recognizes and submits to (police) authority, the arrestee, in effect has forfeited the privacy of his home to a certain extent.”]
\(^{151}\) Id .at p 303.
LaFave recognizes that this creates a new problem. What to do if the person, upon seeing the police, retreats back into the residence? Lafave says that in such a case, the police should be required to “withdraw and return another time with a warrant.” This is asking for an unusual degree of restraint by police who are, under LaFave’s approach, legitimately seeking a suspect whom they have probable cause to arrest. Most courts would likely find exigent circumstances to justify chasing down the suspect in this situation, arguing that, unlike Riddick, he was trying to get away.

Still, if one accepts the basic propriety of police going to people’s houses in hopes of getting them to submit to warrantless arrests, despite the holding of Payton, then LaFave’s solution is reasonable. But I do not. As we have seen, police, whatever their motive in conducting the knock and talk originally, use it as a means of intruding on the suspect’s privacy in numerous ways. Thus in hoping to effect a “voluntary” arrest, the police will also obtain plain views and smells from the suspect’s residence, go around the back to look for him, and perhaps be allowed to look in outbuildings if he doesn’t answer the door.

More importantly, if they can arrest him, either by ordering or asking him to come to the door, or by hoping that he comes voluntarily, they will then be able to search the entrance area from whence he came, incident to the arrest. Moreover, they will be able to make a “protective sweep” of the room from which he emerged, without any showing of additional suspicion, and upon a showing of reasonable suspicion of danger, extend that sweep into other rooms of the house, seizing all evidence in plain view as they go. It is these sorts of intrusions that the Payton arrest warrant requirement, as well as the holding of Johnson, protects against.

Police should not be allowed to avoid the arrest warrant requirement by seeking “voluntary cooperation” at the door to the suspect’s residence, with all of the additional intrusions that such a knock and talk entails. If the police want to encourage people to give themselves up voluntarily, they can call on the telephone and invite them to do so, including calling from a cellphone while positioned directly outside the suspect’s curtilage. Or they can wait for him to come out on his own. In either of these latter two situations, they won’t

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152 Id. at p. 304.
153 Id. at p. 304.
154 This would be the “area within his immediate control” prior to the arrest under the dubious reasoning of Chimel v. California, 395 U.S. 752 (1969).
155 Maryland v. Buie, 494 U.S. 325 (1990). Even when the police arrest someone just outside his door, the courts are in agreement that, upon reasonable suspicion of danger from within, they can enter and perform a protective sweep. See, Sharrar v. Felsing, 128 F3d 810, 820 (9th Cir., ) and cases cited therein. Such reasonable suspicion would rarely arise if the arrest occurred on the public sidewalk outside the house rather than at the entryway.
be able to search inside the house or perform protective sweeps incident to the arrest, nor obtain special access to the activities inside the house by causing the front door to be opened or by trespassing on the curtilage. Moreover, the suspect will be dressed for the outside, so it won’t be necessary to follow him into the house while he dresses. Ordinarily, however, as Payton holds, they should come with an arrest warrant or arrest him outside.

III. SOLUTIONS

At first blush, it isn’t obviously unreasonable for the police to come to one’s door and knock on it, “like anyone else could do.” This explains the universal acceptance of the “knock and talk” tactic by courts around the country. But as this article shows, “knock and talk” repeatedly leads to serious intrusions into the privacy of the homeowner, and to regular avoidance by police of the arrest and search warrant requirements. It has also led to widespread confusion among the courts as to just what police behavior is acceptable and what is prohibited. A number of courts have expressed serious reservations about various police tactics while continuing to allow the general practice.

This is a case where police need “clear rules to follow.” The current method of evaluating each case based on the aggressiveness of the police behavior or the voluntariness of the suspect’s cooperation has produced widely divergent, and, in my view, frequently unacceptable results. As the Supreme Court put it in Oliver v. United States in adopting the clear rule that “open fields” are outside the scope of the Fourth Amendment entirely:

Under (a case-by-case approach) police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded The lawfulness of a search would turn on “a highly sophisticated set of rules, qualified by all sorts of ifs, ands and buts and requiring the drawing of subtle nuances and hairline distinctions.”

Similar remarks could be made about the “knock and talk” cases.

