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Stanley A. Goldman

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THE CONCEPT OF "BREAKING" IN ANNOUNCEMENT STATUTES

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less."

"The question is," said Alice, "whether you can make words mean so many things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."¹

American breaking and entering statutes codify the common law rule that police may break into a home for the purpose of arrest or search only after they have announced their presence and purpose in seeking entry.² In spite of the widespread enactment of such statutes,³ the

1. L. CARROLL, *Through the Looking Glass*, in COMPLETE WORKS OF LEWIS CARROLL 214 (1936) (emphasis added).

2. The common law thus merged the two inconsistent maxims that everyman's home is his castle and the king's keys unlock all doors. Wilgus, *Arrest Without A Warrant*, 22 MICH. L. REV. 798, 800 (1924) [hereinafter cited as Wilgus]. From the first, it would seem the king received the better bargain—his keys could unlock the doors of everyman's castle provided only that the king's agents gave notice of their presence and purpose:

In all cases where the king is a party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or 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 door.

Semayne's Case, 77 Eng. Rep. 194 (K.B. 1603).

The influence of the common law upon contemporary American announcement statutes may be seen by comparing the rule in *Semayne's Case* with the federal announcement statute, one which is typical of the American statutes:

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 (1970).

3. ALA. CODE tit. 15, § 155 (1959); ALAS. CODE CRIM. PRO. § 12.25.150 (1972); ARIZ. REV. STAT. ANN. § 13-1411 (1956); ARK. STAT. ANN. § 43-414 (1964); CAL. PENAL CODE § 844 (West 1972); C.Z. CODE tit. 6, § 3741 (1963); FLA. STAT. ANN. § 901.19(1) (Supp. 1973); IDAHO CODE § 19-611 (1948); IND. STAT. ANN. § 9-1009 (Burns 1956); IOWA CODE ANN. § 755.9 (1950); KAN. STAT. ANN. § 62-1819 (1964); KY. REV. STAT. § 70.078 (1971); LA. CODE CRIM. PRO. ANN. art. 224 (West 1967); MICH. STAT. ANN. § 28.880 (1972); MINN. STAT. ANN. § 629.34 (1947); MISS. CODE CRIM. PRO. tit. 99, § 99-3-11 (1973); MO. ANN. STAT. § 544.200 (1953); NEB. REV. STAT. § 29-411 (1965); NEV. REV. STAT. § 171.275 (1967); N.Y. CODE CRIM. PRO. § 120.80(4) (McKinney 1971); N.C. GEN. STAT. § 15-44 (1965); N.D. CENT. CODE ANN. § 29-06-14 (1960); OHIO REV. CODE ANN. tit. 29, § 2935.12 (Page Supp. 1972); OKLA. STAT. ANN. tit. 22, § 194 (1969); ORE. REV. STAT. tit. 14, § 133.290 (1971);

actual definition of the term "breaking" has not been conclusively litigated.⁴ This Comment will explore the definitions of "breaking" which courts have given in the four situations in which the issue has most commonly arisen: passkey entry, entry through a closed but unlocked door, entry through an open door, and ruse entry.⁵ These situations will be analysed in view of the three policy considerations⁶ thought to be safeguarded by breaking and entering statutes: preservation of individual privacy,⁷ the prevention of needless property destruc-

S.C. CODE ANN. tit. 53, § 53-198 (1962); S.D. COMPILED LAWS ANN. tit. 23, § 15-14 (1967); TENN. CODE ANN. tit. 40, § 807 (1955); TEX. CODE CRIM. PRO. ANN. art. 18.18 (Vernon 1966); UTAH CODE ANN. tit. 77, § 13-12 (1953); V.I. CODE ANN. § 3566 (1967); WASH. REV. CODE ANN. § 10.31.040 (1961); WYO. STAT. ANN. § 7-165 (1959).

All of these are substantially similar to the federal rule codified in 18 U.S.C. § 3109 (1971), the text of which is set out in note 2 *supra*.

4. The United States Supreme Court has not definitively determined the extent to which announcement statutes codify constitutional requirements. See note 14 *infra*. Therefore each jurisdiction has been bound by no authoritative definition of a breaking and has been free to adopt its own.

5. There is no question that entry gained by physical violence comes within the definition of "breaking." See, e.g., *Miller v. United States*, 357 U.S. 301, 303-04 (1958) (police breaking chain lock was in violation of announcement requirement); *United States v. Likas*, 448 F.2d 607, 609 (7th Cir. 1971) (evidence properly suppressed when agents broke down apartment door with sledge hammer); *Accarino v. United States*, 179 F.2d 456, 465 (D.C. Cir. 1949) (evidence obtained by breaking down door must be suppressed); *Commonwealth v. Newman*, 240 A.2d 795, 799 (Pa. 1968) (breaking through defendant's door with a sledge hammer violative not only of announcement statute but fourth amendment as well).

6. In *Duke v. Superior Court*, 1 Cal. 3d 314, 321, 461 P.2d 628, 632-33, 82 Cal. Rptr. 348, 352-53 (1970), Justice Tobriner saw the purposes and policies underlying California's breaking and entering statute, Penal Code § 844, as fourfold: (1) the protection of the privacy of the individual in his home; (2) the protection of innocent persons who may also be present on the premises where an arrest is made; (3) the prevention of situations which are conducive to violent confrontations between the occupant and individuals who enter his home without proper notice; and (4) the protection of police who might be injured by a startled and fearful householder.

Justice Marshall in *Sabbath v. United States*, 391 U.S. 585, 589 (1968), gleaned from the decision in *Miller v. United States*, 357 U.S. 301 (1958), that there are two underlying purposes: (1) "the reverence of the law for the individual's right to privacy in his house" and (2) "to safeguard officers, who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there."

This Comment, however, will use the three fold analysis provided in Comment, *Announcement in Police Entries*, 80 YALE L.J. 139, 140-42 (1970). This division consists of three purposes: decreasing the potential for violence, the protection of privacy, and the prevention of the physical destruction of property.

7. Justice Brennan chose to emphasize the privacy aspect of the rule in *Miller v. United States*:

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. Congress, codifying a tradition embedded in Anglo-American law, has

tion,⁸ and the avoidance of violent confrontations.⁹

I. PASSKEY ENTRY

The first of the four classes of entry has proven the least controversial. Although entry by means of a passkey does not itself involve the use of force, there is clearly an invasion of privacy and a danger of violent confrontation when unannounced policemen silently and swiftly enter a room with a key. The United States Supreme Court assumed such an entry was a breaking in *Ker v. California*.¹⁰ In holding that the fourth amendment to the United States Constitution¹¹ did not require that the prevailing standards developed under the federal statute¹² be employed to judge a police entry under California's announcement statute¹³ (and thus leaving unclear the extent to which announcement statutes codify constitutional requirements¹⁴), the Court

declared in § 3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

357 U.S. at 313 (footnote omitted).

8. Comment, *The New No-Knock Provision and Its Effect on the Authority of the Police to Break and Enter*, 20 AM. U.L. REV. 467, 469 (1971); Comment, *Announcement in Police Entries*, 80 YALE L.J. 139, 142 n.14 (1970).

9. *Miller v. United States*, 357 U.S. 301, 313 n.12 (1958); *McDonald v. United States*, 335 U.S. 451, 460 (1948) (Jackson, J., concurring); *Duke v. Superior Court*, 1 Cal. 3d 314, 321, 461 P.2d 628, 632-33, 82 Cal. Rptr. 348, 352-54 (1969); *Greven v. Superior Court*, 71 Cal. 2d 287, 292-93, 455 P.2d 432, 435-36, 73 Cal. Rptr. 481, 484-85 (1969); *People v. Rosales*, 68 Cal. 2d 299, 304, 437 P.2d 439, 443-44, 66 Cal. Rptr. 1, 4-5 (1968).

10. 374 U.S. 23, 38 (1963).

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

U.S. CONST. amend. IV.

12. 18 U.S.C. § 3109 (1971).

13. To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

CAL. PENAL CODE § 844 (West 1972).

14. In *Ker*, the Court upheld California's judicially created exceptions to the announcement requirement which permit a breaking without the usually required preliminaries when police reasonably believe announcement would result in the destruction of evidence, increased peril to the officers, or frustration of the arrest. 374 U.S. at 40-41. Although Justice Clark's plurality opinion held that the exceptions were constitutionally permissible, it is clear that the Court regarded the announcement requirement as constitutionally based. The opinion, concurred in by three Justices, recognized that "the method of entering the home may offend federal standards of reasonableness."

classified the entry of California police officers into defendant's apartment by means of a passkey as a breaking.¹⁵ Since *Ker* there have been no federal¹⁶ or state¹⁷ cases deviating from its inclusion of pass-

Id. at 38. Justice Brennan's dissent, in which three other members of the Court joined, argued that the "minimal conditions" for the invocation of an exception to the announcement requirement were not present. *Id.* at 61. Thus, eight members of the *Ker* Court understood the announcement requirement to be constitutionally mandated.

