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## Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness

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# Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness

Michael R. Dimino, Sr.\*

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### I. Introduction

The "often competitive enterprise of ferreting out crime"<sup>1</sup> forms the backdrop for much of our thought about policework and underlies much Fourth Amendment<sup>2</sup> doctrine, but actually represents only about one-fifth to one-third of patrol officers' activity.<sup>3</sup> Police activity directed to a different end—for example, correcting a dangerous condition on a highway or assisting a person in need—fits uncomfortably within a conception of the Constitution that permits intrusions into private areas only when the police have obtained warrants based on probable cause<sup>4</sup> and specifying "the persons

1. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

2. Technically the Fourth Amendment is not implicated when the officer in question is acting on behalf of a state rather than the national government. See *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (finding that in order for a constitutional amendment to apply to the states, the amendment must indicate an intention to apply to the states). The protections of the Fourth Amendment have, however, been incorporated against the states through the Due Process Clause of the Fourteenth Amendment. See *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643, 650 (1961) ("[T]he security of one's privacy against arbitrary intrusion by the police is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause . . . ." (internal quotations omitted)). For the sake of simplicity, this Article refers to the Fourth Amendment whether the relevant government entity is state or national.

3. See PETER K. MANNING, *POLICE WORK: THE SOCIAL ORGANIZATION OF POLICING* 302 (1977) ("Estimates vary, but perhaps as much as 80% of an officer's duty is taken up with assisting citizens, maintaining order, ensuring the smooth flow of traffic and pedestrians, and routine patrol."), *quoted in* HOWARD ABADINSKY, *DISCRETIONARY JUSTICE* 34 (1984); SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA: AN INTRODUCTION* 5–6 (5th ed. 2005) ("Only about one-third of a patrol officer's activities are devoted to criminal law enforcement." (citations omitted)); SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990* 46 (1993) [hereinafter WALKER, *TAMING THE SYSTEM*] ("[C]riminal law enforcement represents only a part of police work—between 20 and 30 percent of a patrol officer's activities."); Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 263 (1998) ("Police spend relatively less time than is commonly thought investigating violations of the criminal law."); see also WALKER & KATZ, *supra*, at 210 ("[O]nly 20 to 30 percent of all calls [to 911] for service involve criminal law enforcement." (citing Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 *CRIMINOLOGY* 27 (1989))).

4. Probable cause typically requires a level of individualized suspicion such that a person "of reasonable caution" would believe that seizable objects are located at the place to be searched, or that the person to be seized is involved in criminal activity. *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949). The Court has redefined probable cause in the context of searches to discover violations of administrative codes, permitting warrants to be issued upon a showing only that the search would occur pursuant to regularized procedures. See *Camara v. Mun. Court*, 387 U.S. 523, 538–39 (1967) ("If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."). This Article discusses the applicability of the administrative warrants to the community-caretaking context in Part IV.A, *infra*.

or things to be seized."<sup>5</sup>

Recognizing the difficulty of applying the warrant "requirement," or even a warrant "preference," to searches and seizures undertaken for a purpose other than law enforcement, the Supreme Court has indicated in several cases that the ordinary presumption that warrantless searches are unreasonable<sup>6</sup> ceases to apply in the "community-caretaking" context.<sup>7</sup> Nevertheless, because searches necessarily involve government intrusion into individuals' private spaces, the absence of constitutional restrictions for even community-caretaking searches carries a substantial risk of abuse. As Justice Brandeis famously warned, "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."<sup>8</sup> But if community-caretaking searches must comply with the general Fourth Amendment command of "reasonableness," it is necessary to make that determination without reference

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5. U.S. CONST. amend. IV. The entire Amendment reads as follows:

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.

*Id.*

6. See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967) ("Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . ."); *Johnson*, 333 U.S. at 13–15 (noting that searches without a warrant may be performed legally only in exceptional circumstances).

7. See, e.g., *Colorado v. Bertine*, 479 U.S. 367, 381 (1987) ("Inventory searches are not subject to the warrant requirement because they are conducted by the government as part of a 'community caretaking' function . . ."); *South Dakota v. Opperman*, 428 U.S. 364, 374 (1976) (finding a warrantless search valid in the context of community caretaking). See generally *Livingston*, *supra* note 3, at 266–90.

8. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967). President Reagan similarly quipped that the most terrifying words in the English language are "I'm from the government and I'm here to help." He likely adopted the phrase from columnist George F. Will. *THE YALE BOOK OF QUOTATIONS* 825 (Fred R. Shapiro ed., 2006).

to the usual standards for reasonableness: Probable cause<sup>9</sup> and reasonable suspicion<sup>10</sup> that the object of the search is connected to criminal activity.

Suppose, for example, that a patrol officer comes upon a vehicle stopped along the side of a highway. The officer looks in and finds a woman lying across the front seats, apparently asleep. If the officer rouses her and she attempts to drive off, may the officer detain her? Should it matter if the woman's behavior leads the officer to suspect her involvement in a crime? Should it matter if the officer simultaneously suspects the woman of criminal activity and thinks that she might be disoriented or in need of assistance?<sup>11</sup> Should it matter if there is a child in the back seat?

Though the Court first referred expressly to the community-caretaking doctrine more than thirty-five years ago,<sup>12</sup> two fundamental questions raised by the vignette have yet to be answered: First, what functions comprise "community caretaking"? In other words, how do we know when this exception to the warrant requirement applies? Second, what makes a community-caretaking search "reasonable" or "unreasonable"?

This Article seeks to provide answers to those questions. In Part II, I attempt to define community caretaking, drawing from cases where the police engaged in searches that served purposes other than merely the investigation of crime.<sup>13</sup> While courts have applied the label community caretaking to all government activity for purposes other than law enforcement, a more nuanced typology would better allow courts to analyze the differing interests that must be balanced in each set of situations. This Article concentrates on "assistance searches," a term coined here for that subset of community-caretaking activity designed to help members of the public. Such searches present concerns about

9. See *Whren v. United States*, 517 U.S. 806, 817, 819 (1996) (referring to probable cause as the "traditional justification" and "traditional common-law" justification for searches and seizures (emphasis deleted)); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (defining probable cause as "a fair probability that contraband or evidence of a crime will be found in a particular place").

10. See *Alabama v. White*, 496 U.S. 325, 330–31 (1990) ("Reasonable suspicion . . . is dependent upon both the content of information possessed by police and its degree of reliability."); *Terry v. Ohio*, 392 U.S. 1, 27, 30–31 (1968) (stating that reasonable suspicion must be based on the facts of a particular situation, not an individual's hunch).

11. This scene, taken from *Psycho* (Universal Studios 1960), is considered in more detail *infra* at notes 345–346 and accompanying text.

12. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) ("Local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what . . . may be described as community caretaking functions . . .").

13. Though the analysis applies to both searches and seizures, explicit reference to seizures is omitted to avoid needless repetition. "Searches," therefore, will include all Fourth Amendment activity unless context indicates otherwise.

police discretion far different from those implicated by other forms of community caretaking, such as inventory searches and drunk-driving checkpoints.

Deciding that a particular search falls within the community-caretaking doctrine is only the first step in assessing whether that search is constitutional. The constitutionality of a particular community-caretaking search depends on whether it was reasonable, as the Fourth Amendment uses that term. In Part III, I examine the approaches that courts have taken to deciding the reasonableness of community-caretaking searches, finding the two currently predominant approaches unsatisfactory.

Part IV sets forth a new approach, distinguishing between community-caretaking searches designed to assist the subject of the search (as in cases where the police enter a house suspecting the occupant needs medical attention)—what I term "first-party community caretaking"—and searches to assist someone other than the subject of the search—what I call "third-party community caretaking." This Article contributes to the literature by recognizing explicitly what no court or commentator has as yet: There is no "government interest" to be weighed in evaluating the reasonableness of first-party community caretaking. Rather, such searches should be analyzed under an implied-consent theory, which would permit a first-party community-caretaking search only if the searching officer reasonably believed that the subject of the search would desire assistance.

Part V considers which remedies are appropriate for unreasonable community-caretaking searches and seizures. In particular, this Part discusses, and criticizes, an approach favored by some courts and Professor Wayne LaFare's leading treatise that would permit community-caretaking searches, but would exclude any evidence found as the result of such action from any subsequent trial of the person whose privacy was abridged by the search. Such a rule, I argue, is inconsistent with the Court's longstanding refusal to suppress evidence in the absence of a constitutional violation. The Article concludes, therefore, that evidence should be suppressed only if the search is unreasonable under the standards discussed in Part IV.

## *II. Defining "Community Caretaking"*

*Cady v. Dombrowski*<sup>14</sup> was the first Supreme Court case to refer to "community caretaking functions" of police departments, and to

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14. *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973) ("Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion

define<sup>15</sup> the category as those activities "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."<sup>16</sup> Searches made in the performance of such functions, the Court held, do not require warrants, and are subject to "only the general standard of 'unreasonableness' as a guide in determining" constitutionality.<sup>17</sup>

In *Dombrowski*, the police, following standard procedures, entered a car to secure a gun, and sought thereby to protect the public from the harm that could result if someone else found the weapon.<sup>18</sup> Subsequent cases have extended the doctrine to include all manner of conduct outside the crime-control paradigm, such as sobriety checkpoints, border searches, drug testing, inventory searches, and searches in public schools.<sup>19</sup> In a series of cases, the Supreme Court has established rules for determining the constitutionality of these searches. The core of the community-caretaking doctrine, however—where police act to protect or assist the public—has been left with little doctrinal guidance from the Supreme Court other than the vague command of reasonableness.<sup>20</sup>

by vandals, we hold that the search was not 'unreasonable' within the meaning of the Fourth and Fourteenth Amendments.").

15. One can read *Dombrowski* not as defining community caretaking, but as giving an example of one kind of community-caretaking responsibility. Under this reading, some community-caretaking activities are "totally divorced" from law enforcement, while others are more closely connected with it. "[*Cady v. Dombrowski*] was noting that many police-citizen encounters have nothing to do with crime, not requiring that they must have nothing to do with crime or else be illegal unless justified by probable cause or a reasonable and articulable suspicion of criminal activity." *People v. Cordero*, 830 N.E.2d 830, 841 (Ill. App. Ct. 2005) (O'Malley, J., concurring); see also *State v. Kramer*, 750 N.W.2d 941, 947–50 (Wis. Ct. App. 2008) (arguing that community-caretaking cases in Wisconsin strayed from Fourth Amendment law due to a misinterpretation of the Court's decision in *Dombrowski*). The far more common reading, however, is that *Dombrowski* was defining community caretaking, not just giving an example of it. See, e.g., *United States v. Johnson*, 410 F.3d 137, 144 (4th Cir. 2005) (defining community caretaking as "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute" (quoting *Dombrowski*, 413 U.S. at 441)). As explained below, policy concerns argue for expanding the definition beyond those activities "totally divorced" from law enforcement, regardless of whether such a definition is the best reading of *Dombrowski*.

16. *Dombrowski*, 413 U.S. at 441.

17. *Id.* at 448.

18. See *id.* at 443 (finding the search necessary "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands").

19. See *infra* notes 188–215 and accompanying text (describing cases in which the doctrine has expanded to include conduct outside of crime control).

20. Cf. Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974) ("It is both regrettable and surprising that the courts have said so little of any substance about the principles of the [Fourth A]mendment when they have considered and reconsidered its application in different circumstances.").

This Article concentrates on this central, but neglected, form of community caretaking, and seeks to give content to the reasonableness standard. Although the Supreme Court's cases in other areas of community caretaking or "special needs" provide insight, the different contexts of searches to help or protect the public call for a constitutional analysis specific to the competing interests there at work.

The Court's definition in *Dombrowski* of community caretaking as including activities "totally divorced from [law enforcement]"<sup>21</sup> ironically coupled a realistic sense of policework as comprising a variety of law enforcement and community-caretaking functions with a naïveté that ignored the very reason the police perform such diverse functions. Police act in a community-caretaking capacity in part because they—like other public servants—are employed to assist people and have the resources to do so,<sup>22</sup> but also because the community-caretaking functions that police provide are not, in fact, totally divorced from law enforcement.<sup>23</sup>

Indeed, one would be quite disappointed with lawmakers if there was such a clean separation between community caretaking and law enforcement<sup>24</sup> because laws are written and enforced to protect the public.<sup>25</sup> Laws prohibiting homicide, theft, drug use, and speeding—in fact, virtually all laws requiring or prohibiting certain conduct—are in place because violations threaten the public safety or welfare.<sup>26</sup> Thus, one might think of law enforcement as the epitome of

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21. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

22. See DOROTHY GUYOT, *POLICING AS THOUGH PEOPLE MATTER* 37 (1991) (noting that police are relied upon to perform community-caretaking functions in part because of their "twenty-four-hour availability").

23. See Livingston, *supra* note 3, at 274, 286 (noting the difficulty of separating community caretaking from law enforcement); Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 116 (1989) ("[T]he fundamental difficulty in the Court's effort to identify the administrative search is that the contrast between regulation and law enforcement is illusory").

24. Community caretaking is a concept distinct from, but related to, "community policing." The latter is "[a] model of policing that stresses a two-way working relationship between the community and the police, in which the police become more integrated into the local community and citizens assume an active role in crime control and prevention." WALKER & KATZ, *supra* note 3, at 532. See generally *Colloquium on Community Policing*, 90 CAL. L. REV. 1415 (2002); David Thacher, *Conflicting Values in Community Policing*, 35 L. & SOC'Y REV. 765 (2001); Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253 (2000).

25. See *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (noting that "law enforcement involvement always serves some broader social purpose or objective").

26. Moreover, laws that prohibit or require certain conduct and that are not supported by a public purpose may be unconstitutional. See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)



community caretaking, rather than in contradistinction to it.<sup>27</sup> Nevertheless, the Court has concluded otherwise, and as a result the lesser requirements of the community-caretaking doctrine apply when the police pursue purposes other than law enforcement—most notably protecting public safety when no crime is apparent, and also including such activities as checking on the elderly,<sup>28</sup> assisting stranded or ill motorists,<sup>29</sup> and checking to make sure that businesses are secured at night.<sup>30</sup>

*Dombrowski's* definition of community caretaking as the performance of functions "totally divorced from [law enforcement]" might imply that police activity fulfilling both a community-caretaking purpose and a law enforcement one would not trigger the exception—neither purpose would be totally divorced from the other.<sup>31</sup> In fact, however, the Court has treated such mixed-motive

("The issue is whether the majority may use the power of the State to enforce [ethical and moral principles condemning homosexual conduct] on the whole society through operation of the criminal law."); *id.* at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1236 (2004) ("[S]ince the middle of the twentieth century, the Court has never relied exclusively on an explicit morals-based justification in a majority opinion that is still good law."). See generally H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

27. Cf. *Smith v. Doe*, 538 U.S. 84, 93–94 (2003) (rejecting the argument that because protecting the public is a purpose of the criminal justice system, sex-offender registration laws are punitive).

28. See, e.g., *Livingston*, *supra* note 3, at 272–73, 273 n.56 ("It is not uncommon for police to intrude into the homes of elderly people in response to calls from anxious relatives unable to locate them." (citing, *inter alia*, *State v. Gocken*, 857 P.2d 1074, 1081 (Wash. Ct. App. 1993))); *id.* at 278 ("Police routinely receive calls . . . expressing concern about people who have not been heard from over a period of time. These people are often elderly . . . ." (citing JONATHAN RUBINSTEIN, *CITY POLICE* 91 (1973))).

29. See, e.g., *Commonwealth v. Leonard*, 663 N.E.2d 828, 830 (Mass. 1996) ("In our view, Trooper Ford was doing his duty as he patrolled the highway to inquire whether the driver of the automobile was ill or in some other kind of difficulty.").

30. See *Livingston*, *supra* note 3, at 273 n.57 (citing, *inter alia*, *Banks v. State*, 493 S.E.2d 923, 926 (Ga. Ct. App. 1997) (holding that "officers who find an apparently closed business unlocked during a normal security sweep may conduct a limited intrusion on the business premises for the sole purpose of securing the area and ensuring no intruders are present"), *overruled by Calbreath v. State*, 519 S.E.2d 145 (Ga. Ct. App. 1998)); *State v. Myers*, 601 P.2d 239, 243–44 (Alaska 1979) (holding that law enforcement may enter a business premises without a warrant only when the premises is in danger and the owner would likely consent).

31. *People v. Ray*, 981 P.2d 928, 931 (Cal. 1999) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)); see *id.* at 938 ("Any intention of engaging in crime-solving activities will defeat the community caretaking exception even in cases of mixed motives."). Note, however, that *Ray* upheld a police entry into a residence to investigate an apparent burglary. See *id.* at

searches and seizures as community caretaking. In inventory-search cases, for example, the Court has stressed the community-caretaking purposes of securing valuables, guarding against false claims of theft, and protection of the police from dangerous items in the vehicle,<sup>32</sup> but police are undoubtedly motivated at least in part by the possibility that such searches will yield evidence.<sup>33</sup> Similarly, when considering the constitutionality of sobriety checkpoints, the Court has focused on the community-caretaking purpose of protecting potential victims of drunk driving,<sup>34</sup> but the law-enforcement motivation of catching drunk drivers is manifest. Thus, in an ironic inversion of the language in *Dombrowski*, the Court at times appears to apply the community-caretaking doctrine unless the police activity is totally divorced from the protection of the public.

But if the complexity of police activity makes it appropriate to extend the community-caretaking doctrine to instances where community-caretaking functions and law-enforcement functions are intertwined, the same complexity threatens to undermine the Court's Warrant Clause and probable-cause precedents.<sup>35</sup> If the general test of reasonableness were held to apply whenever the police activity involved the protection of some portion of the public, then there would be very little left of the warrant requirement because so few law-enforcement activities are completely separate from community caretaking. Police investigation of weapons possession, drug sales, and extortion, to name only a few crimes, is designed to protect the public from the harm caused by the violations, and yet the Court has generally required some measure of individualized suspicion before permitting the police to interfere with suspects'

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939 ("When officers act in their properly circumscribed caretaking capacity, we will not penalize the People by suppressing evidence of crime they discover in the process."). Obviously the officers were acting partially in a law-enforcement capacity, although the residents of the home were not the ones suspected of committing the crime.

32. See *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976) (stating that local police departments use a common set of procedures when impounding vehicles).

33. See *United States v. Roberson*, 897 F.2d 1092, 1096 (11th Cir. 1990) ("[T]he mere expectation of uncovering evidence will not vitiate an otherwise valid inventory search." (quoting *United States v. Bosby*, 675 F.2d 1174, 1179 (11th Cir. 1982))).

34. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the State's interest in eradicating it.").

35. See *State v. Ludes*, 11 P.3d 72, 77 (Kan. Ct. App. 2000) ("[W]e believe it somewhat disingenuous for the State to pursue an investigatory function with a fall back position that the stop was in the interest of public safety. If successful, the public safety stop would literally emasculate the constitutional protection afforded a motorist's privacy under *Terry* [*v. Ohio*, 392 U.S. 1 (1968)].").

liberty.<sup>36</sup> Mere protection of potential crime victims, then, cannot suffice to place searches or seizures within the community-caretaking doctrine, at least unless the threat appears particularly likely to materialize if not for official intervention.

Thus, the Court has expanded community caretaking beyond instances where law-enforcement concerns are completely absent, but has not applied the doctrine so expansively as to encompass every instance where government acts in part to protect the community. The vagueness surrounding the definition of the community-caretaking category and the different standards governing the constitutionality of different types of community-caretaking searches indicate that more precision is needed. There is not a single community-caretaking doctrine. Rather, there are several different community-caretaking doctrines, but courts have not clarified the constitutional interests affected by those different kinds of searches. This Article aims to fill that need by providing a typology and analyzing the rules that should apply to the different categories.

### *III. Current Approaches and Their Flaws*

Where officers act for a purpose not relating to law enforcement—for example, where someone's life is in danger but no crime is suspected—there are two principal reasons to dispense with the warrant requirement: time may not allow it, and there would be no probable cause to justify a warrant in any event. Further, as then-Professor Debra Livingston has argued, the warrant and probable-cause protections of the Fourth Amendment may be deemed inapplicable to community caretaking because "the absence of a law-enforcement motive often mitigates the harms associated with intrusions on privacy for the purpose of criminal investigation."<sup>37</sup> Specifically, community-caretaking searches may not damage the reputation of the party searched, and may be briefer, less intrusive, and less likely to produce anxiety than are law-enforcement searches.<sup>38</sup>

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36. See, e.g., *Florida v. J.L.*, 529 U.S. 266, 274 (2000) (holding that an anonymous tip did not amount to reasonable suspicion that the suspect was carrying a gun, and therefore holding the search and seizure of the suspect unconstitutional); *Adams v. Williams*, 407 U.S. 143, 149 (1972) (holding that an informant's tip did provide reasonable suspicion that an individual was carrying a gun).

37. Livingston, *supra* note 3, at 273.

38. See *id.* at 273–74 ("[T]he absence of a law enforcement motive often mitigates the harms associated with intrusions on privacy for the purpose of criminal investigation." (citations omitted)); see also *Illinois v. Lidster*, 540 U.S. 419, 425 (2004) ("[I]nformation-seeking highway stops are less likely to provoke anxiety or to prove intrusive."); *Sitz*, 496 U.S. at 451–53 (1990) (finding checkpoints less intrusive than roving patrol stops); *United States v.*

Community-caretaking entries are thus so different from traditional Fourth Amendment activity that it is not entirely clear that the Amendment applies to community caretaking at all. There remains no square holding by the Supreme Court that entries for community-caretaking purposes constitute "searches,"<sup>39</sup> and occasionally lower courts have concluded that if the police are not "looking" to solve crime, they are not "searching" in the constitutional sense.<sup>40</sup>

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Martinez-Fuerte, 428 U.S. 543, 558–59 (1976) (suggesting that the regularized manner of checkpoints makes them less intrusive on the public).

39. *Cady v. Dombrowski* reserved the question whether entries for community-caretaking purposes constituted "searches," saying that it was unnecessary to decide whether only those searches that invade a reasonable expectation of privacy *and* are accomplished "with the specific intent of discovering evidence of a crime" would trigger application of the Fourth Amendment. 413 U.S. 433, 442 n.† (1973) (emphasis added). Similarly, in *South Dakota v. Opperman*, the Court noted, but did not decide, the open question whether inventories of impounded vehicles are searches. 428 U.S. 364, 370 n.6 (1976).

40. *See United States v. Maple*, 334 F.3d 15, 20 (D.C. Cir. 2003) ("[T]he anterior question before any court is whether a search of *any kind* has occurred, and only after that question is answered in the affirmative are we to consider the target's expectation of privacy."), *vacated in part on reh'g*, 348 F.3d 260 (D.C. Cir. 2003); *Commonwealth v. Evans*, 764 N.E.2d 841, 846 (Mass. 2002) (finding "that by requesting the defendant's license and registration, the officer [did not] restrain[] the defendant through any physical force or authority"). Illinois had treated community-caretaking activity as completely outside the Fourth Amendment. *See, e.g., People v. Murray*, 560 N.E.2d 309, 311–12 (Ill. 1990) (claiming that community caretaking does not "involve coercion or detention and therefore does not involve a seizure"), *overruled by People v. Luedemann*, 857 N.E.2d 187 (Ill. 2006). But Illinois has recently clarified that the community-caretaking purposes of police actions are relevant to the actions' reasonableness, not whether they constitute searches or seizures. *See Luedemann*, 857 N.E.2d at 199 (claiming community caretaking "is not relevant to determining whether police conduct amounted to a seizure in the first place").

Several other cases may be read to state that community-caretaking searches and seizures do not trigger Fourth Amendment protections, but those cases usually do not turn on such a conclusion. *See, e.g., People v. Gonzalez*, 789 N.E.2d 260, 263 (Ill. 2003) (describing community-caretaking activity as "consensual"), *overruled by People v. Harris*, 886 N.E.2d 947 (Ill. 2008); *In re Clayton*, 748 P.2d 401, 402 (Idaho 1988) ("[E]ven if Officer Moser's actions amounted to a seizure within the meaning of the fourth amendment, sufficient probable cause existed to conclude the removal of the keys was reasonable under the circumstances."); *People v. Cordero*, 830 N.E.2d 830, 839–40 (Ill. App. Ct. 2005) (O'Malley, J., concurring) (suggesting the court in *Gonzalez* thought "seizures may be justified on community caretaking grounds"). Rather, they uphold community-caretaking activity as reasonable, but also say that the Fourth Amendment is not implicated because the activity is neither a search nor a seizure.

