Expedient Knocks and Cowering Citizens: The Supreme Court Enables Police to Manufacture Emergencies by Pounding on Doors at Will in *Kentucky v. King*

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ABSTRACT

This article analyzes Kentucky v. King, *in which the Supreme Court considered whether a warrantless entry based on exigent circumstances satisfied Fourth Amendment reasonableness even though officers, in knocking on the door, could have foreseen that their own actions could provoke the emergency of occupants attempting to destroy contraband. The* King *Court ruled that the entry would be reasonable so long as the conduct of police prior to entry was, in itself, entirely lawful. This work examines the concerns created by* King's *ruling. This article asserts that* King *has diminished the Court's warrant requirement by undermining its status as a constitutional rule.* King's *reasoning has also altered the definition of exigent circumstances by inserting a new component based on the occupant's reaction to police conduct. Moreover,* King's *new formulation of exigency has potentially impacted the Fourth Amendment's definition of seizure of a person. Finally,* King's *refusal to consider the foreseeability of police behavior has altered the balance between the interests of law enforcement and the citizenry.*

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INTRODUCTION

Imagine being an officer who has just chased a criminal into an apartment's breezeway. Your quarry, a drug dealer, has just slipped beyond your reach and into either one of two rooms. The smell of marijuana wafts outside both doors of these rooms. In the adrenaline rush, do you suddenly stop all pursuit and begin the intricate and careful planning needed to obtain a search warrant under the Fourth Amendment?[1] Or, heart still pounding, do you knock on the door you believe most likely entered by your offender? The temptation to forgo the warrant process, with its tedious paperwork, sworn affidavits, and presentation to a magistrate, is obvious. In that moment of decision, abstractions of probable cause and detached, neutral magistrates might seem distant; you know in your heart that the person you are seeking has willingly broken the law because your colleague, a trained officer, has just seen him do so. Why not simply flush out the wrongdoer by knocking on the door? The criminal himself knows he is guilty and will most likely try to evade responsibility by flushing his inventory. Once you hear the telltale rush of activity, you simply enter to avoid the emergency caused by the threatened destruction of evidence.

The Court, faced with essentially this scenario in *Kentucky v. King*, invited the officers to pound away at the door.[2] Confronted with the potentially problematic fact that police might be creating or manufacturing exigent circumstances by banging on the door and thus provoking destruction of evidence,[3] *King* rejected such concerns because, "in some sense the police always create the exigent circumstances."[4] *King*

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[1] U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[2] Kentucky v. King, 131 S. Ct. 1849, 1854 (2011). In *King*, officers "banged on the left apartment door 'as loud as [they] could.'" *Id.* (alteration in original) (quoting Joint Appendix at 22-23, *King*, 131 S. Ct.1849 (No. 09-1272)).

[3] *Id.* at 1854, 1857.

[4] *Id.* at 1857 (quoting United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990)). The *King* court explained that in most cases where evidence is destroyed, such destruction results from a fear that police will otherwise obtain it. Specifically, Justice Alito opined,

> [I]n the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the

therefore reasoned, "a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement."[5] *King* instead narrowed its focus to the simple question of whether the police knock, in itself, was a lawful act under the Fourth Amendment.[6]

The Court took a distinctly different approach over a half-century ago in *Johnson v. United States*, where it weighed the Fourth Amendment issues raised by an official knock at the door.[7] In *Johnson*, the Court emphasized the important protection offered by warrants, ruling that the determination of when privacy must yield to police intrusion was "to be decided by a judicial officer, not by a policeman or government enforcement agent."[8] Any other rule would "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-states where they are the law."[9] *King* thus represents an erosion of the Court's previous preference for warrants. In allowing police to trigger exigent circumstances with a knock on the door, *King* has shifted the balance from the citizens' rights to security and privacy toward the government's law enforcement rights.

This Article begins in Part II with a review of precedent needed for a full understanding of *King*: the warrant requirement, exigent circumstances, and Fourth Amendment privacy in the home. Part III examines *King*—its facts and the Court's opinion. Finally, Part IV critically analyzes the consequences of *King*'s reasoning, including the Court's diminution of the warrant requirement, its curious redefinition of exigent circumstances, the potential impact of its ruling on Fourth

> destruction is fear that the evidence will fall into the hands of law enforcement. Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain. Persons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police. Consequently, a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement.

Id.

[5] *Id.*

[6] *Id.* at 1854.

[7] Johnson v. United States, 333 U.S. 10 (1948).

[8] *Id.* at 14.

[9] *Id.* at 17.

Amendment seizure of the person litigation, and its encouragement of official intrusions into people's homes.

I. OVERVIEW OF RELEVANT FOURTH AMENDMENT FUNDAMENTALS

A. The Court's Warrant Requirement

The Fourth Amendment is composed of two clauses: the reasonableness clause, which declares that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,"[10] and the warrant clause, which mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[11] These two clauses are connected by the unhelpfully ambiguous word "and," leaving the precise relationship between the clauses in question.[12]

The Court has long aimed to resolve this matter by employing the warrant clause as a yardstick for measuring Fourth Amendment reasonableness, thus deeming a warrantless search, when not supported by an exception, actually abhorrent to our laws.[13] Reliance on the Warrant Clause to flesh out reasonableness grew out of logical necessity, for the Fourth Amendment offered no other concrete guidelines for judging searches and seizures. The Court feared that simply deeming a particular action "reasonable" would provide nothing more than a subjective conclusion about what seemed proper.[14] The Court asserted that, "To say that the search must be reasonable is to require some criterion of reason."[15] Therefore, "in a long line of cases, this Court has

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[10] U.S. CONST. amend. IV.

[11] *Id.*

[12] *Id.* For an apt discussion of the Court's struggle with the two clauses, see Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 383-84 (1988).

[13] *See* Agnello v. United States, 269 U.S. 20, 32 (1925) ("The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws.").

[14] Chimel v. California, 395 U.S. 752, 764-65 (1969). The Court worried that affixing the label of reasonableness would amount to making an unsupported assertion "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests." *Id.*

[15] *Id.* at 765.

stressed that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"[16] The warrant requirement thus became a fundamental principle to be jealously guarded from corrosive claims of police efficiency.[17]

The warrant requirement was not a mere formality, for it "serve[d] a high function" of ensuring that the decision to invade a citizen's privacy would be made by the objective mind of a magistrate.[18] The need for a warrant could be traced to the abuse of the "obnoxious writs of assistance"[19] which were issued not by a neutral and detached judge, but on executive authority, which provided the king's agents sweeping power to search at large.[20] James Otis, a famous lawyer in the colonies, considered writs of assistance "the worst instrument of arbitrary power" which "placed the liberty of every man in the hands of every petty officer" rather than with those of a judge.[21]

The Court candidly described the human dynamics underlying search decisions, noting, "Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they

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[16] Thompson v. Louisiana, 469 U.S. 17, 19-20 (1984) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). In *Minnesota v. Dickerson*, the Court referred to the fact that it had relied on this presumption "[t]ime and again." 508 U.S. 366, 372 (1993). The Court's trust in the judiciary to protect a person's Fourth Amendment rights extended to seizures as well as searches. In *Beck v. Ohio*, the Court determined, "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause." 379 U.S. 89, 96 (1964). In *Payton v. New York*, the Court deemed it a "'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." 445 U.S. 573, 586 (1980).

[17] The Court deemed the warrant requirement a "general rule," Coolidge v. New Hampshire, 403 U.S. 443, 512 (1971), and a "basic principle of Fourth Amendment law," *id.* at 477, which was not to be balanced away by being "'weighed' against the claims of police efficiency," *id.* at 481.

[18] McDonald v. United States, 335 U.S. 451, 455 (1948).

[19] Boyd v. United States, 116 U.S. 616, 623 (1886).

[20] United States v. Chadwick, 433 U.S. 1, 8 (1977).

[21] *Boyd,* 116 U.S. at 625 (quoting James Otis, Against Writs of Assistance (Feb. 1761), *in* 2 THE WORKS OF JOHN ADAMS 524 (Charles Francis Adams ed., 1850)). John Adams viewed the debate over writs of assistance as pivotal in moving the colonies to revolution, declaring of Otis' statement, "then and there was the . . . first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Id.*

violate the privacy of the home."[22] Recognizing the reality of human frailty, the Court has explicitly stated that a crucial aim of the Fourth Amendment was to mandate that factual inferences be made by the sober second thought of a neutral magistrate rather than by an officer caught up in competition with other officers or agencies in catching a criminal.[23] Thus, "[w]hen the right of privacy must reasonably yield to the right of a search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."[24] Ignoring this rule would reduce the Fourth Amendment "to a nullity."[25]

The warrant requirement, however, has not been the only word on Fourth Amendment reasonableness. Even in cases that recognize the mandate, there is mention of a rival view in which "the ultimate touchstone of the Fourth Amendment is reasonableness."[26] This approach notes, "The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.'"[27] Justice Scalia has declared the "victory" of the warrant requirement to be "illusory," for it had "become so riddled with exceptions that it was basically unrecognizable."[28] One exception that has made such inroads is exigent circumstances.