In addition, state courts have ruled that violations of their jurisdictions' breaking and entering rules violate the fourth amendment. *See, e.g.,* *Duke v. Superior Court*, 1 Cal. 3d 314, 324, 461 P.2d 628, 635, 82 Cal. Rptr. 348, 355 (1969) (entry by police through closed but unlocked door after only thirty seconds wait after knocking made subsequent search unreasonable under fourth amendment); *Greven v. Superior Court*, 71 Cal. 2d 287, 290, 455 P.2d 432, 434, 78 Cal. Rptr. 504, 506 (1969) (search unreasonable under the fourth amendment when it follows breaking open door only fifteen seconds after knocking); *People v. Garber*, 275 Cal. App. 2d 119, 131, 80 Cal. Rptr. 214, 222 (1969) (entries in violation of § 844 render any following search unreasonable under fourth amendment); *People v. Floyd*, 260 N.E.2d 815, 817 (N.Y. 1970) (police entry by passkey without prior announcement was violation of fourth amendment); *State v. Furry*, 286 N.E.2d 301, 304-05 (Ohio Ct. App. 1971) (entry without prior announcement violative of fourth amendment); *State v. Wetteland*, 496 P.2d 27, 29 (Ore. Ct. App. 1972) (fourth amendment forbids breaking in absence of exigent circumstances); *State v. Monteith*, 477 P.2d 224, 227 (Ore. Ct. App. 1970) (use of stealth and stratagems to gain admittance does not run afoul of the fourth amendment); *State v. Olson*, 462 P.2d 681, 684 (Ore. Ct. App. 1969) (police entry without asking permission not unreasonable within fourth amendment since the door was open and the officer announced himself first and waited before entering); *Commonwealth v. DeMichel*, 277 A.2d 159, 163 (Pa. 1971) (fourth amendment requires notice of identity and purpose before officer enters private premises to search or arrest); *Commonwealth v. McCloskey*, 272 A.2d 271, 272 (Pa. 1970) (fourth amendment requires that before a policeman enters a private premise to conduct a search or make an arrest, he must give notice of his identity and purpose in absence of exigent circumstances); *Commonwealth v. Newman*, 240 A.2d 795, 799 (Pa. 1968) (forceful entry twenty seconds after making an announcement and receiving no response violated fourth amendment); *Coleman v. Reilley*, 508 P.2d 1035, 1037 (Wash. Ct. App. 1973) (announcement requirement an essential element of a reasonable search); *State v. Miller*, 499 P.2d 241, 244 (Wash. Ct. App. 1973) ("break open" as used in arrest statute, does not, when read in light of the fourth and fourteenth amendments, require forcible breaking).

15. 374 U.S. at 37.

16. *See, e.g.,* *Jack v. United States*, 387 F.2d 471, 473 (9th Cir.), *cert. denied*, 392 U.S. 934 (1967), *appeal after remand*, 439 F.2d 879 (9th Cir.), *cert. denied*, 403 U.S. 920 (1971) (entry by passkey obtained without permission of tenant constitutes a breaking and as such must be tested by federal standards under which such a breaking is allowed after a proper announcement); *Dickey v. United States*, 332 F.2d 773, 777 (9th Cir.), *cert. denied*, 379 U.S. 948 (1964) (dicta indicating that although entry gained by ruse not a breaking under 18 U.S.C. § 3109, entry by a passkey would have been a breaking); *Munoz v. United States*, 325 F.2d 23, 26 (9th Cir. 1963) (entry into defendant's room by use of passkey obtained from clerk amounted to the same thing as "breaking open his door"); *United States v. Sims*, 231 F. Supp. 251, 254 (D. Md. 1964) (entry into defendant's hotel room by use of a passkey was a breaking and hence an illegal entry).

17. *See, e.g.,* *People v. Flores*, 68 Cal. 2d 563, 567, 440 P.2d 233, 235, 68 Cal. Rptr.

key entries within the definition of the term "breaking."

II. UNLOCKED BUT CLOSED DOORS

*A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.*¹⁸

A similar analysis is appropriate when police enter through a closed but unlocked door. As in the passkey entries, there is no initial danger to property, but there does exist an inherent possibility of violent confrontation as well as an obvious invasion of privacy. However, unlike the treatment of entry through a closed and locked door with the aid of a key, several courts have been reluctant to hold that an entry through an unlocked door is a breaking. They regarded the opening of a locked door as involving sufficient force to constitute a breaking; the opening of an unlocked door, however, was perceived as not employing force and therefore not a breaking.

Through the 1950's and 1960's, the federal circuits were split over the issue. The District Court of the District of Columbia has held force to be an indispensable element of the federal announcement statute in *United States v. Bowman*¹⁹ and again in *United States v. Silverman*.²⁰ These cases, however, were overruled in *Keiningham v. United States*.²¹ There, the Court of Appeals for the District of Columbia

161, 163, cert. denied, 393 U.S. 1057 (1968) (police entry by use of defendant's key constituted a breaking); *People v. Hamilton*, 257 Cal. App. 2d 296, 302, 64 Cal. Rptr. 578, 582 (1967) (while holding entry through closed but unlocked door was a breaking, the court stated use of a key to open locked door without permission was a forcible entry and thus a breaking); *People v. Stephens*, 249 Cal. App. 2d 113, 116, 57 Cal. Rptr. 66, 68 (1967) (entry by passkey into defendant's apartment without announcement after knocking and receiving no response was illegal under Penal Code § 844); *People v. Arellano*, 239 Cal. App. 2d 389, 393, 48 Cal. Rptr. 686, 688 (1965) (passkey entry into defendant's hotel room unannounced in absence of exigent circumstances was illegal even though defendant's parole had been revoked); *Berigan v. State*, 236 A.2d 743, 745 (Md. Ct. App. 1968) (officers entering defendant's hotel room behind the manager who let himself in was equivalent to a breaking); *People v. Floyd*, 260 N.E.2d 815, 817 (N.Y. 1970) (use of hotel passkey was a breaking); *State v. Gassner*, 488 P.2d 822, 823 n.1 (Ore. Ct. App. 1971) (for purposes of determining whether officers executing search warrant have made an unauthorized entry, the use of a passkey is a breaking); *Commonwealth v. McCloskey*, 272 A.2d 271, 272 (Pa. 1970) (passkey entry into student room constitutes breaking).

18. *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (emphasis added).

19. 137 F. Supp. 385, 388 (D.D.C. 1956) ("So long as the entry is peaceful and there is no breaking of parts of the house, the execution of the search warrant is legal.").

20. 166 F. Supp. 838, 841 (D.D.C. 1958) (illegal entry "limited to a situation in which the officer broke into the premises by force . . .").

21. 287 F.2d 126, 130 (D.C. Cir. 1960).

was confronted with an unannounced police entry into the porch area of a home through a closed but unlocked door. Once in the porch area, the police announced themselves and then entered an interior door leading to the inside of the premises where the arrest and search were effected.²² After discussing the distinction between entering through a locked and unlocked door as recognized by the lower courts in *Silverman* and *Bowman*, the court proceeded to reject it. Circuit Judge Bastian concluded:

[A] person's right to privacy in his home . . . is governed by something more than the fortuitous circumstance of an unlocked door, and . . . the word "break" as used in 18 U.S.C. § 3109, means to enter without permission. We think that a "peaceful" entry which does not violate the provisions of § 3109 must be a permissive one, and not merely one which does not result in a breaking of parts of the house.²³

In *United States v. Poppitt*,²⁴ the District Court of Delaware compared the *Bowman* and *Keiningham* decision and concluded that the *Keiningham* interpretation of section 3109 was consistent with the common law. Citing Professor Wilgus²⁵ as authority, the court stated, "[T]he concept of 'breaking' for the purpose of serving a warrant is the same as in burglary: . . . lifting a latch, turning a door-

22. The late Professor William Prosser described *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) as "a law professor's dream of an examination question." W. PROSSER, *LAW OF TORTS* 254 (4th ed. 1971). The same can be said of *Keiningham*. The arresting officers possessed arrest warrants for all the appellants and a search warrant for the home next door to the one in which the suspects were eventually arrested. The police entered the dwelling where they believed the suspects were to be found by stepping, unannounced, through its open front door. They then found themselves confronted by two other doors leading to different portions of the home. After making proper announcements at each of these doors, the officers were admitted through one door, but receiving no response at the other, they entered uninvited. Neither search proved fruitful. The officers, however, grew suspicious when they noticed a freshly cut partition leading to the porch of the home next door. Without announcement, they entered by opening this closed but unlocked door. After viewing the suspects and various gambling paraphernalia through the glass pane of an interior door, they announced themselves and entered the inside of the dwelling. There the arrest and search were made. In determining the rights and liabilities of all the parties, the court found the only relevant entry to be that which the police made unannounced through the partition. 287 F.2d at 128-29.

23. 287 F.2d at 130. *Keiningham* was followed in *Hair v. United States*, 289 F.2d 894, 897 (D.C. Cir. 1961), where Judge Bazelon stated it would be "sheer sophistry" to describe as peaceful, the entry of three officers into a home with drawn weapons.