Additionally, some cases make it rather tough to determine whether the police action was legitimated because there was no search or because the search was reasonable. *See, e.g., State v. Schlueter*, No. E2006-02365-CCA-R3-CD, 2008 WL 2166010, at \*3–4 (Tenn. Ct. Crim. App. May 23, 2008) (holding that because the officer "was acting within his community caretaking function when he activated the blue lights of his police cruiser and approached the appellant's vehicle . . . the stop of the appellant was not illegal").

Nevertheless, the Supreme Court has deemed the protections of the Fourth Amendment applicable in certain types of community-caretaking cases, and it is likely that the Court would apply the Fourth Amendment's reasonableness standard to all searches of areas as to which individuals have reasonable expectations of privacy,<sup>41</sup> regardless of the purposes underlying the searches.<sup>42</sup> In *Michigan v. Tyler*,<sup>43</sup> for example,<sup>44</sup> the Court considered whether police and firefighters had violated the Constitution when they entered a burned building and located evidence of the defendant's arson. The Court held that the officials had indeed "searched" the premises, concluding that "there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because . . . [the official's] purpose is to ascertain the cause of a fire rather than to look for evidence of a crime . . . ."<sup>45</sup> Most recently, in *Brigham City v. Stuart*,<sup>46</sup> the Court applied the reasonableness test in concluding that a police entry into a home was justified by the need to "prevent[] violence and restor[e] order," making no mention of the possibility that there had been no search at all.<sup>47</sup>

Holding community-caretaking entries to a reasonableness standard makes eminent sense from a policy perspective. In a way, the reasonableness standard produces the perfect policy result, for only those searches that intrude on

41. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (concluding that a Fourth Amendment "search" occurs when the government intrudes on an area where an individual has a subjective expectation of privacy "that society is prepared to recognize as 'reasonable'").

42. Cf. *United States v. Maple*, 348 F.3d 260, 261–62 (D.C. Cir. 2003) ("The United States concedes that any deliberate governmental intrusion into a closed space—opening a door or a closed compartment—is a search regardless of the reasons for the intrusion."); *Poe v. Commonwealth*, 169 S.W.3d 54, 58 (Ky. Ct. App. 2005) ("All courts that have considered the community caretaking function have required, at a minimum, that the officer's actions must be measured by a standard of reasonableness.").

43. See *Michigan v. Tyler*, 436 U.S. 499, 511 (1978) ("In summation, we hold that an 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.").

44. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (finding that the use of a narcotics dog does not constitute a search under the Fourth Amendment); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (stating that when a seizure occurs, the court must decide whether or not it was reasonable under the Fourth Amendment).

45. *Tyler*, 436 U.S. at 506; see also *Thompson v. Louisiana*, 469 U.S. 17, 22 n.3 (1984) (per curiam) (holding that a person retained a privacy interest in her home even after a suicide attempt rendered her unconscious).

46. *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006) (holding that "police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury").

47. *Id.* at 406.

individual privacy without sufficient cause are unreasonable and thus unconstitutional.<sup>48</sup> A Fourth Amendment exemption for community caretaking makes little sense in terms of protecting privacy; one's privacy is identically breached whether the purpose of the search is criminal investigation or community caretaking.<sup>49</sup> Moreover, viewing community caretaking as outside the Fourth Amendment would create a tremendous incentive for "helpful" police to intrude into all manner of private spaces and situations, and the Constitution would have no role in limiting such entries.<sup>50</sup>

Classifying community-caretaking entries as searches would also have the advantage of treating searches and seizures similarly—both would be determined irrespective of the officer's purpose. In *Illinois v. Lidster*,<sup>51</sup> for example, the Court required that temporary seizures of cars at a checkpoint be "reasonable in context," even though the purpose of the checkpoint was not to investigate the occupants of the stopped cars.<sup>52</sup> The common understanding—and the historically understood meaning—of "seizure" does not require that the action be undertaken for any particular purpose.<sup>53</sup> The Supreme Court has held that a seizure must be "willful"<sup>54</sup>—"the termination of freedom of movement through means intentionally applied,"<sup>55</sup> but "[a] seizure occurs even when an

48. See Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133, 1133 (1998) ("It is mighty hard to argue with reasonableness. . . . A 'one-size-fits-all' Fourth Amendment reasonableness standard seems to offer the best of all worlds: An ability to have an expansive Fourth Amendment that can be finely calibrated to meet the peculiarities of any situation.").

49. One kind of search may lead to the other, as in the situation where an officer executing a community-caretaking function develops probable cause to believe evidence of a crime is present. In such situations, it is the initial compromise of privacy that enables the subsequent, more intrusive, police activity.

50. Cf. *Brendlin v. California*, 551 U.S. 249, 263 (2007) ("Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal.").

51. *Illinois v. Lidster*, 540 U.S. 419, 426–27 (2004) (holding that information-seeking highway checkpoint stops are not presumptively unconstitutional, but rather the reasonableness of such stops must be evaluated by balancing public and private interests).

52. *Id.* at 426; see also *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) ("Petitioners concede, correctly in our view, that a Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint.").

53. See *California v. Hodari D.*, 499 U.S. 621, 624 (1991) ("From the time of the founding to the present, the word 'seizure' has meant a 'taking possession[.]'" (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 67 (1828); 2 J. BOUVIER, A LAW DICTIONARY 510 (6th ed. 1856); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2057 (1981))).

54. *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

55. *Id.* at 597 (emphasis deleted); accord *County of Sacramento v. Lewis*, 523 U.S. 833, 843–44 (1998) (restating rule that a seizure occurs only when there is a governmental

unintended person or thing is the object of the detention or taking."<sup>56</sup> If official detentions of "unintended person[s] or thing[s]"<sup>57</sup> qualify as seizures, *a fortiori* it would seem that official deprivations of *intended* persons—whether the officer has a purpose grounded in community caretaking, law enforcement, or his own curiosity—similarly qualify.

Once community-caretaking searches are determined to implicate the Fourth Amendment, however, it is therefore necessary to determine what, in the absence of probable cause and a warrant, makes such a search or seizure reasonable. Though the formulations vary somewhat, most cases employ one of two approaches to determining the reasonableness, and therefore the constitutionality, of community-caretaking searches. First, many states use a test of unadorned reasonableness.<sup>58</sup> That is, courts simply will announce their conclusion that a particular search or seizure is or is not reasonable. Some formulations of this general reasonableness test announce that reasonableness depends on balancing the private and governmental interests implicated by the search, but will provide no guidance as to how that balance should be struck in future cases.<sup>59</sup> Second, several states restrict community caretaking to instances where "emergency aid" is necessary, and uphold those searches that are reasonable responses to such emergencies.<sup>60</sup> Both approaches are unsatisfactory.

### *A. Balancing Tests and General Reasonableness*

In the law-enforcement context, the Fourth Amendment's probable-cause requirement<sup>61</sup> generally sets the balance between the public interest in the potential discovery of crime, evidence, or a suspect against the privacy interests

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termination of freedom of movement through means intentionally applied).

56. *Brower*, 489 U.S. at 596; *see also* *Brendlin v. California*, 551 U.S. 249, 256–57 (2007) (holding that automobile passengers are seized during traffic stops). *But cf.* *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000) (citing *Brower* in a suit under 42 U.S.C. § 1983 (2000) for the contention that "authorities [cannot] 'seize' any person other than one who was a deliberate object of their exertion of force").

57. *Brower*, 489 U.S. at 596.

58. *See infra* Part III.A (criticizing courts that make a general assessment of reasonableness without any standardized process).

59. *Id.*

60. *See infra* Part III.B (examining those states that limit community caretaking to emergency situations).

61. *See generally* *Illinois v. McArthur*, 531 U.S. 326, 331–33 (2001); *Maryland v. Buie*, 494 U.S. 325, 334 n.2 (1990); *see also* *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (establishing the probable-cause standard).

that would be sacrificed by the intrusion.<sup>62</sup> In community-caretaking cases, though, the balance may not be reduced to such relative clarity. As *Whren v. United States*<sup>63</sup> recognized, "detailed 'balancing' analysis [i]s necessary" in evaluating the reasonableness of police actions that "involve[] seizures without probable cause."<sup>64</sup>

Unfortunately, cases holding that community-caretaking searches must be reasonable have been quite vague in defining that notoriously general term.<sup>65</sup> Courts have announced that reasonableness requires that the government's interest in undertaking the search outweigh the searched party's interest in being free from the interference with his or her privacy.<sup>66</sup> But that "definition," of course, is not much more helpful than if a court announced, "a reasonable search is one that we think was a good thing to do under the circumstances."<sup>67</sup> In other words, a standard that asks only whether a search was reasonable is meaningless without "some criterion of reason . . . . What is the test of reason which makes a search reasonable?"<sup>68</sup>

Content must be given to this reasonableness standard if the community-caretaking doctrine is to be applied consistently by courts and if police are to be

62. See *Whren v. United States*, 517 U.S. 806, 816–19 (1995) (explaining that for a traffic stop, the existence of probable cause normally "outbalances" the private interest in avoiding police contact).

63. See *id.* at 819 (holding that a temporary police detention of defendant upon probable cause to believe he violated traffic laws does not violate the Fourth Amendment).

64. *Id.* at 818.

65. See, e.g., *Lockhart-Bembrey v. Sauro*, 498 F.3d 69, 75 (1st Cir. 2007) ("The ultimate inquiry is whether, under the circumstances, the officer acted 'within the realm of reason.' . . . Reasonableness does not depend on any particular factor; the court must take into account the various facts of the case at hand."); *State v. Diloreto*, 850 A.2d 1226, 1234 (N.J. 2004) (requiring community caretaking searches to be "objectively reasonable under the totality of circumstances").

66. See, e.g., *State v. Mireles*, 991 P.2d 878, 881 (Idaho Ct. App. 1999) (explaining Idaho's totality-of-the-circumstances test, which weighs "'the public need and interest furthered by the police conduct against the degree and nature of the intrusion upon the privacy of the citizen'" (quoting *State v. Ellenbecker*, 464 N.W.2d 427, 429 (Wis. Ct. App. 1990))). Furthermore, as discussed in Part IV.C, *infra*, weighing a "government interest" against an individual's privacy interest makes little sense when the government's interest is to protect the very individual whose privacy is invaded.

67. See, e.g., *State v. Wixom*, 947 P.2d 1000, 1002 (Idaho 1997) (explaining that police intrusion must be "reasonable in view of all the surrounding circumstances" (quoting *State v. Waldie*, 893 P.2d 811, 814 (Idaho Ct. App. 1995))).

68. *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting); see also Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 712 (1998) ("[W]hen the Court states that an officer acted reasonably (appropriately), the Court has announced its ultimate conclusion, not a methodology or perspective from which to assess constitutionally reasonable searches.").



expected to comply with its strictures.<sup>69</sup> A malleable standard in Fourth Amendment cases presents a particular danger that it will be practically difficult to declare unreasonable a search that has resulted in the seizure of evidence proving a defendant's guilt.<sup>70</sup>

Of course, the flexibility of a reasonableness standard is also its greatest advantage, and it would be both impossible and unwise to catalogue in advance all of the possible community-caretaking scenarios that might arise. Courts and the police should be able to react differently when presented with different facts, and such details as the weather and temperature; the traffic on a road where the police find a disabled vehicle; the degree to which an ill or intoxicated person is incoherent or disoriented; and the body position of someone who might be sick, dead, or just sleeping in a car might be important in assessing whether a police response would be appropriate. But no statute or judicial doctrine could be written that would provide concrete guidance in cases turning on those variables and countless others. Thus, the flexibility present in

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69. See *New Jersey v. T.L.O.*, 469 U.S. 325, 370 (1985) (Brennan, J., dissenting). In criticizing the majority's use of a balancing approach to determine Fourth Amendment reasonableness, Justice Brennan noted:

[T]he presence of the word "unreasonable" in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good. . . . [T]his Court has an obligation to provide some coherent framework to resolve such questions on the basis of more than a conclusory recitation of the results of a "balancing test."

*Id.*; see also George M. Dery III, *Are Politicians More Deserving of Privacy Than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73 (1998) (offering a detailed critique of the Supreme Court's context-sensitive "special needs" balancing approach used in certain Fourth Amendment cases).

70. See, e.g., WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH* 39 (1999) ("When the crime is a serious one and the consequences of suppression would mean that the guilty person will go free, judges are tempted to credit testimony that they have good reason to believe has been embellished, to avoid suppression."); Bacigal, *supra* note 68, at 707 ("Why did the Court choose to empathize with the officers' plight while turning a deaf ear to [defendants']? The distasteful answer may be that in the actual cases that reach the Court, the defendants usually are guilty of some serious crime."); Stephen Markman, *Six Observations on the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 425, 428 (1997) ("When something less draconian than the exclusionary rule is restored as a remedy for an unreasonable search and seizure, then the judiciary will be less inclined to interpret the Fourth Amendment in the narrowest possible fashion in an effort to avoid the application of the rule."); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 884 (1991) ("Exclusion, unlike damages, may bias judges' after-the-fact probable cause determinations by requiring that they be made in cases where the officer actually found incriminating evidence."); cf. *United States v. Leon*, 468 U.S. 897, 917 n.18 (1984) ("Limiting the application of the exclusionary sanction may well increase the care with which magistrates scrutinize warrant applications.").

a reasonableness standard has the advantage of allowing police and reviewing courts to calibrate a response appropriate to each situation.

It would be a mistake, however, to think that the choice is between either a rigid formalism that reduces reasonableness to a checklist containing detailed instructions for every imaginable set of facts on the one hand, and unconstrained police and judicial discretion on the other. Rather, a doctrine that gives content to the reasonableness standard by focusing the inquiry on the constitutional interests implicated by different types of searches promises to give police and courts both the flexibility and the direction they need to protect us and our liberty. Although some courts have attempted to explain the reasonableness standard,<sup>71</sup> no attempt has done much to focus the inquiry on particular factors that will bring consistency to the field.

Some states use a three-part test of reasonableness, asking (1) whether a search or seizure occurred, (2) whether the police conduct was "bona fide community caretaker activity," and (3) whether the public need for the intrusion outweighed the interests of the person subject to the search or seizure.<sup>72</sup> But of those three parts, only the last one is of any significance, and it provides no information as to how that balance should be struck in an individual case. The other two elements are strictly preliminary—no question of the reasonableness of police activity is *raised* unless the Fourth Amendment is implicated by a search or seizure, and the community-caretaking doctrine by definition simply cannot apply unless there is some need other than law enforcement for the police conduct.<sup>73</sup>

Another formulation, used in Maryland and developed by the Tenth Circuit, is more helpful. That standard permits community-caretaking seizures where: (1) there are specific and articulable facts reasonably warranting the action; (2) the government's interest outweighs the individual's interest in being free of the seizure; and (3) the scope of the detention is no more severe than necessary for its purpose.<sup>74</sup> This approach has the advantage not only of

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71. See *Mireles*, 991 P.2d at 881 (explaining that reasonableness is determined by weighing the public need for police conduct against citizens' privacy interests).

72. See, e.g., *State v. Crawford*, 659 N.W.2d 537, 543 (Iowa 2003) (providing the three-part analysis required in community-caretaking cases (citing *State v. Anderson*, 417 N.W.2d 411, 414 (Wis. Ct. App. 1987))); see also *State v. Ziedonis*, 707 N.W.2d 565, 570 (Wis. Ct. App. 2005) (reciting the three-part test for reasonableness and naming four factors to consider when weighing the public need for intrusion against privacy interests).

73. See *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (defining community caretaking as those activities "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute").

74. See *Wilson v. State*, 932 A.2d 739, 744–45 (Md. Ct. Spec. App. 2007) (articulating the three-part test for when community-caretaking seizures are permissible (citing *United States*

stating the relevant interests that must be balanced, but of specifying part of what that balance entails—the police activity must be no broader than necessary. Such a limitation suggests that if privacy interests can be overridden when the police are acting for community-caretaking purposes, the police activity must be designed to fulfill those purposes. Further, this standard requires that the government officials be able to articulate reasons justifying the search; hunches are insufficient.<sup>75</sup>

These attributes are commendable, but the formulation suffers from some flaws. First, the "reasonably warranting" language in prong one seems to duplicate the balance in prong two. Surely the articulable facts known to police could reasonably justify a search only if they indicate that the balancing of interests would make the entry constitutional. Second, and more important, the test does nothing to indicate how that balance should be drawn. What kinds of governmental interests matter, and how significant are they relative to privacy or possessory interests of individuals? Are we to consider the particular individual's interests, or those of a typical (innocent) person in that individual's position? Third, prong two's balance has little utility when the government is not trying to serve its interests or those of the community at large, but instead is trying to protect the interests of the person who is searched. The three-part Maryland/Tenth Circuit standard, therefore, can be improved.

### B. Limiting Community Caretaking to Emergencies

The most influential standard<sup>76</sup> for evaluating community caretaking comes from the New York case of *People v. Mitchell*.<sup>77</sup> That case, which permitted a search of hotel rooms for a missing chambermaid who ultimately was found murdered, established a three-part test for assessing the reasonableness of "emergency" entries:

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v. *Garner*, 416 F.3d 1208, 1213 (10th Cir. 2005))), *rev'd*, 975 A.2d 877 (Md. 2009).

75. See *Garner*, 416 F.3d at 1213 (explaining that, like an investigative detention, "a community caretaking detention must be based on 'specific and articulable facts which . . . reasonably warrant [an] intrusion' into the individual's liberty" (citations omitted)). See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

76. See 3 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.6(a) n.19 (4th ed. 2004) (listing courts that follow the three-point test set forth in *People v. Mitchell*, 347 N.E.2d 607 (N.Y. 1976)).

77. See *People v. Mitchell*, 347 N.E.2d 607, 610–11 (N.Y. 1976) (finding that warrantless police search of defendant's hotel room for missing hotel maid was justified by the emergency doctrine and thus not in violation of the Fourth Amendment), *abrogated by* *Brigham City v. Stuart*, 547 U.S. 398 (2006).

(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.

(2) The search must not be primarily motivated by intent to arrest and seize evidence.

(3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.<sup>78</sup>

The *Mitchell* test thus requires that the action be immediately necessary to quell the emergency. Limiting the justification to "emergencies," "imminent" threats, or to situations where action is needed "immediately,"<sup>79</sup> focuses attention on the question of timing: Is the harm to be avoided by the action occurring *at that very moment*?

Several cases from other jurisdictions,<sup>80</sup> including Arizona,<sup>81</sup> Colorado,<sup>82</sup> Delaware,<sup>83</sup> Florida,<sup>84</sup> Kansas,<sup>85</sup> New Mexico,<sup>86</sup>

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78. *Id.* at 609.

79. See *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) ("Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.").

80. Many of these cases are compiled in Professor LaFave's treatise. See generally 3 LAFAVE, *supra* note 76, § 6.6 n.19.

81. See, e.g., *State v. Fisher*, 686 P.2d 750, 760–61 (Ariz. 1984) (using the three-part *Mitchell* framework to uphold trial court's finding that officers' warrantless entry into defendant's apartment did not violate the Fourth Amendment).

82. See, e.g., *People v. Hebert*, 46 P.3d 473, 479 (Colo. 2002) (finding that police officers' warrantless entry into defendant's house was not justified by an immediate crisis, and thus emergency aid exception did not apply).

83. See, e.g., *Guerri v. State*, 922 A.2d 403, 406 (Del. 2007) (adopting the three-prong formulation of the emergency aid exception and finding officers' warrantless entry into defendant's home to be justified under that test).

84. See, e.g., *Riggs v. State*, 918 So. 2d 274, 282 (Fla. 2005) (applying a two-part test that asks whether there were "reasonable grounds" to believe that medical attention was necessary and whether there were "reasonable grounds to connect the feared emergency to the" place searched); see also *Zakrzewski v. State*, 866 So. 2d 688, 695 (Fla. 2003) (finding that, given the exigent circumstances exception to the warrant requirement, defendant's attorney's choice not to file a motion to suppress evidence found during a warrantless search did not render his assistance deficient). The absence of the second *Mitchell* factor from *Riggs*'s formulation is of no moment, as the Supreme Court would later hold officers' subjective intent to be irrelevant in evaluating the constitutionality under the Fourth Amendment of emergency searches. See *Brigham City v. Stuart*, 547 U.S. 398, 404–05 (2006) (explaining that an officer's subjective intent is irrelevant when determining the constitutionality of an exigent circumstances search).

85. See, e.g., *State v. Jones*, 947 P.2d 1030, 1036–37 (Kan. Ct. App. 1997) (using three-prong *Mitchell* test to find that emergency exception doctrine justified warrantless search of defendant's room).

86. See, e.g., *State v. Ryon*, 108 P.3d 1032, 1044 (N.M. 2005) ("[The court] adopt[s] the *Mitchell*

Nebraska,<sup>87</sup> North Dakota,<sup>88</sup> Oregon,<sup>89</sup> and some federal courts<sup>90</sup> follow the *Mitchell* rule and do not permit police to search for community-caretaking purposes unless they satisfy either the requirements of the emergency doctrine,<sup>91</sup> or unless the search fits within a specifically accepted special-needs category, such as automobile inventories.<sup>92</sup>

*Mitchell*'s requirement of an "emergency," with a concomitant "immediate need" for police action, has been repeated over and over, but is rarely applied with teeth.<sup>93</sup> *People v. Molnar*,<sup>94</sup> another New York case, for example, permitted the police to enter an apartment without a warrant to investigate the

test.").

87. See, e.g., *State v. Plant*, 461 N.W.2d 253, 262 (Neb. 1990) (explaining that law enforcement must prove a warrantless search was conducted under a three-part test resembling that in *Mitchell* for the emergency doctrine to apply).

88. See, e.g., *Lubenow v. N.D. State Highway Comm'r*, 438 N.W.2d 528, 533 (N.D. 1989) (using *Mitchell* framework to find that officer's entry into defendant's garage did not violate Fourth Amendment).

89. See, e.g., *State v. Christenson*, 45 P.3d 511, 514 (Or. Ct. App. 2002) (applying the emergency requirement under the state constitution, and distinguishing it from the Fourth Amendment's community-caretaking doctrine); *State v. Follett*, 840 P.2d 1298, 1302 (Or. Ct. App. 1992) (adopting a modified version of the *Mitchell* framework).

90. See, e.g., *United States v. Stafford*, 416 F.3d 1068, 1073–75 (9th Cir. 2005) (using the three-part *Mitchell* test to uphold district court's finding that officers' warrantless search was justified under the emergency doctrine); *Martin v. City of Oceanside*, 360 F.3d 1078, 1081–83 (9th Cir. 2004) (using three-part test to determine officers' warrantless entry did not violate defendant's Fourth Amendment rights); *United States v. Smith*, 797 F.2d 836, 840 (10th Cir. 1986) (delineating a three-part "exigent circumstances" exception to the warrant requirement similar to that in *Mitchell*).

91. Others apply closely related tests. See *State v. Blades*, 626 A.2d 273, 280 (Conn. 1993) ("A police officer's objectively reasonable belief that a person might be in need of immediate aid or assistance will justify a warrantless entry."); *State v. Rincon*, 147 P.3d 233, 237 (Nev. 2006) (requiring "clear indicia of an emergency").

92. See, e.g., *People v. Johnson*, 803 N.E.2d 385, 387 (N.Y. 2003) (setting forth the basic elements of a proper inventory search).

93. See, e.g., *State v. Crawford*, 659 N.W.2d 537, 543 (Iowa 2003) (holding that a stop of a vehicle was constitutional because of "the interest of public safety and emergency aid" when the officer had received a report that the passenger had taken "some pills" and been aggressive toward a third party who was not in the vehicle); see also John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 CRIM. L. & CRIMINOLOGY 433, 508 (1999) ("[W]hile [the requirement of an immediate need for the officer's action] suggests there is an element of immediacy required in situations where the emergency doctrine is applied, this requirement is not always strictly enforced." (citing *United States v. Bute*, 43 F.3d 531, 537–39 (10th Cir. 1994))).

94. See *People v. Molnar*, 774 N.E.2d 738, 739 (N.Y. 2002) (holding that police entry into defendant's apartment in response to a call alerting them to a "strange odor," which lead them to discover a rotting body, satisfied the *Mitchell* test).

source of a putrid odor.<sup>95</sup> The odor was ultimately traced to a rotting corpse that the lessee/murderer had stuffed in a closet.<sup>96</sup> The court considered the situation an "emergency"<sup>97</sup> though time was obviously not as crucial as it was in *Mitchell*; indeed, the police waited an hour before they entered Molnar's apartment.<sup>98</sup> As the *Molnar* court explained,

[n]ot all emergencies are the same. In some, a person's life may hinge on the passage of mere seconds, demanding immediate police action. In others, police must act with reasonable swiftness but their response need not be calculated in seconds. . . . The appropriately measured response of the police should not be declared illegal merely because they thoughtfully delayed entry for a relatively brief time.<sup>99</sup>

*Molnar* was absolutely correct about the reasonableness of the police action—after all, the government could hardly force the other apartment residents to tolerate the odor indefinitely.<sup>100</sup> Nevertheless, *Molnar* is unconvincing in its shoehorning of *Molnar*'s facts into the emergency doctrine.

