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## The Quantum of Suspicion Needed for an Exigent Circumstances Search

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# THE QUANTUM OF SUSPICION NEEDED FOR AN EXIGENT CIRCUMSTANCES SEARCH

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Kit Kinports\*

## ABSTRACT

*For decades, the United States Supreme Court opinions articulating the standard of exigency necessary to trigger the exigent circumstances exception to the Fourth Amendment’s warrant requirement have been maddeningly opaque and confusing. Some cases require probable cause, others call for reasonable suspicion, and still others use undefined and unhelpful terms such as “reasonable to believe” in describing how exigent the situation must be to permit the police to proceed without a warrant. Not surprisingly, the conflicting signals coming from the Supreme Court have led to disagreement in the lower courts.*

*To resolve this conflict and provide guidance to law enforcement officials and lower court judges, this Article proposes a three-step solution. First, the Court should reaffirm that probable cause to enter is a prerequisite for any exigent circumstances search: probable cause to believe, for example, that a suspect or piece of evidence is presently located on the premises. Second, the Court should clarify that any full search also requires probable cause of exigency: an independent finding of probable cause to believe that taking the time to obtain a warrant would result in some untoward consequence. This Article thus rejects the views expressed by some scholars that the Court already does—or should—allow at least some exigent circumstances searches on a standard lower than probable cause. Third, the Court should retreat from its opinions holding that a police officer’s subjective motivations are irrelevant in the subset of exigent circumstances cases where the entry is purportedly intended to provide emergency aid or further some other non-law-enforcement interest. Rather, the Court should recognize that these searches are, in essence, administrative inspections and therefore should demand proof that the primary purpose of the entry was actually to provide assistance, rather than to investigate a crime or conduct a pretextual search for evidence.*

## TABLE OF CONTENTS

INTRODUCTION .....	616
I. THE CONFLICT CREATED BY THE SUPREME COURT.....	617
II. THE MEANING OF “REASON TO BELIEVE” .....	623
III. THE WAY OUT OF THE CONFLICT.....	628
A. <i>Probable Cause to Enter</i> .....	628

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B. <i>Probable Cause of Exigency</i> .....	631
C. <i>Subjective Motivation for Entering</i> .....	637
CONCLUSION.....	648

## INTRODUCTION

The Supreme Court opinions describing the amount of exigency needed to support a warrantless search under the exigent circumstances exception to the Fourth Amendment's warrant requirement have long varied. Some decisions speak in terms of probable cause, others require reasonable suspicion, and many others use amorphous, undefined phrases such as "reasonable to believe." These unexplained fluctuations in the Court's standard of exigency have generated uncertainty and conflicts among the lower courts.

To resolve these discrepancies, this Article recommends a three-part approach. First, law enforcement officials should have probable cause to enter the premises in order to make any exigent circumstances search—probable cause to believe, for example, that a wanted suspect or evidence of a crime can be found on the property. Second, even when police have probable cause to search, a warrantless full search under the exigent circumstances exception should also require an additional and distinct finding of probable cause: probable cause to believe that some exigency justifies the failure to obtain a warrant. The lesser standard of reasonable suspicion of exigency should be sufficient to justify only intrusions that are less invasive than a full search, such as a protective sweep, a no-knock entry, or an impoundment of the premises while a warrant is obtained. Finally, to maintain consistency with the Fourth Amendment standards governing administrative searches, entries to offer emergency aid or to serve some other non-law-enforcement interest should require proof that the police were primarily motivated by the need to provide that assistance and were not conducting a pretextual search for evidence.<sup>1</sup>

In sketching out this proposal, the Article proceeds in three parts. Part I discusses the Supreme Court's case law in this area, setting out the conflict in the Court's descriptions of the amount of exigency required to justify an exigent circumstances search and highlighting the disagreement that conflict has created in the low-

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1. Although this summary is written in terms of Fourth Amendment "searches," the proposal also applies to intrusions that qualify as Fourth Amendment "seizures." *See infra* notes 15–16 & 140 and accompanying text.

er courts. Rejecting the argument that terms like “reasonable to believe” necessarily connote a standard lower than probable cause, Part II traces the history of the Court’s use of such language in its Fourth Amendment rulings and the varying definitions the Court has given that term. Part III then defends the Article’s proposed approach, separately analyzing each of its three elements.