24. 227 F. Supp. 73, 80 (D. Del. 1964) (opening of unlocked screen door by federal officers executing search warrant constituted a breaking within § 3109).

25. Wilgus, *supra* note 1, at 806 (footnotes omitted).

knob or pushing open a closed door'²⁶

On the other hand, in *United States v. Garnes*²⁷ the Second Circuit echoed the feelings of the *Bowman* court when it held that the exclusion of evidence for a violation of section 3109, as called for in *Miller v. United States*²⁸ and *Accarino v. United States*,²⁹ "is applicable only where the arresting officers forcibly break into and enter the dwelling."³⁰ Eight years later in *United States v. Conti*,³¹ the same court held that "it is clearly established in this circuit that 'breaking' in the statute means forcible entry."³²

26. 227 F. Supp. at 80 (footnote omitted). The entire Wilgus quotation is:

What constitutes police "breaking" seems to be the same as in burglary: lifting a latch, turning a door knob, unhooking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house—even a closed screen door, though not a storm door, is a breaking; so, too, is pushing it higher, or removing a window screen; raising a trap door, or a cellar window grating, or even climbing down the chimney, are breakings; but contrary to the rule in burglary, obtaining admission by stratagem by officer is not a "breaking," if not accompanied by false pretense and violent entry.

Wilgus, *supra* note 1, at 806 (footnotes omitted). This convenient summary is misleading. The paragraph seems to be saying that the different types of "breakings" given as examples are cases in which courts have applied the elements of burglary to define breaking by police. Thus Professor Wilgus gave the impression that there existed a large body of cases holding that the elements of burglary defined a police breaking. However, a review of the cases Professor Wilgus cited reveals that they all relate to breakings in criminal burglary cases and do not discuss police entry.

For example: *Walker v. State*, 52 Ala. 376 (1875) (going down a chimney is a burglary); *State v. O'Brien*, 46 N.W. 861 (Iowa 1890) (lifting a latch in order to enter is a breaking within the definition of burglary); *State v. Powell*, 58 P. 968 (Kan. 1899) (when the door was closed and fastened with a post, its removal was a "breaking" in burglary); *State v. Groning*, 5 P. 446 (Kan. 1885) (lifting of a latch of a closed door and pushing open the door is a sufficient breaking to constitute burglary); *State v. Hecox*, 83 Mo. 531 (1884) (opening a door which is closed and fastened is a breaking sufficient to meet the element required in burglary).

The first of the two authorities supportive of his original assertion is Annot., 61 Am. Dec. 156 (1911). That annotation does discuss a long common law history which holds that police entry of a dwelling through a closed door does constitute a breaking. However, the subject matter of the annotation concerned courts' treatment of police entry to serve civil process and not police entry to effect an arrest.

The other authority is H. VOORHES, LAW OF ARREST §§ 183-90 (1904). The actual sections dealing with police breaking are §§ 159, 172-82. See *Sabbath v. United States*, 391 U.S. 585, 590 n.5. Mr. Voorhess does discuss the subject of police breaking, but his citations are the same as those Professor Wilgus used and deal only with breaking with regard to the service of civil process.

27. 258 F.2d 530 (2d Cir. 1958), *cert. denied*, 359 U.S. 937 (1959).

28. 357 U.S. 301 (1958).

29. 179 F.2d 456 (D.C. Cir. 1949).

30. 258 F.2d at 533.

31. 361 F.2d 153, 157 (2d Cir. 1966). See *Williams v. United States*, 273 F.2d 781, 793-94 (9th Cir. 1959), *cert. denied*, 362 U.S. 951 (1960) (opening closed but unlocked door was not a forceful entry and thus not a breaking under California law).

32. 361 F.2d at 157.

At least two state courts have endorsed the burglary analogy. The Supreme Court of Florida held that an officer's opening of an unlocked screen door constituted an "entry by breaking" in *Bennefield v. State*.³³ The California supreme court reached a similar conclusion in *People v. Rosales*,³⁴ a case of far reaching influence.³⁵

The actual facts of *Rosales* are somewhat unclear. Some of the arresting officers appear to have entered the home of the defendant by opening either an unlocked screen or a wooden door, while others apparently entered a different door with the aid of a passkey. Writing for the four justice majority, Chief Justice Traynor overturned earlier lower court precedent³⁶ by stating:

Although the common law rule was first articulated to regulate entry by force, it is not limited to entries effected by physical violence At the very least it covers unannounced entries that would be considered breaking as the term is used in defining common law burglary. . . . As so defined, no more is needed "than the opening of a door or window, even if not locked, or not even latched. Pulling open a screen door held closed only by a spring is sufficient."³⁷

Chief Justice Traynor's comments proved to have an impact beyond California's borders. Only a few months after the *Rosales* decision was handed down, the United States Supreme Court confronted the same issue in determining whether police entry through a closed but unlocked door was a breaking within the definition of 18 U.S.C. § 3109.³⁸ In *Sabbath v. United States*,³⁹ the Supreme Court utilized much of Justice Traynor's analysis as it ended the split in federal courts by erasing the distinction between entry through a closed but unlocked door and entry through a locked door.

Sabbath involved the entry of federal customs agents into the defendant's Los Angeles apartment by opening a closed but unlocked door without announcing themselves. The Ninth Circuit Court of Appeals had ruled that the officers had not "broken open" the door within the meaning of section 3109.⁴⁰ Justice Marshall, writing for eight⁴¹ mem-

33. 160 So. 2d 706, 708-09 (Fla. 1964). The court relied upon the prior Florida case of *Boyton v. State*, 64 So. 2d 536 (Fla. 1953) which held that merely pushing a door open was a breaking under the Florida constitution. *Id.* at 548.

34. 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (1968).

35. See text accompanying notes 38-46 *infra*.

36. *People v. Feeley*, 179 Cal. App. 2d 100, 3 Cal. Rptr. 529 (1960).

37. 68 Cal. 2d at 303, 437 P.2d at 492, 66 Cal. Rptr. at 4, *quoting* Wilgus, *supra* note 1, at 806.

38. See note 2 *supra* for the text of this statute.

39. 391 U.S. 585 (1968).

40. 380 F.2d 108 (9th Cir. 1967), *rev'd*, 391 U.S. 585 (1968).

41. Justice Black dissented without a separate opinion. 391 U.S. at 591.

bers of the Court held that the agents' entry was a breaking even though the door had been unlocked.⁴²

Citing Justice Brennan's comments in *Miller v. United States*,⁴³ and Justice Jackson's concurring opinion in *McDonald v. United States*,⁴⁴ Justice Marshall concluded that the two underlying purposes of the statute are the protection of the homeowner's right to privacy in his own home and the safeguarding of the policeman who might be mistaken for an unlawful intruder.⁴⁵ Considering these purposes, he specifically held that entry through a closed but unlocked door is a breaking under 18 U.S.C. § 3109 even though such entry is not gained by the use of force:

[I]t would indeed be a "grudging application" to hold . . . that the use of "force" is an indispensable element of the statute. To be sure, the statute uses the phrase "break open" and that connotes some use of force. But linguistic analysis seldom is adequate when a statute is

42. *Id.* at 588.

43. 357 U.S. 301, 313 (1958). See note 7 *supra*.

44. 335 U.S. 451 (1948). In *McDonald*, police entered a rooming house without a search warrant. Observing through a window that the petitioner was operating a lottery, they entered, arrested petitioner, and seized evidence. The Court held the evidence inadmissible since the search had been conducted without a warrant. *Id.* at 456. Justice Jackson in his concurring opinion discussed the officer's entry and chose to emphasize the danger of violent confrontation inherent in such intrusions:

Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.

Id. at 460-61. Though Justice Jackson's remarks would seem to suggest a fear that both officer and occupant might be injured, Justice Marshall limited his concern to safeguarding officers. 391 U.S. at 539. Justice Jackson also said, in words not quoted in *Sabbath*:

But it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry. Here the police gained access to their peeping post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal. In prying up the porch window and climbing into the landlady's bedroom, they were guilty of breaking and entering—a felony in law and a crime far more serious than the one they were engaged in suppressing. Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality.

335 U.S. at 458-59.

45. 391 U.S. at 589.

designed to incorporate fundamental values and the ongoing development of the common law.⁴⁶

The *Sabbath* Court's debt to Justice Traynor's *Rosales* opinion is apparent. Justice Marshall buttressed his reasoning that force was not required to constitute a breaking under the statutory definition by citing to the "useful analogy afforded by the . . . development of the law of burglary: a forcible entry has generally been eliminated as an element of that crime under statutes using the word 'break'"⁴⁷

The *Sabbath* conclusion has been followed in the lower federal courts,⁴⁸ and various state courts, including Indiana,⁴⁹ Delaware,⁵⁰ Maryland,⁵¹ and Ohio,⁵² have found it persuasive. Indeed, although *Sabbath* is a statutorily based decision, numerous lower courts have held its conclusion to be a minimum requirement under the fourth amendment.⁵³

III. OPEN DOOR ENTRY

*The door is open, I must say,
I rather fancy it that way.*⁵⁴

Entries made by breaking down a locked door clearly offend against all three policy considerations: they involve destruction of property,

46. *Id.*

47. *Id.* at 589 n.5.

