EXIGENCIES, NOT EXCEPTIONS: HOW TO RETURN WARRANT EXCEPTIONS TO THEIR ROOTS

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ABSTRACT

When a police officer interacts with an individual, the encounter is subject to myriad exceptions to the Fourth Amendment's warrant requirement that lack a coherent justifying theory. For instance, officers can warrantlessly search if an automobile was involved in the interaction, an arrest occurred, or a protective sweep was necessary to prevent a third-party ambush. Officers and individuals struggle to understand the breadth and complexity of these exceptions. The resulting confusion breeds widespread distrust and raises the tension in millions of interactions across the country.

There is an easier way. The Supreme Court has recently reaffirmed its support for a clear and limited "exigent circumstances" exception to the warrant requirement. Such exigencies originally motivated the Court to create many of the separately-named exceptions that apply today. The Supreme Court should return those separate exceptions to their exigency-based roots, eliminating or reducing many of them while lowering the tension in officer-individual interactions. The Court should follow a simple guiding principle: if officers have reasonable suspicion that an interaction creates an exigent circumstance, a warrantless search is constitutional.

The Court should also take additional steps to ensure that the exigent circumstances exception remains limited. First, it should clarify that officers must have "reasonable suspicion" that a genuine emergency is afoot before warrantlessly searching. Second, it should hold that evidence officers discover after deliberately creating a pretextual exigency to avert the warrant requirement will be excluded from trial.

These changes are both revolutionary and simple. They create a clear and coherent basis for exceptions to the warrant requirement in officer-individual interactions. And they are an important step towards reducing the dangerous tension that plagues everyday policing.

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INTRODUCTION

Although the Fourth Amendment presumptively requires officers to obtain a warrant before conducting a search,[1] the Supreme Court has created a labyrinth of exceptions whenever officers interact with individuals. Exceptions like searches incident to a lawful arrest ("SITLAs") in homes;[2] protective sweeps;[3] SITLAs in cars;[4] and automobile searches[5] all potentially

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[1] *See, e.g.*, Riley v. California, 573 U.S. 378, 382 (2014) ("Our cases have determined that [w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing... reasonableness generally requires the obtaining of a judicial warrant. Such a warrant ensures that the inferences to support a search are drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.") (citations and quotations omitted); Michigan v. Fisher, 558 U.S. 45, 47 (2009) ("[T]he ultimate touchstone of the Fourth Amendment, we have often said, is reasonableness. Therefore, although searches and seizures inside a home without a warrant are presumptively unreasonable, that presumption can be overcome.") (citations and quotations omitted); Kentucky v. King, 563 U.S. 455, 459 (2011) ("[T]his Court has inferred that a warrant must generally be secured. It is a basic principle of Fourth Amendment law, we have often said, that searches and seizures inside a home without a warrant are presumptively unreasonable.") (citations and quotations omitted).

[2] *See* Chimel v. California, 395 U.S. 753, 762–63 (1969) ("When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape . . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.").

[3] Maryland v. Buie, 494 U.S. 327, 334 (1990) ("[A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."); *see also* Mark A. Cuthbertson, Note, Maryland v. Buie*: The Supreme Court's Protective Sweep Doctrine Runs Rings Around the Arrestee*, 56 ALB. L. REV. 159, 173 (1992) (asserting that *Buie* implies that protective sweeps are performed when reasonable suspicion exists).

[4] "[C]ircumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" Arizona v. Gant, 556 U.S. 335, 343 (2009) (quoting Thornton v. United States, 541 U.S. 617, 632 (2004) (Scalia, J., concurring)); *see also* Geoffrey S. Corn, Arizona v. Gant*: The Good, the Bad, and the Meaning of "Reasonable Belief*," 45 CONN. L. REV. 177, 179 (2012) (noting that, traditionally, "the most fundamental principle of search law" is that "pure evidentiary searches may only be reasonable when based on probable cause.").

[5] "[A] warrantless search of an automobile, based upon probable cause to believe that the vehicle contained evidence of crime in the light of an exigency arising out of the likely disappearance of the vehicle, [does] not contravene the Warrant Clause of the Fourth Amendment." California v. Acevedo, 500 U.S. 566, 569 (1991) (discussing Carroll v. United States, 267 U.S. 143, 158-59 (1925)).

apply.[6] Though each has its own internal logic, no consistent rationale justifies this wide swath of exceptions that practically consumes any warrant requirement. The breadth and complexity of those exceptions breeds contempt.[7] Individuals assume that officers have unlimited authority to invade their privacy at will,[8] making them wary of any exchange with officers and defensive when interactions occur.[9] At the same time, officers genuinely

[6] This is not an exhaustive list of warrant exceptions; others, such as administrative searches (Camara v. Mun. Ct. of City & Cnty. of San Francisco, 387 U.S. 525, 534 (1967)), inventory searches (Florida v. Wells, 495 U.S. 1, 4 (1990)), or special needs searches *see, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 825, 829 (2002) (explaining that a search might be necessary without probable cause when there are special needs), might also apply. But those species of exceptions typically apply either after the officer-citizen interaction, and its inherent tensions and dangers, has passed, or in an interaction between individuals and a different type of government agent. The Article thus does not address those species of exceptions directly, though there may be grounds to similarly reduce those exceptions.
This Article will also argue for a reduced consent "exception" to the warrant requirement, which is a common facet of officer-individual interactions. *See infra* Part VI.

[7] The Supreme Court itself has noted its distaste for its own rules. *See, e.g.*, Robbins v. California, 453 U.S. 422, 430 (1981) (Powell, J., concurring) ("[T]he law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how [the instant] cases should be decided."). Thus, the Court often highlights the need to create clearer rules for officers to implement in the field. *See, e.g.*, Dunaway v. New York, 442 U.S. 202, 213–14 (1979) (stating that police officers need a single standard to guide them in the specific circumstances they confront); New York v. Belton, 453 U.S. 455, 458 (1981) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141-42); United States v. Ross, 456 U.S. 799, 821 (1982) (stating that precisely defined legitimate searches allow efficient completion of the task an officer faces); Atwater v. Lago Vista, 532 U.S. 323, 347 (2001) (stating that because the Fourth Amendment is to be applied in the heat of the moment, to be reasonable the standards have to be clear and simple).

[8] In recent oral arguments in *Lange v. California* concerning the scope of exigent circumstances, Justice Gorsuch highlighted the slippery slope that can emerge when too many categorical exceptions to the warrant requirement emerge. "[W]e live in a world in which everything is illegal, you put that together with the good faith exception and the—the fact that an officer's not being tested on his subjective intentions, which may be nefarious, but whether a reasonable officer could think as he did, and hot pursuit could be pretty tepid, it turns out, have we come pretty close to—doesn't that sound a bit like the general war—world and––and the founding that the framers were so concerned about rejecting?" Transcript of Oral Argument at 106, Lange v. California, 141 S. Ct. 2011 (Feb. 24, 2021) (No. 20-18).

[9] Public distrust of police departments is rampant; Gallup polls from the summer of 2020 showed that only 19% of Black adults had "a great deal" or "quite a lot" of confidence in policing, and only 56% of white adults—the lowest rates in the Gallup poll's history. Desiree Stennett, *Black Communities' Distrust of Police Has Roots in History*, U.S. NEWS & WORLD REP., (Nov. 28, 2020), https://www.usnews.com/news/best-states/california/articles/2020-11-28/black-communities-distrust-of-police-has-roots-in-history.
This may explain why individuals so often grant consent for a warrantless search. "Members of communities with historically tense relationships with police may fear that a refusal to cooperate will

interested in solving crime struggle to understand the limits of their power in sparse hours of training;[10] violate those limits unintentionally; and perpetuate the public perception that overzealous officers will stop at nothing to put young men in handcuffs.[11]

There is an easier way. Last term, the Supreme Court twice supported a clear and limited "exigent circumstances" exception to the warrant requirement.[12] Building upon that momentum, the Court could use exigent circumstances to eliminate or reduce the other disparate warrant exceptions that currently apply in officer-individual interactions.

'aggravate or intensify' the encounter." Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 527 (2015) (quoting Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1013-14 (2002)).

[10] "Police agencies around the country regularly fail to meet what are generally recognized as minimum standards for use-of-force and arrest training, frontline supervision, and internal investigations." Seth W. Stoughton, Jeffrey J. Noble, & Geoffrey P. Alpert, *How to Actually Fix America's Police*, THE ATLANTIC (June 3, 2020), https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520 [https://perma.cc/4RVD-BQQ2]. Justice Department Guidance suggests that "[o]n average, new police recruits are expected to complete more than 700 hours or 19 weeks of training, although the actual number of training hours varies widely based on the specific jurisdiction and academy." U.S. DEP'T OF JUSTICE, COMMUNITY RELATIONS SERVICE, POLICING 101, https://www.justice.gov/file/1376626/download [https://perma.cc/CR49-84M7]. However, much of that training– approximately 250 hours – is devoted to topics on the use of force, with little focus on constitutional search-and-seizure rules. *See* Police Executive Forum's "Re-Engineering Use of Force" Research Survey, Use of Force Training (2015), https://www.policeforum.org/assets/reengineeringsurvey.pdf [https://perma.cc/VFX8-XPEY].

[11] Stephen J. Schulhofer, Tom R. Tyler, and Aziz Z. Huq have argued that wide public perception of police officers as behaving illegitimately contributes to stubborn crime rates, while in contrast perceived police legitimacy leads to greater compliance and cooperation. Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 338, 345-46 (2011); *see also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 59 (rev. ed. 2006) (arguing that belief in police legitimacy increases compliance with the law). One suggestion they offer is to require officers to provide an information card to the subjects of a stop that would explain the subject's rights in clear terms. Schulhofer, *supra* note 11, at 354. If search and seizure rules in an officer-individual encounter were similarly reduced to a set of clear, easy-to-explain precepts, there could be a similar gain in perceived police legitimacy, and in turn in compliance with the law and cooperation with law enforcement. *See also* Michael Gentithes, *Suspicionless Witness Stops: The New Racial Profiling*, 55 HARV. C.R.-C.L. L. REV. 492, 495 (2020) (arguing that constitutional rules allowing officers to stop alleged witnesses to crime perpetuate distrust of officers, counter-productively reducing community cooperation with investigators in the neighborhood where policing is needed most).

[12] *See* Lange v. California, 141 S. Ct. 2015, 2016 (2021) (holding that there is no categorical exigent circumstance when officers are in hot pursuit of a fleeing misdemeanant); Caniglia v. Strom, 141 S. Ct. 1598, 1598 (2021) (holding that, although exigent circumstances exceptions remain, there is no freestanding "community caretaking" exception to the warrant requirement).

In their origins, many exceptions reflected narrow concerns over officers' ability to respond to emergencies. But those exceptions have expanded well beyond emergency response. For instance, purely evidentiary searches of cars are untethered from any emergency justification that motivated that categorical exception in the first place. This Article proposes taking those myriad exceptions back to their roots, which will mean reducing or eliminating many of them. Any exceptions in an officer-individual interaction should follow a simple guiding principle: if officers have reasonable suspicion that the interaction creates an exigency, a warrantless search is permissible.

My proposal reconciles concepts from three areas of constitutional criminal procedure. First, it uses the exigent circumstances rule, which currently applies to a limited set of warrantless searches, to swallow many other unnecessary exceptions. Second, it relies upon *Terry v. Ohio*'s reasonable suspicion standard to describe the level of certainty officers must have that a genuine emergency is afoot before warrantlessly searching.[13] Third, it excludes evidence that officers discover after deliberately creating a pretextual exigency to avert the warrant requirement.[14]

First, I argue that the Court should use the limited exigent circumstances doctrine that it supported last term[15] to reduce or eliminate the myriad exceptions that apply in officer-individual interactions. Exigent circumstances are easy for individuals and officers to understand and to justify.[16] When officers respond to an exigency such as an immediate safety threat, a fleeing suspect, or evidence that is about to be destroyed, they need not seek independent judicial review.[17] Instead, they can and should act quickly, without

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[13] Terry v. Ohio, 392 U.S. 1, 21 (1968).

[14] *See infra* Part V.

[15] *See, e.g.*, Caniglia, 141 S. Ct. at 1600 (Roberts, C.J., concurring) (emphasizing support for an exigent circumstances exception that permits warrantless entry to assist persons who are seriously injured or threatened with serious injury, even if there is no additional "community caretaking" exception).

[16] As Justice Kavanaugh recently noted in oral arguments in Lange v. California, "the exigent circumstances doctrine [is] a pretty clear rule for officers because the [e]xigent [c]ircumstances [d]octrine really, as I see it, tracks common sense, these are the kinds of cases and the kinds of reasons an officer would do this in the first place, want to go into the house without a warrant, especially escape of the suspect, threats to others, destruction of evidence." Transcript of Oral Argument at 107-108, Lange v. California, 141 S. Ct. 2011 (2021) (No. 20-18).

[17] *See* Kentucky v. King, 563 U.S. 452, 460 (2011) (describing the emergency aid, hot pursuit, and imminent destruction of evidence prongs of the traditional exigent circumstances doctrine); Kit Kinports, *The Quantum of Suspicion Needed for an Exigent Circumstances Search*, 52 U. MICH. J. L. REFORM 615, 617 (2019) (describing the need to apprehend a fleeing suspect, to prevent evidence

worry over the evidentiary repercussions. When the exigencies are genuine[18]—a standard that must be defined with great care to prevent a few nefarious officers from generating pretexts for warrantless searches[19]—all individuals benefit from police reactions that promote public safety and curb antisocial, criminal behavior.

Despite its normative appeal, the exigent circumstances exception does little jurisprudential work in most officer-individual interactions. The Supreme Court should use the exigent circumstances exception to explain how officers can constitutionally react in any interaction with individuals. Doing so will create a simpler and clearer Fourth Amendment jurisprudence.

Second, I argue that the Court should require officers to demonstrate an exigency using the familiar "reasonable suspicion" standard. This standard borrows from the rationale for brief investigatory stops under *Terry v. Ohio*,[20] which are constitutional when officers have reasonable, articulable suspicion that a crime has been or is about to be committed.[21] The standard also matches the framework for exigent circumstances that the Court announced this past term.[22] The Court has suggested that officers responding to emergencies may incidentally collect evidence without a warrant if they have "an objectively reasonable basis" to believe the emergency was genuine.[23]

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destruction, and protect the public or officers—possibly including helping an injured person or safeguarding property—as the primary categories of exigent circumstances in the Supreme Court's jurisprudence).