## I. THE CONFLICT CREATED BY THE SUPREME COURT

As a general rule, compliance with the Fourth Amendment’s ban on “unreasonable searches and seizures”<sup>2</sup> dictates that any search or seizure must be supported by both probable cause and a warrant, “subject only to a few specifically established and well-delineated exceptions.”<sup>3</sup> The Supreme Court has long recognized exigent circumstances as one of the principal exceptions to the Fourth Amendment’s warrant requirement.<sup>4</sup>

The notion of exigency encompasses a number of different concerns. Some are traditional law enforcement interests: the need to apprehend a fleeing suspect,<sup>5</sup> to prevent the destruction of evidence,<sup>6</sup> or to protect the public or officers from a dangerous person or item.<sup>7</sup> Others are “emergency assistance” or “community caretaking” interests: the need to help an injured person<sup>8</sup> or to safeguard someone’s property.<sup>9</sup> Although, as discussed below, lower court judges and scholars disagree about the relationship between these different varieties of exigency,<sup>10</sup> the Supreme Court has treated them all as subcategories of a single exigent circumstances exception to the warrant requirement.<sup>11</sup>

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2. U.S. CONST. amend. IV.

3. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). On occasion, the Court has departed from this warrant presumption model and has instead assessed the constitutionality of a search by using a balancing test to determine whether the search was reasonable. *See Maryland v. King*, 569 U.S. 435, 448 (2013); *Samson v. California*, 547 U.S. 843, 848 (2006); *United States v. Knights*, 534 U.S. 112, 118–19 (2001). *See generally* 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 10.01[C] (6th ed. 2013).

4. *See, e.g., Vale v. Louisiana*, 399 U.S. 30, 35 (1970).

5. *See, e.g., Warden v. Hayden*, 387 U.S. 294, 298–99 (1967).

6. *See, e.g., Illinois v. McArthur*, 531 U.S. 326, 332 (2001) (discussed *infra* notes 25–26 and accompanying text).

7. *See, e.g., Hayden*, 387 U.S. at 298–99.

8. *See, e.g., Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (discussed *infra* notes 23, 72–85 & 125–37 and accompanying text).

9. *See, e.g., Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (discussed *infra* notes 157–61 and accompanying text).

10. *See infra* notes 111–14 and accompanying text.

11. *See, e.g., Kentucky v. King*, 563 U.S. 452, 460 (2011); *see also infra* note 114 and accompanying text.

The Court has been less consistent, however, in articulating the quantum of proof of exigency necessary to justify a warrantless search or seizure in exigent circumstances. Some Supreme Court decisions mandate that law enforcement officials have probable cause to believe some adverse consequence will occur if they must satisfy the Fourth Amendment's warrant requirement. Others require reasonable suspicion. And frequently, the Court's opinions use vague, undefined terms such as "reason to believe" or "reasonable belief."

In *Minnesota v. Olson*, for example, the Supreme Court endorsed a probable cause requirement in affirming the Minnesota Supreme Court's conclusion that exigent circumstances did not excuse the officers' failure to obtain a warrant before entering a home to conduct an arrest.<sup>12</sup> The Court noted that the state supreme court had applied "the proper legal standard" in requiring "at least probable cause to believe that one or more . . . of the . . . factors justifying the [warrantless] entry were present" (unless the police were in hot pursuit of a fleeing suspect).<sup>13</sup> That language suggests that the exigent circumstances exception requires probable cause to believe a warrantless entry is necessary to prevent the "imminent destruction of evidence, . . . a suspect's escape, or the risk of danger to the police or other persons."<sup>14</sup>

Likewise, in *Tennessee v. Garner*, the Court held that the use of deadly force to apprehend a fleeing felon—a "seizure" in Fourth Amendment terms<sup>15</sup>—is permissible only if the police have "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."<sup>16</sup> Similar language requiring probable cause has appeared in a number of the Justices' separate opinions discussing the exigent circumstances exception.<sup>17</sup>

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12. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990).

13. *See id.* (likewise observing that the court below "applied essentially the correct standard in determining whether exigent circumstances existed").

14. *Id.* (quoting *State v. Olson*, 436 N.W.2d 92, 97 (Minn. 1989), *aff'd*, 495 U.S. 91 (1990)).

15. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

16. *Id.* at 3; *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (applying the same standard).