48. *United States v. Pratter*, 465 F.2d 227, 230 (7th Cir. 1972) (unauthorized entry effected by use of no more force than is necessary to turn knob and open unlocked door is breaking within the meaning of § 3109); *United States v. Wylie*, 462 F.2d 1178, 1185 (D.C. Cir. 1972) ("Indubitably . . . entry through the closed but unlocked back door was an intrusion to which § 3109 would ordinarily apply."); *United States v. Davis*, 346 F. Supp. 435, 441 (S.D. Ill. 1972) (opening a wooden storm door a breaking); *United States v. McClard*, 333 F. Supp. 158, 167 (E.D. Ark. 1971), *aff'd per curiam*, 462 F.2d 488 (7th Cir.), *cert. denied*, 409 U.S. 988 (1972).

49. *Hadly v. State*, 238 N.E.2d 888, 897-99 (Ind. 1968), *cert. denied*, 394 U.S. 1012 (1969) (concurring opinion) (opening of unlocked screen door a breaking, but excused on grounds of "hot pursuit").

50. *Dyton v. State*, 250 A.2d 383, 385 (Del. 1969) (officers entering after their knock caused the door to swing open revealing occupants who made no attempt to answer, met "the demands of the *Sabbath* opinion.").

51. *Mabane v. State*, 256 A.2d 701, 703 n.1 (Md. 1969) (assumed sufficient force used to effectuate a breaking where officers entered by reaching through an aperture opening the door by means of an inside handle).

52. *State v. Furry*, 286 N.E.2d 301, 305 (Ohio Ct. App. 1971) (evidence excluded on ground that arresting officers failed to announce their purpose before entering the house of defendants through an unlocked but closed screen door).

53. *See* note 14 *supra*.

54. *People v. Anderson*, 9 Cal. App. 3d 80, 85, 88 Cal. Rptr. 4, 7 (1970) (emphasis added).

possible violence, and intrusion into privacy.⁵⁵ Passkey entries and entries through a closed but unlocked door do not involve a physical breaking, and therefore present no possibility of property damage.⁵⁶ Nonetheless, the policy considerations of preventing violence and protecting privacy have led to the classification of such entries as breakings within the statutory meaning.⁵⁷

Once courts had generally adopted the *Sabbath* and *Rosales* rationale, that the force or violence of the entry was not an essential element of the statute's application in view of the growing regard for the protection of privacy and prevention of dangerous confrontation,⁵⁸ it would seem logical for the next step in the evolution of the law to have been for the courts to hold all non-consensual police entries to be breakings. Indeed, if the interest involved were restricted to protection from unnecessary property damage, there would be no reason at all to condemn entry through a closed but unlocked door.⁵⁹

The United States Supreme Court has yet to decide a case involving the question of police entry through an open door. Circuit courts treating the issue before and after *Sabbath's* resolution of the closed but unlocked door question have reached different conclusions. The Second,⁶⁰ Sixth,⁶¹ Seventh,⁶² and Ninth⁶³ Circuits have treated an un-

55. See note 6 *supra*.

56. See note 5 *supra*.

57. See notes 10-52 *supra* and accompanying text.

58. See notes 34-52 *supra* and accompanying text.

59. Comment, *Unannounced Entry to Search: The Law and No-Knock Bill* (S. 3246), 1970 WASH. U.L.Q. 205, 211. Of course, it can also be argued that the "reasonable expectation of privacy" one has in his home is considerably less when the door is open than when it is closed. Cf. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

60. *United States v. Conti*, 361 F.2d 153, 157 (2d Cir. 1966), *vacated on other grounds*, 390 U.S. 204 (1968) ("[I]t is clearly established in this circuit that 'breaking' in the statute means forcible entry."); *United States v. Monticallos*, 349 F.2d 80, 81-82 (2d Cir. 1965) (no breaking where agents enter unannounced by following a prospective customer for narcotics through an open door); *United States v. Garnes*, 258 F.2d 530, 533 (2d Cir. 1958), *cert. denied*, 359 U.S. 937 (1959) (holding the doctrines of *Miller v. United States*, 357 U.S. 301 (1958) and *Accarino v. United States*, 179 F.2d 456, 462 (D.C. Cir. 1949) are applicable only when arresting officers forcibly break into and enter the dwelling); *United States ex rel. Turco v. Dross*, 224 F. Supp. 142, 144-45 (S.D.N.Y. 1963) (New York announcement statute, almost a verbatim copy of § 3109, did not include entry through an open door as a breaking, nor would such entry be a breaking under the common law).

61. *United States v. Williams*, 351 F.2d 475, 477 (6th Cir. 1965), *cert. denied*, 383 U.S. 917 (1966) (state announcement statute not of assistance on the question of whether a search following an unannounced entrance by officers through an open door

announced but peaceful entry through an open door, as not constituting a breaking in violation of 18 U.S.C. § 3109.

The Second and Sixth Circuits, however, have not discussed the issue since *Sabbath* was handed down, whereas the Seventh Circuit has sought to evade the impact of *Sabbath* by narrowly reading the case. In *United States v. Lopez*,⁶⁴ narcotics agents eavesdropping in the next apartment heard defendant say he was leaving his apartment. Ten agents waited for defendant to open his door and then rushed into his apartment, seizing 474 grams of heroin.⁶⁵ The Seventh Circuit limited *Sabbath* to its facts, *i.e.*, entry through a closed but unlocked door,⁶⁶ and held that the open door entry before the court was not a violation of 18 U.S.C. § 3109.⁶⁷

Though the Ninth Circuit has spoken of entries through open doors three times since *Sabbath*, each of these discussions has been dictum.⁶⁸

was lawful and the fourth amendment not violated by a search following such an entrance under the circumstances there appearing).

62. *United States v. Lopez*, 475 F.2d 537, 540 (7th Cir. 1973) (entry by officers waiting for defendant to open door was not a breaking); *United States v. Rowlette*, 397 F.2d 475, 478-79 (7th Cir. 1968) (unannounced entry by officers through the open door of defendant's motel room did not invalidate the arrest).

63. *United States v. Vargas*, 436 F.2d 1280, 1281 (9th Cir. 1971) (18 U.S.C. § 3109 aimed at closed or locked doors); *Reyes v. United States*, 417 F.2d 916, 919 (9th Cir. 1969) ("[E]ntry through an open doorway without force does not constitute a 'breaking,' and hence does not require notice of authority and purpose."); *Ponce v. Craven*, 409 F.2d 621, 626 (9th Cir. 1969) (police entry after occupant has opened door as result of police ruse not an entry under California's announcement statute, CAL. PENAL CODE § 844); *Sabbath v. United States*, 380 F.2d 108, 111 (9th Cir. 1967), *rev'd on other grounds*, 391 U.S. 585 (1968) (see notes 37-46 and accompanying text *supra*) ("An entry through an open door is not a breaking, even though there be no permission."); *Ng Pui Yu v. United States*, 352 F.2d 626, 631-32 (9th Cir. 1965) (stating there is no language in *Miller v. United States*, 357 U.S. 301 (1958), supporting the position that the entry must be with consent when the door is open); *Hopper v. United States*, 267 F.2d 904, 908 (9th Cir. 1959) (entry through an open door not a breaking under a Washington statute substantially like 18 U.S.C. § 3109).

64. 475 F.2d 537 (7th Cir. 1973).

65. *Id.* at 539.

66. See text accompanying notes 38-39 *supra*.

67. 475 F.2d at 541. This was the same result as that reached in *United States v. Rowlette*, 397 F.2d 475 (7th Cir. 1968), decided only two weeks after *Sabbath*.

68. In *United States v. Vargas*, 436 F.2d 1280 (9th Cir. 1971), the court stated that 18 U.S.C. § 3109 was aimed at closed or locked doors in a case where the officers had in fact announced their identity and purpose before entry and thus had complied with the statute. In *Reyes v. United States*, 417 F.2d 916 (9th Cir. 1969), the arresting agent knocked on defendant's door and was admitted without announcing his identity. Upon being informed that the defendant was in her bedroom, he quickly entered and placed her under arrest. The court held that the "[p]recedent in this court and the Supreme Court of the United States indicates that entry through an open door without force does not constitute a breaking, and hence does not require notice of authority

On the other hand, the District of Columbia Circuit has held that any entry, whether peaceful or not, if unannounced, constitutes a breaking.⁶⁹ Similarly, the Third⁷⁰ and perhaps the Fifth⁷¹ Circuits have also favored this broader interpretation. Those state court decisions on point since *Sabbath* have generally given an expansive definition of the term. Washington,⁷² Colorado,⁷³ and, arguably, Pennsylvania,⁷⁴ Ore-

and purpose." *Id.* at 919. *Ponce v. Craven*, 409 F.2d 621 (9th Cir. 1969) dealt with the slightly more complicated but nevertheless distinct problem of a ruse entry. See notes 114-60 *infra* and accompanying text. The arresting officers had the motel manager announce there was a telephone call for the defendant's female companion. When she opened the door, the officers entered and arrested her and the defendant. In a habeas corpus proceeding, the Ninth Circuit held that the unannounced entry was not in violation of the California announcement statute, reasoning that

[t]he employment of a ruse which results in the occupant of a dwelling voluntarily opening the door and thereby allowing officers to enter without announcement of purpose, is not a breaking, and therefore not violative of California arrest law.