The defining feature of an emergency is urgency—the need for immediate action.<sup>101</sup> We should not pretend that the police are presented with an emergency requiring an "immediate need"<sup>102</sup> for help if the police can afford to

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95. *Id.* at 742–43. Other nuisances should yield the same result. See *United States v. Rohrig*, 98 F.3d 1506, 1524–25 (6th Cir. 1996) (permitting the police to enter a residence when other attempts to contact someone to turn down loud music had failed). But see *United States v. Williams*, 354 F.3d 497, 504–05 (6th Cir. 2003) (holding unconstitutional an entry to stop a water leak, arguing that the only danger presented by the leak was a speculative risk of property damage).

96. See *Molnar*, 774 N.E.2d at 738–39 (describing the manner in which the defendant killed the victim and placed her body in a closet, only for it to be discovered by police the next month).

97. See *id.* at 739–43 (rejecting defendant's argument that, as a matter of law, there was no emergency to justify the officers' entry).

98. See *id.* at 739, 741 (describing how police debated various alternatives to warrantless entry for about an hour before forcing their way into defendant's apartment).

99. *Id.* at 741–42.

100. See *id.* at 743 ("As defendant concedes, a public official would have been required to enter the apartment at some point, regardless of whether that official could obtain a warrant.").

101. See, e.g., *United States v. Williams*, 354 F.3d 497, 503 (6th Cir. 2003) ("Exigent circumstances are situations where 'real immediate and serious consequences' will 'certainly occur' if a police officer postpones action to obtain a warrant." (internal citations omitted)); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 741 (1993) (defining emergency as "an unforeseen combination of circumstances or the resulting state that calls for immediate action"; "a pressing need" (emphasis added)).

102. See *id.* at 1129 (defining immediate as "occurring, acting, or accomplished *without loss of time*" (emphasis added)).

wait hours before taking action.<sup>103</sup> Community caretaking comprises more than just dealing with emergencies, however. Police may act in a community-caretaking capacity where an imminent threat to life, health, or property is present,<sup>104</sup> but community caretaking also encompasses far less time-sensitive concerns where neither persons nor property would be placed in substantial jeopardy by failing to act immediately.<sup>105</sup>

Permitting the emergency exception to apply in circumstances where time is not of the essence essentially causes the doctrine to revert to one of generalized reasonableness.<sup>106</sup> Without the emergency requirement, and without the requirement of subjective good faith (which the Supreme Court subsequently, in *Brigham City v. Stuart*, held not to be required in emergency situations),<sup>107</sup> *Mitchell*'s three-part test requires only (1) "reasonable grounds to believe that there is a[] . . . need for [police] assistance for the protection of life

103. See *Mincey v. Arizona*, 437 U.S. 385, 395 (1978) (holding that a search occurring *after* an emergency had been resolved could not be justified by the emergency); *Thompson v. Louisiana*, 469 U.S. 17, 21 (1984) (following the holding in *Mincey* by declining to find that the warrantless search of a murder scene falls within one of the narrow exceptions to the warrant requirement); *Root v. Gauper*, 438 F.2d 361, 365 (8th Cir. 1971) (concluding that waiting several minutes before entering a house "is not consistent with [the actions] of a man who believes that wounded persons might be lying inside the house awaiting attention" and therefore declining to apply the emergency exception); *People v. Hebert*, 46 P.3d 473, 480–81 (Colo. 2002) (holding unconstitutional an entry to a home occurring sixty to ninety minutes after the discovery of a dead body).

104. See *Livingston*, *supra* note 3, at 227 (defining exigency as "something like 'a compelling demand for immediate action'" (quoting H. RICHARD UVILLER, *VIRTUAL JUSTICE* 82 (1996))).

105. See *State v. Gocken*, 857 P.2d 1074, 1080 (1993) ("[T]he police may be required to perform a warrantless search, *not in response to an immediate emergency*, but as part of their function of protecting and assisting the public." (emphasis added) (citations omitted)).

106. See *State v. Jones*, 947 P.2d 1030, 1036–39 (Kan. Ct. App. 1997) (utilizing the *Mitchell* test to analyze the applicability of the "emergency doctrine exception"). The court opined:

While [*Mitchell*'s] three-prong analysis will be of assistance in some cases, in most instances, common sense will be the touchstone. Police entry to check on the welfare of a person may not be used as a stratagem for circumventing the Fourth Amendment to the United States Constitution. But if police appear truly to have acted for the purpose of checking on a person's welfare, and their actions appear to be reasonable under the circumstances, further analysis is unnecessary.

*Id.* at 1039; see also, e.g., *Love v. State*, 659 S.E.2d 835, 838 (Ga. Ct. App. 2008) (upholding the search of a residence upon discovering that its front door was ajar and when no one responded to the officers' shouts, because there was a "reasonable basis for believing that . . . an emergency [such as a burglary in progress or an injury to an occupant] existed").

107. See *Brigham City v. Stuart* 547 U.S. 398, 404 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as circumstances, viewed *objectively*, justify the action.'" (emphasis added) (citations omitted)).

or property," and (2) "some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched."<sup>108</sup> And because we can hardly expect that prosecutors will invoke the community-caretaking doctrine to defend a search of a place other than the one associated with the threat to "life or property,"<sup>109</sup> unhelpfully, *Mitchell* turns out to require only "reasonable grounds" to believe that the official assistance is "need[ed]."<sup>110</sup> Professor John Decker has suggested just such a modification of "immediate";<sup>111</sup> delayed entries should be permissible, in his view, as long as "there is a reasonable explanation for the officer's delay."<sup>112</sup>

But if we are comfortable with the police taking community-caretaking action simply because doing so is "reasonable," then we should not behave as if limiting such entries to emergencies constrains (or should constrain) the police behavior. Instead, we should determine what types of community-caretaking behavior we consider reasonable, and constrain police discretion by means adapted to that concern.

The emergency exception is not well adapted to concerns about community caretaking. Rather, it is an outgrowth of the long-recognized exigent-circumstances exception to the warrant requirement for crime-control searches.<sup>113</sup> Police in hot pursuit of a fleeing felon or in reasonable fear of the imminent destruction of evidence may act without a warrant,<sup>114</sup> but because the police are acting to enforce the law, the exigent-circumstances exception permits the police action only if the police have probable cause and an exigency.<sup>115</sup> The exigency itself is insufficient.

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108. *People v. Mitchell*, 347 N.E.2d 607, 609 (N.Y. 1976).

109. If the police did search a place unconnected to the community-caretaking goal, the search would be unreasonable. In the terms offered in Part IV, *infra*, such a search would be unlikely to "prevent or lessen the harm."

110. *Mitchell*, 347 N.E.2d at 609.

111. See Decker, *supra* note 93, at 508 ("Immediacy should not be construed as a set time period within which the officer must act, rather, it should be assessed in the context of the factual situation.").

112. *Id.*

113. See *id.* at 441-45 ("[W]hen the police act in response to an emergency, this action is within their community caretaking function, and is not a variant of exigent circumstances, but, like a border search or hot pursuit, is a separate exception to the Fourth Amendment.").

114. See, e.g., *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (stating that "a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or *imminent destruction of evidence*, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling" (emphasis added) (citations omitted)); *Warden v. Hayden*, 387 U.S. 294 (1967) (applying the exigent circumstances exception to authorize a search of an apartment into which a bank robber had fled).

115. See, e.g., *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (upholding a warrantless search



The justification for the exigent-circumstances exception is that the time pressure makes it impracticable to obtain a warrant.<sup>116</sup> Accordingly, in law-enforcement circumstances, the warrant requirement should apply where the police have the time to get one, but where there is an emergency, then no warrant should be necessary. The time limitations inherent in an emergency or exigent-circumstances requirement, then, are necessary in the law-enforcement context because without them the warrant requirement would be a nullity. We would be left with only the requirement of reasonableness, and though the Court has emphasized the Reasonableness Clause of the Fourth Amendment in recent years,<sup>117</sup> it continues to require warrants as a general rule.<sup>118</sup>

In the community-caretaking context, however, we need not worry about evading the warrant requirement because it would be impossible to obtain traditional warrants based on probable cause in any event.<sup>119</sup> A lenient

where the police had probable cause to believe the evidence was being destroyed); *Schmerber v. California*, 384 U.S. 757, 770 (1966) (requiring a "clear indication" that evidence would be found to justify a warrantless blood test); 1 JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE* 192 (4th ed. 2006) ("[A]lthough an exigency justifies the absence of a search warrant, it does not dispense with any underlying requirement of probable cause that exists.").

116. See *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").

117. See, e.g., *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009) (holding that police may search a vehicle without a warrant incident to an arrest if "it is reasonable to believe the vehicle contains evidence of the offense of the arrest"); *Herring v. United States*, 129 S. Ct. 695, 699 (2009) ("When a probable cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation."); *Virginia v. Moore*, 128 S. Ct. 1598, 1604 (2008) ("[W]e have analyzed a search or seizure in light of traditional standards of reasonableness 'by assessing . . . the degree to which it intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate government interests.'" (citations omitted)); *Samson v. California*, 547 U.S. 843, 848 (2006) ("Under our general Fourth Amendment approach, 'we 'examin[e] the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment.'" (citations omitted)).

118. See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) ("'[W]arrants are generally required to search a person's home or his person . . .'" (citations omitted)); see also *Thompson v. Louisiana*, 469 U.S. 17, 20 (1984) ("[W]e have consistently reaffirmed our understanding that in all cases outside the exceptions to the warrant requirement the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the 'persons, houses, papers, and effects' of citizens." (citations omitted)).

119. Cf. *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (analyzing the reasonableness of a search and seizure under the Fourth Amendment). The Court in *Terry* stated:

[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . . But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been,

interpretation of "immediate" or "emergency" that requires only that community-caretaking actions be reasonable simply recognizes that the Warrant Clause has never been, and could never be, applicable in such situations.<sup>120</sup> Accordingly, courts should dispense with the emergency nomenclature and focus on what reasonable means in the community-caretaking context.

Some courts do limit community caretaking to true emergencies. In *United States v. Bute*,<sup>121</sup> for example, the Tenth Circuit cited the emergency limit of the *Mitchell* test in refusing to permit a sheriff's deputy to enter a commercial structure that had been left open at night.<sup>122</sup> Similarly, *State v. Trudelle*<sup>123</sup> declined to apply the exception to a warrantless entry of a methamphetamine lab despite the potential safety threats caused by the chemicals.<sup>124</sup> Michigan even refused to permit police to enter a motel room to ensure the safety of occupants after a shots-fired report identified that room or one other as the source of the shots.<sup>125</sup> Kansas restricts public safety stops of vehicles to situations presenting "clear, urgent, and immediate" danger,<sup>126</sup> and has applied that rule to invalidate a stop where police received a tip that a motorist had injected something into his arm, but where the motorist did not appear to be driving erratically.<sup>127</sup>

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and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

*Id.*

120. See *id.* (recognizing police action conduct "which historically has not been, and as a practical matter could not be, subjected to the warrant procedure").

121. See *United States v. Bute*, 43 F.3d 531, 539 (10th Cir. 1994) (holding that the open door of a commercial building at night did not constitute an emergency rising to an exception to the warrant requirement).

122. See *id.* ("We simply cannot accept the notion that an open door of a commercial building at night is, in and of itself, an occurrence that reasonable and objectively creates the impression of an immediate threat to person or property as to justify a warrantless search of the premises.").

123. See *State v. Trudelle*, 162 P.3d 173, 184–85 (N.M. Ct. App. 2007) (deciding that a methamphetamine lab, despite potential dangers of all such labs, did not rise to the level of an emergency exception to the warrant requirement).

124. See *id.* ("Although they expressed a concern about safety with regard to meth labs in general, the officers did not have any credible and specific information about possible victims inside of Defendants' home. Absent such specific information, the officers were not entitled to enter as community caretakers.").

125. See *People v. Davis*, 497 N.W.2d 910, 921–22 (Mich. 1993) (noting that "the police had no warrant and no probable cause" as well as no "specific and articulable facts" suggesting "that a person within room 33 was in need of immediate aid"; therefore, "entry into defendant's room violated the Fourth Amendment").

126. *State v. Tucker*, 878 P.2d 855, 861 (Kan. Ct. App. 1994).

127. See, e.g., *State v. Ludes*, 11 P.3d 72, 77 (Kan. Ct. App. 2000) ("Because the caller's

Such strict interpretations of "emergency" can cause problems, however, as police may not know there is an immediate need for their assistance until it is too late for their assistance to be effective, or until a minor situation has grown into a crisis. Police should not have to allow an apartment's gas leak to threaten the whole block, or wait until a water leak causes a floor to collapse, before entering a dwelling.<sup>128</sup> At the same time, not every situation that could conceivably become a catastrophe is cause for the police to take action.<sup>129</sup>

The Supreme Court's discussion of emergency entries in *Brigham City v. Stuart* is instructive. There, the Court rejected the idea that the police needed to wait until the need for action was grave, and countered that police could more effectively serve the community by preventing injury than by providing help only after damage had been done:<sup>130</sup> "The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to

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tip was so lacking in details and [the officer] did not observe any behavior which would indicate immediate danger to Ludes or the public, it cannot be held the stop was justified under the guise of a safety stop."). Other times, however, Kansas has adopted a flexible approach to its public-safety exception. See *State v. Jones*, 947 P.2d 1030, 1039 (Kan. Ct. App. 1997) (citing "common sense" as the "touchstone" and reading *Mitchell* to require only that the officer act "reasonably under the circumstances").

128. See, e.g., *United States v. Bishop*, 338 F.3d 623, 628 (6th Cir. 2003) (upholding police entry into an unlocked, unoccupied vehicle when the officer observed a handgun inside); *State v. Stanberry*, No. 2002-L-028, 2003 WL 22427922, at \*4 (Ohio Ct. App. Oct. 24, 2003) (finding unconstitutional the search of a hospitalized man's home for burning candles after officers noticed some candles dripping wax onto the floor). Certainly the situation in *Bishop* could have developed into an emergency if someone had taken the gun from the vehicle. Nevertheless, and despite the Sixth Circuit's contrary conclusion, it is indisputable that the situation facing the officer did not *then* present an immediate threat to public safety. So long as the vehicle was unoccupied, and so long as the officer was at the scene, the handgun was not going to injure anyone. See *id.* at 638 (noting that the danger arose from someone approaching the vehicle and picking up the handgun, not from the unattended handgun itself). The officer's action was reasonable—the intrusion on privacy by opening an unlocked car door was minimal, and the potential gain in terms of public safety was substantial. The police should not have had to guard the car until the owner returned. Cf. *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (holding that the removal of a weapon from a car was reasonable, even though police could have neutralized the danger by posting a guard there). And reasonableness is all that should be required. Additional emergency requirements tend to result in a curiously lenient application of the emergency standard.

129. See *United States v. Williams*, 354 F.3d 497, 504–05 (6th Cir. 2003) ("Even if a water leak that could potentially cause damage to a new carpet could be considered an emergency, the additional time it would have taken to obtain a search warrant was marginal . . . . Such risk was, at best, speculative."). In *Williams*, the court disapproved the warrantless entry. *Id.* at 504.

130. As Chicago Mayor Richard J. Daley eloquently put it, "[t]he policeman isn't there to create disorder, the policeman is there to preserve disorder." THE YALE BOOK OF QUOTATIONS, *supra* note 8, at 183.

casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."<sup>131</sup>

The necessity or "choice-of-evils" defense in criminal law features the same debate about the need to limit its scope to situations where action is needed immediately. Jurisdictions interpreting the necessity defense are split on whether the defense carries an implicit time limitation—that is, whether the necessity defense is restricted to those actions combating an imminent harm. Some states require the actor to respond to an "imminent" threat<sup>132</sup> or an "emergency,"<sup>133</sup> while others require that the actor's conduct be "immediately necessary."<sup>134</sup> Still others, and the Model Penal Code, require only that the action be "necessary."<sup>135</sup>

The rationale for a time limit is that people should violate criminal prohibitions—even when defending oneself or others—only as a last resort.<sup>136</sup> Thus, the defendant is justified only when we are certain that the harm sought to be avoided would have occurred but for that behavior. If the harm is to occur in the future, perhaps another way of avoiding the harm will become available, and the defense should not apply.<sup>137</sup> The better rule, however, is that strict time limits are unnecessary and potentially harmful, for certain dangers may be prevented only in advance of the threat's materialization.<sup>138</sup> Requiring

131. *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006); *see also* *United States v. York*, 895 F.2d 1026, 1030 (5th Cir. 1990) (upholding a search to neutralize a person who was drunk and threatening children as reasonable despite the fact that no actual violence had yet been done); MATT LEAF, *USA HOCKEY INTERMEDIATE OFFICIALS MANUAL* 58 (7th ed. 2005) ("Enter together [with your partner], when the fight slows down or one player gains an advantage . . . [C]ommunicate with player to calm him/her down or make him/her feel better ('nice fight' or 'you definitely got the better of him/her this time').").

132. *See* PAUL H. ROBINSON, *CRIMINAL LAW* 410 (1997) ("Many statutes require that the threat of harm must be 'imminent' in order to entitle the actor to act under a lesser-evils defense.").

133. *See id.* at 410 n.8 ("Requiring that the actor's conduct be necessary as an 'emergency' measure, as is sometimes done, leads to the same results as the imminent-threat requirement.").

134. *See id.* at 410–11 ("Some necessity statutes require that the actor's conduct be 'immediately necessary.'").

135. *See id.* at 407 ("[A]n actor is justified if his conduct is: 'Necessary to avoid a harm to himself or to another . . .'" (quoting MODEL PENAL CODE § 3.02(1)(a) (2008))).

136. *See* 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* 131 (2d ed. 2003) ("Perhaps this is but a way of saying that, until the time comes when the threatened harm is immediate, there are generally options open . . . other than the option of disobeying the literal terms of the law.").

137. *See id.* ("It is sometimes said that the defense of necessity does not apply except in an emergency . . .").

138. *See* ROBINSON, *supra* note 132, at 411–12 ("The 'immediately necessary' requirement would seem always to force an actor to delay, rather than leaving it for a jury to decide whether it was reasonable under the circumstances to reduce the risk of the harm by acting earlier.").

that the actor's response be necessary suffices to limit the defense, without adding the limitation of immediacy.<sup>139</sup> Where another solution is truly likely to materialize, then the defendant's actions are not necessary; if they are necessary, then it should make no difference whether the defendant sought to avoid a harm that was to occur in two seconds or two weeks.<sup>140</sup>

Likewise, in community-caretaking situations, requiring that the police action be objectively reasonable through a balancing of the interests involved ensures that police action that unnecessarily interferes with privacy rights will not trigger the exception.<sup>141</sup> An appropriate balance should seek to preserve the emergency doctrine's advantage of prohibiting the police from acting when another, substantially less intrusive means would be as effective, without preventing the police from acting where their help is beneficial but no danger is immediately apparent.<sup>142</sup> Additionally, to the extent that a requirement of present danger is necessary to guard against pretext,<sup>143</sup> a test that overtly prohibits pretextual community caretaking with regard to non-emergencies—as this Article proposes in Part IV, *infra*—would be more closely tailored to that interest.

#### IV. Different Types of Community-Caretaking Cases

All community-caretaking cases are incompatible with Fourth Amendment requirements of warrants and probable cause. One might suggest, therefore, that community-caretaking activity is unconstitutional if it involves a governmental intrusion into an individual's reasonable expectation of privacy.

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(citations omitted)).

139. See MODEL PENAL CODE § 3.02 (2008) (requiring only "that the actor believes [the conduct] to be necessary to avoid the harm or evil to himself or to another").

140. See *id.* (requiring only subjective belief that conduct is necessary to avoid harm).

141. See *State v. Maddox*, 54 P.3d 464, 468 (Idaho Ct. App. 2002) ("Officer Reyes' basis for the stop was speculative and anticipatory, a concern about something that *might* happen if Maddox himself did not perceive the danger . . . . Community caretaking justifies a detention only if there is a present need for assistance.").

142. But cf. *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (requiring that courts grant officers considerable discretion concerning the manner in which they address a public safety issue). Necessary, then, does not always translate to "least restrictive means"; rather, the option available to—but not utilized by—police would be relevant to the question of whether the action taken was reasonable or not. For further discussion on this point, see *infra* Part IV.

143. See *Maddox*, 54 P.3d at 468 ("Allowing . . . community caretaking stops whenever [officers] anticipate that a citizen might be about to embark upon an unwise venture would present far too great an opportunity for pretextual stops and far too great an imposition on the privacy interests of our citizenry . . . .").

Such a broad attack on community caretaking, however, is both inconsistent with precedent and unwise.

Consider the following situation: A police officer walking down the street hears a crash coming from inside a nearby home. He sees through a window an individual prone on the floor at the foot of a staircase. There is no sign of foul play; by all indications the unfortunate person just slipped on the stairs. Nobody responds to his knock on the door, and the individual remains motionless. If the officer or other rescue personnel were not permitted to enter without a warrant or probable cause, the individual would be denied obviously needed assistance.

Certainly this example presents a dramatic and rare situation. But if we are to permit the officer to enter in such a situation, the community-caretaking doctrine must have some applicability; police must *sometimes* be able to invade a person's reasonable expectation of privacy without a warrant or probable cause. The area of dispute then becomes when, not whether, such entries are appropriate—in Fourth Amendment terms, what makes such entries reasonable?

An assessment of reasonableness should turn on the interests at play in different kinds of community-caretaking searches. But though different kinds of community-caretaking searches can be identified, there has been no attempt to formulate a framework within which each kind of community caretaking can be analyzed. The framework that follows begins by focusing the discussion on police attempts to help members of the public by separating from consideration areas of community caretaking as to which the Supreme Court has already provided significant direction concerning the factors making such searches reasonable: searches justified by probable cause or reasonable suspicion,<sup>144</sup> emergencies,<sup>145</sup> "special-needs" searches,<sup>146</sup> and searches of items in the government's possession.<sup>147</sup> The prescriptive focus of this Article is not on

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144. See *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (noting that in the context of an investigatory stop falling short of arrest, the "Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity 'may be afoot'" (citations omitted)).

145. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) ("[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.").

146. See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) ("[W]e have permitted exception [to the warrant requirement] when 'special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'" (citations omitted)).

147. See *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976) ("[T]his Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car or its contents.").

those areas, but they do provide insight—by analogy and by contrast—as to what should make assistance searches reasonable.

#### A. Lessons from Related Areas of Established Fourth Amendment Law

"The central purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."<sup>148</sup> The Supreme Court has occasionally permitted exceptions to this general principle,<sup>149</sup> but throughout at least the last half-century it has used the Fourth Amendment to control police discretion<sup>150</sup> and minimize the opportunity for police to target certain individuals for abusive invasions of privacy.<sup>151</sup>

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148. *Id.* at 377 (1976) (Powell, J., concurring); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." (citations omitted)); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TULANE L. REV. 1409, 1412 (2000) ("Permitting an officer standardless discretion . . . runs afoul of [the Fourth] Amendment, which is designed to prevent placing 'the liberty of every man in the hands of every petty officer.'" (citations omitted)).

149. See cases cited *supra* notes 144–47 (showing examples of Supreme Court-sanctioned exceptions to the warrant requirement).

150. Professor Maclin has identified "control[ing] police discretion" as "the central premise of the Fourth Amendment." Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 7 (1994); see also Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 578–83 (1999) (explaining the Framing era's antipathy to discretionary law enforcement); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) ("[T]he central meaning of the Fourth Amendment is distrust of police power and discretion.").

151. Limiting official discretion is a prominent theme in other areas of the law as well. Due process protection against vague laws is one notable example. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) ("Vagueness may invalidate a criminal law for either of two reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."); *City of Houston v. Hill*, 482 U.S. 451, 465 n.15 (1987) (concluding that the law at issue "effectively grants police the discretion to make arrests selectively on the basis of the content of the speech"); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (emphasis added)); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (disapproving a law with "no standards governing the exercise of the discretion granted" to police because it "permits and encourages an arbitrary and discriminatory enforcement of the law"); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that a law is unconstitutionally vague when one "of common intelligence must necessarily guess at its meaning").