[18] "Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency." Kentucky v. King, 563 U.S. 452, 470 (2011).

[19] Exigent circumstances jurisprudence attempts to control for this phenomenon through the "'police-created exigency' doctrine." Kentucky v. King, 563 U.S. 452, 461 (2011). As discussed below, however, that concept of police-created exigencies has been read far too narrowly by the Supreme Court. *See id.* at 469 (holding that such improper exigencies only exist when officers "gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.").

[20] 392 U.S. 1 (1968).

[21] *Id.* at 21.

[22] Caniglia v. Strom, 141 S. Ct. 1596, 1604 (2021) (Kavanaugh, J., concurring) ("[T]he Court's exigency precedents, as I read them, permit warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now."); Lange v. California, 141 S. Ct. 2011, 2021-22, n.3 (2021) ("When an officer reasonably believes those exigencies exist," he can "justify a warrantless home entry."); *see also id.* at 2023 (noting that the common law required "probable grounds" or "probable suspicion" that a fleeing suspect committed a felony).

[23] Michigan v. Fisher, 558 U.S. 45, 47 (2009); *see also* Missouri v. McNeely, 569 U.S. 141, 150 (2013) (noting "the fact-specific nature of the reasonableness inquiry" needed to decide whether the exigent

The Court should clarify that this standard is akin to *Terry*-style reasonable suspicion, providing an appropriate and understandable baseline when applying the exigent circumstances exception. That standard is preferable to a higher requirement of true facts or even probable cause. A true facts requirement would lead officers to hesitate unnecessarily in emergencies. Probable cause might tempt courts evaluating exigency cases to lower their conception of probable cause, leading to undesirable shifts in other areas of constitutional criminal procedure. Instead, a robust version of reasonable suspicion—higher than the threshold many courts have relied upon in stop-and-frisk cases, with tragic consequences[24]—is appropriate.

Under this standard, officer-individual interactions will generate some exigencies, but many of the current exceptions to the warrant requirement will fall by the wayside.[25] In-home SITLAs should only occur when officers can articulate why they suspect an ambush is forthcoming. Officers do not need the privilege of an automatic search of areas immediately adjoining an arrest where an attacker may be hiding, which empirical evidence suggests is

circumstances exception based upon each case's individual facts.) (citations omitted). The language in exigent circumstances cases in many circuit courts of appeal echoes this test. *See, e.g.*, United States v. Goree, 365 F.3d 1086, 1090 (D.C. Cir. 2004) (discussing the requirement that "the police have a reasonable belief in the existence of the exigency"); United States v. Holloway, 290 F.3d 1331, 1337 (11th Cir. 2002) (applying the exigent circumstances exception "[w]hen the police reasonably believe an emergency exists which calls for an immediate response to protect citizens from imminent danger"); United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006) (stating exigent circumstances exception may apply if "the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others"); United States v. Snipe, 515 F.3d 947, 951-52 (9th Cir. 2008) ("Considering the totality of the circumstances, law enforcement must have an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm" before exigent circumstance exception will apply.).

[24] *See* Michael Gentithes, *Suspicionless Witness Stops: The New Racial Profiling*, 55 HARV. C.R.-C.L. L. REV. 491, 523-24 (2020) (warning of how police officers may abuse the reasonable suspicion test to "*post hoc* justify a stop").

[25] Exigent circumstances jurisprudence rightly resists creating categorical rules of exigency without any factual basis. *See, e.g.*, Missouri v. McNeely, 569 U.S. 141, 149-50 (2013) ("To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances . . . . [T]he fact-specific nature of the reasonableness inquiry demands that we evaluate each case of alleged exigency based on its own facts and circumstances.") (citations and quotation omitted); Riley v. California, 573 U.S. 373, 402 (2014) ("[T]he exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case.") (citing *McNeely*, 569 U.S. at 149-50); Carpenter v. United States, 138 S. Ct. 2206, 2222 (2018) (calling the exigent circumstances exception "case-specific").

extremely unlikely.[26] In-car SITLA doctrine should emphasize that exigencies only arise when officer safety or evidence is threatened by an unrestrained suspect—which publicly-available statistics show is relatively rare.[27] Once the suspect is secured away from the car, searches solely to find evidence of the crime are unnecessary to respond to any emergency.[28] Warrantless automobile searches based upon probable cause should only proceed where a suspect in or near the automobile creates an exigency.

Third, I will argue that the Court must clarify limits on officer-created exigencies that can serve as pretexts for warrantless searches. Such limits will properly balance public safety and individual privacy in a broader exigent circumstances jurisprudence. Current doctrine claims officer-created exigencies only exist when officers enter a home through "an actual or threatened violation of the Fourth Amendment"[29]—which does not consider the officers' subjective bad faith, how foreseeable it was that their actions might

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[26] One study of felonious killings of officers in the ten-year period surrounding the *Buie* decision concluding that "No felonious killings of police officers were directly attributable to third parties and only in two of the seventy-six incidents [studied] was there any third-party involvement at all." Illya Lichtenberg, *The Dangers of Warrant Execution in a Suspect's Home: Does an Empirical Justification Exist for the Protective Sweep Doctrine?*, 54 SANTA CLARA L. REV. 623, 645 (2014). More recent data collected in the FBI's annual "Law enforcement Officers Killed and Assaulted" (LEOKA) studies suggest that, of the 56,034 assaults on officers in 2019, only 245, or 0.44%, resulted from an "ambush situation," which the FBI defines as a "[s]ituation in which an officer is unexpectedly assaulted as the result of premeditated design by the perpetrator." FBI, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, UNIFORM CRIME REPORTING PROGRAM, 2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, tbl.88, https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-88.xls [https://perma.cc/Z5P8-8QR4]; FBI, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION UNIFORM CRIME REPORTING PROGRAM, 2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, DEFINITIONS, https://ucr.fbi.gov/leoka/2019/resource-pages/definitions [https://perma.cc/L2ZC-ZEGT]. Of those 245 assaults, nearly half—107—did not involve the use of a deadly weapon. FBI, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, UNIFORM CRIME REPORTING PROGRAM, 2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, tbl.88, https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-88.xls [https://perma.cc/5JFR-Y8U3].

[27] "[One] study found that roughly ten police officers were victims of felonious killing per year during motor vehicle stops. Because motor vehicle stops are so common in general police activities, the likelihood of such victimization was extremely unlikely." Lichtenberg, *supra* note 26, at 631 (citing Illya Lichtenberg & Alisa Smith, *How Dangerous are Routine Police-Individual Traffic Stops?: A Research Note*, 29 J. CRIM. JUST. 419, 425-26 (2001)). Nonetheless, the chance that an unsecured suspect in a car might quickly leave the scene, either destroying evidence in the process or creating a dangerous hot pursuit, should give officers leeway to search the automobile incident to an arrest.

[28] And those SITLAs duplicate other opportunities officers might have to search the passenger compartment of a car after an arrest is complete. *See infra* Part III.B.

[29] Kentucky v. King, 563 U.S. 452, 469 (2011).

create exigencies, or whether their tactics violated standard investigatory practices in their jurisdiction.[30] This view aligns with an unduly cramped reading of *Terry*'s reasonable suspicion standard and gives officers wide leeway to stop and frisk individuals.[31] It is inadequate to protect civil liberties in officer-individual interactions. Instead, the Court should hold that where there is objective evidence that officers deliberately generated exigent circumstances to avert the warrant requirement—or even followed a department-wide policy or practice that amounted to such deliberate skirting of the warrant requirement—the evidence they recover should be suppressed.

Finally, I address another warrant "exception" that applies in many officer-individual interactions: consent.[32] The Court has wrongly suggested that consent is an exception to the warrant requirement. But consent doctrine is premised upon the voluntary nature of the interaction. Returning to those roots will sharply limit consent from its current form. Consent is a non-search that officers can only use to skirt the warrant requirement by meeting a high burden to prove the genuinely voluntary nature of the interaction. If courts demand a greater demonstration of voluntariness—which might require officers to notify suspects of the scope of their rights to refuse or cabin that consent, contrary to existing Court jurisprudence[33]—they can reduce the tension and danger of officer-individual interactions pursuant to consent.

In Part I of the Article, I review the evolution of exceptions that commonly justify warrantless searches during officer-individual interactions. Those exceptions have confusing and insufficient justifications, which courts have interpreted broadly to give officers discretion that is both wide and poorly understood. In Part II, I explain the exigent circumstances exception's evolution and historical roots. Part III demonstrates how the easy-to-understand exigent circumstances exception is at the root of many of the confusing exceptions to the warrant requirement. Returning those separate exceptions to their roots will both clarify and reduce police authority to

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[30] *Id.* at 464-70.

[31] *See* Michael Gentithes, *Suspicionless Witness Stops: The New Racial Profiling*, 55 HARV. C.R.-C.L. L. REV. 491, 499–501 (2020) (arguing that the *Terry* reasonable suspicion standard is so low that stops are frequently approved by courts despite thin justifications).

[32] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) ("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.").

[33] *Id.* ("While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.").

warrantlessly search in officer-individual interactions. Part IV explains the level of suspicion officers must have that a genuine emergency exists before proceeding with a warrantless entry or search—an especially important determination under my prescription for a broader exigent circumstances doctrine. Part V then considers how the Court might control police abuse of the exigent circumstances exception to create a pretext for warrantless searches. Finally, Part VI explains how the consent "exception" can be returned to its roots based upon genuinely voluntary officer-individual interactions, which will sharply reduce consent's scope.

I. THE EVOLUTION OF EXCEPTIONS TO THE WARRANT REQUIREMENT

This Part examines the Court's expanding jurisprudence of exceptions to the warrant requirement. Too often, what began as a simple, limited exception designed to respond to emergencies subsequently grew into a complex, expansive doctrine that is difficult for individuals to understand and for officers to implement.

A. Searches Incident to a Lawful Arrest (SITLAs) and Protective Sweeps

The story of SITLAs begins with the Court's approach to arrests in the home. In 1925's *Agnello v. United States*, the Court refused to permit warrantless searches of a suspect's home several blocks away from the arrest itself, but added that officers had the right, following a lawful arrest, to "search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed . . . ."[34] Later decisions used that broad language to rapidly expand SITLA authority to include, for instance, warrantless searches of an entire apartment—including a bedroom, bathroom, and kitchen—after lawfully arresting the defendant in the living room.[35]

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[34] Agnello v. United States, 269 U.S. 20, 30–31 (1925).

[35] Harris v. United States, 331 U.S. 145, 148 (1947). After quoting the *Agnello* dicta, the Court reasoned that the defendants could not take advantage of the "fortuitous circumstance that the arrest took place in the living room" to limit SITLA authority to that room only. *Id.* at 152. Similarly, in 1950's *United States v. Rabinowitz*, the Court approved a thorough, one-and-a-half-hour search of the defendant's one-room office after officers arrested the defendant inside. 339 U.S. 56, 58–59 (1950). The Court again quoted *Agnello*'s dicta, adding that SITLA authority was premised upon searches in the area within the arrestee's control, which includes the entire premises where the arrest was made. *Id.* at 61.

By the 1960's, Justices uncomfortable with the vast reach of in-home SITLA authority settled on a limited conception of the "area 'within [the arrestee's] immediate control'" that is warrantlessly searchable.[36] In 1969's *Chimel v. California*, the Court overruled cases resting upon *Agnello*'s dicta.[37] SITLA authority aims to remove weapons or evidence from the person, and justifies only a search "of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence."[38]

Though Chimel still controls searches of the area in the arrestee's immediate control, *Maryland v. Buie*, decided in 1990, again expanded SITLA authority outside that area in a series of concentric circles. In Buie, officers executing a search warrant located the defendant at the top of the basement stairwell, then entered the basement to check for other suspects, finding evidence of a robbery in plain view.[39] The Court highlighted its concern for officer safety during an arrest, demonstrated by the stop-and-frisk authority granted in *Terry v. Ohio*.[40] Following an in-home arrest, "there is an analogous interest of the officers in taking steps to assure themselves that the house . . . is not harboring other persons who are dangerous and who could unexpectedly launch an attack."[41] Premised entirely on that fear of surprise attacks, the Court announced that officers could, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."[42] The Court also authorized a broad protective sweep of the remainder of the house—an even larger concentric circle—but

[36] Chimel v. California, 395 U.S. 752, 763 (1969).

[37] *Id.* at 760, 768 (overruling *Rabinowitz* and *Harris*).

[38] *Id.* at 763.

[39] Maryland v. Buie, 494 U.S. 325, 328 (1990).

[40] *Id.* at 331–33 (discussing Terry v. Ohio, 392 U.S. 1 (1968)).

[41] *Id.* at 333.

[42] *Id.* at 334. "The majority analogized a protective sweep to a *Terry* frisk and relied heavily on this analogy to justify a protective sweep based on reasonable suspicion. Since *Terry* was concerned about danger to officers arising out of the person to be frisked, rather than dangerous third parties, the majority's attempt to distinguish *Chimel* is inconsistent with the majority's own logic in establishing the legal justification for a protective sweep." Angad Singh, Comment, *Stepping Out of the Vehicle: The Potential of* Arizona v. Gant *to End Automatic Searches Incident to Arrest Beyond the Vehicular Context*, 59 AM. U. L. REV. 1759, 1790–91 (2010).

only if officers possess *Terry*-style reasonable suspicion that the area to be swept harbors a potential attacker.[43]

Buie's concentric circle framework for SITLA authority in the home is thus explicitly based upon fear of a third-party ambush upon officers—a risk that seems intuitively obvious.[44] But empirical research suggests that protective sweeps are far more likely to uncover evidence of crimes than any third parties lying in wait. According to FBI statistics, of the 56,034 assaults on officers in 2019, only 245 (0.44%) resulted from an "ambush situation,"[45] defined as "an officer . . . unexpectedly assaulted as the result of premeditated design by the perpetrator."[46] The number of assaults in ambush situations was consistently low in the prior five years, ranging from 0.50% of all assaults in 2018[47] to just 0.34% in 2014.[48] Ambushes almost never lead to officer deaths. From 2015 to 2019 just 44 officers were feloniously killed during an ambush; in 2019 alone, just 2 were killed.[49] Arrests themselves may be even less deadly. From

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[43] *Buie*, 494 U.S. at 334 (citing Terry v. Ohio, 392 U.S. 1 (1968)). "In adopting the reasonable suspicion standard [for broad protective sweeps], the Supreme Court expressly refused to adopt a 'per se' rule . . . . [that] would require no objective justification for a protective sweep executed incident to an arrest." Mark A. Cuthbertson, Note, Maryland v. Buie*: The Supreme Court's Protective Sweep Doctrine Runs Rings Around the Arrestee*, 56 ALB. L. REV. 159, 176 (1992). Importantly, protective sweeps in either the intermediate or outer concentric circle are "not a full search" and "may extend only to a cursory inspection of those spaces where a person may be found." *Buie*, 494 U.S. at 335.