B. Exigent Circumstances

[22] *McDonald*, 335 U.S. at 456. The Court has described the warrant process as "an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended," and complained that "[o]fficers instead of obeying this mandate have too often, as shown by numerous cases in this Court, taken matters into their own hands and invaded the security of the people against unreasonable search and seizure." United States v. Jeffers, 342 U.S. 48, 51 (1951).

[23] *See* Johnson v. United States, 333 U.S. 10, 14 (1948). Specifically, the court noted "[t]he point of the Fourth Amendment" is to require that factual inferences justifying a search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.*

[24] *Id.*

[25] *Id.* The Court has recently reiterated its rule that "warrantless searches 'are *per se* unreasonable under the Fourth Amendment.'" City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010). *See also* Groh v. Ramirez, 540 U.S. 551, 559 (2004).

[26] Brigham City v. Stuart, 547 U.S. 398, 403 (2006). The competing interpretations of the Fourth Amendment's two clauses, the Warrant Clause and the Reasonableness Clause, were adroitly analyzed in Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985).

[27] California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring).

[28] *Id.* at 582.

As noted by Justice Scalia, the Court has recognized exceptions to the warrant mandate, including that of exigent circumstances.[29] Exigent circumstances include various kinds of emergency situations. In particular, exigency has been divided into three categories: 1) life-threatening exigencies, 2) hot pursuit, and 3) preserving evidence from destruction.[30] The Court addressed exigencies to life or safety in the 2006 case, *Brigham City v. Stuart*.[31] In *Stuart*, police were arriving at a home and came upon a 3:00 a.m. melee where a juvenile broke away from four adults to strike one of the adults so severely that he spit blood into a nearby sink.[32] The Court deemed the warrantless police entry to break up the fight reasonable because of the need "to protect or preserve life or avoid serious injury."[33] As for hot pursuit, an illustration of this exigency is provided in *United States v. Santana*, where police attempted to arrest a drug dealer standing in the doorway of her own home.[34] When officers approached to arrest "Mom Santana," she retreated into the vestibule of her home, prompting officers to chase her through the door and capture her in the home's entryway.[35] The Court justified this warrantless entry to arrest a fleeing felon as hot pursuit, even though the chase "ended almost as soon as it began."[36]

The last category of exigency is the need to prevent the destruction of evidence. The Court considered this warrant exception as early as 1948, in *Johnson v. United States*, where a narcotics officer received a tip that several people were smoking opium at the Europe Hotel in Seattle, Washington.[37] Outside the room, police recognized the

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[29] *Id.* (noting that about twenty such exceptions existed at the time of his writing). For a history of the Supreme Court's treatment of exigency with particular reference to destruction of evidence, see Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283, 289-300 (1988). For a discussion including search incident to arrest in exigent circumstances, see Catherine A. Fiske, *Clean Sweeps: Protecting Officer Safety and Preventing the Imminent Destruction of Evidence*, 55 U. CHI. L. REV. 684 (1988).

[30] *See generally* Clifford S. Fishman, *Interception of Communications in Exigent Circumstances: The Fourth Amendment, Federal Legislation, and the United States Department of Justice*, 22 GA. L. REV. 1(1987).

[31] Brigham City v. Stuart, 547 U.S. 398, 403-04 (2006).

[32] *Id.* at 400-01.

[33] *Id.* at 403, 406-07.

[34] United States v. Santana, 427 U.S. 38, 40 (1976).

[35] *Id.*

[36] *Id.* at 43.

[37] Johnson v. United States, 333 U.S. 10, 12 (1948).

distinctive smell of burning opium.[38] Police knocked on the door, were admitted, and ultimately searched for the source of the smell.[39] The Court, in considering whether the search was justified by exigent circumstances, determined that "[n]o evidence or contraband was threatened with removal or destruction."[40] *Johnson* did surmise that the opium fumes were in danger of dissipating, but determined that the police could not recover and seize this odor in any event.[41]

In yet another 1948 case, the Court revisited the destruction of evidence exigency in *McDonald v. United States*.[42] In *McDonald*, police performed a warrantless search of the defendant's home as part of an investigation of a numbers operation.[43] Before any police seizure of items, one officer stood on a chair and looked through a transom to observe "numbers slips, money piled on the table, and adding machines."[44] The Court found no exigency, because it determined that the evidence was not being destroyed, nor in danger of being so since the criminals were "busily engaged in their lottery venture."[45]

Exigent circumstances based on potential evidence destruction continued to be a hard sell for the Court. In *United States v. Jeffers*, police were unable to justify a warrantless search of a hotel room for cocaine in the occupants' absence, because there lacked any proof of "imminent destruction, removal, or concealment of the property intended to be seized."[46] Police in *Vale v. Louisiana*, which involved a search of a home following the arrest of a heroin dealer on the front steps of his house, fared no better with the Court.[47] In *Vale*, the state Supreme Court upheld the search since it involved narcotics, which could be removed, concealed, or destroyed.[48] The state Court even speculated that potential confederates inside the home could destroy the drugs.[49] The Court in *Vale* rejected such reasoning, noting that the government had failed to carry its burden to demonstrate exigent circumstances.[50]

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[38] *Id.*
[39] *Id.*
[40] *Id.* at 15.
[41] *Id.*
[42] McDonald v. United States, 335 U.S. 451 (1948).
[43] *Id.* at 452-53.
[44] *Id.* at 453.
[45] *Id.* at 455.
[46] United States v. Jeffers, 342 U.S. 48, 52 (1951).
[47] Vale v. Louisiana, 399 U.S. 30, 32-33 (1970).
[48] *Id.* at 34.
[49] *Id.*
[50] *Id.*

The government finally convinced the Court of exigency in the seminal evidence destruction case, *Schmerber v. California*.[51] Schmerber, a driver who was hospitalized for injuries he sustained after drunkenly colliding with a tree, presented police with the inexorable decrease of alcohol in his blood as it was naturally filtered through the liver and kidneys.[52] The officer at the hospital directed a physician to obtain a blood sample despite the patient's refusal of consent.[53] The *Schmerber* Court understood that the officer faced an emergency in which the delay necessary to obtain a warrant could result in destruction of evidence, because, "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system."[54] Since time had already elapsed in taking Schmerber to the hospital and in investigating the accident scene, there existed no time to seek permission from a judge by obtaining a warrant.[55] The Court thus accepted exigency as a warrant exception only when the facts presented a key difference: the evidence in question was in the process of being destroyed rather than merely being in danger of such destruction.

The Court, as recently as its 2010 term, has emphasized that any such exigency exceptions are to be rare, specific, and tailored.[56] Further, the police "bear a heavy burden" when attempting to fit their conduct within one of these exceptions.[57] The bar the government must reach is particularly high, an "urgent need" only "might justify" a warrantless search.[58] For exigency, the Court will only "tolerate" departures from the warrant mandate "when an exigency makes a warrantless search *imperative* to the safety of the police *and* of the community."[59] Therefore, exigency

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[51] Schmerber v. California, 384 U.S. 757 (1966).
[52] *Id.* at 758 n.2.
[53] *Id.* at 758-59.
[54] *Id.* at 770.
[55] *Id.* at 771.
[56] *See* City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010) ("Although as a general matter, warrantless searches 'are *per se* unreasonable under the Fourth Amendment,' there are 'a few specifically established and well-delineated exceptions' to the general rule." (quoting Katz v. United States, 389 U.S. 347, 357 (1967))); Thompson v. Louisiana, 469 U.S. 17, 21 (1984) (characterizing warrant exceptions as "narrow and specifically delineated"); Payton v. New York, 445 U.S. 573, 587 n.25 (1980) (noting that warrant exceptions are "carefully defined"); Jones v. United States, 357 U.S. 493, 499 (1958) ("The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn.").
[57] Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984).
[58] *Id.* at 750.
[59] Illinois v. Rodriguez, 497 U.S. 177, 191 (1990) (emphasis added).

was a question not of the lawfulness of a particular official action in isolation, but of facing a situation so dangerous and time sensitive that police could not first obtain a warrant.[60]

Exigency meant a true emergency "demanding immediate action"[61] to stave off a threat to "life or limb."[62] As examples, the Court offered hot pursuit of a fleeing felon, actual destruction of evidence, and ongoing fire.[63] The case creating "hot pursuit" of a fleeing felon was *Warden v. Hayden*, which involved the chase of an armed robber who held-up the victim only minutes before officers arrived.[64] The *Hayden* Court allowed the warrantless entry, fearing that delay to obtain a warrant "would gravely endanger" the lives of police and others.[65] Moreover, *Schmerber* involved the actual destruction of evidence, for as police were considering a search, Schmerber, with each beat of his heart, was eliminating alcohol from his bloodstream.[66] For the case involving a fire, *Michigan v. Tyler*, the Court stated the obvious, "A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.'"[67]

The exigent circumstances exception was thus conceived as a rule borne of necessity enabling police to act when urgency required it.[68] The narrow view of exigency explains the Court's use of language referring to "an emergency situation demanding immediate action,"[69] "compelling needs,"[70] and "grave emergency."[71] Exigent circumstances were to be so

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[60] In this regard, the Court has specified, "The burden rests on the State to show the existence of such an exceptional situation." Vale v. Louisiana, 399 U.S. 30, 34 (1970).