A second example of the theme of limiting official discretion is the First Amendment protection against discretionary licensing schemes for speech. See, e.g., *Forsyth County v.*

Accordingly, the Court has attempted to give content to the Fourth Amendment's general requirement of reasonableness by creating a series of rules for determining the constitutionality of some searches for non-law-enforcement purposes, such as protecting the public from the threats caused by drunk drivers<sup>152</sup> and protecting police from potential dangers posed by impounded cars or arrested persons.<sup>153</sup> These rules allow the police and the public to know which searches and seizures are going to be treated as "reasonable," without resorting to the unpredictability of a case-by-case elucidation of the Constitution's meaning.<sup>154</sup>

This Article seeks to isolate a subset of community-caretaking activity as yet uncovered by such rules: Those police actions designed to assist the public deal with a present or future problem. To do so, however, it is necessary to specify those areas that are *not* the focus of this Article's prescriptions, and to assess the ways in which the doctrine from those areas can inform the constitutional questions surrounding assistance searches.

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Nationalist Movement, 505 U.S. 123, 130 (1992) ("[G]overnment, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally . . . [but] [i]t may not delegate overly broad licensing discretion to a government official." (citations omitted)); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) ("[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969) (disapproving a regulatory ordinance conferring "virtually unbridled and absolute power to prohibit" speech on a public official); *Kunz v. New York*, 340 U.S. 290, 295 (1951) ("It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action."); *Saia v. New York*, 334 U.S. 558, 559–60 (1948) (holding an ordinance unconstitutional in part because it contained "no standards prescribed for the exercise of [the authority's] discretion").

152. See *Schmerber v. California*, 384 U.S. 757, 770 (1966) (explicating the requirements for conducting a valid warrantless blood test when an officer suspects drunk driving).

153. See *United States v. Bishop*, 338 F.3d 623, 628 (6th Cir. 2003) (upholding police entry into an unlocked, unoccupied vehicle when the officer observed a handgun inside); see also *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (stating that "a warrantless intrusion may be justified by . . . the risk of danger to police or to other persons inside or outside the dwelling").

154. See *Livingston*, *supra* note 3, at 267 ("These exceptions, however, must be categorical, rather than case-by-case, so that police are not left to make ad hoc assessments of reasonableness . . ."); cf. *Chimel v. California*, 395 U.S. 752, 764–65 (1969) (criticizing a view of reasonableness resting only on "a subjective view regarding the acceptability of certain sorts of police conduct"). See generally Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471 (1985) (discussing the "no lines" and "bright line" approaches to the Fourth Amendment).



### 1. *Objective Requirements of Reasonableness*

Searches to detect violations of administrative codes—like searches to detect violations of the criminal law—are reasonable only if the searching official obtains a warrant.<sup>155</sup> Administrative search warrants, however, may be issued without individualized suspicion that the search is going to turn up evidence of a violation;<sup>156</sup> it is enough that the location of the search be chosen by non-discretionary means.<sup>157</sup> Special-needs searches, by contrast, do not require warrants of either the traditional type or the administrative variety.<sup>158</sup> They must, however, be performed in accordance with standard procedures.<sup>159</sup> This subsection analyzes whether assistance searches should be similarly limited by a requirement that police either obtain a warrant or operate according to standard procedures.

Most obviously, police do not need to rely on the community-caretaking doctrine to justify searches that are supported by warrants or where an exception to the warrant requirement for law-enforcement searches applies. Such searches may have community-caretaking goals, such as the protection of crime victims or the general public, but there is no need to use the community-caretaking doctrine to limit officers' discretion in such a circumstance; the warrant, probable cause, and reasonable-suspicion requirements are used in the law-enforcement context to serve precisely that purpose.

The warrant requirement provides the quintessential restraint on police discretion. By holding that the constitutionality of a search must ordinarily be decided *ex ante* "by a judicial officer, not by a policeman or government

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155. See *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 533 (1967) ("We simply cannot say that the protections provided by the warrant procedure are not needed in [the administrative search] context . . .").

156. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989) ("[W]here the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.").

157. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) (disapproving a search "conducted in the unfettered discretion of the members of the Border Patrol" because it "embodied precisely the evil the Court saw" when it "insisted that the 'discretion of the official in the field' be circumscribed by obtaining a warrant" (citations omitted)).

158. See *Ferguson v. Charleston*, 532 U.S. 67, 75 n.7 (2001) ("[I]n limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification." (citations omitted)).

159. See *id.* at 84–85 (differentiating between a constitutionally compliant "duty to provide the police with evidence of criminal conduct that [hospitals] inadvertently acquire *in the course of routine treatment*" and an inappropriate "undertak[ing] to obtain such evidence from their patients for the specific purpose of incriminating those patients" (emphasis added)).

enforcement agent,"<sup>160</sup> the Court has shown its resolve that evaluating a search's reasonableness after the fact presents an unconstitutionally high risk that too many unreasonable searches will occur. As the Court has reasoned, the warrant requirement was imposed "so that an objective mind might weigh the need to invade . . . privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."<sup>161</sup> Thus, in those circumstances where a warrant is required, searches that are reasonably executed<sup>162</sup> and based on probable cause are nonetheless unconstitutional if a magistrate has not authorized the search ahead of time.<sup>163</sup>

Even where a warrant exception applies, probable cause and reasonable suspicion limit officer discretion by reducing the number of people who may lawfully be the subject of a search. In *Whren v. United States*, the Court not only held that the Fourth Amendment imposes no bar to an officer's discretionary and pretextual enforcement of traffic laws so as to investigate a hunch about criminal activity, but it also took pains repeatedly to stress that the stop in that case was reasonable because the police had probable cause to believe the driver had violated the traffic laws.<sup>164</sup> It acknowledged language in cases involving inventory searches<sup>165</sup> and administrative inspections<sup>166</sup>

160. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

161. *McDonald v. United States*, 335 U.S. 451, 455–56 (1948).

162. *See, e.g., Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (holding that a knock-and-announce requirement is contained within the Fourth Amendment's requirement of reasonableness).

163. *See Payton v. New York*, 445 U.S. 573, 587–88 (1980) (holding that an arrest in one's home "is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present" (citations omitted)).

164. *See Whren v. United States*, 517 U.S. 806, 812 (1996) ("Not only have we never held, outside the context of inventory search or administrative exception . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." (citations omitted)); *see also Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (upholding an arrest in which there was probable cause to believe the person committed a crime, even where the officer incorrectly thought that there was probable cause to believe that the suspect committed a different crime); *Scott v. United States*, 436 U.S. 128, 137–39 (1978) (holding subjective intentions irrelevant in the context of a search held reasonable and supported by probable cause).

165. *See Whren*, 517 U.S. at 811 ("[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990))); *see also United States v. Coccia*, 446 F.3d 233, 241 (1st Cir. 2006) (holding subjective intentions irrelevant in the context of a search held reasonable and supported by probable cause).

166. *See Whren*, 517 U.S. at 811 (acknowledging previous mention of an apparent "no pretext requirement" (citing *New York v. Burger*, 482 U.S. 691, 716–17 n.27 (1987))).

condemning "bad faith"<sup>167</sup> pretextual police actions, but distinguished that language on the ground that the searches and seizures involved in those earlier cases were "conducted in the *absence* of probable cause."<sup>168</sup>

Thus, *Whren* does not foreclose an inquiry into an individual officer's purpose as part of the reasonableness test for assistance searches, which are also necessarily "conducted in the *absence* of probable cause."<sup>169</sup> While the Supreme Court has attempted to avoid inquiring into subjective purpose in other Fourth Amendment contexts,<sup>170</sup> in those instances the police either possessed probable cause, as in *Whren*, or were presented with an emergency, as in *Stuart*, which permitted police to enter a house to stop an ongoing threat of serious physical injury.<sup>171</sup> In nonemergency community-caretaking cases, however, the police discretion is greater than in either of those situations. An officer could intrude into individuals' private areas or interfere with their freedom of movement, ostensibly to offer a motorist directions or check on the health of an individual suspected of drug use, etc., even if the officer is trying to obtain evidence to use against the subject of the search.

167. *Id.* (noting the apparent significance of there being no indication in *Bertine* of "bad faith" or a "sole purposed of investigation" (quoting *Colorado v. Bertine*, 479 U.S. 367, 372 (1987))).

168. *Id.*; see also *id.* at 817 (holding the balancing test of *Prouse* inapplicable because that case "involve[d] [a] police intrusion *without the probable cause that is its traditional justification*." (citing *Delaware v. Prouse*, 440 U.S. 648, 661 (1979))).

169. *Id.* at 811; see *United States v. Cervantes*, 219 F.3d 882, 889–90 (9th Cir. 2000) (concluding that a subjective community-caretaking purpose was required); *State v. Mountford*, 769 A.2d 639, 645 (Vt. 2000) (same).

170. See, e.g., *Brendlin v. California*, 127 S. Ct. 2400, 2408–09 (2007) (preferring to focus on "the intent of the police as objectively manifested [rather than] the motive of the police for taking the intentional action" and noting that the Court has "repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis"); *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978))); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (establishing an objective standard for evaluating seizures: Whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

171. *Stuart*, 547 U.S. at 402 ("We granted certiorari . . . in light of differences among state courts and the Courts of Appeals concerning the appropriate Fourth Amendment standard governing warrantless entry by law enforcement *in an emergency situation*." (emphasis added)); see also *United States v. Beaudoin*, 362 F.3d 60, 66 & n.1 (1st Cir. 2004) (concluding that the reasonableness of an emergency entry should be judged without reference to the officer's subjective motivation).

True, *Whren* permits officers to stop motorists observed violating the law, and violations occur so frequently that virtually every driver could be stopped on a pretext.<sup>172</sup> Nevertheless, the discretion provided in *Whren* is limited in two important respects. First, under *Whren*, officers can interfere with the freedom of individuals only if the officer has reasonable suspicion to believe that there has been a violation of the law.<sup>173</sup> Even though in practical terms violations of the traffic laws are common, a driver who complies with the law has nothing to fear under *Whren*.<sup>174</sup> By contrast, a motorist whose behavior is legal but might be indicative of distress could be subject to a community-caretaking seizure.<sup>175</sup>

Second, the discretion accorded officers under *Whren*, because of the universality of violations, applies only to traffic infractions.<sup>176</sup> Drivers may speed and roll through stop signs regularly, but violations of law are much less frequent off-road. Allowing searches whenever officer assistance might reasonably be thought helpful would permit police to interfere with all aspects of citizens' lives, from unloading groceries to dealing with a crying baby.

Where individualized suspicion of crime is absent, searches may still be reasonable, provided that the searching officers are not permitted to exercise discretion as to what or whom to search. This discretion-limiting requirement

172. See *Whren*, 517 U.S. at 816 ("[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."). Similarly, in *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008), all nine Justices agreed that an individual could not successfully bring a class-of-one claim under the Equal Protection Clause against an officer who stopped the plaintiff for speeding when there was no reason to distinguish the plaintiff from dozens of other speeders. See *id.* at 2154 ("[A]llowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action."); see also *id.* at 2160 (Stevens, J., dissenting) ("If there were no justification for the arrest, there would be no need to invoke the Equal Protection Clause because the officer's conduct would violate the Fourth Amendment. But as noted, a random choice among rational alternatives does not violate the Equal Protection Clause.").

173. See *Whren*, 517 U.S. at 810 ("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.").

174. *Id.*

175. See *State v. Macelman*, 834 A.2d 322, 326 (N.H. 2003) ("The officer's observation of a car poised at the edge of the defendant's property . . . [provided the officer with] 'reasonable grounds' to believe the reported emergency existed, and to enter the backyard to conduct further investigation.").

176. See *Whren v. United States*, 517 U.S. 806, 809–10 (1996) (noting that the "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons'" and "is thus subject to the constitutional imperative that it not be unreasonable under the circumstances" (emphasis added)).

is demonstrated by the Court's treatment of administrative searches and "special needs" searches, including searches of items that come into police possession, such as impounded vehicles.<sup>177</sup>

The Supreme Court has permitted suspicionless searches to ensure compliance with administrative codes, but has required the officials to obtain warrants.<sup>178</sup> In addition to failing the usual Fourth Amendment requirement of probable cause based on individualized suspicion of criminal activity, such warrants cannot specify the "persons or things to be seized."<sup>179</sup> The Court, however, announced that warrants could authorize reasonable searches of businesses to ensure compliance with regulatory standards, requiring only that the officer's discretion be appropriately limited by, for example, choosing the target of the search by standardized means, rather than by a selection method that left the official free to harass those people or businesses he or she disliked.<sup>180</sup>

A similar warrant could be required for community-caretaking entries. The officer would need to show that an established procedure was followed and that the officer was not choosing to search this particular location because of a vindictive motive or because the officer had a hunch that criminal activity would be discovered. As with all warrant requirements, this one would have the advantage of limiting the officer's desire to search by requiring preapproval of the search by a "neutral and detached" magistrate who could evaluate and

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177. See *South Dakota v. Opperman*, 428 U.S. 364, 383 (1976) (stating that "the officer does not make a discretionary determination to search based on a judgment that certain conditions are present," but rather searches "in accordance with established policy department rules or policy and occur whenever an automobile is seized").

178. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1977) (holding that the Occupational Health and Safety Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651 *et seq.* (2000 & Supp. V 2005)) was unconstitutional insofar as it allowed agents to search work areas without a warrant); *Camara v. Mun. Court*, 387 U.S. 523, 534-40 (1967) (concluding that a tenant had a constitutional right under the Fourth Amendment to demand a warrant before city housing inspectors entered his dwelling to ensure that it complied with fire safety standards).

179. U.S. CONST. amend. IV. *Camara* said that the administrative warrants it authorized *did* satisfy the probable-cause requirement, but in doing so it did not apply the probable-cause standard applicable in other contexts. *Camara*, 387 U.S. at 538. As applicable to administrative searches, probable cause "must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.*; see also *id.* at 539 ("[R]easonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.").

180. See *id.* at 538 ("Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area[ . . . ]").

weigh the individual's privacy interest.<sup>181</sup> Of course, if the exigencies of time prevent an officer from obtaining a warrant, the officer can enter without one,<sup>182</sup> just as the Court permits warrantless searches for law-enforcement purposes when it is impracticable to obtain them.<sup>183</sup>

Requiring administrative warrants for nonemergency community-caretaking searches as a matter of Fourth Amendment doctrine carries substantial disadvantages, however. It would be a substantial shift from the Supreme Court's practice in the community-caretaking area, which has shown no inclination whatever to require any kind of warrant,<sup>184</sup> and it would be contrary to the trend of the Court's other Fourth Amendment cases, which have tended of late to stress the Reasonableness Clause much more than the Warrant Clause.<sup>185</sup> Further, if the officer does not subjectively expect to find evidence of a crime, then the judgment of the neutral magistrate is less necessary to temper the officer's enthusiasm for searching than when a law-enforcement warrant is sought. There is no "competitive enterprise of ferreting out" people who need help.<sup>186</sup>

Additionally, community-caretaking situations arise on the spur of the moment, and it is difficult to imagine officers being able to expend the time necessary to obtain a warrant while their crime-detection and crime-prevention duties go neglected. Rather, because community-caretaking needs present themselves without forewarning, a court is likely to conclude that "as a practical matter [such searches] could not be[] subjected to the warrant procedure."<sup>187</sup> A warrant requirement, therefore, might not only decrease police discretion in

181. *Johnson v. United States*, 330 U.S. 10, 14 (1948).

182. *See id.* at 539–40 ("[W]arrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry.").

183. *See infra* notes 188–201 and accompanying text (discussing settings that present a special need that justifies searches that would have been unconstitutional if conducted elsewhere).

184. *See, e.g., Cady v. Dombrowski*, 413 U.S. 433, 446 (1987) ("[T]he intrusion into the trunk of the 1967 Thunderbird at the garage was not unreasonable within the meaning of the Fourth and Fourteenth Amendments solely because a warrant had not been obtained by Officer Weiss after he left the hospital.").

185. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32, 51 (2000) ("The reasonableness of highway checkpoints, at issue here, turns on whether they effectively serve a significant state interest with minimal intrusion on motorists."); *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) ("[W]e generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests.").

186. *Johnson*, 330 U.S. at 14.

187. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

community caretaking, but might dissuade police from engaging in community-caretaking functions entirely, even in those instances where society would be benefited by police action.

Less drastically than imposing a requirement of community-caretaking warrants, we might follow the lead of the Court's "special-needs"<sup>188</sup> precedents involving roadblocks<sup>189</sup> and inventory searches,<sup>190</sup> and limit police discretion by requiring that assistance searches follow established procedures. Because special-needs cases involve non-law-enforcement purposes such as protecting potential victims, they are examples of community caretaking. Nevertheless, special-needs searches are distinguishable from assistance searches in that the officers serve those non-law-enforcement purposes *by enforcing the law*. And though inventory searches are ostensibly undertaken for non-law-enforcement purposes, they differ from assistance searches both as to the scope and as to the justification for the doctrine. Inventory searches are permitted only as to items and persons taken into police custody, and the searches serve the interests in "protect[ing] the police from potential danger" and from "claims or disputes over lost or stolen property."<sup>191</sup>

Thus in special-needs cases it is typically the *context* of the search, and not its object, that earns it the appellation.<sup>192</sup> For example, in *Vernonia School*

188. *Ferguson v. City of Charleston*, 532 U.S. 67, 75 n.7 (2000); *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J. concurring).

189. *See Edmond*, 531 U.S. at 44 ("[W]e decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control."); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 453 (1990) ("Here, checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle. The intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*."); *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) ("[C]heckpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest.").

190. *See South Dakota v. Opperman*, 428 U.S. 364, 383 (1976) ("Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized.").

191. *Id.* at 369. Inventory searches' other justification, "the protection of the owner's property," *id.*, bears a resemblance to the interests served by assistance searches, but the context of inventory searches indicates that the governmental interest in the two situations is quite different. Because the police have control of property that is inventoried, they have a special responsibility to ensure its security. Indeed, the interest recognized in *Opperman* was not the protection of property *simpliciter*, but "the protection of the owner's property *which remains in police custody*." *Id.* (emphasis added).

192. *See Chandler v. Miller*, 520 U.S. 305, 314 (1997) ("When . . . 'special needs'—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing

*District 47J v. Acton*,<sup>193</sup> *Board of Education v. Earls*,<sup>194</sup> and *New Jersey v. T.L.O.*,<sup>195</sup> the Court held that the scholastic environment provided a special need justifying searches that would have been unconstitutional if conducted elsewhere. Similarly, in *Skinner v. Railway Labor Executives' Association*,<sup>196</sup> the Court found a special need to drug-test railway employees who had been involved in accidents or violated safety rules, in part because the time spent gaining reasonable suspicion or probable cause "likely would result in the loss or deterioration of the evidence" of drug use.<sup>197</sup> To be sure, the safety of passengers—the protection of the community—was an interest protected by the drug testing.<sup>198</sup> But there can be no gainsaying that safety was to be protected *through law enforcement*.

The same interests were present in *MacWade v. Kelly*,<sup>199</sup> a Second Circuit case upholding suspicionless searches of New York City subway passengers. Potential threats to the safety of other passengers presented a "special need" to search, but the searches were designed to uncover and prevent criminal activity, and the safety threat was anything but unrelated to the potential crimes.<sup>200</sup> If

private and public interests advanced by the parties.").

193. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665–66 (1995) (finding that a random urinalysis in the context of interscholastic sports did not violate the Fourth Amendment because of the "decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search").

194. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 836 (2002) (finding that a high school's suspicionless urinalysis drug testing policy for all those who participated in competitive extracurricular activities did not violate the Fourth Amendment because the special need for students' safety extended to athletes and non-athletes alike).

195. See *New Jersey v. T.L.O.*, 469 U.S. 325, 347–48 (1985) (finding that the standard for searches in the school context is reasonableness rather than probable cause, and it was reasonable for a principal to search a student's purse for cigarettes, and it was also reasonable for him to search for marijuana after he found rolling papers in the purse).

196. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989) (concluding that railway employees who previously exhibited unsafe behavior could be subject to drug tests without a warrant or reasonable suspicion because of the limited discretion of the employees conducting the tests, the safety interest being protected, and the decreased expectation of privacy).

197. *Id.* at 631.

198. See *id.* at 621 ("[The] governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty.").

199. See *MacWade v. Kelly*, 460 F.3d 260, 275 (2d Cir. 2006) ("[T]he Program is reasonable, and therefore constitutional, because (1) preventing a terrorist attack on the subway is a special need; (2) that need is weighty; (3) the Program is a reasonably effective deterrent; and (4) . . . the searches intrude on a full privacy interest . . . to a minimal degree.").

200. See generally Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719 (2007).



potential threats to crime victims sufficed to bring a search within the community-caretaking doctrine, then police could search anyone suspected of attempting a violent crime, subject only to a reasonableness test rather than the usual probable-cause-plus-warrant standard.<sup>201</sup>

In special-needs searches, context makes it impractical to obtain a warrant—either because delay in obtaining the warrant is intolerable or because the costs of requiring individualized suspicion are deemed unacceptable. Community-caretaking cases that do not present law-enforcement concerns, however, present situations where an individualized-suspicion requirement is not only impractical, but would not make sense. When police act to attend to someone who is sick or injured, there is no suspicion of crime, let alone the quantum of suspicion that would satisfy the constitutional requirements applicable in the law-enforcement context.

Because uncontrolled police discretion can result in a subversion of Fourth Amendment protection in both special-needs and assistance searches, it is helpful to consider how the special-needs doctrine limits the risk that officers will abuse their discretion. *South Dakota v. Opperman*,<sup>202</sup> which established the constitutionality of inventory searches of impounded cars,<sup>203</sup> repeatedly stressed that the searches were undertaken pursuant to "standard procedures,"<sup>204</sup> which limited the discretion of the officers who searched.<sup>205</sup> As the Court said,

201. See generally, e.g., Robert C. Power, *Changing Expectations of Privacy and the Fourth Amendment*, 16 WIDENER L.J. 43 (2006) (analyzing the Fourth Amendment's reasonableness test in the post-September 11 context).

202. See *South Dakota v. Opperman*, 428 U.S. 364, 384 (finding that the inventory search of a vehicle that was impounded for multiple violations was reasonable under the Fourth Amendment because it was done pursuant to routine procedures).

203. See *id.* at 376 ("On this record we conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not 'unreasonable' under the Fourth Amendment."); see also *United States v. Robinson*, 414 U.S. 218, 221 nn.1–2 (1973) (upholding routine searches incident to arrest, and leaving for another day the question of the constitutionality of such searches conducted on pretext).

204. *Opperman*, 428 U.S. at 366, 372, 375, 376.

205. Some lower courts read *Opperman* not to require standardized procedures for inventory searches, but to establish a safe harbor for inventory searches conducted pursuant to standardized procedures. See *United States v. Smith*, 522 F.3d 305, 312 (3d Cir. 2008) ("[A] decision to impound a vehicle contrary to a standardized procedure or even in the absence of a standardized procedure should not be a per se violation of the Fourth Amendment."); *United States v. Coccia*, 446 F.3d 233, 240–41 (1st Cir. 2006) (upholding a decision to impound a vehicle though the officer did not follow a standard procedure in ordering the impoundment). Others disagree. See *United States v. Maple*, 348 F.3d 260, 264–65 (D.C. Cir. 2003) ("Because the officer's opening of the console does not fall within one of the 'few specifically established and well[]delineated exceptions' to the warrant requirement . . . the reasonableness of the officer's conduct is to be determined by reference to whether he followed the [Metropolitan

such procedures "tend[] to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function."<sup>206</sup> Likewise, roadblocks must also conform to standards limiting discretion if they are to be held reasonable. *Michigan Department of State Police v. Sitz*<sup>207</sup> upheld the use of sobriety checkpoints, but only under conditions that left little doubt that the individuals targeted for investigation were chosen neither out of spite nor because the police suspected, but did not have reasonable suspicion to believe, they were violating the law.<sup>208</sup>

Border searches do accord customs agents wide discretion owing to the "long-standing right of the sovereign to protect itself,"<sup>209</sup> but even that exception applies only "at the border"<sup>210</sup> or its "functional equivalents."<sup>211</sup> Interior border patrols must either be supported by reasonable suspicion<sup>212</sup> or, if they take the form of fixed checkpoints, fulfill the standards for other roadblocks, including limits on officers' discretion.<sup>213</sup> As the Court noted in approving fixed border checkpoints, officers' discretion is constrained both in the operation of the checkpoint and in the selection of the site where it occurs.<sup>214</sup> "[S]ince field officers may stop only those cars passing the

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Police Department's] procedures." (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)); *Young v. State*, 497 So. 2d 228, 230-31 (Ala. Ct. Crim. App. 1986) ("[T]he police officer entered appellant's vehicle to secure the vehicle and appellant's belongings inside the vehicle. This activity constituted a legitimate caretaking function which 'was no more than a routine and good faith attempt, in the exercise of reasonable caution, to safeguard the defendant's own property.'" (quoting *Cobb v. State*, 378 So. 2d 82, 83 (Fla. Dist. Ct. App. 1979))); *Kirk v. State*, 832 S.W.2d 271, 274 (Ark. Ct. App. 1992) ("The opening of closed containers in an inventory search is permissible only if officers are following standard police procedures.").