[44] *See, e.g.*, Daniel L. Rotenberg, *An Essay on the Unexpected Person Factor in Searches and Seizures*, 39 ST. LOUIS U. L. J. 505, 517 (1995) (arguing that *Buie* protective sweep doctrine is a necessary response to the "obvious" risks inherent in arrests); Zachary P. Mardis, Comment, United States v. Fadul*: The Appropriate Standard for Protective Sweeps in Consent Entry Situations*, 47 CUMB. L. REV. 401, 428 (2017) (claiming that courts extending protective sweep doctrine to consent entries are "recognizing the obvious safety risks that may be present when officers enter a home . . . .").

[45] FBI, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, UNIFORM CRIME REPORTING PROGRAM, 2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, tbl.88, https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-88.xls [https://perma.cc/DAK3-EZ8K]. Of those 245 assaults, nearly half—107—were not assaults that involved the use of a deadly weapon. *Id.*

[46] FBI, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, UNIFORM CRIME REPORTING PROGRAM, 2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, Definitions, https://ucr.fbi.gov/leoka/2019/resource-pages/definitions [https://perma.cc/H7N9-G7DB].

[47] FBI, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, UNIFORM CRIME REPORTING PROGRAM, 2018 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, tbl.88, https://ucr.fbi.gov/leoka/2018/topic-pages/tables/table-88.xls [https://perma.cc/96S4-7KN3].

[48] FBI, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, UNIFORM CRIME REPORTING PROGRAM, 2014 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, tbl.79, https://ucr.fbi.gov/leoka/2014/tables/table_79_leos_asltd_circumstance_at_scene_of_incident_by_type_of_weapon_and_percent_distribution_2014.xls [https://perma.cc/PF5L-MJAC].

[49] FBI, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, UNIFORM CRIME REPORTING PROGRAM, 2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, tbl.24, https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-24.xls [https://perma.cc/SG6D-JWD8].

2015 to 2019, just 15 officers were feloniously killed while attempting to arrest or verbally advise a suspect, and not a single officer was killed while attempting to arrest another individual at the scene of the arrest.[50] Officers are far likelier to be injured when responding to calls in public places.[51] Given the unlikelihood of a deadly ambush, the majority of cases addressing protective sweep doctrine concern excluding evidence found during those sweeps, rather than actual third-party threats.[52]

Although deadly ambushes are exceedingly rare, in the last 20 years a majority of circuits have expanded protective sweeps even to situations where no arrest is made at all, untethering *Buie*'s rationale from the SITLA context altogether.[53] Indeed, officers are trained to utilize protective sweep doctrine when executing search or arrest warrants in a home.[54] But an expanded "protective sweep doctrine" is difficult to justify in light of the infrequent

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[50] *Id.*

[51] Just over 30% of assaults on officers in 2019 occurred when officers responded to calls of a "disturbance," such as a "breach of the peace . . . curfew violations, disorderly persons, drinking in public, fights, fireworks violations, gambling in public space, persons under the influence, landlord/tenant disputes, loitering, [or] loud noise." FBI, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, UNIFORM CRIME REPORTING PROGRAM, 2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, tbl.88, https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-88.xls [https://perma.cc/728T-WJQQ]; FBI, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, UNIFORM CRIME REPORTING PROGRAM, 2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, Definitions, https://ucr.fbi.gov/leoka/2019/resource-pages/definitions [https://perma.cc/6V3S-FAFK]. Another 9,592 assaults, or 17.1% of the total, occurred during an attempted unspecified arrest; those assaults were presumably caused by the attempted arrestees themselves, as they are not included in the separately tabulated "ambush situations" included in the study. FBI, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, UNIFORM CRIME REPORTING PROGRAM, 2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, tbl.88, https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-88.xls [https://perma.cc/RE5X-5LJT].

[52] "Most of the cases in the lower courts concerning the propriety of a protective sweep have dealt with the exclusion of evidence found during such a sweep, and not with the issue of what the police could do if a dangerous unexpected person were found." Daniel L. Rotenberg, *An Essay on the Unexpected Person Factor in Searches and Seizures*, 39 ST. LOUIS U. L.J. 505, 512 (1995).

[53] "[T]he great majority of circuits have indicated that, at least in certain circumstances, protective sweeps may be valid even when they are not incident to an arrest." Leslie A. O'Brien, Note, *Finding a Reasonable Approach to the Extension of the Protective Sweep Doctrine in Non-Arrest Situations*, 82 N.Y.U. L. REV. 1139, 1141, 1156-57 (2007); *see also* United States v. Hassock, 631 F.3d 79, 86–87 (2d Cir. 2011) (summarizing the circuit split).

[54] Fed. L. Enf't Training Ctrs., *Protective Sweeps (MPS)*, https://www.fletc.gov/audio/protective-sweeps-mp3 [https://perma.cc/33UB-HML3]. As one commentator responding in the immediate wake of *Buie* noted, pretext may have motivated the officers in *Buie* itself. "[A]t the time of the protective sweep, Buie had not only been arrested, but had been removed from the house to the police car. In a sense, the police created their own need for a protective search." Rotenberg, *supra* note 52, at 513.

attacks actually launched against officers by third parties.[55] A properly limited reading of *Buie* focuses on the goals of SITLA jurisprudence more broadly—protecting officer safety during a high-stress, fast-moving circumstance.

B. Evolving SITLAs in Cars: Belton, Thornton, and Gant

The history of SITLA authority in cars follows a similar pattern of expansion followed by contraction. In 1981, the Court noted in *New York v. Belton* that SITLAs are generally limited to the area in the arrestee's immediate control, but included the entire passenger compartment of an automobile, and any containers found therein, as part of that area.[56] The Court thus held that officers could always search that compartment contemporaneously with an arrest of an automobile's occupant—even when the occupant was handcuffed and unable to reach that compartment.[57] *Belton* quickly became a broad constitutional excuse for warrantless searches of almost any vehicle. The Court would subsequently confirm that police have the constitutional authority to arrest drivers for even minor traffic violations, then search the passenger compartment of the car without a warrant.[58] The Court also ruled that, following the arrest of a driver who had just parked and exited his car, officers could warrantlessly search the passenger compartment.[59]

In the early 2000's, the Justices grew uncomfortable with the expansiveness of in-car SITLA authority. In a 2004 concurring opinion in *Thornton v. United States*, Justice Scalia noted that a handcuffed arrestee cannot possibly reach or control the passenger compartment of a car.[60] Thus, the traditional justifications for a SITLA could not apply to the passenger compartment.[61] However, Scalia suggested that such searches might still be justified "simply because the car might contain evidence relevant to the crime for which he was arrested."[62] Thus, Scalia claimed a broader authority for warrantless searches

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55 For instance, if officers execute a search warrant at a suspect's home but are unable to locate him, they should not automatically be permitted to search the remainder of the home. "[T]he absence of a citizen from an expected location cannot logically enter into the balancing test as a factor enhancing reasonable suspicion that the citizen constitutes a threat to officer safety." Jamie Ruf, Note, *Expanding Protective Sweeps within the Home*, 43 AM. CRIM. L. REV. 143, 156 (2006).

56 New York v. Belton, 453 U.S. 454, 460 (1981).

57 *Id.*

58 *See* Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

59 *See* Thornton v. United States, 541 U.S. 615, 620-21 (2004).

60 *Id.* at 627-28 (Scalia, J., concurring).

61 *Id.*

62 *Id.* at 629.

purely to find evidence of a recent crime under investigation, a justification that was explicitly excluded from SITLA authority in *Chimel*.[63]

The conflicting views on in-car SITLA authority came to a head in 2009's *Arizona v. Gant*,[64] where the Court simultaneously limited in-car SITLA authority while expanding Scalia's suggested loophole. In *Gant*, the Court addressed a warrantless search of a car's passenger compartment after officers arrested the driver, handcuffed him, and secured him in the back of a patrol car.[65] The Court ruled that search unconstitutional, holding that SITLA authority existed when the arrestee was within reaching distance of the passenger compartment—not when he was secured in a cruiser several yards away.[66] But the Court did not stop there. Relying on Scalia's *Thornton* concurrence, the Court also authorized an in-car SITLA when "it is reasonable to believe the vehicle contains evidence of the offense of arrest."[67] That additional authority was not based on any emergency; it was expressly based upon the need to collect evidence of crime without a warrant, an authority that the Court expressly overruled in *Chimel* and which Scalia suddenly revived in his *Thornton* concurrence.[68]

C. SITLAs in Public: Technologies and Limitations

SITLAs in public places have traditionally remained limited to a small space in the arrestee's immediate control, including any containers on the arrestee's person that they could quickly access. In 1973's *United States v. Robinson*, the Court reiterated that when a suspect is arrested based upon probable cause, officers can conduct warrantless searches, both to disarm the

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[63] Ironically, Scalia relied upon the expansive reading of SITLA authority the Court took in *Rabinowitz*, which it subsequently overruled in *Chimel* three decades before Scalia issued his opinion. "Justice Scalia based this rule upon the evidence-gathering rational from cases such as *Rabinowitz*, but did not acknowledge that *Chimel* overruled *Rabinowitz*. He also justified his rule by reasoning that permitting such a vehicular search is not rummaging, presumably because an officer would be searching for evidence of the crime of arrest as opposed to conducting a general automobile search in order to discovery some other criminal evidence." Angad Singh, Comment, *Stepping Out of the Vehicle: The Potential of* Arizona v. Gant *to End Automatic Searches Incident to Arrest Beyond the Vehicular Context*, 59 AM. U. L. REV. 1759, 1770 (2010).

[64] 556 U.S. 332 (2009).

[65] *Id.* at 335.

[66] *Id.* at 351.

[67] *Id.*

[68] Thornton, 541 U.S. at 629 (Scalia, J., concurring) (arguing for such a rule based upon United States v. Rabinowitz, 339 U.S. 56, 61 (1950), which had already been overruled by Chimel v. California, 395 U.S. 752 (1969)).

suspect and to preserve evidence on his person for later use at trial.[69] This warrantless authority included patting down the arrestee's outer clothing, uncovering a crumpled cigarette package in his breast pocket, and opening that package to discover heroin capsules.[70] *Robinson* thus seemed to set a bright line rule around SITLAs in public; without any additional suspicion that the suspect is armed, officers can warrantlessly search an arrestee detained in public, including both that suspect's person and readily accessible containers they are carrying.[71]

The rules for SITLAs in public have faced challenges in adapting to new technologies that might be involved in a public arrest. For instance, in 2014's *Riley v. California*, the Court addressed the search of digital data on an arrestee's cell phone following an arrest in public.[72] The Court attempted to tether its decision to the two justifications for SITLA authority outlined in *Chimel*—protecting officer safety and preventing the destruction of evidence—without including the expanded in-car SITLA authority suggested in *Gant*.[73] The Court first noted that digital data itself cannot be used as a weapon to harm an arresting officer. Though officers might search the physical phone for a hidden razor blade, they could not access its data on the grounds that the data could physically harm them.[74] The Court also discounted the threat of "remote wiping" of data from a digital device. Such wiping would be initiated by a third party, not the arrestee, which *Chimel*'s justifications for SITLA

[69] United States v. Robinson, 414 U.S. 218, 234-35 (1973).

[70] *Id.* at 223, 236.

[71] "A few years later, the Court clarified that this exception was limited to 'personal property . . . immediately associated with the person of the arrestee.'" Riley v. California, 573 U.S. 373, 384 (2014) (quoting United States v. Chadwick, 433 U.S. 1, 15 (1977)).

[72] *Id.* at 378.

[73] *Id.* at 386 ("*Robinson* concluded that the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data.").

[74] *Id.* at 387. The Court specifically rejected an argument that searching the data might help officers ensure that the arrestee's confederates may be headed to the scene to ambush officers, noting that the government provided no evidence of such ambushes. *Id.* at 387-88. Even if there was such evidence, the Court noted that *Chimel*'s safety concern was based upon threats to the officer from the arrestee himself, not third parties. *Id.* This holding appeared to be in some tension with *Buie*, however. There, the Court authorized protective sweeps based upon the threat of an ambush from third parties following an arrest in the home. Perhaps the Court intuited a lower risk of such ambushes in public, or perhaps it signaled some discomfort with the expansiveness of *Buie*'s rule and the subsequent generation of a "protective sweep doctrine" in the lower courts.

authority did not include (but which *Buie* seemingly included when an arrest occurs in the home).[75]

Riley's discussion presages a wide array of challenges the Court will confront to address the scope of SITLA authority in the digital age. The Court showed little willingness to expand that authority without strong evidence to show that a new technology presents a genuine, replicable threat either to officer safety or to the preservation of evidence. And interestingly, the Court also seemed hesitant to acknowledge threats that third parties might pose to those interests using new technologies or devices. That position runs counter to *Buie*'s expansion of SITLA authority to include third party threats in the home.

D. The Automobile Exception

Even when no arrest occurs, the Court has authorized warrantless searches of automobiles, largely on the assumption that their mobility creates an inherent emergency, which justifies dispensing with a time-consuming warrant requirement.[76] Because automobiles are inherently mobile, the "fleeting" opportunity for a search justifies dispensing with the warrant requirement.[77] The Court has taken an expansive reading of the automobile exception, even in cases where the automobile in question seems unlikely to move any time soon. The Court has upheld a warrantless search of a motor home parked in a lot removed from public highways that contained sleeping furniture inside and had curtains hanging over the front windshield.[78] That search was acceptable because the automobile exception is premised both upon the ready mobility of automobiles and the alleged lesser expectations of privacy that individuals have in their automobiles given the government's pervasive

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[75] Riley, 573 U.S. at 389. Furthermore, officers can easily prevent remote wiping by disconnecting the device from the cellular network, either by turning the phone off or placing it in a "Faraday bag" that isolates the device from radio waves. *Id.* at 390.