17. *See Missouri v. McNeely*, 569 U.S. 141, 177 (2013) (Thomas, J., dissenting) (observing that the exigent circumstances exception applies if police have "probable cause to believe that failure to act would result in" the destruction of evidence); *Illinois v. McArthur*, 531 U.S. 326, 337 (2001) (Souter, J., concurring) (pointing out that probable cause to believe evidence will be destroyed "exemplifies the kind of present risk that undergirds the accepted exigent circumstances exception"); *Welsh v. Wisconsin*, 466 U.S. 740, 759 (1984) (White, J., dissenting) (noting that a warrantless entry to arrest is permissible based on "probable cause to believe that the delay involved in procuring an arrest warrant will gravely endanger the officer or other persons or will result in the suspect's escape"); *cf. Georgia v. Randolph*, 547 U.S. 103, 141 (2006) (Roberts, C.J., dissenting) (accusing the majority of

In other cases, the Supreme Court has required only reasonable suspicion that some untoward consequence will result if police are forced to adhere to the usual Fourth Amendment requirements. Reasonable suspicion is, of course, the quantum of evidence necessary to conduct a *Terry* stop-and-frisk.<sup>18</sup> In *Maryland v. Buie*, for example, the Court rejected probable cause as “unnecessarily strict” and instead adopted *Terry*’s reasonable suspicion requirement as the standard for allowing a protective sweep of a home beyond the areas “immediately adjoining the place of arrest.”<sup>19</sup> Such sweeps are permissible, the Court held, if the police have “a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.”<sup>20</sup>

Likewise, the Court’s opinion in *Richards v. Wisconsin* concluded that a reasonable suspicion standard—“as opposed to a probable cause requirement—strikes the appropriate balance” between “legitimate law enforcement concerns” and “individual privacy interests” in determining when police may enter without complying with the Fourth Amendment’s knock-and-announce requirement.<sup>21</sup> Thus, *Richards* allows police to make a no-knock entry to execute a warrant based on “reasonable suspicion that knocking and announcing their presence . . . would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.”<sup>22</sup>

Finally, the Court at times has required a reasonable belief, or reason to believe, that an exigency exists in order to justify dispensing with the usual Fourth Amendment requirements. Language along these lines has appeared in several Supreme Court opinions authorizing a warrantless “emergency assistance” or “community caretaking” entry. In *Brigham City v. Stuart*, for example, the Court held that law enforcement officials 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

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“creat[ing] a new exception to the warrant requirement to justify warrantless entry short of exigency” by allowing the police to enter despite a co-occupant’s refusal to consent if they have “good reason” to believe that “violence (or threat of violence) has occurred or is about to (or soon will) occur” (quoting *id.* at 118 (majority opinion)); *Vale v. Louisiana*, 399 U.S. 30, 40 (1970) (Black, J., dissenting) (concluding that the exigent circumstances exception should have allowed a warrantless entry where police had “probable cause to believe that a felony had been committed *and* that immediate action was necessary” (emphasis added)).

18. See *Terry v. Ohio*, 392 U.S. 1, 25–27 (1968) (rejecting a probable cause requirement).

19. *Maryland v. Buie*, 494 U.S. 325, 337, 334 (1990).

20. *Id.* at 336.

21. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

22. *Id.*

with such injury.”<sup>23</sup> In *Cady v. Dombrowski*, the Court likewise concluded that “concern for the safety of the general public” allowed the warrantless “community caretaking” search of an automobile that was “reasonably believed to contain a gun.”<sup>24</sup>

The Court has also suggested that reasonable belief is the requisite quantum of suspicion in some cases involving the threatened destruction of evidence. In *Illinois v. McArthur*, for example, the Court allowed law enforcement officials to prevent a suspect from entering his residence unaccompanied by the police while they obtained a search warrant for the home.<sup>25</sup> One of the Court’s justifications for permitting the officers to secure the premises in *McArthur* was that “[t]hey reasonably believed that the home’s resident, if left free of any restraint, would destroy th[e] evidence.”<sup>26</sup>

Similarly, in *Schmerber v. California*, the Court approved of a warrantless blood draw in a DUI case where the officer “might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant . . . threatened ‘the destruction of evidence.’”<sup>27</sup> When the same issue recently returned to the Court in *Missouri v. McNeely*, the majority rejected the notion that the natural dissipation of alcohol in the bloodstream creates a *per se* exigency in DUI cases, but quoted with approval *Schmerber*’s “might reasonably have believed” language.<sup>28</sup> The Court concluded that “our analysis in *Schmerber* fits comfortably within our case law applying the exigent circumstances exception.”<sup>29</sup> Three of the Justices in the minority in *McNeely*, concurring in part and dissenting in part, likewise took the position that “[t]he reasonable belief that critical evidence is being destroyed gives rise to a compelling need for [warrantless] blood draws.”<sup>30</sup>

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23. *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006).