[61] Mincey v. Arizona, 437 U.S. 385, 392 (1978). In a similar vein in *Warden v. Hayden*, the Court justified the warrantless entry and search by noting, "Speed here was essential." 387 U.S. 294, 299 (1967).

[62] *Mincey*, 437 U.S. at 393.

[63] *Welsh*, 466 U.S. at 750.

[64] *Hayden*, 387 U.S. at 297. Another hot pursuit case mentioned by the *Welsh* Court was *United States v. Santana*, a case in which police had an actual altercation with the defendant before she entered her home. 427 U.S. 38, 42-43 (1976).

[65] *Hayden*, 387 U.S. at 298-99.

[66] Schmerber v. California, 384 U.S. 757, 770 (1966). The Court noted, "We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Id.* It therefore concluded that "there was no time to seek out a magistrate and secure a warrant." *Id.* at 771.

[67] Michigan v. Tyler, 436 U.S. 499, 509 (1978).

[68] The *Welsh* Court thus spoke of demonstrating an "urgent need." *Welsh*, 466 U.S. at 750.

[69] Mincey v. Arizona, 437 U.S. 385, 392 (1978).

[70] *Id.* at 394.

pressing that police acted without a warrant because there simply was no time to obtain one.[72] Moreover, the Court further restricted exigent circumstances in *Welsh v. Wisconsin,* a case in which a motorist observed Edward Welsh erratically swerve his car off a road into an open field.[73] Although the witness had stopped and suggested to Welsh that he wait for roadside assistance, Welsh instead walked away from the scene to his nearby home.[74] When police later entered Welsh's home and found him lying naked in his bed, they arrested him for driving under the influence of an intoxicant and requested he submit to a breath-analysis test.[75] Welsh's refusal led to suspension of his driver's license.[76] Considering Welsh's offense to be "relatively minor,"[77] the Court added another factor to limit exigency when entering a home to arrest an occupant: "the gravity of the underlying offense."[78] The actual implementation of this test necessitated the making of fine distinctions,[79] as shown in *Minnesota v. Olson*, where the Court refused to find exigency despite the fact that the arrestee was involved in a murder.[80] *Olson* found a lack of exigency because the person within the home "was known not to be the murderer but thought to be the driver," and the murder weapon had already been recovered.[81] In the recent case of *Brigham City v. Stuart,* the Court emphasized that the emergency supporting the exception in its case involved "ongoing violence" which officers personally observed occurring in the home.[82] The Court's exigent circumstances involved dynamic situations of dire consequences that forced police to forgo a warrant; as the Court characterized exigency in *Roaden v. Kentucky*, the

[71] *McDonald*, 335 U.S. at 455. Further, in *Illinois v. McArthur*, the Court noted that exigent circumstances involved a claim that was "specially pressing" or an "urgent law enforcement need." 531 U.S. 326, 331(2001).

[72] *Tyler*, 436 U.S. at 509 ("[A] warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant.").

[73] *Welsh*, 466 U.S. at 742.

[74] *Id.*

[75] *Id.* at 743.

[76] *Id.* at 747.

[77] *Id.* at 750.

[78] *Id.* at 753.

[79] Minnesota v. Olson, 495 U.S. 91, 100 (1990) (characterizing the analysis as a "fact-specific application of the proper legal standard").

[80] *Id.* at 101.

[81] *Id.*

[82] Brigham City v. Stuart, 547 U.S. 398, 405 (2006).

circumstances had to be such that "police action literally must be now or never."[83]

C. The Sanctity of the Home

The Court has long recognized that the home "is entitled to special protection as the center of the private lives of our people."[84] One half-century ago, the Court deemed the Fourth Amendment's "very core" to be "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[85] The Court has repeatedly mentioned the "ancient adage" that "a man's home is his castle,"[86] and even quoted William Pitt, Earl of Chatham, as saying,

> The poorest man in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all the force dares not cross the threshold of the ruined tenement! [87]

Since the issue foremost in the minds of the Framers was searches and seizures "involving invasions of the home,"[88] "physical entry of the home [was] the chief evil" which the Fourth Amendment protected against.[89]

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[83] Roaden v. Kentucky, 413 U.S. 496, 505 (1973).

[84] Georgia v. Randolph, 547 U.S. 103, 115 (2006); Minnesota v. Carter, 525 U.S. 83, 99 (1998). *See also* Welsh v. Wisconsin, 466 U.S. 740, 748 (1984) ("It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" (quoting United States v. U.S. District Court (*Keith*), 407 U.S. 297, 313 (1972))); Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 490-93 (2009) (analyzing how privacy in the home might be viewed).

[85] Silverman v. United States, 365 U.S. 505, 511 (1960).

[86] *Randolph*, 547 U.S. at 115; Wilson v. Layne, 526 U.S. 603, 609 (1999); Miller v. United States, 357 U.S. 301, 307 (1958).

[87] *Miller*, 357 U.S. at 307. The *Miller* Court also noted that Coke thought, "the breaking of a house was limited to cases in which a writ, now our warrant, had been issued." *Id.* at 308.

[88] United States v. Chadwick, 433 U.S. 1, 8 (1977).

[89] *Keith*, 407 U.S. 297, 313 ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."). The *Payton* Court saw the warrant as the primary protection against this chief evil because "the warrant procedure minimizes the danger of needless intrusions of that sort." Payton v. New York, 445 U.S. 573, 586 (1980).

Perhaps the Court's most passionate defense of residential privacy came in *Kyllo v. United States*, where a government agent employed a thermal imager to detect heat emanating from a home, indicating that the occupants were cultivating marijuana in the garage.[90] The *Kyllo* Court, in deeming the viewing of a home with such an imager to be a search, declared that "the Fourth Amendment draws a firm line at the entrance to the house."[91] This line "must not only be firm but also bright," because in the home, "*all* details are intimate details, because the entire area is held safe from prying government eyes."[92] *Kyllo* thus concluded that, "[w]ith few exceptions, the question of whether a warrantless search of a home is reasonable and hence constitutional must be answered no."[93]

II. *KENTUCKY V. KING*

A. Facts

On October 13, 2005, Lexington-Fayette County police conducted a "buy bust" operation near an apartment complex in which Hollis Deshaun King resided.[94] Police had a confidential informant buy cocaine from a "'street-level' dealer" while Officer Steven Cobb and narcotics detectives were waiting nearby in marked police cars for the completion of the sale.[95] Undercover Officer Gibbons, after watching the completion of a drug deal from an unmarked car in a nearby parking lot,[96] gave a prearranged signal alerting officers to move in and make the arrest.[97] Gibbons "told the officers that the suspect was moving quickly toward the breezeway of an apartment building, and urged them to 'hurry up and get there' before the dealer entered an apartment."[98]

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[90] Kyllo v. United States, 533 U.S. 27, 29-30 (2001).
[91] *Id.* at 40.
[92] *Id.* at 37. It was the very fact that the details were in and about the home that made them intimate (the details were "intimate because they were details of the home.") *Id.* at 38.
[93] *Id.* at 31.
[94] King v. Kentucky, 302 S.W.3d 649, 651(Ky. 2010). The buy bust occurred on Centre Parkway in Lexington, Kentucky. *Id.*
[95] *Id.*
[96] Kentucky v. King, 131 S. Ct. 1849, 1854 (2011).
[97] *King*, 302 S.W.3d at 651.
[98] *King*, 131 S. Ct. at 1854.