[76] "Our treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impracticable." United States v. Chadwick, 433 U.S. 1, 12 (1977); *see also* Collins v. Virginia, 138 S. Ct. 1663, 1669-70 (2018). A primary example is *Chambers v. Maroney*, where officers arrested four robbery suspects in a car but chose not to search it until it was transported back to the station. 399 U.S. 42, 44-45 (1970). Although SITLA rules did not apply to this later warrantless search, the Court permitted it anyway given that the officers had probable cause to believe the car contained evidence of the robbery. *Id.* at 47-48.

[77] Chambers, 399 U.S. at 51.

[78] California v. Carney, 471 U.S. 386, 402-04 (1985) (Stevens, J., dissenting).

regulation of automobiles.[79] Thus, officers can warrantlessly search automobiles as long as they have probable cause to believe they contain evidence of a crime.

The automobile exception applies to any area of any vehicle where officers have probable cause to believe evidence is located.[80] It also permits officers to warrantlessly search any containers found in the automobile that officers have probable cause to believe contains the evidence they seek.[81] Whether the vehicle is capable of quickly leaving the scene—indeed, whether a potential driver of the automobile is even near the automobile at all—is immaterial. The Court's automobile exception, originally justified by a kind of inherent exigency created by a car's mobility, is thus untethered from that emergency justification in the Court's current jurisprudence.

II. THE EVOLUTION OF THE EXIGENT CIRCUMSTANCES EXCEPTION

The exceptions discussed so far have disparate, confusing justifications. In contrast, the exigent circumstances exception is relatively easy to understand and to justify.[82]

The exigent circumstances exception to the warrant requirement arises from the need for officers to respond quickly to emergencies; any delay caused by seeking a warrant would have "'real, immediate, and serious consequences.'"[83] Exigent circumstances generally fall into three categories.[84]

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[79] *See id.* at 390-92; *id.* at 390 ("The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation."); *see also* Chadwick, 433 U.S. at 12-13.

[80] *See* United States v. Ross, 456 U.S. 798, 821 (1982).

[81] California v. Acevedo, 500 U.S. 565, 580 (1991) ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.")

[82] "[T]he exigent circumstances doctrine really, as I see it, tracks common sense, these are the kinds of cases and the kinds of reasons an officer would do this in the first place, want to go into the house without a warrant, especially escape of the suspect, threats to others, destruction of evidence." Transcript of Oral Argument at 107, Lange v. California, 141 S. Ct. 2011, No. 20-18 (Kavanaugh, J.).

[83] Welsh v. Wisconsin, 466 U.S. 740, 750-51 (1984) (quoting McDonald v. United States, 335 U.S. 451, 459-60 (1948) (Jackson, J., concurring)).

[84] *See, e.g.,* Carpenter v. United States, 138 S. Ct. 2206, 2222 (2018) ("Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence."); *see also* Caniglia v. Strom, 141 S. Ct. 1596, 1603 (2021) (Kavanaugh, J., dissenting) ("For example, the exigent circumstances doctrine allows officers to enter a home without a warrant in certain situations, including: to fight a fire and investigate its

The first involves the provision of "emergency aid" to protect the public, or officers themselves, from an ongoing or imminent injury.[85] Next is an exception based upon hot pursuit of a fleeing felon.[86] Third is the need to prevent imminent destruction of evidence that may occur if officers delay action and seek a warrant.[87]

In its most recent term, the Supreme Court confirmed that only these three exigent circumstances generate a categorical exception to the warrant requirement. Though some lower courts had also considered a freestanding "community caretaking" exception to the warrant requirement, the Court rejected that position in *Caniglia v. Strom*.[88] Instead, officers must solely rely upon traditional exigencies like emergency aid to justify any warrantless entries

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cause; to prevent the imminent destruction of evidence; to engage in hot pursuit of a fleeing felon or prevent a suspect's escape; to address a threat to the safety of law enforcement officers or the general public; to render emergency assistance to an injured occupant; or to protect an occupant who is threatened with serious injury.") (citations omitted); Lange v. California, 141 S. Ct. 2011, 2017 (2021) ("Over the years, this Court has identified several such exigencies. An officer, for example, may enter a home without a warrant to render emergency assistance to an injured occupant, to protect an occupant from imminent injury, or to ensure his own safety. So too, the police may make a warrantless entry to prevent the imminent destruction of evidence or to prevent a suspect's escape.") (quotation omitted).

[85] *Lange*, 141 S. Ct. at 2017 ("An officer, for example, may enter a home without a warrant to render emergency assistance to an injured occupant, to protect an occupant from imminent injury or to ensure his own safety.") (citations and quotations omitted); Kentucky v. King, 563 U.S. 452, 460 (2011) ("Under the 'emergency aid' exception, for example, officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect and occupant from imminent injury.") (citations and quotations omitted); Michigan v. Fisher, 558 U.S. 45, 47 (2009) (noting that officers may warrantless respond to "'the need to assist persons who are seriously injured or threatened with such injury.'") (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)); Michigan v. Tyler, 436 U.S. 499, 511 (1978) ("[A]n entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze.").

[86] *King*, 563 U.S. at 460 ("Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect.") (citing United States v. Santana, 427 U.S. 38, 42-43 (1976)); Minnesota v. Olson, 495 U.S. 91, 100 (1990) (noting that exigent circumstances are present when action is needed to "prevents a suspect's escape"). The Supreme Court recently explained that this exception does not categorically apply where the police only suspect that the individual committed a misdemeanor, rather than a felony. *Lange*, 141 S. Ct. at 2016.

[87] *Lange*, 141 S. Ct. at 2017 ("[T]he police may make a warrantless entry to prevent the imminent destruction of evidence.") (citations and quotations omitted); *King*, 563 U.S. at 460 (citing *Brigham City*, 547 U.S. at 403; Georgia v. Randolph, 547 U.S. 103, 116 n.6 (2006); *Olson*, 495 U.S. at 100.

[88] *Caniglia*, 141 S. Ct. at 1599 (explaining that the "First Circuit's 'community caretaking' rule . . . goes beyond anything this Court has recognized.").

into a home.[89] Similarly, the Court noted that hot pursuit of a suspected misdemeanant, rather than a suspected felon, does not categorically waive the warrant requirement.[90] Although many misdemeanor pursuits may involve another exigency, the Court held that "whether a given one does so turns on the particular facts of the case."[91] The Court left standing the categorical warrant exception for hot pursuit of a fleeing felon.[92]

When a genuine exigency is present,[93] immediate police action is so beneficial to individuals that officers should be able to dispense with the warrant requirement. In contrast, where officers merely avoid the warrant requirement for convenience, and a slight delay would have no evidentiary or real-world consequences, the exigent circumstances exception does not apply.[94]

Exigent circumstances exceptions, especially those involving pursuit of a fleeing felon or emergency aid to protect the public, have support in founding-era common law. In part, warrantless responses to exigencies were a product of the differences between colonial "law enforcement" and the professionalized police departments of today.[95] The "contemporary sense of 'policing' would be utterly foreign to our colonial forebears."[96] Instead, law enforcement was largely conducted by a system of constables and night

[89] *See id.* at 1599 (noting that providing emergency assistance is a situation in which the Court has decided that no warrant is necessary). As was noted during oral arguments in that case, there is no separate historical justification for "community caretaking" that does not involve more immediate danger to a person, and thus would fit into the emergency aid prong of exigent circumstances. Transcript of Oral Argument at 75-77, Caniglia v. Strom, 141 S. Ct. 1596 (2021) (No. 20-157).

[90] *Lange*, 141 S. Ct. at 2016 (holding that pursuit of a suspected misdemeanant - instead of a suspected felon - does not always waive the warrant requirement).

[91] *Id.*

[92] *See id.* at 2025 ("[T]he Court's opinion does not disturb the long-settled rule that pursuit of a fleeing *felon* is itself an exigent circumstance justifying warrantless entry into a home.").

[93] *See* Kentucky v. King, 563 U.S. 452, 470 (2011) ("Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency.").

[94] *See* Mincey v. Arizona, 437 U.S. 385, 393 (1978) ("[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary."); *see also* Chapman v. United States, 365 U.S. 610, 615 (1961) ("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.") (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

[95] Police officers were "unknown to the common law," and were considered a "creature of a statute" in the 19th century. State v. Freeman, 86 N.C. 683, 684 (1882).

[96] Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830 (1994).

watchmen, mostly comprised of ordinary men who took turns in this undesirable role.[97] Those thrust into a constable role received little training, and their duties "never developed into the job of investigative 'policing' with which modern law enforcement agencies are charged."[98] Instead, constables primarily aimed to keep the peace by responding to disturbances that might be dangerous to the public at large, such as "affrays" in taverns or potentially dangerous "vagrants."[99]

The authority the framing-era common law granted for warrantless action by constables and watchmen was limited to those fast-arising emergencies, leaving "little room for governmental investigation of crime."[100] For instance, the colonial-era common law permitted something akin to the modern fleeing felon rule. Because warrantless arrests were only permitted for felonies—crimes that typically carried a death sentence that would motivate suspects to flee[101]—warrantless pursuits of fleeing felons were a "necessity" that justified warrantless entry into a home.[102] At the same time, it was unclear how certain authorities must be that a felony had been committed; various authorities suggested the police must have "probable grounds," "probable suspicion," or even more certainty that an exigency existed.[103]

Warrantless entries akin to the modern-day "emergency aid" prong of the exigent circumstances exception were also permitted in the colonial era. Such entries were permissible after a victim had been dangerously wounded so as

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[97] *Id.*; *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 813 (1994) ("The Framers' constables have become our police *departments*; their watchmen, our environmental protection *agencies*; and so on."); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 620 (1999) ("The peace officer, most commonly a constable, was usually a low status 'freeman' pressed into a tour of duty for a year.").

[98] Steiker, *surpa* note 96 at 831.

[99] "Constables were expected to preserve order by keeping an eye on taverns, controlling drunks, apprehending vagrants, and responding to 'affrays' (fights) and other disturbances—but they were not otherwise expected to investigate crime." Davies, *supra* note 97 at 621-22.

[100] Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law"*, 77 MISS. L.J. 1, 181 (2007).

[101] *Id.* at 59.

[102] "As to the case of breaking open doors, in order to apprehend offenders, it is to be observed, that the law doth never allow of such extremities but in cases of necessity." RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 86 (n.p., 6th ed. 1758).

[103] Lange v. California, 141 S. Ct. 2011, 2023 (2021) (quoting 2 PLEAS OF THE CROWN 91-92 (1736) (Hale); 2 PLEAS OF THE CROWN 138-139 (1787) (Hawkins)).

to be in danger of death,[104] or if there was a violent "affray" or "breach of the peace" that might lead to public violence.[105] Warrantless home entries might also be possible upon a constable's "hue and cry" that a serious crime had just been committed by a suspect that those in the surrounding area should pursue.[106] Responses to such a "hue and cry" could include warrantlessly entering private homes, though perhaps only with probable cause that a felony was actually committed.[107]

Colonial-era common law did not, however, include a clear analogue to the modern category of exigent circumstances premised upon preventing the imminent destruction of evidence. Constables and watchmen were not generally charged with investigating crime, but merely responding to immediate threats.[108] Thus, evidentiary concerns did not arise in the common law at the time the Fourth Amendment was written. This branch of the exigent circumstances exception thus has little historical support prior to the last half-century of Supreme Court jurisprudence.

III. EXIGENCIES, NOT EXCEPTIONS

The historical review of the exigent circumstances exception to the warrant requirement demonstrates both its long-standing roots and its limited nature. Exigent circumstances provide a cabined, understandable exception to the warrant requirement. It is narrower in scope than the myriad exceptions the Court has applied to officer-individual interactions, while at the same time retaining broader normative appeal.

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104 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 176 (1797); 2 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 90 (1736). Such a dangerous wounding might also permit a temporary warrantless arrest. *See* Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law"*, 77 MISS. L.J. 1, 59-60 (2007)

105 Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 303 (2002); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND BOOK THE FOURTH 142, 145 (11th ed. 1791).

106 *See* COKE, *supra* note 104 at 90-92.

107 BLACKSTONE, supra note 105 at 292-93.

108 "Over the course of the nineteenth century, professional police forces had become the norm in the United States, and evidence collection had accordingly come to be viewed as the initial phase of the government's criminal proceedings against a defendant." Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1920 (2014) (citing STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 16 (2012)).

First, the exigent circumstances exception remains narrow, even though it is not readily reducible to a bright-line rule. It only applies where an officer can point to a genuine emergency that involves either emergency aid, hot pursuit, or imminent destruction of evidence.[109] As the historical record suggests, it evolved from the emergency response role of colonial era constables charged with peacekeeping, not criminal investigation. Thus, it sets a limited scope for law enforcement engagement with individuals without a warrant, which should be the primary avenue through which modern police interact with the public. Unless a neutral magistrate provides prior warrant authorization, officers' discretion to observe or collect evidence in an interaction with individuals is sharply limited.

Second, the exigent circumstances exception has strong normative appeal. When genuine emergencies arise, officers should be able to respond quickly and without concern that their actions will lead to either liability or the exclusion of evidence in a later criminal trial. When officers respond to an immediate safety threat, pursue a fleeing suspect, or prevent the imminent destruction of evidence, they must act without taking the time to seek independent judicial review. Any delay in those situations can be costly to both property and persons.

Given the speed with which warrants can be obtained today, only those traditional species of exigent circumstances—and not many of the categorical exceptions to the warrant requirement that the Court established in the last half-century—seem necessary.[110] As the Supreme Court has acknowledged, modern electronic warrant procedures allow officers to obtain a warrant in just a few minutes.[111] The ready availability of warrants undermines arguments for

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[109] I discuss how officers and courts should identify a "genuine" emergency using a familiar reasonable suspicion standard in Part IV below.

[110] "The reasoning in *McNeely* and *Birchfield* emphasizing the increasingly expeditious availability of electronic warrants calls into question the continuing doctrinal soundness of maintaining a categorical impracticability approach for [many] exceptions." Benjamin J. Priester, *A Warrant Requirement Resurgence? The Fourth Amendment in the Roberts Court*, 93 ST. JOHN'S L. REV. 89, 122 (2019).