206. *Opperman*, 428 U.S. at 375.

207. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 445 (1990) (finding that a highway sobriety checkpoint comports with the Fourth Amendment because it furthers the legitimate state interest in preventing drunk driving and only minimally intrudes upon individual motorists).

208. *See id.* at 453 ("Here, checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle.").

209. *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

210. *Id.*

211. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

212. *See id.* ("The Fourth Amendment forbids . . . stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.").

213. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) ("[C]heckpoint operations both appear to and actually involve less discretionary enforcement activity [than do roving border patrols].").

214. *See id.* (noting that field officers operate the checkpoints in a regularized manner and that the officials who select the checkpoints are unlikely to place them in an arbitrary or oppressive location).

checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops.<sup>215</sup>

The limits on the conditions under which suspicionless roadblocks and inventory searches can be conducted suggest that similar constraints might be appropriate in other types of community caretaking. For the community-caretaking events that occur with some frequency—for example, the call to check on an elderly relative whom the family has been unable to reach—standard procedures could be instituted that would discourage police from pursuing such requests with more vigor when they believe evidence of a crime may be obtained by conducting the search. For example, police could require that a request to enter an individual's residence come from an immediate family member; that a lieutenant approve in advance any patrol officer's plan to enter a home to check on a resident; or that the family be unable to contact the individual for a specific period of time before entry would be authorized.<sup>216</sup>

Cases applying the Fourth Amendment in community-caretaking situations, however, generally decline to impose any *ex ante* requirements on the police.<sup>217</sup> Rather than attempt to tell officers ahead of time how to behave in community-caretaking situations, courts evaluate the police conduct *ex post* at a suppression hearing or in a § 1983 suit.<sup>218</sup> The reason may be that there

215. *Id.*

216. Any waiting period suggests the possibility that an individual would suffer without aid for a time during which assistance could prove valuable. While such a result is unfortunate, as a practical matter, one's fear of an individual's incapacity takes shape only after an inordinate period of unresponsiveness. We certainly would not want to authorize an entry into a person's dwelling because the person had failed to answer his phone, only to find that the person had not responded because he was in the shower. Thus, there will always be some risk of squandering time that could be put to good use, and the amount of time allowed to pass will depend on the chosen balance between the privacy interest and the risk of harm from inaction.

217. See, e.g., *Maryland v. Buie*, 494 U.S. 325, 337 (1990) ("The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene."); *United States v. Quezada*, 448 F.3d 1005, 1008 (8th Cir. 2006) (finding that it was reasonable for an officer to enter the defendant's apartment without a warrant to offer assistance because the door was ajar, the television was on, and nobody answered when he called out on multiple occasions); *State v. Jones*, 947 P.2d 1030, 1038 (Kan. Ct. App. 1997) (permitting a police officer to exercise discretion in deciding to enter the dwelling of a man in response to the worries of that man's parents).

218. 42 U.S.C. § 1983 (2000 & Supp. V 2005) (providing a damages remedy for the victims of unconstitutional actions taken under color of state law); see *Lockhart-Bembrey v. Sauro*, 498 F.3d 69, 76–77 (1st Cir. 2007) (finding that it was reasonable for an officer to ask a woman to move her stalled vehicle from the side of the road in the interest of public safety and that this request did not constitute a seizure for the purposes of a § 1983 suit); *Martin v. City of Oceanside*, 360 F.3d 1078, 1084 (9th Cir. 2004) ("[T]he officers reasonably believed that

will always be new situations that do not fit exactly within prior experience, and thus an attempt to impose *ex ante* requirements will unduly constrain the officer's ability to respond appropriately to unanticipated situations. As Chief Justice Burger stated:

The policeman on the beat, or in the patrol car, makes more decisions and exercises broader discretion affecting the daily lives of people, every day and to a greater extent, in many respects, than a judge will ordinarily exercise in a week . . . and no law book, no lawyer, no judge, can really tell the policeman on the beat how to exercise this discretion perfectly in every one of the thousands of different situations that can arise in the hour to hour work of the policeman.<sup>219</sup>

Concrete standards limiting officer discretion have the disadvantage that whatever standards are chosen will be ill-suited to certain individual cases. For example, as to the suggestion that established "waiting periods" be observed before entering a dwelling, different amounts of time will be appropriate in different circumstances.<sup>220</sup> If I call my grandfather every day at noon and 7:00 sharp, perhaps police should be able to check on my grandfather if I have been unable to reach him by 8:00. If, however, I call him every few weeks, then the passage of a few days might not be enough to lead to the inference that his health is at risk. Perhaps such problems are remediable by a carefully crafted standard that authorizes entries only after such time passes as would cause a reasonable person to fear for the individual's safety, but the more such a standard attempts to take account of individual circumstances, the less it eliminates police discretion. A rigid requirement that the police adopt protocols for dealing with community-caretaking situations, then, might be beneficial in some recurring situations, but would be a poor fit for many of the events police officers must encounter.

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someone inside Martin's home was potentially in need of help, and they were motivated by a desire to assist that person rather than gather evidence. The officers' reasonable belief . . . justified their visit and subsequent entry.").

219. ABADINSKY, *supra* note 3, at 15 (quoting J. PHIL CARLTON, A CRIME AGENDA FOR NORTH CAROLINA 26-27 (1978)).

220. See, e.g., *Quezada*, 448 F.3d at 1008 ("When Deputy Ruth yelled into the apartment several times but received no answer, a reasonable officer in the deputy's position could conclude that someone was inside but was unable to respond for some reason."); *Jones*, 947 P.2d at 1038 (upholding a search for an individual when his parents "had not seen or heard from [him] in 3 days, he had inexplicably missed a dinner appointment with them, and he had failed to answer his phone or return their messages").

## 2. Subjective Police Purpose

The Supreme Court has held that the purposes motivating individual officers are irrelevant in determining the reasonableness of law enforcement, emergency, and special-needs searches.<sup>221</sup> The "programmatic purpose" of a special-needs search (as distinguished from the purpose of the officers conducting the search) does, however, factor into constitutional reasonableness.<sup>222</sup> This subsection analyzes whether purpose should be considered at all in determining the constitutionality of assistance searches, and if so, whether it is proper to consider the subjective purpose of officers or to only consider programmatic purpose.

The Supreme Court has been hesitant in most instances to consider the subjective motivation of police officers, but the cases rejecting a subjective standard arose either in situations where the police possessed probable cause or in emergency situations where there could be little debate about the need for the officers to act.<sup>223</sup> Consideration of officers' subjective purposes in nonemergency community-caretaking situations could help achieve the same discretion-limiting function served by the probable-cause requirement for criminal investigations and by the pressures for action that surround emergencies.

For that reason, the Fourth Amendment should require assistance searches actually to be motivated by a desire to help the public. Special-needs and emergency cases allow the police to take "reasonable" action in the absence of probable cause and without inquiring into the subjective motivations of officers, but they constrain the discretion of police through other means.<sup>224</sup> As we have seen, however, those means are ill-adapted to assistance searches.<sup>225</sup> Allowing assistance searches only when the officer in question is actually, subjectively motivated by the desire to assist the public would serve that discretion-limiting function without stripping the officer of the flexibility to adapt to the needs of any given situation.

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221. See *supra* Part IV.A.1 (providing examples of Supreme Court cases that establish an objective standard of reasonableness in community-caretaking settings other than assistance searches).

222. *City of Indianapolis v. Edmond*, 532 U.S. 32, 45 (2000).

223. See *supra* notes 170–71 and accompanying text (referring to Supreme Court cases that emphatically state that subjective intentions do not factor into Fourth Amendment analysis).

224. See, e.g., *supra* notes 172–80 and accompanying text (stating that in these contexts, an officer's discretion is limited by standard procedures).

225. See *supra* notes 101–15 and accompanying text (explaining that in the context of assistance searches, requiring an officer to obtain a warrant or to follow standard procedures risks ignoring the exigencies and particularities of different situations).

Specifically, in assessing the reasonableness of assistance searches, reviewing courts should apply a standard that includes both subjective and objective elements. Courts should apply the community-caretaking doctrine only where the officer reasonably believed—i.e., he subjectively held a belief that was objectively reasonable, as evaluated from the perspective of a reasonable person in the officer's position—that his assistance was appropriate.<sup>226</sup> Because the government is seeking the benefit of an exception to the warrant requirement,<sup>227</sup> it must bear the burden of proof on both points.<sup>228</sup>

The purpose of the community-caretaking doctrine is to encourage government officials to offer assistance to the public. Extending the doctrine to cover cases where the police were not in fact motivated by a community-caretaking purpose would provide little, if any, benefit; the public is unlikely to

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226. In the law-enforcement context, courts assess reasonable suspicion and probable cause based on a "reasonable officer" standard. Such a standard considers the training and experience of the officer in determining whether there was sufficient indication that "criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Police experience is important in making such a determination because an experienced officer would be more likely than a lay person to recognize certain behavior as indicative of criminal activity. In the community-caretaking context, however, experience as a police officer is of minimal help, because a lay person can ordinarily tell as well as a police officer whether a person is ill or otherwise in need of assistance. The experience of life, rather than the experience of law enforcement, is likely to help determine whether a community-caretaking search or seizure is called for. See *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (holding that the scope of a consent search is to be determined by answering: "What would the typical reasonable person have understood by the exchange between the officer and the suspect?"). Some courts, however, disagree, and apply the reasonable-officer standard to community caretaking as well as to law enforcement. See, e.g., *State v. Bakewell*, 730 N.W.2d 335, 339 (Neb. 2007) (considering the "totality of the circumstances surrounding the [traffic] stop, including [the officer's] objective observations and considerations based upon his training").

227. See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (finding that the state failed to meet its burden of proving that a third party possessed common authority over the premises and that a warrant was thus not required); *United States v. Jeffers*, 342 U.S. 48, 51 (1951) ("[T]he burden is on those seeking the exemption to show the need for it."); *McDonald v. United States*, 335 U.S. 451, 456 (1948) ("We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."); 3 LAFAYE, *supra* note 76, § 6.6(a) ("Since the [emergency] doctrine is an exception to the ordinary Fourth Amendment requirement of a warrant for entry into a home, the burden of proof is on the state to show that the warrantless entry fell within the exception." (quoting *Root v. Gauper*, 438 F.2d 361, 364 (8th Cir. 1971))).

228. The burden of proving the officer's subjective motivation should rest on the government for an additional reason: The government is the party with primary access to the information relevant to that determination. An individual forced to try to prove the officer's bad faith would have little access to the information needed to make out such proof.

be helped by an officer who is not trying to help.<sup>229</sup> A purely objective approach has the advantage of obviating any need to consider the sometimes-difficult question of subjective purpose, but at the cost of permitting police to act when they are not trying to comply with the law indeed, when they believe that they are violating the law. In those cases the courts can, and should, deter Fourth Amendment violations;<sup>230</sup> bad-faith conduct should be penalized, not rewarded, if the privacy and liberty guaranteed by the Fourth Amendment are to be respected.<sup>231</sup>

Requiring police to have been motivated by a community-caretaking concern would limit the broad discretion they would otherwise possess, without limiting their ability to give us help when we need it. In *Murray v. United States*,<sup>232</sup> the Court was presented with an analogous situation involving the independent source doctrine. There, the police had probable cause to obtain a warrant to search a warehouse but entered the warehouse before they applied

229. See Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 77–78, 87 (2008) (noting the ability of tests that focus on the subjective intentions of police officers to deter Fourth Amendment violations).

230. See *Rakas v. Illinois*, 439 U.S. 128, 168 (1978) (White, J., dissenting) (referring to "the deterrence of bad-faith violations of the Fourth Amendment" as "the one area in which [the exclusionary rule's] use is most certainly justified").

231. For example, in *People v. Morton*, 8 Cal. Rptr. 3d 388 (Cal. Ct. App. 2003), police received reports about marijuana cultivation at the defendants' nursery. *Id.* at 389. Arriving on the scene, the police noticed marijuana leaves near a spot where it appeared that someone had breached the property's fence to steal the contraband. *Id.* at 389–90. The officers then entered the property, ostensibly to determine whether any victims of the apparent theft needed assistance. *Id.* at 390–91. While it is certainly conceivable that officers might enter a house to ensure the safety of burglary victims, and while some of those entries would be reasonable, see, e.g., *People v. Ray*, 981 P.2d 928, 934 (Cal. 1999) ("Under the community caretaking exception, circumstances short of a perceived emergency may justify a warrantless entry, including the protection of property, as 'where the police reasonably believe that the premises have recently been or are being burglarized.'" (citation omitted)); *Love v. State*, 659 S.E.2d 835, 837–38 (Ga. Ct. App. 2008) (finding that "police officers were justified in conducting a search for possible intruders" because the police "had a reasonable basis for believing that . . . an emergency existed"), it is plainly apparent that the officers' subjective purpose in *Morton* was law enforcement. See *Morton*, 8 Cal. Rptr. 3d at 394–95 (finding faulty reasoning in the officer's conclusion that the search was necessary to protect defendants' life or property because she had found "evidence of a marijuana rip off" and "drug thefts may involve violence"). The result in the case was predictable: Police found nobody in need of help, but did find evidence of crime. See *id.* at 392 (noting that the officer saw marijuana being processed, but that the officer did not fear "for the safety of the occupants"). The court held the entry unconstitutional. *Id.* at 394–95.

232. See *Murray v. United States*, 487 U.S. 533, 541–44 (1988) (stating that the Fourth Amendment does not require the suppression of evidence initially discovered during an illegal search if the same evidence is discovered later in a legal search with a valid warrant untainted by the initial warrantless search).

for a warrant. The officers discovered evidence of crime and then applied for the warrant, not mentioning any of the observations made during the illegal entry. The Supreme Court applied the inevitable-discovery doctrine and upheld the admission of evidence seized during the execution of the warrant, but noted that the result would have been different "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry."<sup>233</sup> In other words, it was insufficient that there was, objectively, probable cause for the warrant; the subjective motivation of the officers must have been unaffected by the unconstitutional behavior.<sup>234</sup> A contrary rule would give police an incentive to invade the private areas of persons they suspect of crime.<sup>235</sup>

The Court has treated purpose as relevant in assessing the constitutionality of special-needs "programs" designed to achieve some non-law-enforcement end. Over the last several years, the Court has validated such programs as suspicionless drug testing of students engaging in extra-curricular athletics<sup>236</sup> or other activities,<sup>237</sup> and roadblocks seeking to discover intoxicated drivers<sup>238</sup> or to seek assistance in locating a hit-and-run driver.<sup>239</sup> On the other hand, the Court has struck down a program under which pregnant women were drug tested to minimize the harms to unborn children from their mothers' drug-abuse<sup>240</sup> and has struck down a roadblock designed to check for evidence of illegal drugs.<sup>241</sup>

The distinction the Court has attempted to maintain in special-needs cases is between those activities having the primary purpose of law enforcement and those whose "primary purpose" is something "special"<sup>242</sup> and "substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of

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233. *Id.* at 542.

234. *Id.* at 533–34.

235. *Id.*

236. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995).

237. *Bd. of Educ. v. Earls*, 536 U.S. 822, 836 (2002).

238. *Mich. Dep't of State Police v. Stitz*, 496 U.S. 444, 453 (1990).

239. *Illinois v. Lidster*, 540 U.S. 419, 428 (2004).

240. *Ferguson v. City of Charleston*, 532 U.S. 67, 87 (2001).

241. *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

242. See *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006) (holding that police officers did not violate the Fourth Amendment when they entered a home without a warrant to stop a fight going on inside); *Ferguson*, 532 U.S. at 83–84 (declaring a hospital's policy of reporting urine tests to the police unconstitutional because of the policy's predominantly law-enforcement purpose); *Edmond*, 531 U.S. at 48 (finding a city's drug interdiction checkpoint program unconstitutional because its purpose was indistinguishable from the city's general interest in crime control).



individualized suspicion."<sup>243</sup> Where such a "special need" is the primary motivation for the search, the warrant requirement plays no role. Further, the purpose that matters is not the intent of the specific official whose activities are being analyzed, but rather it is the purpose of the *program* as a whole that matters.<sup>244</sup> "[W]hat is in the mind of the individual officer conducting the search"<sup>245</sup> is "irrelevant."<sup>246</sup>

This focus on *programmatic* purpose, however, creates obvious difficulties when there is no program—when the decision to make an entry for community-caretaking purposes is made on an ad hoc basis in response to an unanticipated situation. Such a situation presented itself in *Brigham City v. Stuart*, where the police entered a home to stop a fight which was then ongoing.<sup>247</sup> The Court acknowledged that "an inquiry into programmatic purpose" is sometimes appropriate" in cases involving "programmatic searches conducted without individualized suspicion," but in *Stuart* there was no "programmatic search[]" and, therefore, the Court made no inquiry into purpose at all.<sup>248</sup> "It therefore does not matter here . . . whether the officers entered . . . to arrest respondents and gather evidence against them or to assist the injured and prevent further violence."<sup>249</sup>

Not considering subjective purpose in assistance searches creates something of an anomaly: Where an individual officer's discretion is limited by the terms of a police-department program that he is implementing, the Court attempts to ensure that the program was not adopted as a pretext to accomplish

243. *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

244. *See Stuart*, 547 U.S. at 404–05 ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" (citations omitted)); *Edmond*, 531 U.S. at 48 ("[T]he purpose inquiry . . . is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene.").

245. *Stuart*, 547 U.S. at 405.

246. *Id.* at 404; *cf. Whren v. United States*, 517 U.S. 806, 809–10 (1996) (holding that the motivation of officers stopping a vehicle for a traffic violation is irrelevant so long as the officers had probable cause to believe an offense was committed).

247. *Stuart*, 547 U.S. at 405. In explaining the situation before the entry, the Court described the fight, noting that:

[F]our adults were attempting, with some difficulty, to restrain a juvenile. The juvenile eventually "broke free, swung a fist and struck one of the adults in the face. . . ." The other adults continued to try to restrain the juvenile, pressing him up against a refrigerator with such force that the refrigerator began moving across the floor.

*Id.* at 401 (citations omitted).

248. *Id.* at 405 (citations omitted).

249. *Id.*

law-enforcement ends.<sup>250</sup> Where, however, the officer is not confined to the parameters of a department program, and thus has considerable discretion to choose the places he searches, pretext is irrelevant and the search is governed only by a general assessment of objective reasonableness.<sup>251</sup> Accordingly, courts appear to scrutinize police action least strictly where the risk of arbitrariness is the greatest.

This anomaly is tolerable under the facts of *Stuart*—or of any other case in which police are presented with an emergency—because the emergency demands an immediate police response and thereby itself effectively constrains the actions of police. There is little practical discretion in emergency situations, such as the one in *Stuart*, because society does not want or expect a police officer to stand by and allow a condition or altercation to continue where it presents a substantial risk of serious harm.<sup>252</sup> For those reasons, courts have concluded that warrantless searches are constitutional if they are otherwise-reasonable responses to emergency situations involving immediate threats to persons or property.<sup>253</sup>

In nonemergency situations, such as checking on businesses whose doors are unlocked at night or investigating a disabled vehicle, police are presented with considerable discretion concerning which actions, if any, are appropriate responses to the facts presented.<sup>254</sup> These cases are the ones where police

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250. See *Ferguson v. City of Charleston*, 532 U.S. 67, 79–86 (2000) (stating that "the 'special need' . . . advanced as a justification for the absence of a warrant or individualized suspicion [must be] divorced from the State's general interest in law enforcement"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40–48 (2000) ("Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.").

251. See *Mincey v. Arizona*, 437 U.S. 385, 394–95 (1978) ("For this reason, warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948))).

252. See Jack E. Call, *Defining the Community Caretaking Function*, 21 POLICING: INT'L J. POLICE STRAT. & MGMT 269, 271 (1998) ("The public undoubtedly views the police as more than mere enforcers of the law . . . and would be critical of the police if they failed to assist those in need of help or failed to prevent harm to people or property.").

253. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 405–06 (2006) (holding a group of officers' entry into a home "plainly reasonable under the circumstances" because the officers could hear "an altercation occurring" inside); *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992) (stating that under the emergency situation doctrine courts, may "excuse objectively reasonable mistakes [made] by an officer in determining that an emergency warranting immediate entry and appropriately limited search existed").

254. See *McDonald v. United States*, 335 U.S. 451, 454 (1948) ("Where . . . officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant.").

discretion most presents a risk of abuse, and where the direction that searches must be reasonable provides the least guidance.

Not only does policy argue for requiring a good-faith community-caretaking motivation on the part of the searching officials, and not only does precedent permit such a result, but each potential alternative is objectionable. One alternative to a good-faith requirement is to permit community-caretaking searches whenever the officer *might* reasonably have believed that such a search or seizure would further a community-caretaking function.<sup>255</sup> Such a rule would effectively permit officers to conduct searches and seizures at will, as an officer's assistance could always be useful, even with such everyday tasks as ensuring the safety of children playing in the yard, quelling a dispute with neighbors, making sure someone cleaning gutters is on a steady ladder, or checking on the health of a person who called-in sick to work. As a result, such a standard would undermine the probable cause and warrant requirements applicable to law-enforcement searches.

*Stuart*, though it allowed the police to act proactively to prevent injuries, did not permit nearly as much police intrusion into individuals' daily lives. That case involved, in the Court's words, "persons who [were] *seriously* injured or threatened with such injury."<sup>256</sup> There is no need to worry about controlling police discretion in such instances; serious injuries are rare and demand immediate police responses in a way different from the minor inconveniences that present the greatest opportunity for pretextual searches and seizures.

Another potential objective alternative is to permit community-caretaking searches and seizures whenever the average officer observing the situation *would* have acted for a community-caretaking purpose. *Whren* rejected a comparable standard in the law-enforcement context, however, and there is no reason why such a standard would be more appropriate for community caretaking. In *Whren*, the Court considered and found inadequate a standard that would have asked whether a typical officer would have enforced the traffic violation at issue.<sup>257</sup> The Court concluded that it would be more difficult to discern the behavior of a typical, but hypothetical, officer than to determine the motivations of the individual officer at issue.<sup>258</sup> The motion court would need

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255. See *Stuart*, 547 U.S. at 406 ("[T]he officers had an objectively reasonable basis for believing both that the injured adult *might* need help and that the violence in the kitchen was just beginning." (emphasis added)).

256. *Id.* at 403 (emphasis added).

257. See *Whren v. United States*, 517 U.S. 806, 813–16 (1996) ("Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.").

258. See *id.* at 814–15 ("[I]t seems to us somewhat easier to figure out the intent of an

to hear testimony about the practices of the entire department (or whatever the relevant community would be) "to plumb the collective consciousness of law enforcement"<sup>259</sup>—an impracticable task, to say the least. Similarly, determining whether a typical officer would have felt the need to act in a community-caretaking capacity is all but impossible.

More fundamentally, as *Whren* recognized, considering the "hypothetical reaction of a hypothetical constable" is really a backdoor way of assessing whether the officer conducting a particular search had an ulterior motive.<sup>260</sup> It is "more sensible,"<sup>261</sup> therefore, to consider an individual's subjective "reasonable belief" than to "frame a[n objective] test designed to combat pretext in such fashion that the court cannot take into account *actual and admitted pretext*."<sup>262</sup>

When other areas of the law have faced similar threats to privacy interests from ostensibly helpful actors, the law has required subjective good faith and has generally required objective reasonableness as well. Under the "necessity" or "choice-of-evils" defense as defined by the Model Penal Code, a person is not guilty of an offense if his or her conduct was "necessary to avoid a harm or evil to himself or to another . . . provided that: the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."<sup>263</sup> Because the defense depends on the harm *sought* to be avoided by the actor's conduct, actors are entitled to the defense if they make a reasonable mistake and commit a crime that was not actually necessary to prevent a greater harm.<sup>264</sup> If the law permits civilians to violate

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individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act . . .").