The uniformed officers immediately exited their cars and headed toward the breezeway the suspect had entered,[99] where they smelled "a very strong odor of marijuana" and heard a door shut.[100] The officers were uncertain whether the suspect had entered the apartment on the right or on the left of the breezeway.[101] Gibbons had actually radioed that the suspect had entered the right apartment, but the uniformed officers, no longer in their cars, failed to hear this last piece of information.[102] Smelling marijuana emanating from the left apartment, Officers surmised that the left door must have been recently opened.[103] The officers banged as loud as they could on the apartment door, repeatedly shouting, "Police."[104] Once they had started their pounding, police heard movement inside the apartment.[105]

Fearing drug-related evidence was "about to be destroyed," the officers announced that they "were going to make entry inside the apartment."[106] Police kicked in the door, finding three people in the room: King, King's girlfriend, Jamela Washington, and a guest, Clarence Johnson.[107] Contrary to the officers' fears of evidence destruction, "Johnson was still smoking marijuana, while Washington and King sat nearby."[108] Police found about 25 grams of marijuana on the coffee table in the middle of the room and 4.6 ounces of cocaine on the kitchen counter.[109] In a later search, police found "crack cocaine, $2,500 in cash, three cell phones, scales with cocaine residue, and other drug

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[99] Petition for Writ of Certiorari at 2, *King*, 131 S. Ct. 1849 (No. 09-1272).

[100] *King*, 131 S. Ct. at 1854.

[101] *Id.*

[102] *Id.*; *King*, 302 S.W.3d at 651.

[103] *King,* 302 S.W.3d at 651. Officer Cobb testified, "As we got closer to the back left apartment, we could tell that it seemed to be the source of that, almost as if the door had been slammed right there." Brief of Respondent at 2, *King*, 131 S. Ct. 1849 (No. 09-1272).

[104] Specifically, police "banged on the left apartment door 'as loud as [they] could' and announced, 'This is the police' or 'police, police, police.'" *King*, 131 S. Ct. at 1854 (alteration in original) (quoting Joint Appendix, *supra* note 2).

[105] Officer Cobb testified that, "'[a]s soon as [the officers] started banging on the door,' they 'could hear people inside moving,' and '[i]t sounded as [though] things were being moved inside the apartment.'" *Id.* (alteration in original) (quoting Joint Appendix, *supra* note 2, at 24). No one inside the apartment responded verbally to the knocking. Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *King*, 131 S. Ct. 1849 (No. 09-1272).

[106] Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 105.

[107] *King*, 131 S. Ct. at 1854; *King*, 302 S.W.3d at 652.

[108] *King*, 302 S.W.3d at 652.

[109] *Id.*; Brief of Respondent, *supra* note 103, at 3.

paraphernalia."[110] Finally, police entered the apartment on the right, finding the drug dealer who had been the target of their investigation.[111]

B. The Court's Opinion in *King*

The Court, in an opinion written by Justice Alito, began with the basics, noting the Fourth Amendment's reasonableness and warrant requirements and recognizing as a "basic principle" that warrantless searches are "presumptively unreasonable."[112] *King* also acknowledged the special privacy of the home by reiterating, "The Fourth Amendment has drawn a firm line at the entrance to the house."[113] The Court declared exigent circumstances to be a "well established"[114] and "well-recognized"[115] warrant exception that covered several emergency situations, including emergency aid, hot pursuit, and prevention of evidence destruction.[116]

Justice Alito then addressed the lower courts' "so-called 'police exigency' doctrine" which forbade officers from manufacturing an exigency to avoid the warrant requirement.[117] *King* feared that such a limit on police entry would unduly shrink the reach of the warrant exception since, in some sense, police "always create" exigent circumstances.[118] The Court dismissed the "welter of tests devised by the lower courts" by ruling that "warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement."[119] Such reasonableness is

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110 *King*, 302 S.W.3d at 652.
111 *King*, 131 S. Ct. at 1855.
112 *Id.* at 1856.
113 *Id.*
114 *Id.* at 1853.
115 *Id.* at 1856.
116 Among the "several exigencies" *King* identified was "the 'emergency aid' exception" where "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Id.* Hot pursuit, created in *Warden v. Hayden*, *see supra* notes 64-65 and accompanying text, allowed police to chase a fleeing felon into a home minutes after the crime without first obtaining a warrant. 387 U.S. 294, 297-99 (1967).
117 *King*, 131 S. Ct. at 1857.
118 *Id.*
119 *Id.* at 1857-58. *King* rejected the following lower court requirements as "unsound": (1) "bad faith," in which courts had inquired whether police deliberately created exigent circumstances in bad faith as a means of avoiding the warrant requirement, *id.* at 1859; (2) "reasonable foreseeability," where courts had rejected a claim of exigency when it

measured simply by ensuring that "police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment."[120] *King* thus trapped itself in a circle of reasoning: manufacturing exigency did not violate the Fourth Amendment if it was reasonable, and police conduct which does not violate or threaten to violate the Fourth Amendment is reasonable "and thus allowed" by the Fourth Amendment.[121]

King likened its rule to *Horton v. California*'s removal of the "inadvertence" requirement for plain view[122] by noting, "we have held that law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made."[123] *Horton* had declared that the "essential predicate" to any valid seizure was simply "that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed."[124] The officer's motive in going to the spot of seizure was irrelevant, for "the Fourth Amendment requires only that the steps preceding the seizure be lawful."[125] Similarly, in the consent context, an officer's approach of a person "with the hope or expectation of obtaining consent" does not invalidate consent given to an officer so long as the officer was "lawfully present" when seeking consent.[126] Thus, the reasonableness of the police conduct in question, whether it is entry into a home, seizure of an item, or request for consent, is assessed by ensuring the validity of all official steps preceding it. Speculation about an officer's predictions or an individual's likely reactions is simply not part of the analysis.

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was reasonably foreseeable that police actions would create exigent circumstances, *id.*; (3) "probable cause and time to secure a warrant," in which courts had faulted police for knocking on the door instead of seeking a warrant when they had the probable cause and time to do so, *id.* at 1860; and (4) "standard or good investigative tactics," where courts had found police had manufactured exigency by failing to follow "standard or good law enforcement practices," *id.* at 1861.

120 *Id.* at 1858.

121 *Id.*

122 *Id.*; Horton v. California, 496 U.S. 128, 130 (1989). In *Horton*, the Court concluded that "even though inadvertence is a characteristic of most legitimate 'plain-view' seizures, it is not a necessary condition." *Id.*

123 *King*, 131 S. Ct. at 1858.

124 *Id.*; *Horton*, 496 U.S. at 136.

125 *King*, 131 S. Ct. at 1858.

126 *Id.* (basing its discussion of consent on the reasoning in *INS v. Delgado*, 466 U.S. 210, 217 n.5 (1984)).

The Court explained its refusal to consider the foreseeable impact of police behavior in its rejection of the defendant's proffered rule.[127] *King* had contended that "law enforcement officers impermissibly create an exigency when they 'engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable.'"[128] Factors for this proposed test included "the officers' tone of voice in announcing their presence and the forcefulness of their knocks."[129] The Court, dismissing such "subtleties" as creating an "extremely difficult" rule, announced that "[t]he Fourth Amendment does not require" such a "nebulous and impractical test."[130]

King therefore concluded, "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."[131] Justice Alito believed that this holding provided "ample protection" of privacy because an officer knocking on a door does "no more than any private citizen might do."[132] Whoever knocks, the person within the home has "no obligation to open the door or to speak," and may simply "go on his way."[133] It is up to the individual to assert his or her rights, for "Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue."[134]

III. IMPLICATIONS OF *KING*

A. *King*'s Reasoning Diminished the Warrant Requirement by Undermining Its Constitutional Underpinnings

[127] *Id.* at 1861. The Court specifically ruled, "The reasonable foreseeability test would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field, as well as for judges who would be required to determine after the fact whether the destruction of evidence in response to a knock on the door was reasonably foreseeable based on what the officers knew at the time." *Id.* at 1860.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 1862.

[132] *Id.*

[133] *Id.*

[134] *Id.*

The Court has deemed the warrant requirement a "cardinal principle"[135] which is to be jealously guarded.[136] Seemingly exasperated by the failure of law enforcement to bother with warrants, the Court, in *United States v. Jeffers*, even admonished, "Over and over again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes."[137] Yet, *Jeffers* complained that police, rather than obeying the warrant mandate, have too often "taken matters into their own hands" and illegally invaded citizens' Fourth Amendment rights.[138] The *King* Court has apparently forgotten this lesson.

In its discussion of the warrant requirement,[139] *King* made a point of noting, "the text of the Fourth Amendment does not specify when a search warrant must be obtained."[140] Justice Alito also mentioned that the warrant requirement had been "inferred" by the Court.[141] These statements are more than a few observations made in passing. Instead, they could signal a potentially significant, if subtle, shift in the Court's view of the warrant mandate from a constitutional right to a judicially created rule.