Id. at 626.

69. *United States v. Harris*, 435 F.2d 74, 82 (D.C. Cir.), *cert. denied*, 408 U.S. 986 (1970) (an entry without consent ordinarily amounts to a breaking and thus it is required that officers first announce their purpose and authority); *Bosley v. United States*, 426 F.2d 1257, 1263 (D.C. Cir. 1970) (announcement prior to entry of suspects apartment through open door held useless gesture when defendant was asleep on couch); *Hair v. United States*, 289 F.2d 894, 896 (D.C. Cir. 1961) (where officers entered through a partially open door, the court stated: "The Government does not seriously dispute that *Miller* requires officers, who seek to invade the privacy of an individual's home, to announce their authority and their purpose in demanding entrance before 'barging in'"). In *Keiningham v. United States*, 287 F.2d 126, 130 (D.C. Cir. 1960), the court opined, "We think that a 'peaceful' entry which does not violate the provisions of § 3109 must be a permissive one, and not merely one which does not result in a breaking of parts of the house."

70. *United States v. Burruss*, 306 F. Supp. 915, 920 (E.D. Pa. 1969) (unannounced police entry through an open doorway a breaking).

71. *Wittner v. United States*, 406 F.2d 1165 (5th Cir. 1969). In holding that the statute need not be complied with when the occupant was previously aware of the officers' presence and purpose, the court stated the *Sabbath* rule to be that "§ 3109 governs unannounced entries by police whether . . . forcible or nonforcible." *Id.* at 1166.

72. *State v. Miller*, 499 P.2d 241, 245 (Wash. Ct. App. 1972) (unannounced entry by officer after an occupant opened door unaware of detective's presence is a breaking under the *Sabbath* rationale).

73. *People v. Godinas*, 490 P.2d 945 (Colo. 1971). The court noted that "forceful entries need not involve the actual breaking of doors and windows, but may include merely entries made without permission." *Id.* at 947.

74. *Commonwealth v. DeMichel*, 277 A.2d 159, 163 (Pa. 1971). In a case where officers broke down defendant's front door, the court stated in dictum that

[i]t is settled in this Commonwealth that the Fourth Amendment prohibition against unreasonable searches and seizures demands that before a police officer enters upon private premises to conduct a search or to make an arrest, he must, absent exigent circumstances, give notice of his identity and announce his purpose.

Id.

The facts of this case present an interesting problem. If the court strictly construes the need for some force, albeit minimal, before an entry can constitute a breaking,

gon,⁷⁵ and Florida⁷⁶ have in one form or another viewed entry without consent through an open door as a breaking.

Unquestionably, the greatest amount of litigation on the issue since *Sabbath* has taken place in California.⁷⁷ No less than eighteen decisions have dealt with police entries through an open door under California's announcement statutes. Four of the first five California cases to discuss the matter determined that entry through an open door did not constitute a breaking.⁷⁸ For example, the court deciding *People v.*

then it is possible it could hold an entry through a partially open door, which the police must open the rest of the way before entering, to be a breaking, but not hold an entry through an already wide open doorway to be a breaking. Thus, the law may depend upon "whether a police officer is thin enough to squeeze through a partially open door." Comment, *Unannounced Entry to Search: The Law and No-Knock Bill* (S. 3246), 1970 WASH. U.L.Q. at 208 (footnote omitted). See, e.g., *United State v. Ramos*, 380 F.2d 717, 721 (2d Cir. 1967) (although pushing open a partially open door was a breaking, it was done after announcement of officer's authority and purpose); *Dickey v. United States*, 332 F.2d 773, 777-78 (9th Cir. 1964) (pushing open all the way a door already partially open after a ruse would have been a breaking had not the door been opened entirely by the occupant); *Gatewood v. United States*, 209 F.2d 789, 790-91 (D.C. Cir. 1953) (officer's pushing open a door partially opened as a result of a ruse was a breaking); *United States ex rel. Dyton v. Ellingsworth*, 306 F. Supp. 231, 236 (D.C. Del. 1969) (although pushing open a partially open door was a breaking, it was excused since the occupant knew of the officer's presence and purpose).

75. *State v. Gassner*, 488 P.2d 822, 823 (Ore. Ct. App. 1971).

76. *Urquhart v. State*, 211 So. 2d 79, 83 (Fla. Ct. App. 1968) (police officers' pushing open door to house, after guest had partially opened door following officers' request to see an occupant of the house, constituted a breaking).

77. California Penal Code Sections 1531 and 844 govern the matter in regard to entries for the purpose of search and arrest respectively. They provide:

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 the warrant, if, after notice of his authority and purpose, he is refused admittance.

CAL. PENAL CODE § 1531 (West 1972).

To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

CAL. PENAL CODE § 844 (West 1972). These sections have been held to be identical in principle so far as their announcement requirements are concerned. *Greven v. Superior Court*, 71 Cal. 2d 287, 292 n.6, 455 P.2d 432, 435 n.6, 78 Cal. Rptr. 504, 507 n.6 (1969); *Hart v. Superior Court*, 21 Cal. App. 3d 496, 500, 98 Cal. Rptr. 565, 568 (1971); *People v. Garnett*, 6 Cal. App. 3d 280, 290 n.2, 85 Cal. Rptr. 769, 774 n.2 (1970); *People v. Garber*, 275 Cal. App. 2d 119, 131, 30 Cal. Rptr. 214, 222 (1969); *People v. Villanueva*, 220 Cal. App. 2d 443, 447, 33 Cal. Rptr. 811, 813 (1963).

78. *People v. Rodriguez*, 274 Cal. App. 2d 770, 774, 79 Cal. Rptr. 240, 243 (1969) (entry through an open door is not a breaking nor is it repugnant to or inconsistent with the United States Constitution); *People v. Naughton*, 270 Cal. App. 2d 1, 9, 75 Cal. Rptr. 451, 457 (1969) (following *People v. Taylor infra* as precedent in a case of criminal burglary); *People v. Taylor*, 266 Cal. App. 2d 14, 17-18, 71 Cal. Rptr. 886,

*Hamilton*⁷⁹ stated in dictum, "If a door is found open by the officer or opened to him, although not by the defendant who is intended to be placed under arrest, the officer may enter without warning"⁸⁰

A contrary view was taken by only one of the five cases, *People v. Beamon*.⁸¹ The *Beamon* court viewed the California supreme court's *Rosales* decision that entry through a closed but unlocked door was a breaking to stand for the notion that no person may be arrested in his home unless the arresting officers first announce their purpose and authority. The court rejected the reasoning of a prior decision⁸² that at common law an entry through an open door was not regarded as a breaking and held that police "may not enter through the open door of a house without first demanding admittance and explaining the purpose for which admittance is desired"⁸³ The court noted that if analogy to the law of burglary is to be considered, it should be remembered that in California no breaking or forcible entry is required⁸⁴ and that a burglary can be committed by entering through an open door or window.⁸⁵

The issue finally reached the California supreme court in *People v. Bradley*.⁸⁶ In that case, the arresting officers approached the fully open

888 (1968) (swinging open of a door upon being subjected only to a rapping of the kind that is a common prelude to a request for admission, more analogous to the open-door cases than to cases where the door was closed and therefore not a breaking); *People v. Hamilton*, 257 Cal. App. 2d 296, 302, 64 Cal. Rptr. 578, 582 (1967) (officers entering closed but unlocked door without prior announcement rendered evidence seized inadmissible).

79. 257 Cal. App. 2d 296, 64 Cal. Rptr. 578 (1967).

80. *Id.* at 302, 64 Cal. Rptr. at 252 (citations omitted).

81. 268 Cal. App. 2d 61, 73 Cal. Rptr. 604 (1968).

82. *People v. Taylor*, 266 Cal. App. 2d 14, 71 Cal. Rptr. 886 (1968).

83. 268 Cal. App. 2d at 64, 73 Cal. Rptr. at 606 (footnotes omitted).

84. *Id.* at 65, 73 Cal. Rptr. at 607. *See, e.g., People v. Talbot*, 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1966); *People v. Failla*, 64 Cal. 2d 560, 414 P.2d 39, 51 Cal. Rptr. 103 (1966); *People v. Sears*, 62 Cal. 2d 737, 401 P.2d 938, 44 Cal. Rptr. 330 (1965); *People v. Garcia*, 214 Cal. App. 2d 681, 29 Cal. Rptr. 609 (1963); *People v. Chambers*, 189 Cal. App. 2d 780, 11 Cal. Rptr. 415 (1961); *People v. Wilson*, 160 Cal. App. 2d 606, 325 P.2d 106 (1958).