259. *Id.* at 815.

260. *See id.* at 814–15 ("[T]his approach is plainly and indisputably driven by subjective considerations.").

261. *Id.* at 814.

262. *Id.*

263. MODEL PENAL CODE § 3.02(1)(a) (1985).

264. *See* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 184(e)(1) (1984) ("[I]f a police officer shoots a bank robber, whom he reasonably believes is about to shoot a teller but who in fact has an unloaded gun, he has intentionally killed the robber. But if the circumstances were as he thought, his conduct would be justified."). If the actor errs in balancing the interests, however (i.e., he or she believes, contrary to the opinion of the community, that the harm his conduct causes is less than the harm averted), then the defense does not apply. *See* MODEL PENAL CODE § 3.02 cmt. 2 (1985) (stating that for a defendant to use the defense "the harm or evil sought to be avoided must be greater than that which would be caused by the commission of the offense, not that the defendant believe it to be so"); MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 201 (2002) (stating that "a mistaken belief in the . . . choice of evils will" preclude the defense); ROBINSON, *supra* § 124(d)(1) ("The balancing of evils cannot, of course, be committed merely to the private judgment of the act."). As applied to the community-

trespass laws where they reasonably believe a violation is necessary to prevent a greater harm, individuals can hardly claim that their privacy rights have been infringed when an officer has done the same; the Court has consistently held that the Fourth Amendment places no greater restrictions on police than the law places on others.<sup>265</sup>

Likewise, the criminal law privileges actions taken in defense of others, and most jurisdictions extend the privilege to an actor who reasonably, but incorrectly, believes that the person on whose behalf she acts needs assistance.<sup>266</sup> Such an approach has a basis in the retributive function of criminal law, under which punishment is inappropriate for someone who acts reasonably (i.e., nonnegligently), but it also accords with the Court's focus on reasonableness under the Fourth Amendment. The Constitution's proscription of unreasonable searches and seizures, the Court has said, permits the

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caretaking doctrine, an entry is constitutional if the officer mistakenly—but reasonably—believes that the entry is necessary to avert a greater harm. An officer's mistake as to the relative importance of the infringed privacy interest as against the harm sought to be avoided by the entry might also qualify as a reasonable search despite the inapplicability of the necessity defense, if the officer's mistaken weighing of the interests was reasonable. The Court has, in other contexts, concluded that police may "reasonably" make "unreasonable" searches. *See* *United States v. Leon*, 468 U.S. 897, 905 (1984) (declining to suppress evidence from a search conducted on less than probable cause where the officers reasonably relied on a magistrate's decision to issue a search warrant); *see also* *Illinois v. Rodriguez*, 497 U.S. 177, 182–89 (1990) (upholding the search of an apartment pursuant to the consent of someone unauthorized to grant it).

265. *See, e.g.*, *Florida v. Riley*, 488 U.S. 445, 449 (1989) (stating that what "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"); *California v. Greenwood*, 486 U.S. 35, 41 (1988) (same); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (same); *Oliver v. United States*, 466 U.S. 170, 179 (1984) (stating that the "expectation of privacy in open fields is not an exception that society recognizes as reasonable"); *United States v. Knotts*, 460 U.S. 276, 282 (1983) (stating that an individual does not have an "expectation of privacy extended to the visual observation" of his automobile arriving on his private property "after leaving a public highway"); *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (stating that an individual has no reasonable expectation of privacy for the numbers dialed on his telephone because he voluntarily conveys those numbers to the telephone company). The Court has been more solicitous of privacy rights regarding searches of the subject's home. *See* *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (stating that the expectation of privacy in the home has "roots deep in the common law" tradition and is where "the minimal expectation of privacy" exists); *United States v. Karo*, 468 U.S. 705, 716 (1984) ("Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight."). Even police surveillance of the interior of the home, however, might be permissible to the extent that the surveillance technology is "in general public use." *Kyllo*, 533 U.S. at 34.

266. *See* MODEL PENAL CODE § 3.05 (1985) ("[T]he use of force upon or toward the person of another is justifiable to protect a third person when . . . the actor believes that his intervention is necessary for the protection of such other person.").

government to take reasonable actions that in retrospect appears unnecessary or unwise.<sup>267</sup> In the community-caretaking context, reasonableness suggests that police may enter citizens' private areas if the officer reasonably believes assistance is necessary, even if it turns out to be only a false alarm.<sup>268</sup>

The analogy to the defense-of-others justification suggests, however, that if a search is to be justified as falling within the community-caretaking doctrine, the officers in question must actually believe they are acting in a community-caretaking capacity. As one court phrased the issue in a closely related context:

One of the determining elements in self-defense is the belief of the accused, concerning the imminence of danger. While it is necessary, therefore, that he have *reasonable grounds to believe*, it is necessary, also, that his mind react to those grounds, to the extent of believing both that danger is imminent, and that force must be used to repel it.<sup>269</sup>

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267. See, e.g., *Arizona v. Evans*, 514 U.S. 1, 11–16 (1995) (holding constitutional the seizure of an individual whom police reasonably, but incorrectly, believed had an outstanding arrest warrant); cf., e.g., *Illinois v. Gates*, 462 U.S. 213, 246 (1983) ("[P]robable cause does not demand the certainty we associate with formal trials."); *id.* at 235 ("[T]he 'quanta . . . of proof' appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant." (quoting *Brinegar v. United States*, 338 U.S. 160, 173 (1949))).

268. Accordingly, it should be irrelevant whether a reasonable but mistaken belief as to the need for self-defense or defense of others is termed a justification or an excuse. Compare GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 761–68 (1978) (arguing that if the defense of the attacked person is a "right" action then everyone is entitled to do it), and George P. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for an Escape?*, 26 UCLA L. REV. 1355, 1362–63 (1979) ("If reasonable beliefs could generate justification for harming another person, then we might indeed have the case of both parties to the fray acting justifiably."), with MODEL PENAL CODE § 3.04(1) (1985) ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person . . ."), Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law*, 32 UCLA L. REV. 61, 92–95 (1984) ("[E]ven if justification implies right conduct, I believe a lack of justifying conditions need not necessarily render conduct unjustifiable."), and Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1907–11 (1984) ("My view about this stands in opposition to suggestions by those who propose rigorous distinctions between justification and excuse that acts that would be wrong if all the true facts had been known are never justified, only excused."). In either case, the right to be free from unreasonable searches and seizures has not been violated, because where the police made a reasonable mistake, the conduct was by definition not "unreasonable."

269. *Josey v. United States*, 135 F.2d 809, 810 (D.C. Cir. 1943) (emphasis added); see also *Andersen v. United States*, 170 U.S. 481, 509 (1898) (noting the defendant's "evil intent" in denying him a defense of self-defense, and saying that "[t]here can be no pretense that he was acting under a reasonable belief that he was in imminent danger of death or great bodily harm at the hands of the [deceased]"); 2 LAFAVE, *supra* note 136, at 149 ("[W]hether a reasonable belief is required or not, the defendant must *actually* believe in the necessity for force. He has no defense when he intentionally kills his enemy in complete ignorance of the fact that his enemy, when killed, was about to launch a deadly attack upon him.").

The Model Penal Code's commentaries concerning self-defense confirm that "the actor must believe in the necessity of his defensive action . . . and thus cannot be privileged by accident."<sup>270</sup> One is not justified in killing another "because it subsequently appears that there was actual danger, of which he was at the time ignorant."<sup>271</sup>

Tort law's privilege for actions done to assist others<sup>272</sup> is perhaps even more analogous to community caretaking than are criminal law's justifications for necessity and defense of others because tort law is concerned with compensation rather than punishment. The tort-law privilege, therefore, suggests that individuals have no right to be free from such intrusions, not merely that the intruders should not be punished. Moreover, because the legality of searches and seizures under the common law was tested in trespass suits,<sup>273</sup> tort law is likely to be an especially valuable source concerning the meaning of the Fourth Amendment's reasonableness requirement.

The modern privilege is reflected in the Restatement (Second) of Torts, which provides that individuals may enter the private property of another if it "reasonably appears to be necessary to prevent serious harm to" persons or property, "unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action."<sup>274</sup> Accordingly, the tort privilege incorporates a requirement of reasonableness in the action of the one entering ("reasonably appears necessary") and a subjective focus on the person to be helped ("the one for whose benefit [the actor] enters is unwilling").<sup>275</sup> As I argue below,<sup>276</sup> this attention to the desires of the person to

270. MODEL PENAL CODE § 3.04 cmt. 2(b) (1985).

271. *Trogdon v. State*, 32 N.E. 725, 727 (Ind. 1892); see also DUBBER, *supra* note 264, at 206 ("[C]onduct that only turns out later to have met the conditions for self-defense . . . won't qualify as self-defense.").

272. See RESTATEMENT (SECOND) OF TORTS § 76 cmt. c (1965) ("Under the rule stated in this Section, the actor is privileged to protect a third person by means which he correctly or reasonably believes the third person is privileged to use in his own defense although such third person is not in fact privileged to use such means.").

273. See, e.g., BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 16 (Harold Hyman & Stuart Bruchey eds., 1986) ("[U]nreasonable searches and seizures were considered trespasses, and . . . officers of the government who abused their authority in such a manner were liable to those whose persons or property they caused to be invaded.").

274. RESTATEMENT (SECOND) OF TORTS § 197(1) (1965).

275. *Id.*

276. See *infra* Part IV.C ("[R]easonableness in a case where government is acting to help an individual by subjecting him or her to a search or seizure should depend on whether the searching officials have appropriately represented the interests and desires of the subject.").

be helped should be part of the Fourth Amendment's reasonableness requirement when searches are undertaken for the benefit of the party searched.

Tort law's privilege for actions in defense of persons or property is valuable here not only for what it says about the reasonableness requirement but also for its attention to the actor's state of mind. Through the language "knows or has reason to know,"<sup>277</sup> the tort privilege requires both that the actor subjectively believe that the help is desired, and that the subjective belief be objectively reasonable. Because most people would want to be helped, the tort privilege<sup>278</sup> and this Article's proposed rule allow actors to presume that help is desired absent an indication to the contrary. If there are such indications, however, police should not be able to override them while claiming to act for the benefit of someone who declines assistance.

There are administrative costs in determining an officer's subjective motivation,<sup>279</sup> and in part for those reasons the Court held in *United States v. Leon*<sup>280</sup> that the "good-faith" exception to the exclusionary rule turns on the objective reasonableness of the police action, rather than on the subjective good faith of the officer.<sup>281</sup> Accordingly, "*Leon*, by foreclosing inquiry directly into the officer's state of mind, creates the possibility of nonsuppression notwithstanding even a deliberate constitutional violation."<sup>282</sup>

Nevertheless, *Leon*'s context suggests limits to its purely objective focus. First, the Court's adoption of a purely objective standard was dictum. The

277. RESTATEMENT (SECOND) OF TORTS § 197(1) (1965).

278. The tort privilege establishes a default rule permitting actors to enter if nothing is known about the desires of the person to be helped. See RESTATEMENT (SECOND) OF TORTS § 197(1) (1965) ("One is privileged to enter or remain on land in the possession of another if it . . . reasonably appears to be necessary to prevent serious harm to . . . a third person."). The privilege, according to the terms, of the Restatement, applies "*unless* the actor knows or has reason to know that the one for whose benefit he enters is *unwilling* that he shall take such action," *id.* (emphasis added), rather than if the one for whose benefit the actor enters manifests a desire that he shall take such action.

279. Such an inquiry is possible to undertake, however. See *United States v. McGough*, 412 F.3d 1232, 1239 (11th Cir. 2005) (noting that the magistrate judge concluded that the officers were partially motivated by obtaining evidence "relating to the violation of a criminal statute" but concluding that the test was an objective one and holding that the search was not objectively reasonable).

280. See *United States v. Leon*, 468 U.S. 897, 905 (1984) (holding that evidence does not have to be suppressed if the officers whom conducted the search reasonably relied on a magistrate judge's decision to issue a search warrant).

281. See *id.* at 919 n.20, 922 n.23 (stating that the good faith inquiry is an objective question of whether a reasonably well trained officer would have known the search was illegal despite a magistrate's authorization of a warrant).

282. 1 LAFAVE, *supra* note 76, § 1.3(e).



lower court had found that the officers had subjective good faith,<sup>283</sup> and the Supreme Court did not disturb this finding. Thus, it is uncertain that the Court would apply the purely objective standard in a case where the officer's subjective bad faith was demonstrated, though of course *Leon*'s focus on objective reasonableness may cause bad faith to go undetected.

Second, and more important, *Leon* applied the good-faith exception to a search conducted pursuant to a warrant,<sup>284</sup> albeit one later held not to have been supported by probable cause.<sup>285</sup> Because a magistrate determined that there was probable cause, and because the officers' behavior was objectively reasonable, little deterrent purpose would be served by requiring subjective good faith.<sup>286</sup> In a situation as presented in *Leon*, the objective standard allows the police reasonably to defer to the judgment of the magistrate issuing the warrant.<sup>287</sup> Where the police are making their own determination whether to proceed without a warrant, however, the good-faith exception may be entirely inapplicable.<sup>288</sup>

Even if the good-faith exception extends to warrantless searches, it is still another step to conclude that in such warrantless searches the police officers' subjective motivation will be treated as irrelevant. *Leon* declined to inquire into subjective motivation, but did so in a situation where there were other constraints on arbitrary police conduct, including the magistrate's decision to issue the warrant.<sup>289</sup> Extending *Leon*'s purely objective focus to the community-caretaking context, however, would remove all effective constraint on arbitrary behavior.

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283. *Leon*, 468 U.S. at 904.

284. *See id.* at 902 ("A facially valid search warrant was issued . . . . The ensuing searches produced large quantities of drugs . . . .").

285. *See id.* at 903 ("[The District Court] concluded that the affidavit was insufficient to establish probable cause . . . .").

286. *See id.* at 920–21 (recognizing that no deterrent purpose could be served by excluding evidence where "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope").

287. *See id.* ("[A]n officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient.").

288. *See* 1 LAFAYE, *supra* note 76, § 1.4 (discussing the impact the subjective belief of the police officer should have on the determination of whether or not evidence seized without a warrant is admissible).

289. *See id.* § 1.4(e) (arguing that pure objectivity is appropriate "provided there are more reliable and feasible means of determining in a particular case whether or not the challenged arrest or search was arbitrary").

### B. Third-Party Community Caretaking

The last section considered whether the warrants and established procedures required in other types of community caretaking should be applied to assistance searches. It also considered whether the reasonableness of assistance searches should turn in part on the subjective purposes of the searching officers. Even if subjective purpose is relevant, though, reasonableness requires more. Assistance searches must be objectively reasonable as well. This section and the next analyze the components of this objective reasonableness determination.

Courts should ask three questions in evaluating the reasonableness of a community-caretaking search or seizure designed to assist the general public or a specific person or persons other than the one whose rights are implicated by the search or seizure. First, how significant is the intrusion? Second, how serious is the potential harm? And third, what is the likelihood that the intrusion will prevent or lessen the harm? The questions draw on *Brown v. Texas*'s<sup>290</sup> three-part test for balancing "the public interest and [an individual's] right to personal security and privacy" in the context of a suspicionless seizure,<sup>291</sup> which requires "a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."<sup>292</sup>

First, how significant is the intrusion?<sup>293</sup> Subsidiary questions include the following: What place was searched? A search of a garage may trigger less substantial privacy concerns than would a search of a bedroom or a bureau,<sup>294</sup>

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290. See *Brown v. Texas*, 443 U.S. 47, 52–53 (1979) (holding that police acted unconstitutionally in detaining the defendant and requiring him to identify himself when they lacked any reasonable suspicion to believe that the defendant was engaged in criminal conduct).

291. *Id.* at 52.

292. *Id.* at 50–51.

293. See *State v. Mireles*, 991 P.2d 878, 881 (Idaho Ct. App. 1999) ("The intrusion into Mireles's privacy was minimal. The balance of interests in this case strikes in favor of the public interest in motorist assistance.").

294. North Dakota has interpreted the community-caretaking doctrine not to apply at all to entries of dwellings. See *State v. Gill*, 755 N.W.2d 454, 460 (N.D. 2008) ("[T]he warrantless entry of law enforcement officers into a home presents a Fourth Amendment issue and should not be examined under the community caretaking doctrine."). That state, however, analyzes the emergency doctrine separately, and does permit entries of dwellings in situations satisfying *Mitchell*'s emergency test. See *State v. Nelson*, 691 N.W.2d 218, 224 (N.D. 2005) ("A warrantless search is not unreasonable if the government can prove the search or seizure is subject to one of the few well-delineated exceptions. One such exception is the emergency doctrine." (citations omitted)). Thus, police may enter dwellings for community-caretaking purposes, but only in emergencies. Essentially, then, North Dakota balances the potential harm avoided by the intrusion against the harm caused by the conclusion, and concludes that the

and a search of a car on the highway may concern us even less,<sup>295</sup> owing to the reduced expectation of privacy applicable to automobiles.<sup>296</sup> At what time of day was the search of seizure conducted? Mid-day police activity may intrude on our privacy and solitude less than would activity performed at night.<sup>297</sup> How much time did the police action take? A brief search or seizure is less of an intrusion, all other things equal, than is a lengthier one.<sup>298</sup>

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severity of an intrusion into a home can be justified only when there is an "immediate need" to act to prevent the harm. *See id.* at 224 (balancing the immediate need for assistance with the intent of the search and the connection between the emergency and area to be searched).

295. Some have suggested, and some courts have held, that the community-caretaking doctrine should be limited to situations involving automobiles because of the greater privacy interests surrounding homes. *See* *United States v. Maddox*, 388 F.3d 1356, 1366 n.5 (10th Cir. 2004) ("The Government argues that the 'community caretaking' doctrine allows this detention. We disagree. Our cases specifically limit this doctrine to vehicle searches." (citing *United States v. Thomson*, 354 F.3d 1197, 1200 n.1 (10th Cir. 2003); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994))); Jennifer Fink, Note, *People v. Ray: The Fourth Amendment and the Community Caretaking Exception*, 35 U.S.F. L. REV. 135, 157–58 (2000) ("The officers should not be able to use the community caretaking exception to circumvent the Fourth Amendment protection of homes; such exception should only be applied to automobiles based on their unique, transitory nature." (citations omitted)). Such an approach is unwise, however, as the Virginia Court of Appeals pointed out: "It would be illogical to allow the police to render assistance to a convulsing man in a car while denying this same assistance to a man on the street." *Commonwealth v. Waters*, 456 S.E.2d 527, 530 (Va. Ct. App. 1995). Most courts extend the community-caretaking doctrine to the home. *See, e.g.,* *United States v. Bradley*, 321 F.3d 1212, 1214–15 (9th Cir. 2003) (holding that the officers' entry into and "protective sweep" of a home under the emergency doctrine was lawful (citations omitted)); *United States v. Rohrig*, 98 F.3d 1506, 1524 (6th Cir. 1996) ("Quite clearly, nothing in the Fourth Amendment requires the police (and the neighbors) to idly observe and tolerate a late-night, ongoing nuisance to the community while a warrant is sought and obtained."). And if the police can offer assistance to the man on the street or in the home, there is no reason not to apply the plain view exception, *see generally, e.g., Horton v. California*, 496 U.S. 128 (1990), to permit the introduction of whatever evidence is found during that assistance. *See infra* Part V (discussing prophylactic exclusionary rules).

There is a legitimate concern that applying the community-caretaking doctrine to validate searches of homes and pedestrians would lead to an unacceptable subversion of the probable-cause requirement, but the concern should be met by limiting police discretion to subvert the requirement, rather than by permitting unfettered discretion in an arbitrary subset of potential searches and seizures.

296. *See, e.g., California v. Carney*, 471 U.S. 386, 393 (1985) ("[T]here is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling.").

297. *See State v. Lindner*, 592 P.2d 852, 857 (Idaho 1979) ("Historically, there has been a strong aversion to nighttime searches." (citations omitted)).

298. *See McGann v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 8 F.3d 1174, 1186 (7th Cir. 1993) ("[T]he government is not required to have an individualized suspicion with respect to each person searched, so long as the need . . . was great, the intrusion—measured by the duration of the search and the intensity of the investigation—was minimal and the discretion of the official was relatively circumscribed.").

Second, how significant is the potential harm?<sup>299</sup> Might someone be killed? Injured? How seriously? If property is at risk,<sup>300</sup> what is the value<sup>301</sup> of the property? An officer should not be able to seize an individual to assist with a trivial inconvenience, as when a motorist appears to need directions,<sup>302</sup> though an officer may of course offer assistance for minor matters as long as there is no interference significant enough to constitute a seizure.

Third, what is the likelihood that the intrusion will prevent or lessen the harm?<sup>303</sup> Even significant intrusions of privacy interests will be reasonable if

299. See, e.g., *United States v. McGough*, 412 F.3d 1232, 1239 (11th Cir. 2005) ("In this case, the exigencies of the situation . . . are not compelling enough to find that the officers' warrantless entry into McGough's apartment was objectively reasonable.").

300. Most courts apply the community-caretaking exception to situations where the only threat is to property, though some do not. See *Decker*, *supra* note 93, at 508–10 (discussing the remaining ambiguities in the law when property is the sole interest to be protected). The better rule is not to exclude such entries from the doctrine entirely (if my house were burning I would want government assistance even if nobody's life was threatened by the fire), but rather to weigh the potential loss of property in determining the reasonableness of the police action. See *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (noting that a structural fire "clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable'").

The protection of mere property provides a justification in criminal law and tort law, as long as the amount sought to be gained exceeds the expected harm caused by the actor. See MODEL PENAL CODE § 3.02(1)(a) (1962) ("(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; . . ."); RESTATEMENT (SECOND) OF TORTS § 197 cmt. c (1965) ("In determining the question of reasonableness, the probable advantage to the actor to be expected from the entry must be weighed against the probable detriment to the possessor of the land or other persons properly upon it.").

301. Value may be monetary or otherwise. A balancing approach also allows courts to take into account the gradations in importance of various pieces of property. An approach that excludes "mere property" per se, however, see *supra* note 300 (discussing the standard for balancing harm when considering protection of mere property as the justification for criminal or tortious conduct), would prevent government from acting to protect property, such as a house or a car, that may be worth much money, and property, such as a pet, whose value is less calculable but potentially no less significant. See *Yates v. City of New York*, No. 04 Civ. 9928(SHS), 2006 WL 2239430, at \*9 (S.D.N.Y. Aug. 4, 2006) (upholding a community-caretaking entry to protect animals); *People v. Rogers*, 708 N.Y.S.2d 795, 796 (N.Y. App. Term 2000) (same); *State v. Bauer*, 379 N.W.2d 895, 899 (Wis. Ct. App. 1985) (same). Certainly many individuals value their houses, cars, jewelry, furniture, photos, and pets more than the privacy interest they have against an officer checking on their well being.

302. See *Poe v. Commonwealth*, 169 S.W.3d 54, 59 (Ky. Ct. App. 2005) ("Officer Marszalek's belief that Poe may need directions is not a valid basis to stop him in these circumstances. . . . The community caretaking function does not provide justification for the stop in this case.").

303. See *State v. Atkins*, 834 N.E.2d 1028, 1034 (Ind. Ct. App. 2005) ("An individual's rights to liberty, privacy and free movement . . . are not absolute; they must be balanced against society's right to protect itself.").

they are virtually certain to avoid substantial harms. However, if the interference with privacy has a negligible chance of producing any beneficial effect, then the search may be unreasonable even if the potential harm is quite significant. To take an extreme example, if a serial killer kidnaps a person in New York's Central Park, the potential harm is of the utmost significance. Nevertheless, it would be unreasonable for the authorities to break down every door in Manhattan, because each such entry has an infinitesimally small chance of saving the victim. Additionally, if the officer's only indication that help is needed is unreliable, then there is less of a chance that the officer's intrusion will accomplish anything beneficial.<sup>304</sup> Reliable information, such as the officer's own observations, would provide more indication that the officer's help is truly warranted. Moreover, once the community-caretaking concern has been addressed, any additional search or detention without probable cause or reasonable suspicion is unreasonable.<sup>305</sup>

Answers to each question should be determined based on information the searching officer knew or should have known at the time of the search, consistent with the Supreme Court's understanding that the reasonableness standard does not permit courts to critique police behavior with the omniscience of hindsight.<sup>306</sup> As explained more fully in Part V, police may search "reasonably"—whether for law-enforcement purposes or otherwise—even if their assessment of the need for action turns out to be incorrect.