Ordinarily when the Supreme Court declares the need for clear rules for police, it is on its way to announcing a clear rule that is beneficial to police and detrimental to privacy interests. But there is no reason why this must necessarily be so. Accordingly, I propose, and defend, three relatively clear rules to limit “knock and talk,” in descending order of

157 466 U.S. 170 (1984);
158 Id. at p. 181.
A. THE OUTRIGHT BAN

Once the police investigation has focused on a particular subject or subjects, the police should not be allowed to go to their dwelling either to question them, to seek consent to search, or to arrest them without a warrant. As discussed, once police go onto the front porch of a house, or the hallway outside an apartment, they are already intruding on the privacy of the homeowner in a way that other visitors do not. Police can of course, acting in their protective capacity, respond to noise complaints, complaints of fights, etc., because these either do not involve criminal investigations focused on particular individuals or are justified by exigent circumstances. Likewise it is appropriate for police to canvass an area following a crime seeking out information from householders as to what they may have witnessed, since this investigation has not focused on a particular subject and they are not going, as far as they know, to his dwelling. Finally, if police have probable cause and exigent circumstances in advance, they can go to dwellings to arrest and search as usual.

Obviously, such a rule would hamper police investigations, but then, so do the Fourth Amendment’s warrant and probable cause requirements. It would be much easier for police to dispense with the inconvenient and demanding warrant all the time, rather than merely much of the time, as courts currently allow through the knock and talk cases. And stopping and searching cars whenever they felt like it would likewise be a useful investigative technique for police.

So what would police be allowed to do in a “post-knock and talk” regime? First, as discussed, they could use the telephone to seek information, consents to search, and to invite people to surrender to arrest. While this technique would undoubtedly be less effective, that’s because it would lack the unacceptably coercive impact that the police’s physical

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159 What if there’s an anonymous tip that someone is being murdered or severely beaten at a particular address? Since the tip is from an unknown source it’s not enough for probable cause, exigent circumstances, an exception to the warrant, but not the probable cause requirement, would not apply. Since this is a true emergency, with lives at stake, I have no difficulty authorizing the police, acting in their protective capacity, going to the house, knocking on the door, and even entering without a warrant if they still have reason to believe that the emergency is ongoing. See, Brigham City v. Stuart, supra. None of the “knock and talk” cases considered in this article involve such an emergency.

160 As Judge Evans put it, concurring in United States v. Johnson, 170 F.3d 708, 721 (7th Cir., 1999) where the court struck down a frisk, associated with a knock and talk: “As see it, the seeds of this bad search were sown when the police decided to use the “knock and talk’ technique.” “If the police use a shortcut and the need to protect themselves arises, the police run the risk of not being able to use, in court, evidence they stumble upon.”
presence has on the homeowner. Thus the ridiculous line that the Supreme Court currently
draws between consent searches that are “voluntary,” even though obviously induced by
police pressure, and those that are involuntary would become clearer. It’s much easier to
refuse consent to search your house on the telephone than it is when the police are looming
over you at your front door and thus more obviously voluntary if you do consent at a
distance. Nor would I object to cell phone calls from the street, outside the curtilage. (Of
course, this only works if the suspect has a phone and the police know the number).\footnote{161}

The same can be said for “voluntary” accession to a police request by phone that you
submit to arrest. Many suspects, when faced with the choice of acceding to an arrest by
coming out voluntarily or waiting for the police enter their home with an arrest warrant,
would still likely choose the former option. Since the suspect does not encounter the police
until he is outside the house, there would be no occasion for the police to search the interior
incident to the arrest or through a protective sweep.\footnote{162} Nor would it be necessary for the
police to go into the house to observe the defendant as he dressed for the outdoors, as is
frequently required when he is arrested at his doorway. If the suspect refuses, the police can
surround the house while they go for a warrant.

It is only “knock and talk” at suspect’s homes that is prohibited by this rule. It’s
perfectly appropriate to go to the neighbor’s house to find out what they know about the
suspect, or to request a view from their yard, in order to obtain probable cause to put in an
arrest or search warrant application (assuming that the investigation is not aimed at the
neighbor as well). But if it turns out that the suspect lives at the location that the police visit,
the burden should be on the government to establish that the police didn’t know it.