24. *Cady v. Dombrowski*, 413 U.S. 433, 441, 447–48 (1973); *see also* *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (per curiam) (noting that the “‘emergency aid exception’ . . . requires only ‘an objectively reasonable basis for believing’ that ‘a person within [the home] is in need of immediate aid’” (first quoting *Brigham City*, 547 U.S. at 406; then quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978))); *Georgia v. Randolph*, 547 U.S. 103, 118 (2006) (acknowledging “the authority of the police to enter a dwelling to protect a resident from domestic violence,” despite a cotenant’s objection, “so long as they have good reason to believe such a threat exists”); *Mincey*, 437 U.S. at 392 (pointing out that “[n]umerous 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”).

25. *Illinois v. McArthur*, 531 U.S. 326, 328 (2001).

26. *Id.*

27. *Schmerber v. California*, 387 U.S. 757, 770 (1966) (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

28. *Missouri v. McNeely*, 569 U.S. 141, 150 (2013) (quoting *Schmerber*, 387 U.S. at 770).

29. *Id.* at 151.

30. *Id.* at 169 (Roberts, C.J., concurring in part and dissenting in part); *see also* *Kentucky v. King*, 563 U.S. 452, 469 n.5 (2011) (denying that *Johnson v. United States*, 333 U.S. 10

In none of these opinions did the Court bother to define the amorphous phrase “reasonably believed,” and the Justices appeared unconcerned with clarifying how it compares to the more familiar constructs of probable cause and reasonable suspicion. Not surprisingly, therefore, lower court judges and scholars disagree on the meaning of terms such as “reasonable belief” in cases involving exigent circumstances.<sup>31</sup> Some lower court opinions equate the language with probable cause.<sup>32</sup> Others believe it is “less exacting” than probable cause,<sup>33</sup> with some analogizing it to rea-

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(1948), was “a case about exigent circumstances” because “the Government did not claim that [the] noise [the officers heard in that case] was a noise that would have led a reasonable officer to think that evidence was about to be destroyed”); *Cupp v. Murphy*, 412 U.S. 291, 298 (1973) (Marshall, J., concurring) (concluding that the warrantless scraping of the suspect’s fingernails was permissible in order to “assure the preservation of the evidence” because “there was good reason to believe that Murphy might attempt to alter the status quo unless he were prevented from doing so”).

For lower court opinions adopting the “reasonable belief” standard in destruction of evidence cases, see, for example, *United States v. Almonte-Báez*, 857 F.3d 27, 32 (1st Cir. 2017); *United States v. Ramirez*, 676 F.3d 755, 759–60 (8th Cir. 2012); *United States v. Menchaca-Castruita*, 587 F.3d 283, 295 (5th Cir. 2009); *United States v. Rivera*, 248 F.3d 677, 680 (7th Cir. 2001); *Commonwealth v. Ramos*, 25 N.E.3d 849, 855 (Mass. 2015); *State v. Walker*, 62 A.3d 897, 904 (N.J. 2013); *State v. Duran*, 156 P.3d 795, 797 (Utah 2007); *State v. Hughes*, 607 N.W.2d 621, 628 (Wis. 2000).

31. For discussion of the various approaches lower courts have taken in exigent circumstances cases, see Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283, 300–20 (1988); Megan Pauline Marinos, Comment, *Breaking and Entering or Community Caretaking? A Solution to the Overbroad Expansion of the Inventory Search*, 22 GEO. MASON U. C.R.L.J. 249, 263–73 (2012); Geoffrey C. Sonntag, Note, *Probable Cause, Reasonable Suspicion, or Mere Speculation?: Holding Police to a Higher Standard in Destruction of Evidence Exigency Cases*, 42 WASHBURN L.J. 629, 640–46 (2003); Claire Frances Stamm, Comment, *Defining the Destruction of Evidence Exigency Exception: Why Courts Should Adopt a Strict Probable Cause Standard in the Wake of Kentucky v. King*, 82 MISS. L.J. 1417, 1423–26 (2013).