A change in language can portend a change in substance. This is what occurred with the Fourth Amendment's exclusionary rule in the wake of *Mapp v. Ohio*.[142] *Mapp* had explicitly held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[143] *Mapp* deemed the exclusionary rule "an essential part" of the Fourth Amendment because

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135 Mincey v. Arizona, 437 U.S. 385, 390 (1978) ("[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.'") (quoting Katz v. United States, 389 U.S. 347, 257 (1967)).

136 Georgia v. Randolph, 547 U.S. 103, 109 (2006).

137 United States v. Jeffers, 342 U.S. 48, 51 (1951). *See* Illinois v. McArthur, 531 U.S. 326, 334 (2001).

138 *Jeffers*, 342 U.S. at 51.

139 For a discussion of the warrant requirement, see Sundby, *supra* note 12, at 386-391. For a concise history of the warrant requirement, see Justin H. Smith, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 VAND. L. REV. 1591 (2002). Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) offers a critique of the warrant requirement.

140 Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).

141 *Id.*

142 Mapp v. Ohio, 367 U.S. 643 (1961).

143 *Id.* at 655.

it was necessary for the "privilege and enjoyment" of the right.[144] The exclusionary rule, of course, had the frustrating tendency to exclude evidence from the courtroom. The Court therefore shifted its characterization of the exclusionary rule from a constitutional right to merely a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."[145] The step down from a right to a "remedial device" enabled the Court to restrict exclusion to "those areas where [the rule's] remedial objectives are thought most efficaciously served."[146] The exclusionary rule's diminished status has enabled the Court to prevent suppression in a whole host of settings, including grand jury testimony,[147] federal civil proceedings,[148] habeas corpus,[149] good faith,[150] and parole revocation hearings.[151]

King gave signs that the warrant requirement might indeed suffer the same fate that has afflicted the exclusionary rule. In particular, the *King* Court reduced the burden on police wishing to forgo a warrant by declaring that "warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth amendment, to dispense with the warrant requirement."[152] This innocuous-sounding statement actually represented a fundamental shift in Fourth Amendment law. Previous cases asked whether circumstances were so "urgent"[153] that they "compel[ed]" police to act without a warrant.[154] Earlier examples included hot pursuit of an armed robber, actual destruction of evidence, and ongoing fire.[155] *King* thus lowered the level of justification for failing to obtain a warrant from "compelling" to "reasonable."

The Court also undermined the warrant requirement when it assessed lower court rulings on exigent circumstances. Here, *King* rejected as "unsound" what it characterized as certain "additional requirements"

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144 *Id.* at 656-57.
145 United States v. Calandra, 414 U.S. 338, 348 (1974).
146 *Id.*
147 *Id.* at 354-55.
148 United States v. Janis, 428 U.S. 433, 446, 454 (1976).
149 Stone v. Powell, 428 U.S. 465, 494 n.37 (1975).
150 United States v. Leon, 468 U.S. 897, 926 (1984). In *Leon*, the Court crafted the good faith exception to the warrant requirement when an officer, in searching a house, reasonably relied in good faith on a warrant later determined to be invalid. *Id.*
151 Penn. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 359 (1998).
152 Kentucky v. King, 131 S. Ct. 1849, 1858 (2011).
153 Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984).
154 Mincey v. Arizona, 437 U.S. 385, 394 (1978).
155 *See Welsh*, 466 U.S. at 750 (listing cases).

created by lower courts.[156] The Court frowned upon "some courts" faulting law enforcement officers who, after obtaining probable cause to search a residence, chose to knock on the door to speak with an occupant or to seek consent to search rather than obtain a warrant.[157] The Court labeled this approach as "*Probable cause and time to secure a warrant*."[158] *King* criticized this lower court rule as "unjustifiably" interfering with "legitimate law enforcement strategies," in part because seeking consent was "simpler, faster, and less burdensome than applying for a warrant."[159] The force of this logic came uncomfortably close to threatening the basis of the warrant requirement itself, because it shifted the focus from the burdens on citizens' privacy rights to the burdens on police performing their jobs. Instead of considering whether an individual would wish to be free from an unexpected and uninvited knock on the door of his or her home, *King* concerned itself with reasons police might not wish to obtain a warrant.[160] The Court noted that police might wish to talk to a dwelling's occupants first in order to decide whether to even bother with a warrant in the first place, or to obtain more information to boost what might be a "marginal warrant application."[161] Worrying about how a rule mandating a warrant might infringe on police practice stands the Fourth Amendment on its head; the right against unreasonable search and seizure was aimed at protecting individuals from government intrusion, not at promoting law enforcement efficiencies. The Court has previously recognized as much in *Georgia v. Randolph*, where it noted, "The warrant requirement . . . is not an inconvenience to be somehow 'weighed' against the claims of police efficiency."[162]

Curiously, *King* seemed blind to the causal link between its diminution of the warrant requirement and problems in Fourth Amendment litigation. For instance, the Court criticized King's contention that "law enforcement officers impermissibly create an exigency when they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable."[163] King had offered as potential factors to assess such conduct as the "tone of voice"

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156 *King*, 131 S. Ct. at 1858-59.
157 *Id.* at 1860.
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.*
162 403 U.S. 443, 481 (1971).
163 *King*, 131 S. Ct. at 1861.

and "forcefulness" of knocks.[164] The Court refused to have a constitutional rule "turn on such subtleties," because "it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule."[165] All such confusing subtleties, of course, could be simply avoided in the first place by adhering to a rule mandating a warrant be obtained in these situations. As previously recognized by the Court,

> The informed and deliberate determination of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers . . . . Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime . . . .[166]

The consequences of *King*'s curtailment of the warrant requirement could be profound. If the need to gain prior approval from a neutral judge can be circumvented simply by pounding on a door in anticipation of hearing people moving inside,[167] the Court will return to *Jeffer*'s nightmare of police routinely invading people's security in "numerous cases."[168] The protection provided by a warrant could therefore disappear with a knock on the door.

B. *King* Altered the Definition of Exigent Circumstances by Creating a New Component Based on the Occupant's Reaction to Police Conduct

[164] *Id.*

[165] *Id.*

[166] Johnson v. United States, 333 U.S. 10, 14 n.3 (1948) (quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1932)).

[167] Officer Cobb had justified entry because "we could hear people inside moving." Brief of Respondent, *supra* note 103, at 3.

[168] United States v. Jeffers, 342 U.S. 48, 51 (1951).

In the first sentence of its opinion, the *King* Court declared, "It is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant."[169] Thus, from the start of its analysis, the Court built its reasoning on the premise that a "need" did indeed exist to act without a warrant in order to preserve evidence.[170] Previously, in a case with circumstances quite similar to the pertinent facts in *King*, the Court was able to refrain from jumping to such a conclusion. In *Johnson v. United States*, the Court was presented with a case where narcotics officers focused their attention on a hallway smelling of opium.[171] The "distinctive and unmistakable" odor led officers to a particular room of unknown occupants.[172] The officers knocked on the door and identified themselves, prompting a "shuffling or noise" from inside the room.[173] Unlike *King*, where officers responded to a suspect noise by kicking in the door,[174] in *Johnson*, after a "slight delay," the defendant herself opened her own door.[175]

The one factual difference of the occupant opening the door turned out to be key. While *King* resulted in a valid exigent circumstances entry, *Johnson* devolved into failed considerations of exigent circumstances and search incident to arrest.[176] Despite the shuffling sounds in *Johnson*, the Court refused to find exigent circumstances because, "No suspect was fleeing or likely to take flight. The search was of permanent premises, not a moving vehicle. No evidence or contraband was threatened with removal or destruction."[177] *Johnson*'s rejection of exigency here was informative not only because of its conclusion, but of the reasoning used to reach it; the circumstances

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169 *King*, 131 S. Ct. at 1853-54.

170 *Id.* at 1854. This is noteworthy in light of the fact that when police did enter King's apartment, none of the occupants had or were in the process of destroying evidence. *Id.*

171 *Johnson*, 333 U.S. at 12. In *King*, the smell was located in a "breezeway" rather than a hallway and was of marijuana instead of opium. *King*, 131 S. Ct. at 1854.

172 *Johnson*, 333 U.S. at 12. In *Johnson*, the odor "led to Room 1," *id.*, while in *King* it came from "the apartment on the left." *King*, 131 S. Ct. at 1854.

173 *Johnson*, 333 U.S. at 12. When police knocked on the door in *Johnson*, a voice from inside asked, "who was there," *id.*, while in *King*, there was no query from inside. *King*, 131 S. Ct. at 1854. Additionally, in *Johnson*, officers heard "shuffling or noise," *Johnson*, 333 U.S. at 12, while police in *King* heard "things being moved inside the apartment." *King*, 131 S. Ct. at 1854.