The California Penal Code defines burglary thus:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petty larceny or any felony is guilty of burglary.

CAL. PENAL CODE § 459 (West 1972).

85. *See, e.g., People v. Failla*, 64 Cal. 2d 560, 414 P.2d 39, 51 Cal. Rptr. 103 (1966); *People v. Massey*, 196 Cal. App. 2d 230, 16 Cal. Rptr. 402 (1961).

86. 1 Cal. 3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969).

door of the defendant's house at 3:15 a.m. With the aid of a flashlight, they saw the defendant asleep in bed. The officers silently entered and made the arrest.⁸⁷

Justice Burke, writing for the majority, chose to take an intermediate position. Citing *Sabbath* to the effect that " 'linguistic analysis is seldom adequate when a statute is designed to incorporate fundamental values and the ongoing development of the common law,' "⁸⁸ he declared that when the legislature codifies a common law rule, it does not necessarily freeze that rule:

Although § 844 codified the common law rule requiring peace officers to demand admittance and explain their purpose before they break open a door or window, the section is silent or inexplicit as to whether the officers must make such a demand and explanation before they enter a house through an open door. Even if at common law an announced intrusion through an open door was lawful, we are satisfied in view of the purposes of § 844, as stated in *People v. Rosales*, that the demand and explanation requirements of that section also apply where, as here, *officers walk into a dwelling through an open door at nighttime when the occupant apparently is asleep.*⁸⁹

Justice Burke warned that one of the consequences "of such an unannounced intrusion could be resistance to the intruders and violent death or injury to them or others including innocent third parties."⁹⁰

After thus restricting his holding to the narrowest interpretation of the facts of the case, Justice Burke went on to expressly disapprove of the dictum⁹¹ in *People v. Hamilton* to the extent to which it was inconsistent with *Bradley*.⁹² However, he also considered it unnecessary for the court to decide the issue as broadly as in *People v. Beamon*.⁹³

We intimate no view whether in the absence of an excuse for compliance under the exceptions to section 844 the demand and explanation requirements of that section apply to *all entries through an open door (including e.g. entrance through an open door by a uniformed officer during the day where immediately after crossing the threshold he announces himself and his purpose).*⁹⁴

87. *Id.* at 83-84, 460 P.2d at 130-31, 81 Cal. Rptr. at 458-59.

88. *Id.* at 87, 460 P.2d at 133, 81 Cal. Rptr. at 461, quoting *Sabbath v. United States*, 391 U.S. at 589.

89. 1 Cal. 3d at 87, 460 P.2d at 133, 81 Cal. Rptr. at 460 (emphasis added and citation omitted).

90. *Id.* at 88, 460 P.2d at 135, 81 Cal. Rptr. at 461.

91. See text accompanying note 79 *supra*.

92. 1 Cal. 3d at 88, 460 P.2d at 134, 81 Cal. Rptr. at 462.

93. See text accompanying notes 79-83 *supra*.

94. 1 Cal. 3d at 87-88 n.1, 460 P.2d at 133 n.1, 81 Cal. Rptr. at 461 n.1 (emphasis added).

Justice Burke went on to say that though the court had chosen not to rule on the question, it would nonetheless be "advisable" for officers to always announce their authority and purpose before entering a house through an open door to make an arrest, unless the case came within an established exception to section 844.⁹⁵

The question left open in *Bradley* was first confronted by a California court in *People v. Norton*.⁹⁶ The court concluded that entry during the daytime through an open door does require compliance with section 844 unless otherwise excused.⁹⁷ Substantially the same conclusion was reached in *People v. Arias*⁹⁸ where the court saw no reason to distinguish between nighttime and daytime open door entry in a situation where the occupants were asleep with a butcher knife beside their bed.⁹⁹ Privacy, the court argued, could be invaded during the day as well as night and a daytime entry might in fact be met by more violence. Accordingly, the court held that a "police officer may not enter through an open door of a house without first demanding admittance and explaining the purpose for which admittance is desired."¹⁰⁰ The same conclusion was reached in *People v. Anderson*¹⁰¹ and *People v. Lawrence*.¹⁰² In *People v. Hayko*,¹⁰³ the state conceded that a breaking could occur when an officer entered through an open door.¹⁰⁴

95. *Id.* at 87-88, 460 P.2d at 133, 81 Cal. Rptr. at 461. Justice Tobriner, concurring and dissenting in a separate opinion signed by Justices Peters and Sullivan, would have made Justice Burke's advice the law. Justice Tobriner felt the "unduly restrictive" language of the majority opinion was an invitation to "unnecessary litigation" which would result from cases "involving daytime entries, and entries upon awakened or apparently awakened occupants." 1 Cal. 3d at 90, 460 P.2d at 135, 81 Cal. Rptr. at 463, citing *Miller v. United States*, 357 U.S. 301 (1958) and *People v. Rosales*, 68 Cal. 2d 299, 437 P.2d 439, 66 Cal. Rptr. 1 (1968), as support for the proposition that section 844 serves to protect the privacy of occupants and their safety, as well as the safety of police and bystanders. He concluded that "the intrusion upon privacy does not depend upon the time of day; an awake occupant is perhaps more likely to offer violent resistance than a sleeping one." 1 Cal. 3d at 90, 460 P.2d at 135, 81 Cal. Rptr. at 463. He thus concluded that *Beamon* was the correct interpretation of *Rosales* and would have held that the officer's entry was a violation of § 844, not because the occupant was asleep and it was at night, but simply because there was no announcement in a situation in which there was no excuse for the lack of announcement. 1 Cal. 3d at 90, 460 P.2d at 135, 81 Cal. Rptr. at 463.

96. 5 Cal. App. 3d 955, 86 Cal. Rptr. 40 (1970).

97. *Id.* at 963, 86 Cal. Rptr. at 44.

98. 6 Cal. App. 3d 87, 85 Cal. Rptr. 479 (1970).

99. *Id.* at 93, 85 Cal. Rptr. at 483.

100. *Id.* at 94, 85 Cal. Rptr. at 484.

101. 9 Cal. App. 3d 80, 85, 88 Cal. Rptr. 4, 7 (1970).

102. 25 Cal. App. 3d 213, 222, 101 Cal. Rptr. 671, 676 (1972).

103. 7 Cal. App. 3d 604, 86 Cal. Rptr. 726 (1970).

104. *Id.* at 607, 86 Cal. Rptr. at 728.

However, three other California appellate courts have ruled that when a door is open and the officers view the occupants in the actual commission of a felony, their entry does not constitute a breaking under section 844.¹⁰⁵ These rulings, however, confuse the question of what should constitute a breaking, with the question of what should constitute an exigent circumstance excusing non-compliance with the statute. It would have been more reasonable if the courts had simply stated that although the entry through defendant's open door was a breaking, the fact that a felony was in progress at the time excused compliance with the statute.¹⁰⁶

It would thus appear that the trend in California, as in Washington,¹⁰⁷ Colorado,¹⁰⁸ Pennsylvania,¹⁰⁹ Florida,¹¹⁰ and Oregon,¹¹¹ and in some of the federal circuits¹¹² is to hold that a police entry for the purpose of arrest or search constitutes a breaking, even if through a wide open door, so long as it is without permission.¹¹³

105. *People v. Lee*, 20 Cal. App. 3d 982, 987, 98 Cal. Rptr. 182, 187 (1971) (police entry through open door without prior announcement held not to involve a breaking since at the time the door opened, the officers perceived defendants actually "engaged in the commission of a narcotic offense." *Id.* at 989-90); *People v. Peterson*, 9 Cal. App. 3d 627, 633, 88 Cal. Rptr. 597, 600 (1970) (no breaking found where police entered after occupant opened door even though no announcement since when door was opened, officers smelled marijuana); *People v. Boone*, 2 Cal. App. 3d 66, 69, 82 Cal. Rptr. 398, 399-400 (1969) (§ 844 held not intended to apply to situations where a felony was presently in progress). The approach taken by the *Lee*, *Peterson*, and *Boone* courts was rejected in *People v. Leighter*, 15 Cal. App. 3d 389, 93 Cal. Rptr. 136 (1971). There, one of the defendants opened the door in response to police knocking and the police smelled marijuana. Their announcement, though immaterial in regard to arresting the defendant at the door, nonetheless was held to be a requirement before entering to arrest the others not yet seen. Thus the uninvited entry constituted a breaking. *Id.* at 397, 93 Cal. Rptr. at 141.

106. The three recognized exceptions to the announcement requirement are discussed in note 14 *supra*. While there is currently no exception to the announcement requirement when officers see an occupant engaged in the commission of a felony, these three decisions do nothing less than create such an exception under the guise of interpreting the term "breaking."

107. *See* note 72 *supra*.

108. *See* note 73 *supra*.

109. *See* note 74 *supra*.

110. *See* note 76 *supra*.

111. *See* note 75 *supra*.

112. *See* notes 69-71 *supra*.