32. See, e.g., *Almonte-Báez*, 857 F.3d at 32 (discussing exigent circumstances); *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 564 (7th Cir. 2014) (addressing emergency aid); *United States v. Holloway*, 290 F.3d 1331, 1338 (11th Cir. 2002) (same); *Koch v. Town of Brattleboro*, 287 F.3d 162, 169 (2d Cir. 2002) (same); *Flores v. State*, 994 P.2d 782, 784 (Okla. Crim. App. 1999) (discussing exigency and emergency aid); 3 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.6(a), at 600 (5th ed. 2012) (describing *Brigham City v. Stuart*, 547 U.S. 398 (2006), discussed *supra* text accompanying note 23); *id.* § 7.4(c), at 869 (describing *Cady v. Dombrowski*, 413 U.S. 433 (1973), discussed *supra* text accompanying note 24); *cf.* *State v. Watts*, 801 N.W.2d 845, 851 (Iowa 2011) (observing that the “probability” that evidence will be lost justifies a warrantless exigent circumstances search); *State v. Deluca*, 775 A.2d 1284, 1287 (N.J. 2001) (defining exigent circumstances in terms of the “probability” of exigency); *State v. Boggess*, 340 N.W.2d 516, 523 (Wis. 1983) (relying on the Supreme Court’s definition of “traditional probable cause” in *Illinois v. Gates*, 462 U.S. 213 (1984), as “relevant” in applying a reasonable belief standard in an emergency aid case). For courts refusing to equate “reasonable belief” with probable cause, without providing any affirmative definition of the term, see *Hill v. Walsh*, 884 F.3d 16, 19 (1st Cir. 2018) (discussing emergency aid); *State v. Allison*, 86 P.3d 421, 427 (Colo. 2004) (same).

33. *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006) (discussing emergency aid and community caretaking); see also, e.g., *State v. Carlson*, 548 N.W.2d 138, 142 (Iowa 1996) (addressing emergency aid); *Duquette v. Godbout*, 471 A.2d 1359, 1362 (R.I. 1984) (same).

sonable suspicion.<sup>34</sup> And still others view “reasonable belief” as a separate standard distinct from both probable cause and reasonable suspicion.<sup>35</sup> Some in this third group take the position that reasonable belief requires a showing somewhere between probable cause and reasonable suspicion,<sup>36</sup> whereas others believe it is a standard even lower than reasonable suspicion.<sup>37</sup> Most lower court opinions, following the Supreme Court’s lead, do not attempt to define the term or to situate it on the probable cause/reasonable suspicion spectrum.<sup>38</sup>

As discussed in the following Part, terms like “reason to believe” have also appeared in Supreme Court opinions addressing other Fourth Amendment issues. Given the history of the Court’s use of such language, it is wrong to assume that it necessarily requires a standard less rigorous than probable cause in exigent circumstances cases.

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34. See, e.g., *United States v. Beaudoin*, 362 F.3d 60, 66–67 (1st Cir. 2004) (addressing exigent circumstances), *vacated on other grounds sub nom. Champagne v. United States*, 543 U.S. 1102 (2005); Craig M. Bradley, *A Sensible Emergency Doctrine*, 42 TRIAL, Aug. 2006, at 60, 62 [hereinafter Bradley, *Sensible Emergency Doctrine*] (discussing *Brigham City v. Stuart*, 547 U.S. 398 (2006) (described *supra* text accompanying note 23)); Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 370–71 (2006) [hereinafter Bradley, *Reasonable Policeman*] (addressing the reasonable suspicion standards imposed by *Richards v. Wisconsin*, 520 U.S. 385 (1997) (described *supra* text accompanying notes 21–22), and *Maryland v. Buie*, 494 U.S. 325 (1990) (described *supra* text accompanying notes 19–20)); Sonntag, *supra* note 31, at 637–38 (referring to *Illinois v. McArthur*, 531 U.S. 326 (2001) (described *supra* text accompanying notes 25–26)). For an opinion using language reminiscent of *Terry*’s “specific and articulable facts” standard in defining a reasonable belief, *Terry v. Ohio*, 392 U.S. 1, 21 (1968), see *People v. Slaughter*, 803 N.W.2d 171, 182 (Mich. 2011) (discussing community caretaking).