174 *King*, 131 S. Ct. at 1854.

175 *Johnson*, 333 U.S. at 12.

176 *Id.; King*, 131 S. Ct. at 1861 n.5.

177 *Johnson*, 333 U.S. at 15.

which would trigger exigency for *Johnson* had to be so pressing that a warrant requirement could not be fulfilled in any practical sense. By the time a warrant would be obtained in *Johnson*'s examples, the suspect would have escaped, the car would have moved on, and the evidence would be destroyed. In contrast, *King* focused not on the imminence of the emergency but on the burdens the warrant requirement would impose on police "strategies" and law enforcement's desire for an option that is "simpler, faster, and less burdensome than applying for a warrant."[178] *Johnson* found such considerations not only unpersuasive, but out of place, for officer inconvenience was "certainly . . . not enough to by-pass the constitutional requirement."[179]

King attempted to finesse this incongruity by labeling *Johnson* as a search incident to arrest case.[180] *Johnson*, after its exigent circumstances discussion, did indeed address the government's search incident to arrest justification, yet found this argument even weaker than the failed exigent circumstances contention. *Johnson* recognized that the government's search incident to arrest theory had fallen into circular bootstrapping where "the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest."[181] Further, in its grasping for straws, the government in *Johnson* also argued hot pursuit, yet even *King* did not dare to label *Johnson* as a "hot pursuit" case.[182] The best authority for identifying *Johnson*'s issue was the *Johnson* Court itself, which spoke in general terms of police "gaining access to private living quarters."[183] *Johnson* concluded that any such entry must "have some valid

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[178] *King*, 131 S. Ct. at 1860.

[179] *Johnson*, 333 U.S. at 15.

[180] *King*, 131 S. Ct. at 1861 n.5.

[181] *Johnson*, 333 U.S. at 16-17. In *Johnson*, the government attempted to justify the officers' warrantless entry into the hotel room by basing this intrusion on the search incident to arrest exception to the warrant requirement. *Id.* at 15. Since it has long been recognized that a search incident to arrest must be based on a lawful arrest, as noted in *United States v. Robinson*, 414 U.S. 218, 229, 235 (1973), the government in *Johnson* had to first establish that "the arrest itself was lawful." *Johnson*, 333 U.S. at 15. Since a lawful arrest requires probable cause to arrest, the government offered as evidence for probable cause the officer's observations, *after* their entry, of Johnson smoking opium in her room. *Id.* at 16. The *Johnson* Court noted, however, that police could only make this observation after they had already entered the room. *Id.* The government was thus caught in an untenable situation where it was justifying its entry to search on search incident to arrest, which itself needed justification by information gained only by the initial intrusion.

[182] *Johnson*, 333 U.S. at 16 n.7.

[183] *Id.* at 17.

basis in law for the intrusion" otherwise, "[a]ny other rule would undermine 'the right of the people to be secure in their persons, houses, papers, and effects.'"[184]

Thus, despite *King*'s assertions to the contrary, the clearest practical distinction between the two cases turns out to be the opening of a door, making a citizen's decision to answer a knock central to the analysis of whether an entry can be based on exigent circumstances.[185] In a sense, the right to privacy in the home turns not only on what police do but on how the citizen reacts. This is reminiscent of the Court's definition of seizure of a person in *California v. Hodari D.*[186] The *Hodari D.* Court ruled that a person chased by police was not seized until tackled, despite the officer's "'show of authority' enjoining [him] to halt," because he "did not comply with that injunction."[187] Specifically, *Hodari D.* recognized two forms of seizure: 1) where an officer applied "physical force," or 2) where an officer shows authority and there is "*submission* to the assertion of authority."[188] In *King*, the "submission" of the citizen in opening the door might diffuse the emergency of the situation, removing

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[184] *Id.*

[185] Granted, the motivations for entry may have differed between the officers in *Johnson* and those in *King*; the *Johnson* officials might have been thinking search incident to arrest while the *King* officers might have focused on emergency. The Court itself, however, has declared, in *Whren v. United States*, that an officer's subjective motivations are irrelevant, for "the Fourth Amendment's concern for 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." 517 U.S. 806, 814 (1996). *Whren* continued, "The fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 813. The Court has even upheld an arrest when it was lawful on one ground in spite of the officer's explicit statement announcing another illegal basis for his action. Devenpeck v. Alford, 543 U.S. 146 (2004). *Devenpeck* upheld an arrest for impersonating an officer even though the arresting officer declared he was making an arrest for violation of a privacy act. *Id.* at 149. *Devenpeck* explained, "Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause," because "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." *Id.* at 153.

[186] California v. Hodari D., 499 U.S. 621 (1991).

[187] *Id.* at 629. *Hodari D.* held that a seizure did not occur when an officer made a "show of authority" if the "subject [did] not yield." *Id.* at 626. The Court has also explained that "neither usage nor common-law tradition makes an *attempted* seizure a seizure," and that "attempted seizures of a person are beyond the scope of the Fourth Amendment." County of Sacramento v. Lewis, 523 U.S. 833, 844 n.7 (1997) (emphasis added).

[188] *Hodari D.*, 499 U.S. at 626.

the need for police to enter. Likewise, had *Johnson* failed to respond to the officer's knock, the shuffling noises might have ripened into an emergency. *King* thus might cause the actions of the individual to become pivotal in determining the Fourth Amendment reasonableness of an entry based on exigent circumstances.

C. *King*'s Ruling on Exigent Circumstances Could Have Unintended Implications for Fourth Amendment Seizure of a Person

An even more direct link could exist between *King* and *Hodari D.* if the homeowner's actions were viewed in terms of seizure of person, that is, if upon hearing a knock, interrupting whatever he or she is doing, the homeowner is viewed as submitting to the officer's will by moving to open the door. Such an interpretation becomes all the more reasonable when viewed in the light of *King*'s criticism of those who choose not to open the door. *King* noted that those who answer the door "need not allow the officers to enter the premises and may refuse to answer any questions at any time."[189] The Court then chided those occupants "who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence" and who have "only themselves to blame for the warrantless exigent-circumstances search that may ensue."[190] Thus, should a homeowner, unaware of the information police have or think they have, wish to ensure against his or her door being kicked in, he or she must take an affirmative act of "standing on his rights" by answering the door and communicating his or her wishes to police. Simply ignoring the knock and going about one's original business offers no guarantee of privacy and security. Regardless of whatever the homeowner was doing before the knock, whether it be cooking, watching television, having an intimate moment with a spouse or visiting the bathroom, *King* calls on the individual to step up to the door in order to keep the government at bay. While answering the door may reveal instead other callers, such as the door-to-door salesperson, the advertiser, or the pamphleteer, the occupant must endure all these false alarms. This in turn multiplies the resulting intrusion on the location and movement of the homeowner's own person.

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[189] Kentucky v. King, 131 S. Ct. 1849, 1862 (2011).
[190] *Id.*

A review of the Court's Fourth Amendment precedent supports the view that *King*'s call to stand on one's rights by opening the door might inadvertently create seizures of the person. The Court's seizure definition in *Florida v. Bostick*, a case involving a police-citizen encounter within the cramped confines of a bus, might have particular relevance to seizures of persons in a home.[191] *Bostick* reasoned that in the specific context of meeting an officer on a bus, a passenger's "freedom of movement was restricted by a factor independent of police conduct—i.e., by his being a passenger on a bus."[192] Asking whether a reasonable person would feel "free to leave" in such a situation would thus be the wrong analysis to assess seizure of a person, for the police were not responsible for the limitation of movement in the situation.[193] Instead, *Bostick* asserted that "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[194] Additionally, *Bostick* conceived as a "crucial test" the question "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"[195]

As on a bus, once in a home, many people have situated themselves in a place from which they are happy to stay for significant periods of time. Activities such as cooking, sleeping, or hosting guests will commit the homeowner to restricting his or her freedom of movement for considerable periods of time. In such settings, an occupant, knowing of *King*'s admonition to stand on one's rights, might not feel free to "ignore the police presence and go about his business." Not knowing the facts upon which officers might be acting, a homeowner might feel compelled to interrupt his own business and answer the door to dispel any fears of officials. Such a seizure is all the more intrusive when it is remembered that it is taking place within the heightened privacy of the home.

Furthermore, *King*'s stand-on-rights analysis could limit the movement of people inside their homes, triggering a Fourth Amendment

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191 Florida v. Bostick, 501 U.S. 429, 431-32 (1991). Moreover, a seizure of a person in *King* would be even more intrusive than a seizure occurring in the public space of a commercial bus, for, as noted in Part II.C, *supra*, the Court recognizes that the home is at the center of Fourth Amendment privacy.