Similarly, this rule would have no effect on police activities outside the curtilage, for
it is designed to protect the privacy of the home. Thus police can continue to question, stop
and frisk, and arrest people on the street, obtain plain views and smells from the street, and
stop, search, or seek consent to search, automobiles,\footnote{163} just as they do now.

A possible source of some confusion in this rule is the “focus” requirement.\footnote{164} In the
vast majority of cases, it is easy to tell whether the police are making general inquiries about
a crime, or have zeroed in on a particular house or suspect, and are knocking and talking for

\footnote{161} On the other hand, hailing the suspect with bullhorn seems too coercive.
\footnote{162} Vale v. Louisiana, 399 U.S. 30 (1970). Unless they had reasonable suspicion of
danger within, Maryland v. Buie, supra.
\footnote{163} Though, as indicated earlier, I share with others concerns about the
“voluntariness” of consents to search in general.
\footnote{164} The “focus” requirement of Escobedo v. Illinois, 378 U.S. 478,491, 492 (1964)
was confusing because it would seem that everyone taken in for questioning by the police is a
focus of the investigation. Here it will ordinarily be obvious, when police come to your door,
whether you, or your dwelling, are a focus of the investigation or not.
one of the purposes discussed in this article. But there are cases, like a classic murder mystery, where there are a number of people who are possible suspects. In other words, the police visit is more than a general canvass, but less than an investigation focused on a particular individual. But to state the problem is to solve it: no "focus" here. If the crime is one that involves a number of people, then all these people can be the focus. When the number of suspects is reduced to two, however, both are the focus. Clear rule.

I recognize that this is an extreme rule and one that the Supreme Court would be unlikely to accept. The question is whether any more moderate limitations on “knock and talk” would work. Perhaps the most obvious one would be a rule forbidding police with probable cause from using knock and talk to avoid the arrest and search warrant requirements, while allowing police to continue to use knock and talk for investigative purposes.

The difficulty with such an approach is that it would put the police in the unusual position of arguing that they didn’t have probable cause to engage in a particular activity (since if they did they should have gotten a warrant) rather than arguing as they now do, that they did.165 It would be easy for police to not disclose all of the evidence that they had before knocking on someone’s door for “investigative purposes” and then engaging in the same plain view discoveries and consent seeking that they do now. And, of course, police frequently won’t be sure whether their information amounts to probable cause or not and would understandably seek a “good faith” exception. These issues would lead to endless litigation, which could be avoided by the simple rule that police aren’t allowed to go onto your curtilage, including your front door, at all.166

B. NO ENTRIES, CONSENTS OR ARRESTS

As currently approved, "knock and talk" investigations achieve two things for the police. First, they put the police in position to obtain plain views, sounds and smells from people's curtilage, as well as getting incriminating answers to questions. Second they allow police to avoid the probable cause and warrant requirement by obtaining consents to search, and to avoid the arrest warrant requirement. (Presumably, an arrest without probable cause is no good even if one consents to it.) These practices are apparently widespread and undercut the fundamental notion of the Fourth Amendment that homes are entitled to the special protection of a judicially authorized warrant.

A more limited rule would allow “knock and talk,” including allowing the police to obtain information for later use in a warrant, but not permit the police to seek to enter due to

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165 See United States v. Ross 456 U.S. 798 (1982) abandoning an experiment in which police were required to do just this as to auto searches by the misbegotten holding in Robbins v. California, 453 U.S. 420 (1981).

166 Subject to the canvassing and emergency/protective exceptions noted above.
exigent circumstances created by the “knock and talk”, seek consents or make arrests, regardless of whether they had probable cause. If the police want to get in to search or want to arrest, they must conform to the warrant requirement. Of course, arrests based on pre-existing exigent circumstances, including hot pursuit, would still be allowed as in Santana, but exigent circumstances arising on the spot during a “knock and talk” would not allow entry. If evidence gets flushed down the toilet, too bad. Police should have come with a warrant in the first place if this was a concern. This is similar to the position of the Third and Fifth and Sixth Circuits, but broader since those circuits seem to require that police “deliberately” create exigent circumstances to avoid getting a warrant.

If knock and talk is looked upon, not as a “right” of the police, but as an exception to the right of the homeowner not to be disturbed by the police without a warrant, then it is appropriate to cabin the exception in a way that preserves the warrant requirement. Whatever may be said of consents to search cars, consents to search homes, or warrantless arrests in homes, should not be allowed, as Johnson suggested.