[111] "[P]olice can often request warrants rather quickly these days. At least 30 States provide for electronic warrant applications. In many States, a police officer can call a judge, convey the necessary information, and be authorized to affix the judge's signature to a warrant. Utah has an e-warrant procedure where a police officer enters information into a system, the system notifies a prosecutor, and upon approval the officer forwards the information to a magistrate, who can electronically return a warrant to the officer. Judges have been known to issue warrants in as little as five minutes. And in one county in Kansas, police officers can e-mail warrant requests to judges' iPads; judges have signed

many other categorical exceptions to the warrant requirement. For instance, in most cases it is no longer impracticable for officers to obtain a warrant to search an automobile, even if that property is readily mobile.[112]

On the other hand, when the exigencies are genuine and an immediate police response is necessary,[113] all individuals benefit if officers can quickly react without fear, thereby curbing antisocial, criminal behavior. This includes communities of color that are often disproportionately the victims of violent crime.[114]

To be clear, the consequence if exigent circumstances were not present to justify an officer's actions is purely evidentiary: suppression of the evidence in an individual case. Officers interested in protecting the community should act quickly, without fear of the repercussions, for two reasons.[115] First, even if the

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such warrants and e-mailed them back to officers in less than 15 minutes." Missouri v. McNeely, 569 U.S. 141, 172–73 (2013) (Roberts, C.J., concurring in part and dissenting in part) (citations and quotations omitted).

Interestingly, Chief Justice Roberts, who authored the quoted passage from *McNeely* above, recently questioned whether officers can quickly obtain warrants. In his concurrence in last term's *Lange v. California*, Roberts claimed that "[i]f the suspect continues to flee through the house, while the officer must wait, even the quickest warrant will be far too late. Only in the best circumstances can one be obtained in under an hour, and it usually takes much longer than that. Even electronic warrants may involve 'time-consuming formalities.'" Lange v. California, 141 S. Ct. 2011, 2032 (2021) (Roberts, C.J., concurring) (citations omitted) (citing Missouri v. McNeely, 569 U.S. 141, 155 (2013)). For more on that conflict, and its repercussions on the incentives to develop efficient warrant application procedures, see Michael Gentithes, *Waiting for Warrants? Chief Justice Roberts's Conflicting Opinions on the Speed of Warrant Applications in* Lange *and* McNeely, (July 27, 2021), https://lawprofessors.typepad.com/appellate_advocacy/2021/07/waiting-for-warrants-chief-justice-robertss-conflicting-opinions-on-the-speed-of-warrant-application.html [https://perma.cc/7RBR-2JSE].

112 "*Chambers* seems particularly dubious now that warrant can be obtained so quickly; there is little meaningful possibility that evidence will disappear from a motor vehicle in a secured police facility in the time it would take to obtain an electronic warrant." Benjamin J. Priester, *A Warrant Requirement Resurgence? The Fourth Amendment in the Roberts Court*, 93 ST. JOHN'S L. REV. 89, 123 (2019).

113 "Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency." Kentucky v. King, 563 U.S. 452, 470 (2011).

114 *See* JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 218 (2017) ("Black Americans benefit the most when violent crime drops."). This is true despite the fact that the burden of incarceration falls disproportionately on populations of color. *See id.* ("African Americans are held in state prisons at a rate five times that of whites. In eleven states, at least one in twenty adult black men is in prison.").

115 *See* Di Jia, Kallee Spooner & Rolando V. Del Carmen, *An Analysis and Categorization of U.S. Supreme Court Cases Under the Exigent Circumstances Exception to the Warrant Requirement*, 27 GEO. MASON U. C.R.L.J. 37, 45 (2016) ("Due to the urgent nature" of the time limit requirement,

officers' instincts prove incorrect and no safety threat was present, there is little chance they will face civil liability. The individual is unlikely to file suit under 42 U.S.C. § 1983 given the minimal, if not nominal, damages involved. Even if the individual sues, current qualified immunity doctrine provides officers broad protection so long as their actions were not plainly contrary to existing precedent. Second, the officer should hardly be concerned about the exclusion of any evidence they might discover. Such evidence would be an unexpected windfall for an officer genuinely interested in protecting the community from harm. Potentially losing such windfall evidence should not concern such well-meaning officers.

Despite the advantages relative to other warrant exceptions, exigent circumstances do little jurisprudential work in most officer-individual interactions. But the exigent circumstances exception can limit the scenarios in which officers can constitutionally view or collect evidence warrantlessly during interactions with individuals. The remaining warrant exceptions, which have long swallowed the general rule requiring warrants, should be returned to their exigency roots that are easier to justify to skeptical individuals and confused officers.

A. Recalibrating SITLAs and Protective Sweeps Inside Homes

When officers make an in-home arrest, Supreme Court doctrine currently authorizes a warrantless search in three concentric circles. First, officers can search the area in the suspect's immediate control;[116] second, officers can search areas immediately adjoining the arrest from which another party might launch an ambush;[117] and third, if officers have reasonable suspicion of an ambush, they can "sweep" any areas in the remainder of the house where attackers may be lying in wait.[118]

This authority is far broader than necessary. FBI statistics show that over the five-year period from 2014 to 2019, third-party ambushes accounted for

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"the police have to identify exigent circumstances by relying on their own understanding and experience.").

[116] Chimel v. California, 395 U.S. 752, 762–63 (1969).

[117] Maryland v. Buie, 494 U.S. 325, 334 (1990).

[118] *Id.*; *See also* Mark A. Cuthbertson, Comment, Maryland v. Buie*: The Supreme Court's Protective Sweep Doctrine Runs Rings Around the Arrestee*, 56 ALBANY L. REV. 159, 173 (1992) ("The *Buie* holding divides the area beyond an arrestee's 'grab area' into two zones. Consequently, including the 'grab area' established in *Chimel*, three zones exist.").

between 0.50% and 0.34% of all assaults on officers[119] and almost never led to officer deaths.[120] Of course, officers deserve protection from even low prospects of injury or death. But protecting officers from even the slightest chance of harm should not justify per se exceptions to the Fourth Amendment's warrant requirement that lead to routine invasions of privacy and contribute to widespread public mistrust of the police.

If in-home SITLA doctrine is reconceived under the emergency aid prong of exigent circumstances, the appropriate limits to in-home searches following an arrest become clear. Beyond the suspect's immediate reach, officers should only be able to search in an arrestee's home when they can articulate why they believe an ambush is forthcoming, and then only in areas they reasonably suspect will be the source of the ambush. That standard borrows from the rationale for brief investigatory stops under *Terry*, which are constitutional when officers have reasonable, articulable suspicion that a crime has been or is about to be committed.[121] Officers should not have per se authority to search areas immediately adjoining an arrest where an attacker may be hiding, nor to sweep the entire home in any area at all where additional attackers could physically hide. Such attacks are unlikely and present a statistically low risk of officer injury or death. In fact, officers conducting such lengthy protective sweeps may even increase their chance of injury as they prolong their time inside an unfamiliar home and expand their intrusion into other unknown areas.

Third-party ambushes only present a genuine emergency where, borrowing the language of *Terry*, officers can articulate some reasonable suspicion that an attack is forthcoming. Requiring that reasonable suspicion for any type of protective sweep of the home balances the need to protect officer safety with the suspect's privacy interest. It will also preclude officers from using an in-home arrest as a pretext to warrantlessly search large swaths of a suspect's home.

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[119] *2019 Law Enforcement Officers Killed & Assaulted*, FBI tbl.88 (2019), https://ucr.fbi.gov/leoka/2019/tables/table-88.xls [https://perma.cc/L2K9-4MC3]; *2014 Law Enforcement Officers Killed & Assaulted*, FBI tbl. 79 (2014), https://ucr.fbi.gov/leoka/2014/tables/table_79_leos_asltd_circumstance_at_scene_of_incident_by_type_of_weapon_and_percent_distribution_2014.xls [https://perma.cc/3WZZ-RZR7].

[120] From 2015 to 2019, just forty-four officers were feloniously killed during an ambush; in 2019 alone, just two were killed. *2019 Law Enforcement Officers Killed & Assaulted*, FBI tbl.24 (2019), https://ucr.fbi.gov/leoka/2019/tables/table-24.xls [https://perma.cc/2497-T6FU].

[121] Terry v. Ohio, 392 U.S. 1, 21 (1968).

Recently, many circuits have allowed protective sweeps even without an arrest, often following a consent entry.[122] This trend untethers protective sweeps even further from the initial, emergency-based concerns that justified them. The authority to sweep areas of the house beyond the arrest is based upon reasonable suspicion of a threat from a third party.[123] But if officers have not yet made an arrest—perhaps gaining entry via consent—they cannot establish who the true "subject" of the investigation is, and thus who is a third-party compatriot ready to spring an attack. The person who consented might be the subject, but if the consent was genuine, there is no reason to think that either the consenter or their colleagues feel threatened. The already slim chances of a third-party ambush thus reduce even further. If the consenter does feel threatened, their consent likely was not genuine, such that it should not have justified the entry in the first place. Any evidence recovered later should be excluded from trial.

Nor can officers claim reasonable suspicion that an attack is about to be launched because the person they sought to arrest is, surprisingly, not home when the officers arrive. Again, the concern is threats from third parties, not the intended target of the arrest in the first place.[124] If that person does not come to the door, officers are not constitutionally justified in breaking that door down to look for that person because of the safety threat which the entry itself created. A warrantless search with such a circular justification would dangerously weaken the Fourth Amendment bulwark against unnecessary and intrusive government investigations.

Similarly, if officers obtain consent to enter, they should not be automatically entitled to look in closets immediately adjoining the area. Consenters have the constitutional right to limit the physical scope of their

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[122] *See* United States v. Hassock, 631 F.3d 79, 86–87 (2d Cir. 2011) (collecting cases demonstrating the circuit split); Leslie A. O'Brien, Note, *Finding a Reasonable Approach to the Extension of the Protective Sweep Doctrine in Non-Arrest Situations*, 82 N.Y.U. L. REV. 1139, 1141 (2007) (noting that, although circuits are split, the majority permits protective sweeps even when not incident to a valid arrest); Jamie Ruf, Note, *Expanding Protective Sweeps Within the Home*, 43 AM. CRIM. L. REV. 143, 143 (2006) ("The protective sweep doctrine has emerged as distinctly separate from the doctrine of search incident to arrest.").

[123] Maryland v. Buie, 494 U.S. 325, 334 (1990) (citing *Terry*, 392 U.S. at 1).

[124] *See* Jamie Ruf, Note, *Expanding Protective Sweeps within the Home*, 43 AM. CRIM. L. REV. 143, 156 (2006) ("[T]he absence of a citizen from an expected location cannot logically enter into the balancing test as a factor enhancing reasonable suspicion that the individual constitutes a threat to officer safety.").

consent to specified areas within a home.[125] If officers have per se authority to search areas adjoining the initial consent, the consenter cannot control the area of consent.[126] Officers should not be entitled to create a risk of self-harm through a consent entry, then use that risk to justify automatic warrantless searches beyond the scope of the consenter's permission. "As Justice Scalia articulated in his *Thornton* concurrence, a search incident to arrest cannot be justified when officers create the very exigencies—the risk of harm to officers and destruction of evidence—that underpin the search incident to arrest exception to the warrant requirement."[127]

B. Reducing SITLAs in Cars

Arizona v. Gant limited an officer's authority to conduct SITLAs in cars, but left a significant loophole.[128] *Gant* limited in-car SITLA authority to situations where the arrestee is within reaching distance of the passenger compartment[129] but added an exception for in-car SITLAs when "it is reasonable to believe the vehicle contains evidence of the offense of arrest."[130] The latter category revives a discredited tradition of warrantless searches premised explicitly upon the need to collect evidence of a crime without a warrant.[131]

Gant's loophole should be closed by reconceiving in-car SITLAs under the exigent circumstances exception. Exigencies that might justify a warrantless search of a car following an arrest only arise when a suspect is

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125 *See* Florida v. Jimeno, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents.").

126 *See* Zachary P. Mardis, Comment, United States v. Fadul*: The Appropriate Standard for Protective Sweeps in Consent Entry Situations*, 47 CUMB. L. REV. 401, 418 (2017) (discussing different approaches to protective sweeps in consent entry situations). If courts do expand protective sweeps, they should, as the Fifth U.S. has suggested, suppress evidence if officers arrive with a premeditated plan to "knock and talk," gain consent to enter, and then conduct a warrantless protective sweep. *See* Jamie Ruf, Note, *Expanding Protective Sweeps within the Home*, U.S. CRIM. L. REV. 143, 157 (2006) (discussing United States v. Gould, 364 F.3d 578, 590-91 (5th Cir. 2004)).

127 Angad Singh, Comment, *Stepping Out of the Vehicle: The Potential of* Arizona v. Gant *to End Automatic Searches Incident to Arrest Beyond the Vehicular Context*, 59 AM. U. L. REV. 1759, 1796 (2010).

128 556 U.S. 332 (2009).

129 *Id.* at 351.

130 *Id.*

131 Thornton v. United States, 541 U.S. 615, 629 (2004) (Scalia, J., concurring) (arguing for such a rule based upon United States v. Rabinnowitz, 339 U.S. 56, 61 (1950), which had already been overruled by Chimel v. California, 395 U.S. 752, 763 (1969)).

unrestrained and near the car. Only then would officers need to render emergency aid, stop a fleeing felon, or preserve evidence that might be quickly destroyed. None of those species of exigent circumstances are possible once a suspect is secured in the back of a police cruiser. At that point, searches to find evidence of the crime are unnecessary to respond to any emergency and are not permitted by the Fourth Amendment.

Even if warrantless searches to find evidence of a recent crime were revived in Fourth Amendment doctrine, officers do not need per se authority to conduct such searches shortly after an arrest in a car. Once the arrest has happened, there are multiple opportunities for just such a search on a non-emergency basis. Officers may be able to conduct an inventory search of the car to protect the owner's property from damage, if such inventory searches are standard policy or practice within the department.[132] Officers may also bring drug detecting dogs to the scene to walk around the car so long as doing so does not unreasonably prolong the stop.[133] And because the car is now immobilized and the suspect in custody, officers can also continue the investigation into the recent crime, possibly generating enough probable cause to present to a magistrate and obtain a warrant. A per se rule for warrantless searches, simply because cars are mobile and thus the evidence inside them is fleeting, is neither doctrinally nor practically necessary.