192 *Id.* at 436.

193 *Id.*

194 *Id.*

195 *Id.* at 437.

seizure. This concern surfaces in a review of the "intent" element of government seizure of persons presented in *Brower v. County of Inyo*.[196] The Court in *Brower* declared that a Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*."[197] *Brower* illustrated its intent standard through a series of hypothetical situations. *Brower* explained, "if a parked and unoccupied police car slips its brake and pins a passer by against a wall, it is . . . not a violation of the Fourth Amendment," because the termination of freedom of movement was not intentionally applied.[198] There would still be no Fourth Amendment seizure even if the pinned person happened to have a warrant out for his arrest or even if he had been running away from other officers when suddenly trapped.[199] This was because simply causing a termination of movement, even if desirable, cannot be a seizure if it is missing the needed ingredient of "intentionally applied" means.[200] Regarding "an intentional acquisition of physical control," *Brower* specified that, "the taking of possession"[201] would be "not merely the result of government action but the result of the very means (the show of authority) that the government selected."[202]

King's warning to those who do not "stand on their constitutional rights" has disturbing implications in light of *Brower*'s seizure discussion.[203] When an officer knocks on a door, particularly if he or she repeatedly pounds upon it, it can be reasonably assumed that the official is: 1) showing the authority of a person demanding the door be opened, and 2) intending to cause a person inside to submit to the authority by answering the door. Presuming that most residents do not hover at their front door waiting for the occasional knock, the action of answering the door necessarily entails stopping the activity in which one is currently involved and walking to the door.[204] Such a change in behavior is itself a submission to the officer's show of authority. Indeed, the Court has previously viewed officers' summoning of a person to their presence as a

196 Brower v. County of Inyo, 489 U.S. 593, 597 (1989).
197 *Id.*
198 *Id.* at 596.
199 *Id.* at 596-97.
200 *Id.* at 597.
201 *Id.* at 596.
202 *Id.* at 597-98.
203 Kentucky v. King, 131 S. Ct. 1849, 1862 (2011).
204 The Court has recognized that police movement of a person does need some justification. Florida v. Royer, 460 U.S. 491, 504-05 (1983).

factor pointing toward seizure.[205] Further, it does not matter that the officer does not know who will answer the door, for "an 'unintended person . . . [may be] the object of the detention,' so long as the detention is 'willful' and not merely the consequence of an 'unknowing act.'"[206] Moreover, the limited magnitude of the intrusion does not negate the existence of a seizure, because a stop of a person still implicates the Fourth Amendment even when it is "'limited and the resulting detention quite brief.'"[207]

Finally, a reasonable person might not feel "free to 'terminate the encounter'" between himself and an officer who is knocking on the door and announcing "Police, police, police."[208] Such "use of language or tone of voice" could indicate that "compliance with the officer's request might be compelled."[209] The Court has previously recognized that officers who pull over a car, thus interrupting the less private activity of driving on public streets, act with the "implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing."[210] When making such a stop, reasonable people understand that an "attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place."[211] When an officer knocks on the door, it may be reasonable to suspect that the officer understands that someone is home and that the police may "object" to the idea that the occupant cannot be bothered to show the minimal courtesy of answering the door, particularly in light of *King*'s notion that failing to answer the door is akin to failing to stand on your constitutional rights. This is all the more so when it is recognized that, at least in certain police-citizen encounters, there exists a "societal expectation of 'unquestioned [police] command.'"[212]

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[205] United States v. Mendenhall, 446 U.S. 544, 555 (1979). In determining the absence of seizure in a particular case, the Court considered relevant the fact that police "did not summon the respondent to their presence, but instead approached her." *Id.*

[206] Brendlin v. California, 551 U.S. 249, 254 (2007) (quoting Brower v. County of Inyo, 489 U.S. 593, 596 (1989)).

[207] *Id.* at 255 (quoting Delaware v. Prouse, 440 U.S. 648, 653 (1979)).

[208] *King*, 131 S. Ct. at 1854.

[209] *Mendenhall*, 446 U.S. at 554.

[210] *Brendlin*, 551 U.S. at 257.

[211] *Id.*

[212] *Id.* at 258 (quoting Michigan v. Summers, 452 U.S. 692, 702-03 (1981)).

The effective seizure of persons by commanding compliance with a knock at the door could have a profound cumulative impact on the freedom to be left alone in the privacy of one's own home. The "aggregation of thousands upon thousands of petty indignities" has been identified in the context of police order-outs of passengers from lawfully stopped vehicles in *Wilson v. Maryland*.[213] In his dissent in *Wilson*, Justice Stevens worried that "thousands of innocent citizens" could suffer the "potential daily burden" of being "offended, embarrassed, and sometimes provoked by arbitrary official commands."[214] Such a concern is even greater when the intrusion occurs within the context of the sanctity of the home.

D. *King*'s Approval of Police Manufacturing Exigent Circumstances Promotes Law Enforcement Concerns Over Individual Interests in Privacy and Security

Although *King* rejected the various "police-created exigency" rules crafted by the lower courts,[215] it characterized its own rule as an "interpretation of the police-created exigency doctrine."[216] The police "did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment," therefore "warrantless entry to prevent the destruction of evidence is reasonable and . . . allowed."[217] This holding implied that so long as the police neither violated the Fourth Amendment nor threatened to do so, officers could proceed without a warrant regardless of the foreseeable consequences of their actions. In this sense, *King* seemed to artificially break police conduct down into a series of independent and unrelated acts. If a knock on the door in and of itself did not trigger a Fourth Amendment violation, then it was reasonable regardless of any of its consequences, no matter how obvious or immediate.

King's reasoning sends a message to police that they should limit their thinking to the present. Officers need not and indeed may act more effectively when they do not think of some of the reasonably foreseeable consequences of their actions. A courteous officer might ponder what explanation to give should a person answer the door, and therefore

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213 519 U.S. 408, 419 (1997) (Stevens, J., dissenting).
214 *Id.*
215 Kentucky v. King, 131 S. Ct. 1849, 1857 (2011).
216 *Id.* at 1862.
217 *Id.* at 1858.

hesitate to knock. In contrast, an impulsive officer will pound away, not fretting about the impact such an interruption might have on the occupant. *King* rewards the self-centered and spontaneous officer to the detriment of his thoughtful and meticulous partner. This case is not the first example of the Court's curious creation of perverse incentives by isolating police actions from their consequences. When the Court defined a seizure in *Hodari D.* as requiring in part both a show of authority and a yielding or submission to that authority,[218] it provoked Wayne LaFave, to wonder whether portly police might offer law enforcement special talents.[219] This was because:

> The message which *Hodari D.* sends to the law enforcement community is clear: when police are acting merely on a hunch, a slow chase is better than a fast one, for if the cop in that case had caught up with the youth and grabbed him by the scruff of the neck before the cocaine was ditched, there would have been an illegal seizure requiring suppression of the subsequently discovered drugs.[220]

Following LaFave's logic, the most valuable officers after *King* would be those who have no compunction about pounding on a door to see what transpires. If facts exist to support probable cause to believe the home contains contraband, any sounds of movement could support a decision to kick in the door to prevent the destruction of evidence. If no such probable cause exists, police can be satisfied that the noises inside might represent the destruction of drugs without the hassle of involving the criminal justice system. This last prospect could encourage police to randomly knock on doors in hopes of implementing an easy way of clearing drugs from their neighborhoods.

King is part of a trend in Fourth Amendment precedent in which the Court has continually lowered the bar for police interacting with the citizens they are entrusted to protect.[221] The Court seems bent on

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[218] California v. Hodari D., 499 U.S. 621, 626 (1991).

[219] La Fave speculated that "obese police (or, if you prefer, corpulent cops) might well become especially valued by departments for their unique law enforcement talents." Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 UNIV. ILL. L. REV. 729, 730 (1991).

[220] *Id.* at 731.