This rule avoids problems with “focus” since “knock and talk” is to be generally allowed. It does allow the police to snoop around your house, but this snooping should be strictly limited to the front porch and door. It takes care of the most egregious cases, where police get around the warrant requirement by getting consents to search of dubious voluntariness. It also avoids warrantless arrests due to “exigent circumstances” caused by the police’s own intrusive behavior or by making the suspect feel that he has no real choice but to submit. By banning all “knock and talk” consents and arrests, it necessarily bans the involuntary ones. In so doing, it resolves the conflicts in the circuits as to both the exigent circumstance issue (only pre-existing exigent circumstances count) and the scope of the police’ arrest power during “knock and talk.” (no arrest power.)

Contrary to an outright ban this proposal raises questions concerning exigent circumstances both when evidence is spotted and when there’s a threat to police safety. What are the police to do if a suspect comes to the door with a gun in his belt, or the police

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167 This approach reflects the “only pre-existing exigent circumstances” position of the Sixth Circuit in Chambers, supra, but adds the “no consent/arrest seeking” limitation.

168 United States v. Coles, 437 F.3d 361, 367 (3rd. Cir., 2006) and cases cited therein: “Exigent circumstances (must) exist before police decide to knock and announce themselves at the door.” However, the decision in Coles was influenced by the fact that the police had pre-existing probable cause and should have gotten a warrant.

169 Some cases will arise where there is confusion as to which is the “front” door. Let the police bear the burden of showing that they reasonably believed that the door they chose was the one the public would use.

170 Since requests for consent or arrest made by phone from outside the curtilage don’t involve “knock and talk” they would also be allowed under this approach.

171 E.g. Can the police cross the threshold to make an arrest.
see a gun on a table and another person sitting there? The answer must be that if there is a genuine threat to police safety, then the police must enter to defuse it. But this is an exigent circumstance created by the knock and talk, and hence should not lead to evidence that the police can use in court. If police observe evidence in plain view from outside during a knock and talk, they can order the residents out of the house, or otherwise control them, while they seek a warrant.

These exigent circumstance problems will arise often and will make this doctrine much less clear than an outright ban. But it does offer protection against the most blatant warrant-avoidance tactics of the police.

C. WARNINGS REQUIRED

An even more limited approach would be to simply require warnings to accompany both requests for consent searches and warrantless arrests. That is, police could only invite people to submit to search or arrest, while warning them that they were not required to. It would be appropriate for police to point out that if the suspect submitted to an arrest and came outside, it would not be necessary for the police to enter the house, as they would if they came back with an arrest warrant. Despite the Court's rejection of a warning requirement in *Schneckloth* and *Drayton*, which didn't involve residential premises, this would be consistent with the Court's often repeated view that homes require special protection.

Such a warning requirement would be better than nothing. However, giving the limited success of the *Miranda* warnings, it is unlikely that a warning requirement would have a significant impact. Arguably, such warnings would be more effective than the *Miranda* warnings since a suspect would be more willing to stand up to police at his home than when he was in custody. A number of "knock and talk" cases involving refusals to

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172 Similarly to *Jones*, supra, though in *Jones* the other man was seated, not at the table but on a couch, near the gun.
174 At least two states, Arkansas and Washington have this requirement. See, 15 A.L.R. supra n, at sec. 33.
175 Currently it is unclear whether, if the suspect submits to arrest in the entryway, or steps outside, the police may search that entryway incident to arrest. It should be made clear that such cooperative submission means that no search incident or protective sweep inside the house is allowed, absent reasonable suspicion of danger.
consent, even without warnings, show that such refusals are not unusual.177 Cutting the other way is that the lines of opposition are more clearly drawn after one is arrested. Prior to that time, one may still want to appear as though he has nothing to hide.

IV. CONCLUSION

“Knock and talk” has become a talisman before which the Fourth Amendment “fades away and disappears.” The many cases discussed show that courts are consistently approving police behavior that intrudes unreasonably upon the privacy of the home. How to deal with this problem is a difficult question. Hence my suggestion of three possible remedies, in decreasing order of home-protectiveness, all of which would limit the intrusiveness of “knock and talk.”