C. Rebalancing the Automobile Exception

The automobile exception gives officers the authority to search a car when they have probable cause to believe it contains evidence of a crime.[134] This authority is wide-ranging. It applies to any area of any vehicle where officers have probable cause to believe evidence is located;[135] it also permits searches of containers in the automobile that officers have probable cause to believe

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[132] *See* Florida. v. Wells, 495 U.S. 1, 4 (1990) ("The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime.")_(internal quotation marks omitted).

[133] *See* Illinois v. Caballes, 543 U.S. 405, 410 (2005) (holding a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment).

[134] *See* Chambers v. Maroney, 399 U.S. 42, 48 (1970) ("In terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office.").

[135] *See* United States v. Ross, 456 U.S. 798, 825 (1982) ("[T]he scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.").

contains the evidence.[136] The authority is premised upon the Court's assumption that a car's mobility justifies dispensing with a time-consuming warrant requirement—even when no arrest occurs and no suspect is near the car.[137]

Viewed through the lens of the exigent circumstances exception, the automobile exception can only justify warrantless searches when the suspect is physically near the automobile. Only then is it possible that officers may need to render emergency aid, stop a fleeing felon, or preserve evidence that might be quickly destroyed. As in the in-car SITLA context, those exigencies simply cannot arise when the suspect is not near the car.[138] Per se authority to search a car immediately for evidence of a crime is unnecessary, especially where officers already have probable cause to believe the car contains evidence. The officers can present that probable cause to a magistrate and obtain a warrant, only proceeding warrantlessly if the suspect arrives on the scene in the intervening moments. Because warrants may be obtained in a matter of minutes in many jurisdictions,[139] asking officers to seek one before searching a car is not unduly burdensome.[140]

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[136] *See* California v. Acevedo, 500 U.S. 565, 580 (1991) ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.").

[137] *See* United States v. Chadwick, 433 U.S. 1, 12 (1977) ("Our treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impracticable."); *see also* Collins v. Virginia, 584 U.S. 1, 7, 9 (2018) (explaining the concept of the automobile exception, its extent, and the governmental interests in an expedient search). The Court has also noted that the automobile exception is premised upon the alleged lesser expectations of privacy that individuals have in their automobiles given the government's pervasive regulation of automobiles. *See* California v. Carney, 471 U.S. 386, 392 (1985) (detailing that the reduced expectation of privacy associated with automobiles is from the "pervasive regulation of vehicles capable of traveling on public highways."); *see also Chadwick*, 433 U.S. at 12-13 (describing the factors that explains why there is a diminished expectation of privacy for automobiles such as its function as transportation in public and being subjected to government regulations). I address this issue below.

[138] Admittedly, this position discounts the possibility of self-driving cars remotely activating to leave the scene suddenly. But until that technology becomes commonplace and remote driving becomes a regular practice, the possibility alone should not justify an expansive automobile exception to the warrant requirement.

[139] As noted above, the wait time for such a warrant may be relatively short in many jurisdictions that have created electronic warrant application platforms. *See* Missouri v. McNeely, 569 U.S. 141, 172–73 (2013) (discussing e-warrant application platforms that can grant warrants in as little as five minutes).

[140] *See* Benjamin J. Priester, *A Warrant Requirement Resurgence? The Fourth Amendment in the Roberts Court*, 93 ST. JOHN'S L. REV. 89, 125 (2019) ("[T]he emphasis in *McNeely* and *Birchfield* on the ready availability of electronic warrants suggests that police should be discouraged from

The Court has also claimed that pervasive government regulation of automobiles has lowered the average individual's expectations of privacy in their cars, rendering warrantless searches based upon probable cause permissible.[141] But this assumption is empirically dubious. First, it ignores the Court's broad protection for homes despite pervasive government regulation—such as property taxes, zoning ordinances, building and safety codes, and nuisance laws. Second, researchers have found that individuals believe a search of the trunk or interior of a car on a public road is highly intrusive, slightly more than arresting and detaining a suspect for 48 hours or rummaging through a suspect's office drawers.[142] Third, such reasoning is highly circular. If the government's own regulatory regimes can themselves lower expectations of privacy so much that the Fourth Amendment no longer applies to the regulated area, then the Fourth Amendment becomes a mere parchment barrier to government invasions of privacy. Rather than providing an objective limit on government investigatory authority, the Fourth Amendment would permit the government to set its own limits. Such a circular regime is contrary to the Fourth Amendment's purpose. It should not justify a wide-ranging automobile exception to the warrant requirement.

IV. HOW SURE MUST OFFICERS BE THAT CIRCUMSTANCES ARE EXIGENT?

In part because the Supreme Court has not deployed the exigent circumstances doctrine to resolve a wide swath of cases, the Court has not developed a clear statement of the quantum of suspicion officers must have

acquiring extensive evidence under the plain view doctrine based on probable cause alone in situations where it would have been easy to obtain a search warrant to clearly validate the continuing discovery of additional evidence and its seizure.").

[141] *See Carney*, 471 U.S. at 392 (detailing the public's awareness that they have a lesser standard of privacy in their vehicles because of the "compelling governmental need for regulation."); *see also Chadwick*, 433 U.S. at 12-13 (finding that people have a diminished expectation of privacy for their automobiles due to the various governmental regulations in place).

[142] *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 738 (1993) (describing the intrusiveness ranking table developed by researchers that shows searching the trunk and interior of a car in public is more intrusive than detaining a suspect for forty-eight hours or going through drawers at an office). Slobogin and Schumacher's research asked undergraduate and law students to rate the intrusiveness of police activities drawn from a variety of well-known Supreme Court cases. *See id.* at 733, 737 (explaining the method of the research which looked to understand how the public perceived "the intrusiveness of government investigative methods").

that circumstances are exigent before the exception is triggered.[143] Terms like probable cause, reasonable suspicion, and reasonable belief all make frequent appearances in exigent circumstances cases.[144] This Part reviews the level of suspicion the Court typically ascribes under different types of exigencies before suggesting that a single, unified standard similar to *Terry*-style reasonable suspicion sets an appropriate bar for officers in the field.

A. Certainty of Exigent Circumstances in Modern Jurisprudence

The Court's description of how certain officers must be of exigent circumstances before warrantlessly searching has evolved in the last half-century, seeking clarity that did not exist at common law.[145] Early cases seemed to suggest that officers must have probable cause to believe that the exigency exists before proceeding. For example, in *Welsh v. Wisconsin*, which concerned the loss of evidence in the form of the defendant's blood alcohol levels, the Court suggested that the government has the burden to demonstrate exigent circumstances to overcome a presumption of unreasonableness, which, "[w]hen the government's interest is only to arrest for a minor offense," typically requires probable cause.[146] Similarly in *Minnesota v. Olson*, the Court suggested that unless officers are in hot pursuit of a fleeing suspect, officers must have probable cause to believe in the exigency based in part upon the gravity of the crime involved.[147] The Court appeared to extend the probable

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[143] *See* Di Jia, Kallee Spooner, & Rolando V. Del Carmen, *An Analysis and Categorization of U.S. Supreme Court Cases Under the Exigent Circumstances Exception to the Warrant Requirement*, 27 GEO. MASON U. C.R.L.J. 37, 38 (2016) ("Rather than providing a readily applicable definition, the U.S. Supreme Court has held that exigent circumstances should be examined on a case-by-case basis.").

[144] *See, e.g.*, Kit Kinports, *The Quantum of Suspicion Needed for an Exigent Circumstances Search*, 52 U. MICH. J.L. REFORM 615, 616 (2019) ("The Supreme Court opinions describing the amount of exigency needed to support a warrantless search under the exigent circumstances exception to the Fourth Amendment's warrant requirement have long varied. Some decisions speak in terms of probable cause, others require reasonable suspicion, and many others use amorphous, undefined phrases such as 'reasonable to believe.'").

[145] In this term's decision in *Lange v. California*, the Court noted that the common law was unclear when describing how certain authorities must be that "hot pursuit" fleeing felon exigency existed, noting that various authorities required "probable grounds," "probable suspicion," or something more certain. Lange v. California, 141 S. Ct. 2011, 2023 (2021) (quoting Sir William Hale and Sergeant William Hawkins).

[146] Welsh v. Wisconsin, 466 U.S. 740, 750 (1984).

[147] *See* Minnesota v. Olson, 495 U.S. 91, 100 (1990) (finding that warrantless searches are permissible when officers are in hot pursuit but when that circumstance is absent officers must have probable cause).

cause standard even to hot pursuit cases in *Tennessee v. Garner*, which required officers using deadly force to apprehend a fleeing felon to have "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[148]

More recently the Court appears to have softened the required proof of exigency before the exception applies, even while insisting that judges evaluate the totality of the circumstances in each case rather than devising categorical rules.[149] In *Richards v. Wisconsin*, the Court allowed officers to execute a search warrant without first knocking and announcing their office so long as they had "reasonable suspicion" that knocking might allow the suspect to destroy evidence inside.[150] In *Brigham City v. Stuart*, the Court stated that officers may enter a home without a warrant when they have "an objectively reasonable basis for believing" that someone inside faces serious injury.[151] *Michigan v. Fisher* similarly noted that officers can warrantlessly enter a home to provide emergency assistance with "an objectively reasonable basis for believing" that someone inside needs immediate aid."[152] In *Missouri v. McNeely*, even though the Court insisted that judges evaluate the totality of the circumstances to determine the applicability of the exigent circumstances exception, it suggested that warrantless blood tests of a driver are permissible where an officer "might reasonably have believed that he was confronted with an emergency [that] threatened the destruction of evidence."[153]

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[148] 471 U.S. 1, 3 (1985) (discussed in Kit Kinports, *The Quantum of Suspicion Needed for an Exigent Circumstances Search*, 52 U. MICH. J.L. REFORM 615, 618 (2019)).

[149] *See* Riley v. California, 573 U.S. 373, 402 (2014) ("The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case.") (citation omitted).

[150] *See* 520 U.S. 385, 394 (1997) (explaining that police officers may conduct "no-knock" entries if they have reasonable suspicion that knocking would lead to evidence being destroyed); *see also* Di Jia, Kallee Spooner, & Rolando V. Del Carmen, *An Analysis and Categorization of U.S. Supreme Court Cases Under the Exigent Circumstances Exception to the Warrant Requirement*, 27 GEO. MASON U. C.R.L.J. 37, 67 (2016) ("If the objective is to prevent the imminent destruction of evidence, agents must have a reasonable belief that the evidence will be destroyed if they do not act quickly.").

[151] 547 U.S. 398, 400 (2006) (holding that officers may enter a home without a warrant when there is an objectively reasonable basis to believe that an individual suffered a serious injury or there is an imminent threat of such injury). This holding builds upon the decision in *Cady v. Dombrowski*, under which officers may warrantlessly enter a car they "reasonably believed . . . contain[ed] a gun" that presented dangers to the community. 413 U.S. 433, 448 (1973).

[152] 558 U.S. 45, 47 (2009) (quoting Brigham City v. Stuart, 547 U.S. 398, 406 (2006)); *see also* Michigan v. Fisher, 558 U.S. 45, 49 (2009) ("Officers do not need ironclad proof of 'a likely serious, life-threatening injury' to invoke the emergency aid exception.").

[153] 569 U.S. 141, 145 (2013) (quoting Schmerber v. California, 384 U.S. 757, 770 (1966)).

In two cases decided this term, the Court seemed to focus on officers' reasonable beliefs as to whether an exigency exists. In *Caniglia v. Strom*, Justice Kavanaugh suggested that the exigent circumstances exception "permit[s] warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now."[154] Similarly, the majority in *Lange v. California*, which limited the hot pursuit exception to suspected felonies, noted that officers can make a warrantless home entry premised upon exigent circumstances "[w]hen an officer reasonably believes those exigencies exist."[155]

Circuit courts have focused upon the language that considers officers' reasonable beliefs—even if they have struggled to define the meaning of that phrase.[156] The D.C. Circuit judges whether exigent circumstances exist "according to the totality of the circumstances and on 'what a reasonable, experienced police officer would believe.'"[157] Similarly, the Fourth Circuit examines "officers' reasonable belief" that exigent circumstances are present.[158] The Eleventh Circuit has held that officers can warrantlessly search when they "reasonably believe an emergency exists which calls for an immediate response to protect individuals from imminent danger."[159] The Tenth Circuit requires officers to have "an objectively reasonable basis to believe there is an immediate need to protect the safety of themselves or others" before invoking the exception.[160] And the Ninth Circuit applies the exigent circumstances exception when, "[c]onsidering the totality of the circumstances, law enforcement [has] an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm."[161]

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154 Caniglia v. Strom, 141 S. Ct. 1596, 1604 (Kavanaugh, J., concurring).

155 Lange v. California, 141 S. Ct. 2011, 2021–22 n.3).

156 *See* Kit Kinports, *The Quantum of Suspicion Needed for an Exigent Circumstances Search*, 52 U. MICH. J.L. REFORM 615, 621–22 (2019) ("Some lower court opinions equate the language with probable cause. Others believe it is 'less exacting' than probable cause, with some analogizing it to reasonable suspicion. And still others view reasonable belief as a separate standard distinct from both probable cause and reasonable suspicion.") (collecting cases).

157 Corrigan v. D.C., 841 F.3d 1022, 1030 (D.C. Cir. 2016) (quoting *In re* Sealed Case, 153 F.3d 759, 766 (D.C. Cir. 1998)).

158 United States v. Moses, 540 F.3d 263, 270 (4th Cir. 2008) (quoting United States v. Turner, 650 F.2d 526, 528 (4th Cir.1981)).

159 United States v. Holloway, 290 F.3d 1331, 1337 (11th Cir. 2002).

160 United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006).

161 United States v. Snipe, 515 F.3d 947, 951–52 (9th Cir. 2008).

B. Applying Terry's Reasonable and Articulable Suspicion Standard

There is good reason, both in precedent and policy, to require officers to show *Terry*-style reasonable suspicion of an exigency before proceeding warrantlessly. First, regarding precedent, *Terry* used the phrase "reasonable grounds to believe"—the very phrase that both the Supreme Court and circuit courts have subsequently applied in exigent circumstances cases—when finding that the stop-and-frisk in *Terry* was constitutionally justified.[162] "Similarly, the Court later characterized *Terry*'s reasonable suspicion standard in *United States v. Brignoni-Ponce* as requiring 'reasonable grounds to believe' a suspect is armed and dangerous."[163] *Terry*'s "reasonable suspicion" standard also mirrors language the Court used this term—"reasonable basis"[164] and "reasonabl[e] belie[f]"[165]—to describe how confident officers must be in the existence of exigent circumstances. *Terry*'s requirement seems to be the closest analogue to any "reasonable belief" standard that is the apparent touchstone for applying the exigent circumstances standard.