113. This should not be confused with nonconsensual entries such as those in *Hoffa v. United States*, 385 U.S. 293 (1966), or *Lewis v. United States*, 385 U.S. 206 (1966), where the Court held legal the entry of an undercover agent into defendant's home or apartment for the purpose of gaining evidence as a result of a conversation he heard while in the defendant's presence, and *Gouled v. United States*, 255 U.S. 298, 305 (1921), holding a search and seizure unreasonable when government representatives gain entrance by stealth or guise to the home or office of one suspected of a

IV. RUSE ENTRY

An entry similar to open door entries is that procured by a police ruse. Such entries occur when the police enter with the permission of the occupant but without the occupant's knowledge that they are police officers entering with the intent to arrest or search. The issue is whether or not it constitutes a breaking for police to gain entry into a home as a result of permission gained by the use of subterfuge or ruse.

There appear to be two possible types of ruse entries. One is where the ruse actually succeeds in gaining the officers an invitation into the suspect's home. This can occur, for example, when officers in plain-clothes announce themselves to be repairmen or announce themselves to be police but misrepresent their reasons for desiring entry, and after being admitted make their arrest. The other situation is where the ruse succeeds only in getting the occupant to open the door. This type of ruse can occur, for example, when the officers have the occupant's motel manager knock and request to speak to the renter. As soon as the door has been opened, the police enter and make the arrest.

In determining whether ruse entries are breakings, courts should consider the three goals underlying the announcement rule: prevention of property damage, violent confrontation, and privacy intrusions.¹¹⁴ Certainly a ruse entry presents no danger of doors or windows being destroyed. But the splintering of the door during entry no longer seems the essence of the rule's application, as witness the courts' expansion of the definition of the term "breaking" to encompass passkey entries,¹¹⁵ entries effected by opening a closed but unlocked door,¹¹⁶ and entries through already open doorways.¹¹⁷ Clearly the courts in applying the announcement rule have been centrally concerned with the threat of violent confrontation and invasion of privacy.

It might be argued that ruse entries are somehow unique in that they do not present dangers of violent confrontation or invasion of privacy. The argument would be that once the occupant has consented to the

crime and in the other's absence search for his papers without his knowledge or consent. Nor should this be confused with situations where the police gain entry by means of threat, coercion, or duress as in *Gatlin v. United States*, 326 F.2d 666 (D.C. Cir. 1963), where the court held that "invitations" to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as "invitations secured by force." *Id.* at 673, quoting *Judd v. United States*, 190 F.2d 649, 650-51 (D.C. Cir. 1951).

114. See notes 6-9 *supra* and accompanying text.

115. See notes 10-17 *supra* and accompanying text.

116. See notes 18-52 *supra* and accompanying text.

117. See notes 54-113 *supra* and accompanying text.

entry of a gasman or a tax assessor, he has consented to an invasion of privacy and is not likely to react violently. But, when a person opens his front door expecting to be met by the milkman and is instead confronted by three armed officers who quickly rush across the threshold, there would appear to be some danger of violence. On the other hand, a ruse entry by an undercover agent would not ordinarily involve a significant risk of confrontation. The question of whether or not a risk of violence is substantial, apparently depends upon whether the ruse will be exposed when the door is opened or whether the ruse will be exposed at the convenience of the officer *after* entry. The former involves significant risks; the latter does not.

Privacy considerations are no less relevant in spite of the argument that when an occupant agrees to the admittance of one type of guest, he cannot claim his privacy has been invaded when the identity of the intruder proves to be other than he anticipated. This "all or nothing" view of privacy ignores the distinction between abandoning one's expectation of privacy vis-a-vis a milkman and consenting to a police intrusion.¹¹⁸ On the other hand, the ruse entry is less intrusive of privacy than the "typical" breaking situation, where the occupant is not forewarned that *anyone* is entering. In the ruse situation, the occupant is at least aware that *someone* is about to enter.

There is another policy consideration uniquely applicable to ruse entries. This is the question of the desirability of police deception of the citizenry as an instrument of law enforcement. While such deception might be tolerable under certain circumstances, few would proclaim its general desirability.¹¹⁹

If the analogy to burglary which was suggested in *Rosales*¹²⁰ and *Sabbath*¹²¹ is accepted, entry by deceit would certainly constitute a breaking. Nevertheless, the rule today in this regard seems quite simi-

118. Cf. *People v. Edwards*, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969). There, the California supreme court extended the reasonable expectation of privacy as set forth in *Katz v. United States*, 389 U.S. 347, 361 (1967) (concurring opinion), to a case where officers found a bag containing marijuana in a trash can in defendant's backyard. The court reasoned that the defendant had abandoned the marijuana and had also abandoned his expectation of privacy insofar as a trashman was concerned but still possessed a reasonable expectation of privacy in regard to the police. 71 Cal. 2d at 1104-05, 458 P.2d at 718, 80 Cal. Rptr. at 638. See also *California v. Krivda*, 409 U.S. 33 (1972). Thus it could be argued that though the occupant of a home consents to the invasion of his privacy by a "gas man," he still has a right to privacy in regard to the entry of the police.

119. Cf. *Hoffa v. United States*, 385 U.S. 293, 315 (1966) (concurring opinion).

120. See text accompanying note 37 *supra*.

121. See text accompanying note 47 *supra*.

lar to that which existed at the time Professor Wilgus concluded his series of articles on warrantless arrest:

What constitutes police "breaking" seems to be the same as in burglary: . . . but contrary to the rule in burglary, obtaining admission by strategem by officer is not a "breaking," if not accompanied by false pretense and violent entry.¹²²

Entry by fraud or affirmative misrepresentation was held illegal in *Wong Son v. United States*¹²³ and *Gatewood v. United States*.¹²⁴ In each case, however, the Court made clear that the illegality arose from the use of force to enter dwellings after the occupants had partially opened their doors in response to the misrepresentations.¹²⁵ In *Dickey v. United States*¹²⁶ this rule was accepted in dictum.¹²⁷

The United States Supreme Court has not decided a case where the fraudulent entry was not accompanied by force. The *Sabbath* Court specifically refused to entertain the question: "We do not deal here with entries obtained by ruse, which have been viewed as involving no 'breaking.'"¹²⁸ The cases *Sabbath* cited as expressing this view were *Leahy v. United States*¹²⁹ which held that misrepresentation of identity to gain admission was not a breaking¹³⁰ and *Smith v. United*

122. Wilgus, *supra* note 1, at 806 (footnotes omitted). Professor Wilgus' statement has the authority of his position but little else. The common law cases he cited dealt with service of civil process. See, e.g., *Hitchcock v. Holmes*, 43 Conn. 528, 529-30 (1876) (civil process of attachment in assumpsit); *Rex v. Backhouse*, 98 Eng. Rep. 533 (K.B. 1772) (writ for 40 pounds); *Waterhouse v. Saltmarsh*, 80 Eng. Rep. 409 (K.B. 1724) (serving private process by sheriff); *Parke v. Evans*, 80 Eng. Rep. 211 (K.B. 1724) (a sheriff cannot lawfully enter a house when the door has been opened by craft and false pretenses in serving civil process). See note 26 *supra*.

123. 371 U.S. 471, 482-83 (1963) (narcotics agent procured entry to laundry by falsely stating he had come for laundry and dry cleaning).

124. 209 F.2d 789, 791 (D.C. Cir. 1953) (officers knocked and announced they were from Western Union).

125. 371 U.S. at 474; 209 F.2d at 790.

126. 332 F.2d 773 (9th Cir.), *cert. denied*, 397 U.S. 948 (1964).

127. *Id.* at 777-78 (officers admitted voluntarily under guise of being repairmen held permissible since no force employed on officers' part in the opening). Similarly, in *Jones v. United States*, 304 F.2d 381 (D.C. Cir. 1962), the court indicated that an entry procured by fraud followed by force would violate § 3109, but upheld the entry in question since the fraud had persuaded defendant to open the door. *Id.* at 384-85. A similar approach was taken on almost identical facts by the Maryland Court of Special Appeals in *Mullaney v. State*, 246 A.2d 291, 298 (1968), and the same result was reached in *Commonwealth v. Riccardi*, 283 A.2d 719, 721 (Pa. 1971).

128. 391 U.S. at 590 n.7.

129. 272 F.2d 487 (9th Cir. 1960), *cert. denied*, 364 U.S. 945 (1961) (revenue agents gained admittance by stating they were agents from County Assessor's Office).

130. *Id.* at 489-90.