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304. See *Kerman v. City of New York*, 261 F.3d 229, 235–36 (2d Cir. 2001) (holding that an anonymous and uncorroborated 911 call was insufficient to justify a warrantless entry into a private home). But see *United States v. Wiggins*, 192 F. Supp. 2d 493, 500 (E.D. Va. 2002) (upholding a search undertaken in response to a false, anonymous 911 report of a shooting, but basing the holding on other factors in addition to the call that indicated that the apartment in question was the site of drug trafficking).

305. See *Thompson v. Louisiana*, 469 U.S. 17, 22 (1984) (holding that a call for medical assistance was insufficient to justify a warrantless search of a home beyond the initial "victim-or-suspect" search and any search conducted under the "plain-view doctrine"); *Mincey v. Arizona*, 437 U.S. 385, 295 (1978) (establishing that a warrantless search of an apartment is not "constitutionally permissible simply because a homicide had recently occurred there"); *State v. Gonzales*, 141 P.3d 501, 507–09 (Kan. Ct. App. 2006) (finding that the officer "exceeded the scope of the safety stop by asking investigative questions and continuing the detention to run a background check on the vehicle's occupants").

306. Cf. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 452–53 (1990) (concluding that the seriousness of the intrusion effected during a sobriety checkpoint was to be viewed from the perspective of a sober driver). Thus, the anxiety caused by the potential discovery of criminal activity would not be relevant to the calculus.

*C. First-Party Community Caretaking*

In cases where the subject of the search poses a potential threat to the community, courts should be able to balance the intrusion against the potential danger, even though such balancing can hardly be reduced to hard-and-fast rules.<sup>307</sup> As demonstrated above, the Court employs a similar balancing test in special-needs cases, and in principle the calculation is simple: Compare the privacy harm committed through community caretaking with the harm sought to be avoided by it, discounted by the probability that the entry will not in fact limit or eliminate the harm, with each fact evaluated as the officer knew it or reasonably should have known it at the time the action was taken.

Where the police are acting to minimize a threat posed *to* (rather than *by*) the subject of the search, however, the balancing test is not so easy to apply. Judges issuing warrants in the traditional law-enforcement model are obligated to limit the public's desire for crime prevention and detection when it interferes too much with individual privacy concerns.<sup>308</sup> But in first-party community-caretaking cases, the community as such has no interest in searching; the judge must balance the privacy interest of the subject of the search against the interest *the subject of the search* has in receiving police assistance.<sup>309</sup>

With the same party's interests on both side of the equation, the job of the person deciding the reasonableness of a search or seizure is not to limit one party's desires when they impinge on another's, but *to give effect to the desires of the subject of the search or seizure*. Thus, reasonableness in a case where government is acting to help an individual by subjecting him or her to a search or seizure should depend on whether the searching officials have appropriately represented the interests and desires of the subject.

If, therefore, the subject of the search is able to communicate with the police and indicates his or her desire that no entry take place, then that should

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307. See, e.g., *Kalmas v. Wagner*, 943 P.2d 1369, 1372 (Wash. 1997) ("Whether an encounter made for noncriminal noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" (citations omitted)); cf., e.g., *California v. Byers*, 402 U.S. 424, 431 (1971) (plurality opinion) (holding that states may require drivers involved in accidents to stop and identify themselves).

308. See *United States v. Travisano*, 724 F.2d 341, 345 (2d Cir. 1983) ("It is the magistrate's duty to hold the balance steady between the protection of individual privacy on the one hand and the public need to recover evidence of wrongdoing on the other.").

309. See *Byers*, 402 U.S. at 427 ("Tension between the State's demand for disclosures and the protection of the right against self-incrimination . . . must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other . . .").

be the end of the matter.<sup>310</sup> On the other hand, if an individual *ex ante* were to notify the police department that a particular relative is authorized to allow a police entry into his or her home,<sup>311</sup> then such authorization would be valid and, through an application of *expressio unius est exclusio alterius*,<sup>312</sup> purported authorization by someone else would likely not be valid.

In many cases, however, the police will be unable to communicate with the subject of the search prior to the search itself. Indeed, the presumed incapacity of the subject may be the very reason for the entry. In those cases, a reasonable search is one to which we would expect the subject would consent, if he or she were able to do so.<sup>313</sup> By the same token, if a person appears capable of asking for assistance but does not do so, then courts should presume that the person did not desire such assistance. For example, if a police officer approaches a legally parked car and detains its occupants because he wishes to offer directions, such a seizure should be held invalid. If, however, the occupants appeared to be ill, then one could infer that they wished for the officer to help, until they indicated that they would prefer the officer to leave.

Courts sometimes ask whether the officer reasonably believed that a person subject to a search of seizure was "in need of assistance."<sup>314</sup> That

310. See *State v. Othoudt*, 482 N.W.2d 218, 223 (Minn. 1992) (holding a warrantless entry unconstitutional when officers were told that their help was not needed); *State v. Fisher*, 2004 WL 440402, at \*3 (Del. Super. Ct. Feb. 18, 2004) (holding unconstitutional a police seizure of a motorist who appeared to be having car trouble after the motorist indicated to the officers that "all was okay"); cf. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 cmt. d (Tentative Draft No. 2, 2002) ("There can be no claim [for restitution] for services that a recipient of full legal capacity has attempted to refuse . . .").

311. If the subject of the search him- or herself asks for the assistance of authorities, the case is even easier. See *Kalmas*, 943 P.2d at 1372 ("Here, Plaintiffs themselves asked the police to perform a caretaking function.").

312. See generally 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:24 (7th ed. 2008).

313. Cf. *State v. Maddox*, 54 P.3d 464, 468 (Idaho Ct. App. 2002) (holding unconstitutional a seizure of a motorist for the motorist's own protection, when any danger presented would have been apparent to him).

314. See, e.g., *State v. Fisher*, 686 P.2d 750, 760 (Ariz. 1984) ("(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property." (quoting *People v. Mitchell*, 347 N.E.2d 607, 609 (N.Y. 1976))); *State v. Lovegren*, 51 P.3d 471, 475 (Mont. 2002) ("[I]f an officer states that he stopped to assist a person who appeared to be in need of assistance, an objective view of the specific and articulable facts must be examined to determine whether they support the officer's statements."); *State v. Guernsey*, 84 P.3d 524, 530 (Haw. Ct. App. 2001) ("[Traffic] stops are valid only if a person, given the totality of the circumstances, would reasonably believe the driver was in need of assistance." (citation omitted)); *Wright v. State*, 7 S.W.3d 148, 155 (Tex. Crim. App. 1999) ("[A] court should examine whether the purpose expressed by the officer for the stop is consistent with his legitimate role as community caretaker.").

approach improperly appears to allow police to help someone who needs, but does not want, police assistance; prohibits police from helping people who want, but do not need, assistance (unless valid consent is obtained); and forces courts to determine what kinds of needs satisfy the standard. We can avoid all those unfortunate consequences if we adopt an individualized approach to first-party community caretaking, and focus on what the subject of the search wants.

Courts assessing a "government interest" in protecting the well being of the person whose privacy was compromised must either operate under the assumption that there is a government interest in individuals' well-being *apart* from the interest those individuals hold in their own well-being, or that government may act temporarily on behalf of the individual to be protected, presuming that the individual would want to be helped until there is reason to believe the contrary. The second approach, consistent with the Fourth Amendment's reservation of areas of individual privacy, places sovereignty with the individual, leaving it to each person whether to sacrifice his or her privacy unless the state can show that maintaining privacy is likely to create more harm to others, or unless the Fourth Amendment's requirements for law-enforcement searches have been met.<sup>315</sup> By contrast, the first approach, in permitting government to act when it determines that people would be better off sacrificing some privacy, turns away from the Fourth Amendment's distrust of we-know-what's-good-for-you government.<sup>316</sup>

Consent searches and first-party assistance searches differ from other warrant exceptions in that the former two categories "have nothing to do with the overriding needs of law enforcement because probable cause to search or seize may be totally lacking."<sup>317</sup> As Professor Ronald Bacigal has argued in criticizing some of the Supreme Court's consent-search jurisprudence, the "right to personal autonomy" protected by the Constitution entitles the individual "to grant or withhold cooperation at the individual's discretion—rational or otherwise."<sup>318</sup> When the government acts only to protect the well-being of an individual citizen, "the only relevant perspective is that of the

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315. *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973) (concluding that a subjective standard for consent searches is appropriate for determining whether the purported consent was voluntarily given).

316. *See, e.g., State v. Tourtillott*, 618 P.2d 423, 430 (Or. 1980) ("We conclude that the governmental interest in the enforcement of laws for the preservation of wildlife in this state is sufficiently substantial to justify the minimal intrusion upon the Fourth Amendment rights of those stopped for brief questioning and a visual inspection of their vehicles.").

317. Bacigal, *supra* note 68, at 729.

318. *Id.* at 728.



individual citizen, who must be taken as the officer finds him—subjective warts and all."<sup>319</sup>

Considering implied consent in first-party assistance searches is also consistent with approaches taken in other areas of law. Tort law privileges otherwise trespassory entries where they "reasonably appear[] to be necessary to prevent serious harm to" persons or property, "unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action."<sup>320</sup> Similarly, presuming consent in certain circumstances accords with established contract law, under which physicians assisting unconscious persons will receive compensation for those efforts, even though the patient was unable to agree in advance to pay for those services.<sup>321</sup>

The implied-consent theory does not, however, fit well with the *language* the courts have chosen to employ in Fourth Amendment cases, which refer specifically to a "government interest" to be weighed against the interest of the people searched.<sup>322</sup> Moreover, in approving some community-caretaking searches and seizures that occurred despite the subject's apparent preference otherwise, some courts have implicitly concluded that the government acts not just as a stand-in for the presumed victim, but in defense of its own interests.<sup>323</sup>

Finding a government interest in protecting people who do not want to be protected, however, appears at odds with the Constitution's preservation of "enclaves" immune from "government interference."<sup>324</sup> The Court has emphatically rejected the idea that government can override individual choices as to fundamental decisions,<sup>325</sup> reasoning that

319. *Id.* at 729.

320. RESTATEMENT (SECOND) OF TORTS § 197 (1965).

321. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 (Tentative Draft No. 2, 2002) ("A person who performs, supplies, or obtains professional services reasonably necessary for the protection of another's life or health has a claim in restitution against the other if the circumstances justify the claimant's decision to intervene without a prior agreement for payment or reimbursement.").

322. *See, e.g.,* State v. Mireles, 991 P.2d 878, 881 (Idaho Ct. App. 1999) (upholding a search on the basis of the "public interest in motorist assistance" where the motorist who might have needed assistance was the one seized).

323. *See* United States v. Johnson, 22 F.3d 674, 680 (Mich. 1994) ("The Supreme Court has recognized four situations satisfying the exigent circumstances exception: (1) hot pursuit of a fleeing felon; (2) imminent destruction of evidence; (3) need to prevent a suspect's escape; and (4) risk of danger to police or others." (citations omitted)).

324. *Oliver v. United States*, 466 U.S. 170, 178 (1984).

325. *See, e.g.,* District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008) (rejecting the argument offered by *amici* and by Justice Breyer in dissent that D.C.'s handgun ban was justified by the government's concern with accidental shootings, and noting that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table" (citations omitted)); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) (holding that "greater

[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>326</sup>

The right to privacy protected by the Fourth Amendment is unquestionably fundamental, as the Court has recognized for sixty years,<sup>327</sup> and therefore the government should not be able to abridge that right based solely on the government's belief that the individual is making a mistake by refusing assistance. Indeed, standard Fourth Amendment law permits people to retain privacy regardless of public opinion, even where the police suspect criminal activity, unless a warrant or the consent of the searched party is obtained.<sup>328</sup> Under this reasoning, police should be able to act in a community-caretaking capacity only when they take actions in furtherance of the actual or presumed desires of the person sought to be helped. Where the person makes plain that help is not desired, intrusions into areas of privacy are no longer warranted.

Still another difficulty is apparent with an approach to reasonableness that simply balances the applicable interests: What law-abiding person would object to the state's intrusion, if that intrusion were for the purpose of checking on the person's safety? If the person is indeed safe, there is usually little intrusion, and little harm is done.<sup>329</sup> If the person is in need of assistance, the person is likely to be extremely grateful for the officer's proactivity. This could mean that there is little to balance—perhaps it is reasonable in the vast majority of cases to make community-caretaking entries, simply because most people

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societal acceptance" of homosexuality "is scarcely an argument for denying First Amendment protection to those who refuse to accept these views"); *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (holding that the state cannot constitutionally interfere with parental decisions concerning child-rearing based simply on a disagreement concerning the child's best interests); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981) ("[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.").

326. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

327. See *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause.").

328. See generally, e.g., *Ohio v. Robinette*, 519 U.S. 33 (1996); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

329. See *Livingston*, *supra* note 3, at 273–74 ("[W]hen police enter the home of an elderly woman to ensure that she is not injured within, their 'search' does not 'damage reputation or manifest official suspicion.'" (citations omitted)).

would prefer the police to adopt a better-safe-than-sorry approach. And though the feelings of the community do not always determine reasonableness, there is less reason to disregard common sentiment in the community-caretaking situation because most law-abiding people can easily imagine themselves or their family members requiring the assistance of the police. As a result, if public sentiment in favor of such entries exists, it likely exists despite the public's internalization of the costs of the searches. In the law-enforcement context, by contrast, it is easy to dismiss the public's desire for more energetic law enforcement because the law-abiding public does not see itself as the target of such searches.<sup>330</sup>

An individualized approach takes account of public approval for community caretaking to the extent that it affects the officer's assessment of the individual's desires or affects the thoughts and behavior of a reasonable person in the officer's position. Officers would be able to effect community-caretaking entries to assist those persons who desire assistance, and would be able to presume such a desire if the vast majority of citizens approves of such entries. Others, however, who place a greater value on their privacy would be able to have their choices respected as long as they can communicate this preference.

Situations involving the disabled present an exception to the general rule, and permit government to act in seeming contravention of the express desires of the individual subject to the search or seizure.<sup>331</sup> That exception, however, is a common one in the law, and does not call into question the principle that a fully competent person has the right to refuse police assistance.<sup>332</sup>

If the subject of the search cannot communicate with police because the individual is incapacitated, a court or officer applying the reasonableness test

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330. Applying public-choice theory, however, it is possible that because the benefits of law-enforcement searches are widely distributed, while the costs are concentrated on the groups subjected to the police activity, the legislative process would tend to overvalue privacy. See Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93, 132 (2007) ("[T]he benefits of [searches and seizures] redound to the population as a whole . . . , while the costs are . . . concentrated on medium-sized groups that are particularly effective at achieving political gains."). Such a critique loses its force if the disaffected groups are unable to access the political process. See *id.* at 152–53 ("Further, legislative burdening of these minorities is also troubling; these groups go unrepresented, the legislature is not bound to consider their interests or respect them as persons."). In any event, community-caretaking searches are more likely than law-enforcement searches to reflect society's true preferences.

331. See, e.g., *Vitek v. State*, 750 N.E.2d 346, 349 (Ind. 2001) (finding that defendant was in need of assistance based in part on his known physical disabilities).

332. See *Moline v. City of Castle Rock*, 528 F. Supp. 2d 1102, 1105 (W.D. Wash. 2005) ("Police may respond to emergencies under the community caretaking function. A competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." (citations omitted)).

suggested here will attempt to discover whether that individual would desire the police assistance if he or she were not suffering from the disability. Similarly, a minor<sup>333</sup> or a person who is suffering from a state of mind that does not permit him or her to appreciate his or her surroundings can be presumed to desire police assistance if most persons would desire such assistance when not in such a condition.<sup>334</sup> Lower courts have held that arrests can constitute reasonable seizures of disturbed individuals under the community-caretaking doctrine,<sup>335</sup>

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333. *Cf. Williams v. Baptist Health Sys., Inc.*, 857 So. 2d 149, 153 (Ala. Civ. App. 2003) (permitting a health-care provider to recover reasonable fees for services needed by a minor, despite the parent's pre-announced unwillingness to pay); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20, illus. 2 (Tentative Draft No. 2, 2002) (applying "the doctrine of necessities" to provide a physician with a claim to restitution for services performed on a minor).

This analysis suggests that if police reasonably think that a minor inside a house needs assistance, the officers may constitutionally enter the home even if an adult meets them at the door and refuses them entry. *Cf. Georgia v. Randolph*, 547 U.S. 103, 118 (2006) (suggesting in dicta that an officer may enter a residence over the objection of one occupant if the officer reasonably believes there is a victim of domestic violence inside the residence). The Court stated:

No question . . . reasonably could be [raised] about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected.

*Id.*; see *id.* at 138–40 (Roberts, C.J., dissenting) ("But the officer's superior claim to enter is obvious: . . . [T]he officer's precise purpose in knocking on the door was to assist with a dispute between the Randolphs—one in which Mrs. Randolph felt the need for the protective presence of the police.").

Of course, a minor's youth does not eliminate his or her protection under the Fourth Amendment; police actions to protect minors must be reasonable. See *State v. Kinzy*, 5 P.3d 668, 679–80 (Wash. 2000) (holding unconstitutional an officer's detention of a juvenile found in a high-crime area at night).

334. See *United States v. Borchardt*, 809 F.2d 1115, 1117–18 (5th Cir. 1987) (holding that medicating a prison inmate against his wishes, even if such conduct was a "search," was reasonable where done to avoid impending death); *cf. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 20 cmt. d (Tentative Draft No. 2, 2002) ("[T]he circumstances in which emergency medical care must be provided will sometimes justify a court in concluding that the recipient's apparent refusal either to accept services or to pay for them is without legal effect."); *id.* at illus. 9 (granting hospital a restitution claim against a psychiatric patient who declined necessary medical treatment, based on *Rockville General Hosp. v. Mercier*, No. CV 90 44838 S, 1992 WL 335218, at \*1–2 (Conn. Super. Ct. Nov. 9, 1992)).

335. See *Winters v. Adams*, 254 F.3d 758, 764 (8th Cir. 2001) (authorizing the arrest of an apparently intoxicated individual from inside a vehicle); *Goldsmith v. Snohomish County*, 558 F. Supp. 2d 1140, 1152 (W.D. Wash. 2008) (applying the community caretaking doctrine to authorize the temporary arrest of "a violent, injured patient . . . for the sole purpose of enabling

even though the arrested individuals have not committed any crime,<sup>336</sup> and obviously would prefer to go about their business.<sup>337</sup> Likewise, a person attempting suicide might reasonably be interfered with by an officer who enters the person's dwelling to stop the suicide attempt,<sup>338</sup> because the subject's desire for privacy at that occasion might be due to his or her temporary mental or emotional strain.

Criminal procedure recognizes the government's ability to override individuals' choices in analogous circumstances, even when persons without disabilities are accorded the right to make choices without government interference. For example, mentally incompetent criminal defendants are unable to waive the right to counsel,<sup>339</sup> though defendants without such a disability have the absolute right to proceed pro se.<sup>340</sup> And, of course,

paramedics to render necessary medical aid").

336. See *United States v. King*, 990 F.2d 1552, 1561–62 (10th Cir. 1993) (permitting the seizure of a motorist when the officer observed a pistol inside the vehicle, though state law permitted the carrying of such weapons). Arguably, *Terry v. Ohio*, 392 U.S. 1 (1968), itself authorized such seizures for the community-caretaking purpose of ensuring the safety of the officer and the public. *Terry* authorized the officer conducting a pat-down search to seize any weapons found as a result, and did not indicate that a different result would obtain if the weapon were possessed legally. See *id.* at 30–31 ("[W]here a police officer observed unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot . . . he is entitled . . . to conduct a carefully limited search of the outer clothing . . . to discover weapons which might be used to assault him.").

337. The arrestee in *Winters* went to an extreme to manifest his desire to be left alone. After telling the officers that he did not want to be disturbed, he had to keep locking the car doors as the officers used a "slim jim" to unlock them. At one point, Winters spread himself across the width of the vehicle so that he could keep both doors locked simultaneously. See *Winters*, 254 F.3d at 761 (describing defendant's actions to keep police officers out of his vehicle). The officers eventually removed Winters from the vehicle by breaking a window of the car, whereupon Winters violently resisted the arrest. See *id.* at 762 ("Accordingly, [the shift commander] decided to break the passenger window of the car with his nightstick, in order to remove appellee from the vehicle . . . . [A]ppellee 'was thrashing around trying to fend us off and fight with us.'").

338. See *United States v. Uscanga-Ramirez*, 475 F.3d 1024, 1029 (8th Cir. 2007) (holding that exigent circumstances justified warrantless entry into a home and bedroom in which an upset Uscanga-Ramirez locked himself with a gun); *Seibert v. State*, 923 So. 2d 460, 470–71 (Fla. 2006) (holding that the warrantless search of an apartment in response to a suicide call was lawful because of exigent circumstances indicating the need for help); *Turner v. State*, 645 So. 2d 444, 447 (Fla. 1994) (per curiam) (holding that warrantless entry into a motel room was lawful when defendant left his door ajar after voluntarily opening it when police knocked and then proceeded back into the room and placed a gun to his head).

339. See *Godinez v. Moran*, 509 U.S. 389, 399–400 (1993) (establishing the standard for competency sufficient to allow a defendant to waive the right to counsel).

340. See *Faretta v. California*, 422 U.S. 806, 813–14 (1975) (stating that a defendant has a right to represent himself in any criminal case).

defendants acquitted by reason of insanity may be civilly committed<sup>341</sup> even as the dangerous and sane may not be.<sup>342</sup> Accordingly, it is perfectly consistent with constitutional precedent to apply a standard that gives effect to individuals' desires while maintaining an exception for those individuals incapable of making thoughtful choices.

#### *D. Mixed-Motive Community Caretaking*

In the real world of policing, few actions are motivated solely by one consideration. Accordingly, doctrine should take into account the possibility that a given search would implicate both law enforcement and community-caretaking goals or that a search would be undertaken for the benefit of both the person searched and the greater public.

The public interest in assistance searches is in preventing harm from occurring, rather than bringing to justice someone who has committed a harmful act in the past.<sup>343</sup> Because protecting crime victims (and potential victims) is a community-caretaking function, however, community-caretaking activities will overlap with law enforcement.<sup>344</sup>

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341. See, e.g., *Jones v. United States*, 463 U.S. 354, 370 (1983) (approving the automatic, involuntary civil commitment of insanity acquitees). See generally ROBINSON, *supra* note 132, at 518–19 (discussing the civil commitment of insane offenders).

342. See *Foucha v. Louisiana*, 504 U.S. 71, 85–86 (1992) (holding that an insanity acquittee may not be civilly committed, despite his continuing dangerousness, once he regains his sanity).

343. *California v. Byers*, 402 U.S. 424 (1971), may provide something of an exception. That case involved a constitutional challenge to a state law requiring drivers involved in traffic accidents to stop and identify themselves, and therefore involved an investigation into past conduct. *Id.* at 426–27. Byers challenged the law as compelling him to incriminate himself, because it was his violation of a traffic law that caused the accident. *Id.* The Court rejected the claim, and in a plurality opinion Chief Justice Burger offered as one reason that the stop-and-identify requirement "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents." *Id.* at 430; see also *id.* at 431 ("[T]he statutory purpose is noncriminal, and self-reporting is indispensable to its fulfillment."). The prohibition on leaving the scene of an accident, the Court noted, applied whether or not any violation of law occurred. *Id.*

While the *Byers* plurality did permit the state to achieve its "noncriminal" purpose by looking backwards in time to compensate for a harm that had already occurred, the primary means of correcting the harm was the civil, rather than the criminal, justice system. Thus, *Byers* is unlike the cases discussed in the text, which feature a greater connection between criminal-law enforcement and the "special-needs" search.

344. See, e.g., *Castella v. State*, 959 So. 2d 1285, 1292–93 (Fla. Dis. Ct. App. 2007) (deeming constitutional the seizure of individuals involved in a boating accident because information obtained might prove useful in assessing the location and condition of victims, as well as potential threats to public safety still present).

Consider the following vignette from the Hitchcock thriller *Psycho*:<sup>345</sup>

Marion Crane steals \$40,000 and flees to California. On the way, she tires of driving and pulls to the side of the road, intending to nap briefly before continuing. Instead, she sleeps through the night and is awakened in the morning by a California Highway Patrol officer who knocks on the car window. Upon waking, Crane immediately attempts to put the car in gear, but is stopped by the officer's command to "hold it there." Crane explains that she had been sleeping, and asks if she has broken any laws. The officer responds that she has not. Crane then asks if she is free to leave. Rather than allowing Crane to proceed or even answering her question, however, the officer asks, "Is anything wrong?" Crane responds quickly that nothing is the matter. The officer responds that Crane is acting as if something is wrong, but the observation provokes only Crane's renewed request to be allowed to go. The officer ignores this request and asks again if anything is wrong, whereupon Crane says that she is in a hurry and starts her engine. The officer tells her to turn off the engine and asks for her driver's license.