Second, applying a robust version of *Terry*'s reasonable suspicion standard makes good policy sense. A probable cause standard requires more certainty than is typically possible in responding to an emergency. Probable cause—the Constitutional standard for obtaining a warrant[166]—contemplates a deliberate investigation under relatively calm circumstances. The warrant clause itself imposes deliberative formalities, such as pleading with specificity, that should not apply under exigent circumstances.[167] The exigent circumstances doctrine evolved to create a lower threshold for investigation when officers are forced to respond to rapidly-evolving circumstances. To be sure, probable cause still applies to some exceptions to the warrant requirement that move more rapidly, such as automobile or plain view searches. But exigent circumstances are by their very definition the most rapidly-evolving warrant exception available, requiring immediate response with almost no time to deliberate. To achieve the necessary level of discretion in emergencies, officers' suspicion of

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[162] Kit Kinports, *The Quantum of Suspicion Needed for an Exigent Circumstances Search*, 52 U. MICH. J.L. REFORM 615, 625 (2019) (quoting Terry v Ohio, 392 U.S. 1, 30 (1968)).

[163] *Id.* (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)).

[164] Caniglia v. Strom, 141 S. Ct. 1596, 1604 (2021) (Kavanaugh, J., concurring).

[165] Lange v. California, 141 S. Ct. 2011, 2021–22 n.3 (2021).

[166] U.S. CONST. amend. IV (describing the Constitutional standard of probable cause).

[167] *See id.* (detailing the rigid standards in place for obtaining a warrant to conduct a search).

an emergency must be lower than the probable cause requirement that applies in slower-paced investigations.

Applying a probable cause requirement in exigent circumstances might also cause courts to lower the probable cause standard in other areas of constitutional criminal procedure. Courts hearing exigency cases will be tempted to favor officers reacting on instinct. Those courts may reduce the level of certainty those officers must have, even if that certainty is still technically labeled "probable cause." And if courts lower the certainty level of "probable cause" in that context, they may in turn lower the meaning of "probable cause" elsewhere. The resulting slow decline in the meaning of probable cause could even lower the threshold of the warrant requirement itself, where courts also apply the "probable cause" label. That risk of seepage in the "probable cause" standard is another reason to favor an explicitly lower standard for officer certainty that an exigency is present.

At the same time, any floor lower than a full-throated version of reasonable, articulable suspicion is misguided. Officers need at least that much suspicion that an emergency is afoot—even when acting in the spur of the moment—before the warrant requirement can be dispensed. "If law enforcement officials cannot even supply some 'articulable' suspicion, if they have only an 'inchoate and unparticularized suspicion or hunch,' they have no justification for conducting a warrantless exigent circumstances search or seizure."[168]

There is some tension in calling for a reasonable suspicion standard to evaluate whether circumstances are exigent—a scenario where courts may be tempted to favor officers acting in the heat of the moment—and my broader proposal for court to apply a robust version of the *Terry* standard. Courts might be tempted to lower the threshold for reasonable suspicion in those cases, and perhaps others as well. But this danger is less pronounced than it would be if courts applied a probable cause standard, in part because reasonable suspicion has already been eviscerated by courts in other cases. As I have argued elsewhere, courts too often interpret *Terry*'s reasonable suspicion standard as a low threshold to investigation, with tragic

168 Kit Kinports, *The Quantum of Suspicion Needed for an Exigent Circumstances Search*, 52 U. MICH. J.L. REFORM 615, 627 (2019).

consequences.[169] Studies in major metropolitan areas have demonstrated the ease with which officers rely upon tropes of suspicion commonly accepted by the courts to justify *Terry*-style stops post hoc.[170]

My call for a reasonable suspicion standard to determine when an exigent circumstance genuinely exists is thus intertwined with a broader call for honest judicial enforcement of a robust version of *Terry*. "[T]o avoid arbitrary, discriminatory application, the reasonable suspicion test must mean what it says. It must require some facts that the officer can articulate to justify stopping someone on suspicion of a crime."[171] Courts can require such facts in the context of exigent circumstances, perhaps rehabilitating the reasonable suspicion standard in the process. And there is little risk that they will further eviscerate the reasonable suspicion standard to anything lower than its already low threshold of today.

Terry-style reasonable suspicion is also appropriate because of its inherent flexibility to adapt to new circumstances or changing facts that face courts in future cases. Fourth Amendment reasonableness is not a static concept, but one that can evolve as new facts or new categories of officer-individual interactions arise.[172] Given the broader scope I prescribe for exigent circumstances analysis, courts will need that flexibility to handle the broad

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169 *See* Michael Gentithes, *Suspicionless Witness Stops: The New Racial Profiling*, 55 HARV. C.R.-C.L. L. REV. 491, 523-24 (2020) (describing the need to apply *Terry* requirements to suspicionless searches).

170 *See, e.g.*, Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 86 (2015) ("As stops increased in New York City from fewer than 100,000 in 1998 to more than 685,000 in 2011, individuated suspicion was diluted as officers defaulted to convenient and stylized narratives to justify stops.").

171 Michael Gentithes, *Suspicionless Witness Stops: The New Racial Profiling*, 55 HARV. C.R.-C.L. L. REV. 491, 523 (2020) (citing BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 158 (2017)) ("As a matter of constitutional law, though, if stop-and-frisk is to be retained, the best solution is to return it to its roots: as an investigative tool to be used only when the police—as in *Terry* itself—can specify precisely what crime they suspect is in the offing, and have the facts to back it up.").

172 In the recent oral arguments in *Lange v. California*, which concerned the hot pursuit branch of exigent circumstances, Justice Kavanaugh suggested that originalists might support just this interpretation of Fourth Amendment reasonableness. *See* Transcript of Oral Argument at 84-85, Lange v. California, 141 S. Ct. 2011 (2021) (No. 20-18) (Kavanaugh, J.) ("I'm not aware of anyone in the first Congress or in the state ratifying processes that said unreasonable means the common law, unlike—and the text is unlike the Seventh Amendment, which refers to the common law expressly. And Professor LaFave and others have pointed this out. So it's not really original meaning or even original intent. It's more like presumed original expected applications, like a Justice Douglas-style interpretation.").

array of factual scenarios they face. Similarly, officers will need that kind of flexibility—though always grounded in what they can articulate as a basis for suspicion—to respond to exigencies in real time.

Reasonable suspicion can bear the weight of determining when exigencies are genuine, even though it is not a clear, bright-line rule. Again, the consequences for a misjudgment by an officer here are minimal. At risk is an evidentiary windfall that officers might have gained by relying upon exigent circumstances to enter an otherwise constitutionally protected space. Officers can rely upon other protections against personal liability such as qualified immunity; they may also argue against exclusion under the good faith exception.[173] It is not too much to ask that, in exchange for those protections, officers apply a flexible standard to determining when an exigency exists rather than a categorical rule.

To be clear, the consequence if exigent circumstances were not present to justify an officer's actions is purely evidentiary: suppression of the evidence in an individual case. Officers interested in protecting the community should act quickly, without fear of the repercussions, for two reasons.[174] First, even if the officers' instincts prove incorrect and no safety threat was present, there is little chance they will face civil liability. The individual is unlikely to file suit under 42 U.S.C. § 1983 given the minimal, if not nominal, damages involved. Even if the individual sues, current qualified immunity doctrine provides officers broad protection so long as their actions were not plainly contrary to existing precedent. Second, the officer should hardly be concerned about the exclusion of any evidence they might discover. Such evidence would be an unexpected windfall for an officer genuinely interested in protecting the community from harm. Potentially losing such windfall evidence should not concern such well-meaning officers.

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[173] Justice Kagan pointed out these supplemental protections for officers acting in what they believe to be an emergency in the recent oral arguments in *Lange v. California*. *See* Transcript of Oral Argument at 102, Lange v. California, 141 S. Ct. 2011 (2021) (No. 20-18) ("There are plenty of doctrines that say to a police officer, you know, when in doubt maybe you can take a little bit more of a risk. Qualified immunity does that. In this case, there's the fact of the good faith exception lurking in the background.").

[174] *See* Di Jia, Kallee Spooner & Rolando V. Del Carmen, *An Analysis and Categorization of U.S. Supreme Court Cases under the Exigent Circumstances Exception to the Warrant Requirement*, 27 GEO. MASON U. C.R.L.J. 37, 45 (2016) ("Due to the urgent nature [of the timing requirements], the police have to identify exigent circumstances by relying on their own understanding and experience.").

V. Police-Created Exigencies and Deliberately Avoiding the Warrant Requirement

The Supreme Court should prohibit officer-manufactured exigencies that act as a pretext for warrantless searches, especially if the Court expands exigent circumstances doctrine as I recommend.[175] But to date, the Court has defined "police-created exigencies," which do not justify warrantless searches, too narrowly. The Court should expand that definition to curtail pretextual warrantless searches.

The Court's most detailed description of the police-created exigency rule came in 2011's *Kentucky v. King*.[176] In that case, an undercover officer who bought drugs from a suspect radioed for other officers to follow the suspect into the breezeway of an apartment building.[177] As the officers entered the breezeway, they heard a door shut, but could not determine which of two doors the suspect entered.[178] Because the officers smelled marijuana emanating from behind one door, they knocked loudly on that door and announced their office.[179] After hearing that "things were being moved inside," the officers announced they were coming in and broke down the door.[180] Though the original suspect was not inside, the officers encountered three different individuals with marijuana and cocaine in plain view.[181]

The Supreme Court held that the officers' loud knocking did not create the subsequent exigency—the possible destruction of evidence.[182] According to the Court, "the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment."[183] Because there was no proof that the officers threatened to

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[175] *See* Kentucky v. King, 563 U.S. 452, 461 (2011) ("Over the years, lower courts have developed an exception to the exigent circumstances rule, the so-called 'police-created exigency' doctrine. Under this doctrine, police may not rely on the need to prevent destruction of evidence when that exigency was 'created' or 'manufactured' by the conduct of the police.").

[176] *See id.* ("The exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense" as "the principle that permits warrantless searches.").

[177] *See id.* at 455–56 (describing the factual background of the case where undercover police officers set up an operation to arrest alleged drug dealers).

[178] *Id.* at 456.

[179] *Id.*

[180] *Id.*

[181] *Id.* at 456–57.

[182] *Id.* at 471–72.

[183] *Id.* at 469.

warrantlessly enter before hearing the sounds of evidence destruction, they never threatened a Fourth Amendment violation to create an exigency.[184] The Court refused to inquire into whether it was reasonably foreseeable that the officers' actions would create an exigency, noting that such a test would hamstring officers' ability to react to rapidly-evolving circumstances in the field.[185] Similarly, the Court rejected any inquiry into the officers' possible bad faith, claiming that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."[186] Finally, the Court held that an inquiry into whether the officers' conduct violated standard or best investigative practices would not provide enough guidance to officers in the field and would force courts to make policy judgments best reserved for individual police departments.[187]

The fast-moving circumstances of *Kentucky v. King* drove the Court's decision to narrow the definition of the police-created exigency rule. The Court was concerned that a broad definition would not allow officers to react quickly to genuine emergencies. But the Court failed to consider cases where there is objective evidence that officers deliberately planned to generate exigent circumstances as an excuse for warrantless entry.

The Fourth Amendment should not allow officers to capitalize upon a planned effort to subvert the warrant requirement. Instead, any evidence officers find through an exigency they have created deliberately to subvert the warrant requirement should be suppressed.[188]

In contrast, where officers are reacting to circumstances as they arise and there is no evidence of such a deliberate, planned action to generate exigencies, no additional inquiry into the officers' state of mind is necessary. If officers respond to quickly-evolving circumstances by violating constitutional rights, they are acting in the "heat of the moment"—a mental state that does

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[184] *Id.* at 471–72.

[185] *See id.* at 466 (finding that the reasonable foreseeable test would create unwarranted difficulties for law enforcement officers).

[186] *Id.* at 464 (quoting Horton v. California, 496 U.S. 128, 138 (1990)).

[187] *See id.* at 467–68 (holding that a court's inquiry into a police officer's investigation fails to provide law enforcement clear guidance and enables courts to make judgements on the province of law enforcement).

[188] *See* Whren v. United States, 517 U.S. 806, 813–14 (1996) (noting that Supreme Court precedent currently suggests that the subjective motivations of police officers are not relevant to determining the constitutionality of a search).

not involve the kind of deliberate creation of pretextual exigencies the Court should guard against. Suppression when officers react in the heat of the moment will not curb officer misbehavior; it cannot change officers' spontaneous, instinctual reactions to a perceived emergency because those instincts never consider the evidentiary repercussions of further investigation.

Importantly, a court's inquiry into deliberate planning would require only limited analysis of the officer's state of mind, one based largely on objectively observable evidence. Deliberate planning is more pronounced than mere bad faith, which can be discretely camouflaged during an investigation. Planning requires more time, effort, and energy—and in turn generates more objective evidence of that time and effort that the defendant could present in court.

As an example, consider the response of two officers, Alicia and Brianna, to complaints by neighbors that suspects are using a house to manufacture and sell illegal drugs. Officer Alicia, who was on patrol in the neighborhood when she received a dispatch about the house, arrived at the address and knocked on the front door. She heard someone inside exclaim, "we have to get rid of this stuff!" and then heard the repeated flushing of a toilet. She then broke down the door, discovering evidence of drug sales in plain view.