[221] *Arizona v. Gant*, 556 U.S. 332 (2009), the Court's latest decision applying search incident to arrest in the context of vehicles could be viewed as a development

removing as much thinking as it can from the job of the police officer. Their efforts were most clearly articulated in *New York v. Belton*, a case where the Court declared that Fourth Amendment protection could "only be realized if the police are acting under a set of rules [that make] it possible to reach a correct determination beforehand . . . [of] whether an invasion of privacy is justified in the interest of law enforcement."[222] *Belton* worried that "[while a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, . . . they may 'literally [be] impossible [for an] officer in the field [to apply].'"[223] The Court therefore crafted a bright-line rule enabling police to search the entire passenger compartment of a vehicle incident to an arrest of its occupant, rather than require an officer to assess on the scene the arrestee's area of immediate control.[224] This rule, with recent modifications, survives to this day even though *Belton* realized that the passenger compartment and the arrestee's area of immediate control do not inevitably align in every case.[225]

countering this trend. Prior to *Gant*, police were guided by the simple rule handed down in *New York v. Belton*, which held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. 454, 460 (1981). *Gant* qualified *Belton*'s search right by holding that police can search the vehicle incident to arrest "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 556 U.S. at 343. While *Gant*, with this holding, demanded more precision and self-control from officers, it simultaneously undermined its call for thoughtful restraint by also holding that police had a new power to search incident to arrest: "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* (quoting Thornton v. United States, 541 U.S. 615, 626 (2004)). This second search option contained no language limiting its reach to the passenger compartment of the vehicle, and hence could extend to the entire car. *See id. Gant* itself seemed to sense the dramatic expansion it had handed police, for it sheepishly acknowledged that its "reasonable to believe" rule did "not follow from *Chimel*," the seminal search incident to arrest case. *Id.* For a complete discussion of these concerns and other potential ramifications of *Gant*, see George M. Dery III, *A Case of Doubtful Certainty: The Court Relapses into Search Incident to Arrest Confusion in Arizona v. Gant*, 44 IND. L. REV. 395 (2011).

[222] *Belton*, 453 U.S. at 458 (quoting Wayne LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The* Robinson *Dilemma*, S. CT. REV. 127, 142 (1974)).

[223] *Id.* (quoting LaFave, *supra* note 222, at 141).

[224] *Id.* at 460.

[225] *Id.* The *Belton* rule was recently modified in *Arizona v. Gant* to include a "reaching distance" limit and a reasonable belief that "evidence of the crime might be found in the vehicle" expansion. *Gant*, 556 U.S. at 343.

As a result of the fear of taxing officer faculties, *per se* rules have proliferated in instances where police meet individuals. One such setting has been police order-outs of motorists in vehicles. In *Pennsylvania v. Mimms*, the Court granted police an absolute right to order the driver out of a lawfully stopped vehicle "as a matter of course," despite lacking any suspicion of "foul play from the particular driver at the time of the stop."[226] In *Maryland v. Wilson*, the Court expanded this order to include all the vehicle's passengers.[227] In the search incident to arrest case, *United States v. Robinson*, the Court enabled police to search an arrestee's person incident to every lawful arrest, thus relieving the police of the burden of having to consider "the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[228] *Maryland v. Buie*, involving protective sweeps, allowed officers executing an arrest in a home to, "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."[229] These cases thus show the Court's decades-long effort to relieve police of the burden of making sophisticated calculations in the daily performance of their duties. *King* is the latest, and perhaps one of the most significant, manifestations of this long-term strategy.

Asking less of police comes at the expense of shifting the burden of action to citizens accosted by knocks at the door. While police, the initiators of contact, no longer need to bother considering the consequences of pounding on a door, the resident, who before the knock was minding her own business in privacy, must suddenly modulate personal behavior in order to maintain her rights as the householder. In *King*, a rustling sound triggered the decision to kick down the door. So what exactly should an occupant—unaware of the identity of the caller, the reason for the visit, or the information held by the outsider—do? Should residents now follow a "freeze" rule and abruptly cease all activity whenever there is a knock at the door to forestall a conclusion that evidence is being destroyed?[230] The very quietness caused by such

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[226] Pennsylvania v. Mimms, 434 U.S. 106, 109-110 (1977); s*ee id.* at 111 n.6.

[227] Maryland v. Wilson, 519 U.S. 408, 410 (1997).

[228] United States v. Robinson, 414 U.S. 218, 235 (1973).

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

[230] Kentucky v. King, 131 S. Ct. 1849, 1854 (2011). It would seem that any amount of noise could provoke police to kick in the door, for *King* provided very little movement before officers entered. *See id.* Instead of finding the occupants flushing drugs down a toilet, the police in *King* discovered upon entry "three people in the front room: respondent Hollis King, respondent's girlfriend, and a guest who was smoking

behavior could itself invite intrusion, for the person knocking could conclude that the sudden silence indicates consciousness of guilt, a severe injury to the person inside, or even a hostage situation.

The *King* Court has thus moved the responsibility for thoughtful action from the party possessing the most information about the reason for the intrusion, and the entity from which the Fourth Amendment is meant to offer protection, to the party lacking knowledge about the reason for the knock. *King* thus goes in a direction counter to that of society. Landline phones are now commonly enhanced with caller-identification technology, enabling the person receiving the call to learn the identity of the caller before committing to a conversation. Similarly, the initiator on Facebook can only become a "friend" after identifying herself and leaving the power in the person contacted to decide whether to establish a relationship.[231] Those who receive tweets do so only after voluntarily choosing to follow a Twitter account.[232] Thus, even the creators of some of the day's most intrusive technologies recognize the common decency of allowing a person to be left alone. In contrast, the Court in *King* seems to be turning the clock back to the last century, when police-states chose when to knock on a door.[233]

CONCLUSION

The *King* Court should have maintained the strength of its long-standing warrant requirement by refusing to allow police to create an exigency simply by pounding on a door of a home with the hope of hearing any ambiguous sounds within. Such a ruling would have maintained the sanctity of the home the Court recognized in *Kyllo v.*

marijuana." *Id.* Rather than destroying contraband, the occupants left "marijuana and powder cocaine in plain view." *Id.* Nothing is offered to explain how the police allegedly heard "people inside moving" or the sounds of "things being moved inside the apartment." *See id.* One would therefore assume that the noises the officers heard were from actions neither rushed nor unusual.

[231] Facebook is a social networking site on the Internet which enables members to create personal profiles and connect with other members. FACEBOOK, http://www.facebook.com.

[232] Twitter is another social networking site on the Internet. Twitter describes itself as a "real-time information network that connects you to the latest stories, ideas, opinions, and news about what you find interesting." TWITTER, http://www.twitter.com/about. Twitter notes that, "At the heart of Twitter are small bursts of information called Tweets" which can have a maximum of 140 characters. *Id.*

[233] *See, e.g.*, Johnson v. United States, 333 U.S. 10, 17 (1948).

United States where, finding that, in a house, "all details are intimate details,"[234] it drew a firm and bright line "at the entrance to the house."[235]

When someone knocks on your door, what should you do? Perhaps you should answer it out of politeness, and listen to the pitch of the person promoting a sale, charity, or religious experience. It would be proper to answer the door for the neighbor who wishes to borrow a cup of sugar or get the stray ball out of your yard. Of course, asking what one should do is an entirely different question from asking what a person has the constitutional right to do.

When someone knocks on your door, you should have the absolute right to answer it, invite him or her in, or do nothing at all. The Fourth Amendment is not a constitutional command to promote proper manners of homeowners; it is instead a fundamental right to be let alone.[236] The whole point of the right to privacy is that it provides protection regardless of the strength, or even the existence, of justifications for that privacy. Perhaps a resident is doing something that he or she wishes to hide from another, such as wrapping a gift, setting up a practical joke, or organizing a surprise party. Maybe a person is doing something that he or she would rather not have others know, such as cheating on a diet, sneaking a cigarette, or being intimate with his or her spouse while the children are at a friend's house. In a free society, people should be allowed to perform such acts, even if they are unwise, without having to worry about accounting to an officer at the door.

The warrant requirement should protect this value from invasion by an officer in the field. Nearly eighty years ago in *United States v. Lefkowitz*, the Court understood that searches and seizures were carried out by normal persons, naturally prone to the sway of emotions.[237] The *Lefkowitz* Court recognized that

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[234] Kyllo v. United States, 533 U.S. 27, 37 (2001).

[235] *Id.* at 40.

[236] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In his dissent, Justice Brandeis declared,

> The makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478-79.

[237] United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

> [T]he informed and deliberate determinations of a magistrate empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.[238]

It now seems that the Court in *King* has forgotten this commonsense lesson.

In her dissent, Justice Ginsburg worried that the *King* Court had provided police with a "way routinely to dishonor the Fourth Amendment's warrant requirement"[239] by overriding it with "an expedient knock" at the door.[240] *King*'s concern for creating a simple rule for easy application by police, as well as its pinpoint focus on the lawfulness, in isolation, of an officer's knocking on a door, represents a dramatic departure from the time when the Court hoped to promote a "sane, decent, civilized society" which provided some "oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle."[241]

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[238] *Id.*

[239] Kentucky v. King, 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting).

[240] *Id.* at 1866.

[241] Silverman v. United States, 365 U.S. 505, 511 n.4 (1960).