*States*¹³¹ which held such an entry permissible so long as force was not employed.¹³²

Soon after *Sabbath*, in *United States v. Syler*,¹³³ the Seventh Circuit held that the invited entry of Secret Service agents through an open door after they had announced themselves as "gasmen" did not invalidate the ensuing arrest and search because it was not a breaking.¹³⁴ In the same year, however, the District Court for the Southern District of West Virginia held a police entry by ruse to be a "breaking" within the definition of section 3109 in *Bower v. Coiner*.¹³⁵ There, an agent called the renter of an apartment on the phone and informed him that there were FBI agents at the door wishing to talk to him, although the agents' actual intention was to arrest the occupant's guest.¹³⁶

Similarly, Circuit Judge Tuttle's opinion in *United States v. Beale*¹³⁷ held federal officers' use of a trick to enter a hotel room, without a proper announcement, to be an invalid method of entry for the purpose of arrest. Noting that *Sabbath* specifically left this question unresolved,¹³⁸ he nonetheless concluded that *Sabbath* required him to rule that

entry by use of deception, even where force is not involved, is governed by § 3109. Indeed, we can see no meaningful difference between gaining entrance into one's hotel room by pretending there is a visit by the hotel manager and by using the manager's passkey.¹³⁹

However, the court granted a rehearing and retreated from its prior opinion that the underlying rationale of *Sabbath* requires entries secured by deception and without the use of any force to be governed by the federal announcement statute.¹⁴⁰ The court distinguished *Sabbath* as a situation involving some force, however minimal,¹⁴¹ and thus concluded that *Sabbath* left undisturbed the distinction between entry where some force is employed and entry where force is not an element.¹⁴² Although it found this rule somewhat dubious, the court concluded

131. 357 F.2d 486 (5th Cir. 1966).

132. *Id.* at 488 n.1.

133. 430 F.2d 68 (7th Cir. 1970).

134. *Id.* at 70.

135. 309 F. Supp. 1064 (S.D.W. Va. 1970).

136. *Id.* at 1070.

137. 436 F.2d 573 (5th Cir. 1971).

138. See text accompanying note 128 *supra*.

139. 436 F.2d at 575.

140. *United States v. Beale*, 445 F.2d 977, 978 (5th Cir. 1971).

141. *Id.* at 978.

142. *Id.*

that only the Supreme Court could broaden the breaking concept to include entry by deception wholly without the use of force.¹⁴³

Judge Tuttle dissented vigorously in the face of this retreat from his earlier opinion:

[W]hat we are dealing with is the right of the government to obtain entrance into a person's home by the use of fraudulent tale, no matter what the dimensions of the fraud or deceit involved.

. . . .

If the basic principle is, as I deem it to be, "the reverence of the law for the individual's right of privacy in his house," then, it seems to me that we should not hesitate to apply what to me appears to be a clear and logical extension of the doctrine announced in *Sabbath*, without requiring the indigent accused to seek an opportunity to present, by certiorari, his plea to the Supreme Court.¹⁴⁴

State courts have also generally proven unreceptive to the idea of holding such entries as breakings. In *State v. Valentine*¹⁴⁵ and *State v. Darroch*¹⁴⁶ the Oregon supreme court decided that ruse entries do not offend privacy considerations.¹⁴⁷ In both cases, an undercover agent posing as a narcotics buyer was present in the defendant's home. The agent left the home under the guise of going to his car to get money for the purchase. Other officers then entered through the door he had left ajar and arrested the defendants.¹⁴⁸ In *Darroch*, the court went so far as to find that an implied invitation had been extended to the arresting officers since the occupants were expecting the reentry of the undercover agent.¹⁴⁹

The California appellate courts confronted by the issue have all but unanimously concluded that such entries do not constitute a breaking,¹⁵⁰

143. *Id.*

144. *Id.* at 979. Judge Tuttle's reasoning was adopted in *United States v. Bradley*, 455 F.2d 1181 (1st Cir. 1972). The court indicated that a concern with privacy was central to section 3109, but found that the prior entry and continued presence of an undercover agent had sufficiently compromised the occupants' privacy as to vitiate the impropriety of any subsequent entry. *Id.* at 1185-86.

145. 504 P.2d 84 (Ore. 1972).

146. 492 P.2d 308 (Ore. 1971).

147. 504 P.2d at 89; 492 P.2d at 310.

148. 504 P.2d at 85; 492 P.2d at 309.

149. 492 P.2d at 310. The Oregon courts also upheld a ruse entry in *State v. Monteith*, 477 P.2d 244 (Ore. 1970).

150. *See, e.g.*, *People v. Superior Court (Proctor)*, 5 Cal. App. 3d 109, 114-15, 84 Cal. Rptr. 778, 781-82 (1970) (occupant opened door to minor who was accompanied by police waiting around corner of building); *People v. Ramirez*, 4 Cal. App. 3d 154, 157-58, 84 Cal. Rptr. 104, 105-06 (1970) (officer invited in after telling occupant he wanted to "talk to him"); *People v. Coleman*, 263 Cal. App. 2d 697, 703, 69 Cal. Rptr.

but the California supreme court has yet to speak specifically on the matter.¹⁵¹ The one deviation from the norm at the California appellate level has been *People v. Mesaris*.¹⁵² Plainclothes police officers went to the door and asked to see a Sears repairman who was in the kitchen.¹⁵³ The court regarded an entry obtained by the police for a purpose different from their real purpose as a non-consensual entry and therefore subject to the requirements of the announcement statute.¹⁵⁴

A more recent appellate case, however, refused to follow this deviation from precedent. In *People v. Veloz*,¹⁵⁵ a sheriff knocked on the door and told defendant's wife that he was a carpet salesman sent by the welfare office to recarpet her home. Immediately upon entering, he saw the defendant lying asleep in a bed three or four feet from the door. Two other deputies entered at a prearranged signal, and one awakened the defendant.¹⁵⁶ The court distinguished the *Mesaris* facts on the theory that in *Mesaris* the police had no probable cause to arrest prior to their entry. The court proceeded to conclude that the use of a ruse to gain entry was lawful because the officers had probable cause to arrest the defendant.¹⁵⁷

But the court in *Mesaris* specifically refused to rule on the issue of probable cause.¹⁵⁸ The *Mesaris* court believed that ruse entries were proscribed by California's announcement statute whether or not they were preceded by probable cause.¹⁵⁹ *Mesaris* might be rejected as a decision out of line with California precedent, but it cannot be distinguished.

It is doubtful that *Mesaris* signals the inception of a trend to invalidate ruse entries in California. The weight of authority in California holds that if police officers have probable cause to enter a dwelling, they

910, 914 (1968) (hotel clerk knocked at door in company of police); *People v. Quilon*, 245 Cal. App. 2d 624, 628, 54 Cal. Rptr. 294, 298 (1966) (defendant opened door to parole officer accompanied by narcotics officers); *People v. Lawrence*, 149 Cal. App. 2d 435, 446, 308 P.2d 821, 827 (1957) (defendant opened a door to narcotics informer accompanied by police).

151. However, in *Ponce v. Craven*, 409 F.2d 621, 626 (9th Cir. 1969), *cert. denied*, 397 U.S. 1012 (1970), the court held in a habeas corpus proceeding that California's announcement protections did not bar ruse entries.

152. 14 Cal. App. 3d 71, 91 Cal. Rptr. 837 (1970).

153. *Id.* at 73, 91 Cal. Rptr. at 839.

154. *Id.* at 75, 91 Cal. Rptr. at 840.

155. 22 Cal. App. 3d 499, 99 Cal. Rptr. 519 (1971).

156. *Id.* at 501, 99 Cal. Rptr. at 521.

157. *Id.* at 503, 99 Cal. Rptr. at 522.

158. 14 Cal. App. 3d at 76 n.4, 91 Cal. Rptr. at 840 n.4.

159. *Id.* at 76, 91 Cal. Rptr. at 840.

may employ a ruse to do so.¹⁶⁰ Presumably, however, California courts will distinguish between ruses which succeed in gaining an invitation to enter and ruses which only succeed in getting a door open. The former minimizes the potential for violence; the latter invites the type of confrontation that announcement statutes were designed to avoid.

CONCLUSION

The home cannot be a sanctuary in which those suspected of crimes may find shelter from officers of the law. But when the police do approach the door of a suspect's home, they have reached an area protected from unreasonable governmental intrusion by the fourth and fourteenth amendments and by a tradition deeply rooted in our common law heritage as codified in breaking and entering statutes.

The growing emphasis on the protection of privacy and prevention of violent confrontations as the primary policies underlying announcement statutes has given rise to the apparently unanimous expanding of the term "breaking" to include those entries by means of a passkey¹⁶¹ or the opening of a closed but unlocked door.¹⁶² The same can be said for the trend in favor of similarly classifying entries through an already open doorway.¹⁶³ The one type of entry, which only a few courts have chosen to classify as a breaking, has been the ruse entry.¹⁶⁴ Although the decisions are not unmixed, most courts maintain that ruse entries are acceptable modes of entry under the announcement statutes.

The courts increasingly have come to recognize that the meaning of the term "breaking" must be fashioned with an eye to the relevant policy considerations and that the interpretation of the announcement statutes cannot be confined by the rules of Webster's Dictionary. Fortunately, the courts have proceeded with the recognition that "linguistic analysis seldom is adequate when a statute is designed to incorporate fundamental values and the ongoing development of the common law."¹⁶⁵

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160. See note 150 *supra* and accompanying text.

161. See notes 10-17 *supra* and accompanying text.

162. See notes 18-52 *supra* and accompanying text.

163. See notes 54-113 *supra* and accompanying text.

164. See notes 114-60 *supra* and accompanying text.

165. *Sabbath v. United States*, 391 U.S. 585, 589 (1968).