In contrast, Officer Brianna received a note of the neighbor's complaints as she arrived at the station in the afternoon to begin her shift. Rather than proceeding to the house immediately, Officer Brianna waited until later in the evening when drug sales were more likely. When she arrived at the scene, she waited outside the house, hoping to observe someone suspicious entering. Having no such luck, Officer Brianna turned on her radio and listened for reports of other crimes in the area. She heard of a robbery at a nearby jewelry store, then approached the house and looked for any signs that someone inside could have been involved—even though she knew nobody had entered or exited for hours. After Officer Brianna saw a discarded wool glove near the front porch, she banged loudly on the front door. When Breanna also heard the exclamation "we have to get rid of this stuff!" she rushed in, claiming she feared destruction of the evidence of the recent robbery—only to find evidence of drug sales in plain view.[189]

[189] This factual scenario is based upon the description of a frequent police tactic once described to Alafair S. Burke in her time as a prosecutor. *See* Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 560-61 (2015).

Officer Alicia could constitutionally enter without a warrant because of the apparent exigency—the possible destruction of evidence—occurring inside. Though Alicia's knock at the door was a proximate cause of the exigency, she did not deliberately generate that emergency to avert the Fourth Amendment's warrant requirement; instead, she simply responded to a dispatch, then reacted to an apparent emergency as it arose. On the other hand, Officer Brianna plotted in advance to generate an exigency as a pretext for a warrantless search. Such deliberate creation of an exigency violated the Fourth Amendment. While evidence Officer Alicia recovered may be admissible at a later trial, evidence Officer Brianna recovered should be excluded from trial because of her pretextual malice aforethought in obtaining it.

To ensure that pretextual warrantless searches do not become normalized, courts should also allow defendants to demonstrate that department-wide policies or practices deliberately generate exigencies to avert the warrant requirement. Where most officers in a particular department or office routinely generate identical exigencies, even in the middle of fast-moving investigations, defendants should be able to argue for exclusion under the police-created exigency doctrine. Though an individual actor may not have deliberately averted the warrant requirement, the evidence of department-wide planning to routinely create pretextual exigencies could be imputed to the individual actor.

Gathering evidence of deliberately generated exigencies will be difficult, but not impossible. Just as prosecutors can demonstrate such a mental state through circumstantial evidence suggesting the defendant's intent or planning, a suspect can present circumstantial evidence tending to demonstrate an officer's deliberate creation of exigencies to avert the warrant requirement. Additionally, courts should apply a moderate evidentiary standard to the suspect's proof of deliberately generated exigencies. Rather than requiring proof beyond a reasonable doubt, clear and convincing evidence may be sufficient to demonstrate a police-created exigency. That standard would balance the need to preserve evidence in most cases against the desire to control for wanton violation of Fourth Amendment protections. Where the defendant can provide such evidence, either at the department or individual officer level, courts should exclude evidence discovered through such a pretextual exigency from a later trial.

VI. CONSENT: NEITHER AN EXIGENCY NOR AN EXCEPTION

An additional warrant "exception," consent, applies frequently in officer-individual interactions yet does not fit neatly with the exigent circumstances framework described so far.[190] But consent is not a true exception to the warrant requirement at all. Instead, it is a non-search at its root. This Part argues that consent, much like the other exceptions discussed so far, should be returned to its roots, which would clarify that officers can only rely upon consent to avoid the warrant requirement by meeting a much higher burden to prove that the consent was voluntary.

The justification for officer investigations pursuant to consent is the supposed voluntary nature of the interaction and a respect for the individual's autonomy in freely choosing to grant consent. Under the Court's current jurisprudence, when an individual gives consent for officers to inspect an area, that activity remains a Fourth Amendment search, just not one which requires a warrant or probable cause.[191] In 1973's *Schneckloth v. Bustamonte*, the Court held that searches conducted pursuant to consent fit an exception from the warrant and probable cause requirements.[192] Though such consent must be voluntary, the Court did not apply relatively high standards for measuring the waiver of Sixth Amendment rights that protect the integrity of fact-finding at trial.[193] Instead, the Court applied a totality of the circumstances test to determine if consent to search is voluntary,[194] explicitly noting that officers' failure to inform an individual of his right to refuse consent is merely one

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190 On some accounts, this exception applies to nearly 90% of the warrantless searches that police conduct. *See, e.g.*, Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 511 (2015) (citing JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES 317–18 (4th ed. 2010); RICHARD VAN DUIZEND, L. PAUL SUTTON, & CHARLOTTE A. CARTER, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 21 (1984); Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005)).

191 *See* Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 518 (2015) (citing Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How* Illinois v. Rodriguez *Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 27-28 (1991)) ("One possible conception of a consent search is that it does not constitute a 'search' at all because the person has voluntarily chosen to allow the police to search and therefore no longer expects privacy in the area searched.").

192 Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

193 *Id.* at 242-43 (holding the Fourth Amendment's protections "have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial").

194 *Id.* at 227.

factor to consider.[195] Subsequently, the Court has resisted holding that any particular facts can dispositively undermine the voluntariness of consent to a search.[196] Instead, courts should generally take the perspective of the officers to determine if they could reasonably conclude that a person with authority has provided constitutional consent.[197]

Under current doctrine, consent wholly relieves investigators of any Fourth Amendments requirements; though the Amendment "proscribes unreasonable searches and seizures[,] it does not proscribe voluntary cooperation."[198] Despite the broad constitutional consequences of consent, the Court has not held, or even presumed, that individuals cannot voluntarily consent until they are informed of their right to refuse.[199] Instead, the Court has focused on whether the defendant had any alternative choices, no matter how unattractive those choices may be.[200]

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[195] *Id.* Empirical research suggests that the majority of individuals who consented to a search were unaware that they had the right to refuse. *See* Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 454 (2004) (discussing Illya D. Lichtenberg, Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police-Citizen Encounter 250–51 (1999) (unpublished Ph.D. dissertation, Rutgers University)).

[196] For example, in 1991's *Florida v. Bostick*, officers boarded a bus bound from Miami to Atlanta, inspected the defendant's identification, then sought and obtained his consent to search his luggage. 501 U.S. 429, 431–32 (1991). The Court held that, although the defendant's inability to leave the bus was a "relevant factor," that fact alone would not be dispositive in the totality of the circumstances test. *Id.* at 439. Similarly, in 2001's *United States v. Drayton*, the Court reiterated that a bus passenger could voluntarily consent to a search of their possessions, at the same time reiterating that officers are not required to inform the passenger of their right to refuse such consent. 536 U.S. 194, 197-98, 206-07 (2002).

[197] *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) ("As with other factual determinations bearing upon search and seizure, determination of consent to enter must 'be judged against an objective standard: would the facts available to the officer at the moment . . . "warrant a man of reasonable caution in the belief"' that the consenting party had authority over the premises?") (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

[198] *Bostick*, 501 U.S. at 439.

[199] *See Drayton*, 536 U.S. at 207 ("Nor do this Court's decisions suggest that even though there are no *per se* rules, a presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to cooperate. Instead, the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning.").

[200] *See* Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 523 (2015) (citing Kent Greenfield, *Free Will Paradigms*, 7 DUKE J. CONST. L. & PUB. POL'Y 1, 11–12 (2011)) ("[T]he Court has been quick to find valid consent based simply upon the existence of an alternative choice, without exploring the desirability or feasibility of that option."). According to Burke, this reasoning "exposes a worldview that assumes not only that reasonable people can exercise their options vis-à-vis law enforcement, but also that when they do, the option they exercise

Unlike the other exceptions discussed so far, consent does not have roots in emergency response. Instead, it is the very lack of any emergency, or even a sense of concern on the consenter's part, that defines officer-individual interactions based upon consent. When an individual gives genuinely voluntary consent, they do not feel threatened by the investigation and are therefore willing to cooperate peacefully.

But that hypothetical low-stakes, low-pressure encounter is not reflected in the myriad consent searches that occur in the real world. Instead, intimidation and oblique coercion characterize many consent searches, largely because the Supreme Court's current jurisprudence permits those tactics. The Court simply assesses the voluntariness of consent though a lenient totality of the circumstances test,[201] taking an objective point of view (or, in some cases, even adopting the officers' perspective)[202] to assess whether they could have believed the individual gave consent. Perhaps because that conception does not require assessing the individual's views of the interaction, the Court has refused even to require officers to inform an individual of their right to refuse consent.[203] Unsurprisingly, empirical research suggests that the majority of individuals who consented to a search were unaware that they had the right to refuse.[204]

Consent should be returned to its roots; a non-search that only arises when the consent is genuine.[205] The mere fact that individuals have at least a

is preferred." Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 524 (2016).

201 *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) ("[T]he question whether a consent to a search was in fact 'voluntary' . . . is a question of fact to be determined from the totality of all the circumstances.").

202 Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How* Illinois v. Rodriguez *Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerated the Excusability of Police Error*, 59 TENN. L. REV. 1, 11 (1991).

203 *See Schneckloth*, 412 U.S. at 249 (explaining that knowledge of the right to refuse is not required to establish voluntary consent); *Drayton*, 536 U.S. at 207 ("The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search.").

204 Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 454 (2004) (discussing Illya D. Lichtenberg, Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police-Citizen Encounter 250–51 (1999) (Ph.D. dissertation, Rutgers University) (on file with author)).

205 *See* Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 518 (2015) (citing Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How* Illinois v. Rodriguez *Demeans Consent, Trivialized Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 27–28 (1991)) ("One possible conception of a

theoretical alternative when officers request consent—refusing, no matter how intimidating the request might be—should not assure the voluntariness of consent. Such reasoning "exposes a worldview that assumes not only that reasonable people can exercise their options vis-à-vis law enforcement, but also that when they do, the option they exercise is preferred."[206] The Court should rethink this presumption, perhaps in tandem with its recent cases considering government aggregation of data about individuals. Just as cases like *Carpenter v. United States* are dubious that individuals act "voluntarily" when they apprise themselves of third-party digital services that are a practical necessity of modern life,[207] the Court should be wary of consent as genuine in light of the frequency and ease with which officers obtain supposedly voluntary agreements for searches in today's society.

Officers should do much more than simply ask for consent to ensure that any following grant of authority is genuine. At a minimum, they should notify suspects of their right to refuse consent, as many others have suggested.[208] That alone may not be enough, as empirical research suggests that such warnings have little effect on the frequency with which consent is granted.[209] Possible explanations for this are many. Individuals may think that officers will

consent search is that it does not constitute a 'search' at all because the person has voluntarily chosen to allow the police to search and therefore no longer expects privacy in the area searched.").

[206] Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 524 (2016).

[207] *See* Michael Gentithes, *The End of* Miller*'s Time: How Sensitivity Can Categorize Third-Party Data After* Carpenter, 53 GA. L. REV. 1039, 1059–60 (2019); Carpenter v. United States, 138 S. Ct. 2206, 2210 (2018) (noting that cell phones are "such a pervasive and insistent part of daily life that carrying one is indispensable to participation in modern society").

[208] *See, e.g.*, Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 465–66 (2004); Brian R. Gallini, Schneckloth v. Bustamonte*: History's Unspoken Fourth Amendment Anomaly*, 79 TENN. L. REV. 233, 235–36 (2012); Craig Hemmens & Jeffrey R. Maahs, *Reason to Believe: When Does Detention End and a Consensual Encounter Begin? An Analysis of* Ohio v. Robinette, 23 OHIO N.U. L. REV. 309, 346 (1996); Christo Lassiter, *Consent to Search by Ignorant People*, 39 TEX. TECH L. REV. 1171, 1177 (2007); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 364 (2001).

[209] *See* Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 553 (2015) (citing Illya Lichtenberg, Miranda *in Ohio: The Effects of* Robinette *on the "Voluntary" Waiver of Fourth Amendment Rights*, 44 HOW. L.J. 349, 360–67 (2001)) ("[E]mpirical evidence demonstrates that, just as most people waive their *Miranda* rights, consent-search warnings have very little effect, most likely because of the inherent social authority that comes with police interactions.").

presume their innocence if they consent[210] or that the failure to consent will only intensify the encounter and lead to a reprisal worse than a search.[211] Officers might also be required to notify individuals that they can limit the scope of their consent or later revoke it.[212] Only if officers do more to ensure that consent is genuine should they have free reign to investigate without first seeking a warrant.

By assuring that consent is genuine, officers can clarify that the individual no longer has a reasonable expectation of privacy in the area upon which they later intrude.[213] The officers' actions thus neither raises the tension and danger of the interaction nor implicates Fourth Amendment protections. Consent should not be a species of search accompanied by a categorical exemption from the warrant requirement. Consent should be a genuinely voluntary, low-stakes interaction that does not implicate the individual's Fourth Amendment rights.

CONCLUSION

The Fourth Amendment's warrant requirement has so many exceptions that it is scarcely a requirement at all. Many of those exceptions apply in the everyday interactions between officers and individuals that have become a source of both tension and danger in today's America. Those exceptions obfuscate the scope of officer's constitutional ability to search citizens, leading to distrust and, ultimately, danger.

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[210] *See* L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons*, 99 GEO. L.J. 1517, 1523 (2011) ("Perhaps the most pervasive example of an activity that law-abiding persons take to avoid a search is, ironically, consenting to a search."); John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1118 (2007) (cited in Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 527 n.127 (2015)).

[211] Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1013–14 (2002) (cited in Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 527 n.126 (2015)).

[212] *See* Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 553 (2015) ("A warning that the individual has a right to refuse does not make clear, for example, that his refusal to cooperate cannot be used against him, that he has the right to limit the scope of the search, and that he can revoke consent at any time.").

[213] *See* Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How* Illinois v. Rodriguez *Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerated the Excusability of Police Error*, 59 TENN. L. REV. 1, 12 (1991) (noting that Supreme Court decisions prior to 1990 "determined validly consented intrusions to be constitutional only because consent withdrew a resident's expectation of privacy and thus made the reasonableness requirement of the Fourth Amendment *inapplicable* to the resulting police intrusion.") (emphasis in original).

This Article proposes a way to lower the temperature in those interactions by simplifying the rules. Using the exigent circumstances doctrine that the Supreme Court has recently reaffirmed, the Court should return many of the separately-named exceptions to their roots as a means for officers to respond to emergencies. Doing so will reduce or eliminate many of those exceptions.

The Court should then take steps to ensure that the exigent circumstances exception remains limited. First, it should clarify that officers must have "reasonable suspicion" that a genuine emergency is afoot before warrantlessly searching. Second, it should hold that evidence officers discover after deliberately creating a pretextual exigency to avert the warrant requirement will be excluded from trial.

These changes would be simple, yet revolutionary. They would significantly clarify Fourth Amendment doctrine in officer-individual interactions. And they would lower the temperature in everyday interactions between officers and the individuals they are sworn to protect.