The highway patrol officer knew that Crane's behavior was strange, but did not know what caused it. The officer likely suspected that she had committed or was soon to commit a crime; perhaps instead she was a crime victim fleeing an abusive boyfriend; perhaps her sleepiness and insistence on being allowed to drive were due to intoxication or illness; or perhaps, like Crane said, she had simply grown sleepy and did not want to waste more time that could be spent driving. It is likely that the officer considered several different possibilities, but his behavior is troubling because he seemed to take advantage of the situation to investigate crime when he lacked reasonable suspicion and thus could not prevent Crane from leaving if the only concern at issue was crime detection.<sup>346</sup>

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345. *PSYCHO* (Universal Studios 1960).

346. Though that particular encounter is taken from fictional cinema, life imitates art. *See* *Winters v. Adams*, 254 F.3d 758, 766 (8th Cir. 2001) (holding that appellants did not violate the appellee's Fourth Amendment rights by detaining him for investigatory purposes and using force during the attempt to resist); *People v. Murray*, 560 N.E.2d 309, 313–14 (Ill. 1990) (holding that evidence stemming from a police search of the vehicle of a defendant who was sleeping in his vehicle should not be suppressed because the officers were assuming a community-caretaking role); *Young v. State*, 497 So. 2d 228, 231 (Ala. Crim. App. 1986) (holding that the officer was acting as a community caretaker when he seized marijuana within his plain view of the defendant's vehicle); *Howell v. State*, 115 P.3d 587, 590–91 (Alaska Ct. App. 2005) (concluding that an officer's investigatory stop of the defendant in his car was lawful); *Blakemore v. State*, 758 S.W.2d 425, 427–28 (Ark. Ct. App. 1988) (holding that the actions of a police officer who knocked on a truck window to question the defendant were reasonable while checking businesses for possible break-ins). Such encounters do not constitute searches, of course, unless—as in the vignette—the officer restrains the subject's freedom of movement. *See* *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."). If the officer merely approached an apparently

Crane's behavior fortuitously raised a question concerning her health, and, as a result, the constitutionality of the seizure would depend on the community-caretaking doctrine. The government would seek to defend the seizure as motivated by a desire to protect Crane, as well as a desire to protect other motorists who might be put at risk if Crane was not capable of operating her car safely. Crane herself, however, was quite clear that she wanted to terminate the encounter, and, accordingly, once the officer determined that she was not in need of assistance, there was no need for first-person community caretaking. Similarly, once Crane demonstrated that she was conscious and alert, it should have been apparent that she did not present a threat to others on the road, and therefore the Constitution did not permit the officer to detain her any further.

*Mincey v. Arizona*<sup>347</sup> and *Arizona v. Hicks*<sup>348</sup> presented dramatic scenarios implicating both law enforcement and community-caretaking concerns. In both cases, police responded to the scene of a shooting,<sup>349</sup> and the initial entry to investigate and check for injured persons was therefore constitutional.<sup>350</sup> Similarly, in *People v. Ray*,<sup>351</sup> neighbors alerted police to a house whose front door had been open all day and which appeared to be in great disorder.<sup>352</sup> The police arrived, looked inside, and found drugs.<sup>353</sup> The police entries in all three

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disabled vehicle and observed contraband through the window, no search or seizure would have occurred, and the action would not have to comply with the reasonableness standard.

347. See *Mincey v. Arizona*, 437 U.S. 385, 401–02 (1978) (finding that the murder-scene exception created by the Arizona Supreme Court to the warrant requirement is inconsistent with the Fourth and Fourteenth Amendments).

348. See *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) (determining that the Fourth Amendment requires the police to have probable cause to search items in plain view).

349. *Id.* at 323; *Mincey*, 437 U.S. at 387.

350. See *Hicks*, 480 U.S. at 392–93 (discussing the constitutionality of entries involving the checking for injured persons); *Mincey*, 437 U.S. at 324. (noting that the legality of the initial entry was conceded); see also *Thompson v. Louisiana*, 469 U.S. 17, 21–22 (1984) (per curiam) (stating in dicta that an entry to offer assistance to a person who had attempted suicide would be constitutional). Not even a report of a shooting, however, will authorize warrantless entries in all instances. The Michigan Supreme Court held that the "emergency-aid" exception could not authorize an entry into a motel room when officers were told of a shots-fired report at that room or one other, and where the officers encountered a person at the room who refused them entry. See *People v. Davis*, 497 N.W.2d 910, 922 (Mich. 1993) (concluding that the entry into the defendant's room violated the Fourth Amendment, and the evidence obtained pursuant to that entry must be suppressed).

351. See *People v. Ray*, 981 P.2d 928, 944 (Cal. 1999) (holding that officers' warrantless entry through an open door, after receiving a report from neighbors that the door had been open all day, did not violate the Fourth Amendment); see also *Love v. State*, 659 S.E.2d 835, 838 (Ga. Ct. App. 2008) (determining that warrantless entry may be justified by exigent circumstances).

352. See *Ray*, 981 P.2d at 932 (discussing the factual background of the case).

353. *Id.*



cases certainly involved criminal investigation, but were also reasonable means of protecting the health and property interests put at risk by the suspected criminal conduct.<sup>354</sup> Thus, the community-caretaking doctrine can authorize such entries by relying on the public interest implicated other than in law enforcement, even as law-enforcement interests are implicated as well.

Applying that lesson to mixed-motive community-caretaking cases where the officers are in part motivated by a desire to enforce the law, we should require both that there be an objective basis justifying the officer's behavior and also that the officers be sufficiently motivated by the community-caretaking concern that they would have taken the actions in question had there been no additional law-enforcement motivation.<sup>355</sup> And, indeed, lower courts adjudicating community-caretaking cases overwhelmingly require not only that a reasonable officer be able to conclude that community caretaking was called for, but that the entering officer was subjectively motivated by a community-caretaking concern.<sup>356</sup>

Some cases require that the community-caretaking purpose predominate in the officer's mind,<sup>357</sup> but such an inquiry, even if the relative predominance of an officer's different purposes could be determined, would make little sense.<sup>358</sup> If an officer was genuinely motivated by a community-caretaking concern, and if that concern would have been sufficient to cause the officer to undertake the search, it should not matter that an additional purpose also motivated the officer even if the crime-control purpose was foremost in the officer's mind.

The inevitable-discovery doctrine again is analogous. Under that doctrine, a court will admit illegally obtained evidence if the evidence would have been

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354. See *Blankenship v. Commonwealth*, 740 S.W.2d 164, 166 (Ky. Ct. App. 1987) (upholding an entry into a vehicle to learn the identity of a gunshot victim).

355. Cf. *State v. Lemieux*, 726 N.W.2d 783, 788 (Minn. 2007) ("[A]n objective standard should be applied to determine the reasonableness of the officer's belief that there was an emergency." (emphasis added)).

356. See, e.g., *United States v. Borchardt*, 809 F.2d 1115, 1117 (5th Cir. 1987) (requiring that such a search be "reasonable and [in] good faith").

357. See *Corbin v. State*, 85 S.W.3d 272, 276–77 (Tex. Crim. App. 2002) ("[A] police officer may not properly invoke his community caretaking function if he is primarily motivated by a non-community caretaking purpose."); see also *Decker*, *supra* note 93, at 511 ("While it is unnecessary that this community-caretaking motive be the only motive in an officer's mind at the time of the warrantless entry, it is essential that the desire to aid . . . be a primary, or at least a substantial, part of the officer's good faith subjective motivation."). As applied to emergency situations, Professor Decker's proposed requirement of good faith has been rejected by the Supreme Court. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006) (rejecting a good-faith requirement in determining the constitutionality of a particular seizure).

358. Cf. *Wayne R. LaFave, The Fourth Amendment as a "Big Time" TV Fad*, 53 HASTINGS L.J. 265, 274 (2001) (analyzing the Court's cases concerning drug checkpoints and noting that "it shouldn't make any difference what purpose is listed first and what is listed second").

obtained notwithstanding the illegality.<sup>359</sup> Thus, a court applying the inevitable-discovery doctrine reconstructs the citizen-police encounter without the illegal conduct.<sup>360</sup> Similarly, a court applying the community-caretaking doctrine should reconstruct the citizen-police encounter without the law-enforcement motive and ask whether the police officer would have searched if he or she had no law-enforcement objective.

### V. Prophylactic Exclusionary Remedies

Some commentators, including Professor Wayne LaFave in his treatise on search-and-seizure law, have argued for the application of a prophylactic exclusionary rule for evidence found during community-caretaking searches, but have balked at discouraging the searches themselves.<sup>361</sup> Accordingly, they have suggested that though community-caretaking searches should not require a warrant to be reasonable, evidence found during such a search unrelated to the reason for the entry should be inadmissible. I refer to the proposed rule as a "targeted" exclusionary rule, as it is targeted to apply only in community-caretaking cases.

Others, including courts in Utah, have adopted an alternative formulation. Under this second approach, nonemergency community-caretaking searches would be unreasonable, but "legitimate" nonetheless.<sup>362</sup> For those "legitimate" (but unconstitutional) searches,<sup>363</sup> an exclusionary rule

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359. See *Nix v. Williams*, 647 U.S. 431, 437 (1984) (discussing the specifics of the inevitable-discovery doctrine).

360. See *id.* ("Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place.").

361. See 5 LAFAVE, *supra* note 76, § 10.1(c) ("[S]uch a 'special' exclusionary rule of this type would be justified under the Fourth Amendment if the risk of undetectable subterfuge were substantial." (citing Russell E. Lovell II, Comment, *Camara and See: Accommodation Between the Right of Privacy and the Public Need*, 47 NEB. L. REV. 613, 636 (1968); Note, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521, 537 (1968))); cf. *New York v. Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("*Miranda* has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State."); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1287 (1998) ("No matter how the Court ruled in *Terry*, police officers would continue frisking people they viewed as a threat to their safety. Once this pragmatic fact was conceded, the crucial question in *Terry* was [whether suppression would follow].").

362. *Provo City v. Warden*, 844 P.2d 360 (Utah Ct. App. 1992), *aff'd*, 875 P.2d 557, 558 (Utah 1994).

363. See *id.* at 365 ("[S]tops which are legitimate exercises of police community caretaker

would be applied.<sup>364</sup> Both forms of the targeted exclusionary rule have the goal of deterring police from claiming a community-caretaking justification when actually motivated by law-enforcement concerns,<sup>365</sup> and thereby seek to achieve a practical solution to the problem of pretextual community-caretaking searches while permitting searches genuinely intended to assist the public to go forward.<sup>366</sup>

From a theoretical perspective as well as a doctrinal one, however, the targeted exclusionary rule is far from satisfying. Searches are either reasonable or unreasonable. Generally speaking,<sup>367</sup> reasonable searches are constitutional and give rise to no issue of remedy. Unreasonable searches are unconstitutional and usually result in exclusion of evidence found during the unreasonable search. The targeted exclusionary rule, however, either requires exclusion when the police were acting reasonably in fulfilling community-caretaking function, or calls the community-caretaking search unreasonable and excludes evidence—all the while winking and nodding to police departments to encourage them to act in the very manner the court holds to be unconstitutional.<sup>368</sup>

responsibilities, but which are not 'reasonable' under the Fourth Amendment, may result in application of the exclusionary rule, while still achieving the objectives of community caretaking.").

364. See *id.* (discussing the circumstances where the application of the exclusionary rule is appropriate); Call, *supra* note 252, at 276, 278 (discussing the manner in which courts have attempted to constrain police officers in situations where they want to help but are not enforcing the law).

365. See 5 LAFAYE, *supra* note 76, § 10.1(c) (noting the problem of "undetectable subterfuge").

366. See *Warden*, 844 P.2d at 365 ("This [targeted exclusionary rule] appears to be a legitimate means of encouraging genuine police caretaking functions while deterring bogus or pretextual police activities.").

367. Though the Court has relied on the Reasonableness Clause and has repeatedly stated that reasonableness is the "touchstone" of the Fourth Amendment—for example, *Samson v. California*, 547 U.S. 843, 855 n.4 (2006); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *United States v. Knights*, 534 U.S. 112, 118 (2002); *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977) (per curiam)—it remains the case that some otherwise reasonable searches are unconstitutional in the absence of a warrant. See *Payton v. New York*, 445 U.S. 573, 590 (1980) ("Absent exigent circumstances, that threshold [the entrance to a house] may not reasonably be crossed without a warrant."); *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . . subject only to a few specifically established and well-delineated exceptions.").

368. One can characterize a targeted exclusionary rule as equivalent to a holding that the police behavior is unconstitutional but that the only available remedy is exclusion. Thus, the police are—one hopes—not over-deterred from engaging in community-caretaking entries but are also not encouraged to interfere with people's rights by the prospect of gathering evidence. If community-caretaking entries are unconstitutional, however, it seems wrong to prevent the

The Supreme Court has never required exclusion where the police action has been reasonable; the exclusionary rule is a *remedy* for a constitutional violation.<sup>369</sup> Its purposes are both compensatory and deterrent, but the Court has consistently required that the police be blameworthy before remedial action is appropriate.<sup>370</sup> If the police have acted reasonably, and thereby have committed no constitutional violation, the Supreme Court has held that nothing

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innocent person from receiving any remedy for the unconstitutional conduct. Limiting the remedies to exclusion is especially troubling from a historical perspective, as tort suits had been the principal means under the Common Law of punishing officers who had unreasonably searched or seized. *See* WILSON, *supra* note 273, at 15–19, 45–48 (discussing tort suits as the means of punishment for police officers that had conducted unreasonable searches and seizures). Victims of unreasonable searches or seizures would sue the officer, and the officer would have to claim that his conduct was privileged—a claim that would fail if the conduct was indeed unreasonable. Indeed, if a state were to privilege unconstitutional behavior, immunizing from all consequences those who committed it, the government would be in violation of the Amendment. *See id.* at 16–17 (“[T]he Fourth Amendment must be understood as guaranteeing the availability of a remedy for violations of the Fourth Amendment right.”); Thomas E. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11, 21 (1925) (arguing that one of the purposes of the Fourth Amendment was to prevent Congress from mandating certain unreasonable searches through statute); Albert J. Harbo, *Evidence Obtained by Illegal Search and Seizure*, 19 ILL. L. REV. 303, 307 (1925) (“[T]he purpose of the search and seizure clause was to restrain the legalization of unreasonable searches and seizures.”).

369. Accordingly, even where evidence was found or seized unconstitutionally, the exclusionary rule applies only when *the defendant's* rights have been violated. *See, e.g.,* United States v. Payner, 447 U.S. 727, 735 (1980) (holding that a defendant's Fourth Amendment rights are violated only when the challenged conduct invaded his legitimate expectation of privacy rather than that of a third party); Rakas v. Illinois, 439 U.S. 128, 133–34 (1978) (“Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”); Alderman v. United States, 394 U.S. 165, 171 (1969) (“The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.”); Wong Sun v. United States, 371 U.S. 471, 491–92 (1963) (stating that inadmissible evidence against one codefendant does not compel a like result with respect to another).

370. The state-action doctrine underscores this lesson, in that “evidence secured by a private individual—no matter how unreasonable or illegal the methods used to obtain it—is constitutionally admissible in a criminal proceeding against the victim of the improper conduct.” 1 DRESSLER & MICHAELS, *supra* note 115, at 59–60 (citing *Burdeau v. McDowell*, 256 U.S. 465 (1921)). Evidence illegally obtained by a private individual is admissible, in other words, because remedies are appropriate under the Fourth Amendment only when there has been a violation, and private parties cannot violate the Amendment. Under similar reasoning, the exclusionary rule should not apply when government conduct is at issue, but where that conduct does not violate the Constitution. *Cf. Weeks v. United States*, 232 U.S. 383, 398 (1914) (refusing to apply the exclusionary rule to evidence seized by state police after an unreasonable search because, prior to the incorporation of the Fourth Amendment's right to be free from such searches, the police action did not violate the Federal Constitution), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

in the Fourth Amendment requires courts to ignore evidence that has been discovered in such a search, even where doing so would produce beneficial deterrent results.<sup>371</sup>

*Terry v. Ohio*<sup>372</sup> flatly rejected the idea that the Fourth Amendment requires states to impose the exclusionary rule in the absence of a constitutional violation: "The exclusionary rule . . . cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections."<sup>373</sup>

Other cases have also refused to invoke the exclusionary remedy where the police have acted blamelessly. Most notably, the good-faith exception to the exclusionary rule holds that violations of the Fourth Amendment will not result in the exclusion of evidence obtained thereby if the officers were acting with an "objectively reasonable belief" that their actions were constitutional.<sup>374</sup>

371. See *Alderman*, 394 U.S. at 174 ("[No cases] hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment."). But cf. *Minnesota v. Dickerson*, 508 U.S. 366, 382 (Scalia, J., concurring) (offering a different approach). Justice Scalia in his concurring opinion specifically stated:

If I were of the view that *Terry* was (insofar as the power to 'frisk' is concerned) incorrectly decided, I might—even if I felt bound to adhere to that case—vote to exclude the evidence incidentally discovered, on the theory that half a constitutional guarantee is better than none.

*Id.*; *Maine v. Moulton*, 474 U.S. 159, 180 (1985) (requiring the exclusion of evidence concerning a charge for which the defendant invoked his Sixth Amendment right to counsel if the police "knowingly circumvent[ed]" the right by asking about a different crime). *Jones*, of course, preceded *Mapp v. Ohio*, 367 U.S. 643 (1961), which required the states to exclude illegally seized evidence, largely because of the exclusionary rule's deterrence benefits. See *id.* at 655–57 ("[T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guarantee in the only effective available way—by removing the incentive to disregard it.'" (citations omitted)). *Mapp*, however, excluded *illegally seized* evidence for reasons of deterrence. It did not require legally obtained evidence to be excluded regardless of the deterrence benefits that might be obtained thereby. *Moulton*, by appearing to limit its remedy to situations where the police are "knowingly circumventing" the Sixth Amendment right, may be incorporating a pretext analysis. See DRESSLER & MICHAELS, *supra* note 115, at 552–53 (stating that the state may violate the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel). In any event, *Moulton*'s rule for the Sixth Amendment is inconsistent with the Court's Fourth Amendment cases. See, e.g., *Horton v. California*, 496 U.S. 128, 130 (1990) (holding that the plain-view doctrine authorized a seizure of evidence found during the execution of a warrant for other items, even if the evidence was not found inadvertently).

372. *Terry v. Ohio*, 392 U.S. 1 (1968).

373. *Id.* at 13.

374. See *United States v. Leon*, 468 U.S. 897, 926 (1984) (holding that evidence obtained by the police acting in good faith pursuant to a search warrant subsequently found to be deficient may still be used in a criminal trial).

Similarly, the Court has permitted police to ask questions in violation of *Miranda v. Arizona*<sup>375</sup> where the questions were "reasonably prompted by a concern for the public safety."<sup>376</sup>

In those two situations, *violations* of the Constitution and the *Miranda* rule were held insufficient to trigger the exclusionary rule.<sup>377</sup> *A fortiori*, police action that is *constitutional* because it is "reasonable" should not cause the exclusion of evidence.<sup>378</sup> In *Maryland v. Garrison*,<sup>379</sup> for example, police erroneously, but reasonably, entered Garrison's apartment in an attempt to execute a warrant for the search of a different apartment.<sup>380</sup> The Supreme Court held that because the action was reasonable, it was constitutional, and as a result declined to order the exclusion of the evidence found in Garrison's apartment.<sup>381</sup>

Most pertinent to the community-caretaking cases, the Supreme Court has stated in dictum that police may enter a home without a warrant to ensure the safety of an abuse victim, "[a]nd since the police would then be lawfully in the premises, there is no question that they could seize any evidence in plain view or take further action supported by any consequent probable cause."<sup>382</sup> Even more directly, the Court has stated that "the police may seize any evidence that is in plain view during the course of their legitimate emergency activities."<sup>383</sup>

375. See *Miranda v. Arizona*, 384 U.S. 436, 498–99 (1966) (holding that a police officer must advise a suspect interrogated in custody of the right to remain silent and obtain an attorney in order to satisfy one's Fifth Amendment privilege against self incrimination).

376. See *New York v. Quarles*, 467 U.S. 649, 656 (1984) (discussing how *Miranda* should be applied in situations where public safety is a concern).

377. See *Leon*, 468 U.S. at 926 (stating that a constitutional violation will not necessarily trigger the exclusionary rule); *Quarles*, 467 U.S. at 659 (concluding that respondent's incriminating statements need not be suppressed despite the officer's failure to read the respondent his *Miranda* rights).

378. *But cf.* *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (requiring states to comply with the requirements of *Miranda*, while seemingly adhering to prior holdings that the *Miranda* warnings are prophylactic measures to guard against Fifth Amendment violations).

379. See *Maryland v. Garrison*, 480 U.S. 79, 85, 88–89 (1987) (determining that a warrant and its execution were valid despite the warrant being broader than appropriate due to a mistaken belief about the place to be searched and despite the officers' search of the incorrect apartment).

380. *Id.* at 80.

381. See *id.* at 88–89 ("[T]he officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment.").

382. *Georgia v. Randolph*, 547 U.S. 103, 118 (2006).

383. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978); see also *Thompson v. Louisiana*, 469 U.S. 17, 22 (1984) (per curiam) (stating in dictum that police could have "seiz[ed] evidence under the plain-view doctrine while they were in petitioner's house to offer her assistance" that

Accordingly, the Fourth Amendment does not require the exclusion of evidence if police have acted reasonably, even if doing so would provide a powerful prophylactic deterrent for Fourth Amendment violations.<sup>384</sup>

If, on the other hand, a community-caretaking search is unreasonable and triggers the exclusionary remedy for that reason, courts have no business announcing, as Utah's courts did,<sup>385</sup> that such unconstitutional entries are "legitimate." Police departments should obey the strictures of the Constitution not because of the consequences of violating those limitations, but because they are the law, and courts above all should not encourage unconstitutional behavior.<sup>386</sup> An unreasonable community-caretaking search should trigger all the remedies applicable to any other Fourth Amendment violation, but such a search is not unreasonable solely because it lacks probable cause.

States wishing to take advantage of the targeted exclusionary rule's pragmatic benefits may, however, wish to adopt such a rule by statute. In particular, states skeptical of courts' ability to determine when an officer's claim of a community-caretaking motivation is pretextual may find the targeted exclusionary rule attractive. Such a rule would presumably require the exclusion of probative evidence even where the officer's motive was not in question, as where the officer's behavior was in response to a life-threatening emergency. Exclusion in such a case would appear to be bad policy, but a state could reasonably conclude that the disadvantage of such exclusion would be outweighed by the rule's discouraging of unconstitutional law-enforcement-motivated searches.

## VI. Conclusion

Most people who appear to be in distress would welcome a genuine offer of police assistance. But permitting police to search or seize whenever they might be pursuing community-caretaking goals risks undermining

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she had requested).

384. On the Supreme Court's prophylactic rules of criminal procedure, see generally Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001) (discussing the Supreme Court's prophylactic rules of criminal procedure).

385. See generally *Provo City v. Warden*, 833 P.3d 360 (Utah Ct. App. 1992), *aff'd*, 875 P.2d 557, 558 (Utah 1994).

386. See *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.").

constitutional protections. The challenge of community-caretaking doctrine is to permit helpful police to fulfill their function of assisting the public, while ensuring that searches for law-enforcement purposes satisfy the requirements of the Fourth Amendment.

Requiring government to demonstrate that officers conducting any assistance search actually attempt to aid the public advances both these goals. An official genuinely trying to help others will not be affected by such a requirement, and applying the exclusionary rule to searches motivated by law-enforcement interests will deter police from violating the Amendment.

When balancing the interests involved in a community-caretaking search, courts should bear in mind that police are acting on behalf of the party that needs help. When police seek to help someone other than the person searched, courts must determine which interest is weightier: the interest in providing help, or the interest in being free of the search. When the person being helped and the person being searched are the one and the same, there is nothing to balance—the government should provide assistance only when officials reasonably believe that person would want help.

The government's power to help the public is often beneficial, but can also be dangerous if misused. The framework offered here permits courts to distinguish between proper and improper uses of the community-caretaking authority, and gives content to the Fourth Amendment's command that such actions be reasonable.