35. See, e.g., *State v. Ryon*, 108 P.3d 1032, 1040–43 (N.M. 2005) (distinguishing the “reasonable belief” necessary for a community caretaking search from both probable cause and reasonable suspicion).

36. See, e.g., Stamm, *supra* note 31, at 1435 (citing *Brigham City v. Stuart*, 547 U.S. 398 (2006) (described *supra* text accompanying note 23), and *Illinois v. McArthur*, 531 U.S. 326 (2001) (described *supra* text accompanying notes 25–26)).

37. See, e.g., *State v. Dunn*, 964 N.E.2d 1037, 1040 (Ohio 2012) (discussing community caretaking and emergency aid); Isaac J. Colunga, *When the Supreme Court Departs from Its Traditional Function*, 45 VAL. U. L. REV. 47, 65 n.113 (2010) (comparing the “reasonableness determination” adopted in *Brigham City v. Stuart*, 547 U.S. 398 (2006), to an “arbitrary and capricious standard,” requiring “simply . . . the ability to justify [a] decision with the facts in the record”).

38. See, e.g., *United States v. Ramirez*, 676 F.3d 755, 759–60 (8th Cir. 2012) (discussing destruction of evidence); *Ray v. Twp. of Warren*, 626 F.3d 170, 176–77 (3d Cir. 2010) (addressing community caretaking); *United States v. Menchaca-Castruita*, 587 F.3d 283, 295 (5th Cir. 2009) (discussing exigent circumstances); *United States v. Rivera*, 248 F.3d 677, 680–81 (7th Cir. 2001) (addressing destruction of evidence); *State v. Neighbors*, 328 P.3d 1081, 1091 (Kan. 2014) (discussing emergency aid); *Commonwealth v. Ramos*, 25 N.E.3d 849, 855 (Mass. 2015) (addressing destruction of evidence); *State v. Walker*, 62 A.3d 897, 904 (N.J. 2013) (same); *State v. Duran*, 156 P.3d 795, 797 (Utah 2007) (same); *State v. Pinkard*, 785 N.W.2d 592, 602–03 (Wis. 2010) (addressing community caretaking); *State v. Hughes*, 607 N.W.2d 621, 628 (Wis. 2000) (discussing destruction of evidence).

## II. THE MEANING OF “REASON TO BELIEVE”

Exigency has historically been considered a justification for dispensing with a warrant, but not an exception to probable cause.<sup>39</sup> When the Court has used terms like “reasonable belief” in its exigent circumstances opinions without specifically equating that language with reasonable suspicion, the Justices have given no indication that they intended to lower the required quantum of proof to something less than probable cause.

In fact, although the city argued in *Brigham City v. Stuart* that an entry to provide emergency aid should be justifiable on a showing of reasonable suspicion,<sup>40</sup> the Solicitor General’s brief in that case equated the term “reasonable to believe” with probable cause, acknowledging that probable cause was the appropriate standard. “[A]n entry to render aid is not based on a ‘less demanding’ showing than a warrant, just a *different* showing,” the Solicitor General pointed out, noting that “an emergency aid entry . . . must always rest on known facts that make it objectively reasonable for an officer to believe that an immediate need for assistance exists.”<sup>41</sup> The Court did not resolve that issue, preferring to leave “reasonable basis for believing” undefined.<sup>42</sup> Still, the discussion in the briefs indicates that the Justices were aware that the term is susceptible to different interpretations and does not necessarily connote a standard lower than probable cause.

The Court’s use of ambiguous terms like “reasonable belief” in Fourth Amendment cases is not confined to its exigent circumstances opinions. Although the Court’s rulings have ascribed different meanings to “reasonable belief,” they do not provide any support for the assumption that the exigent circumstances decisions that have used this language without defining it have silently departed from the probable cause requirement.

Admittedly, some of the references to “reasonable belief” in the Court’s Fourth Amendment case law do imply a standard lower

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39. See, e.g., *Vale v. Louisiana*, 399 U.S. 30, 34 (1970); see also *infra* note 69 and accompanying text.

40. See Brief for Petitioner at 18–20, *Brigham City v. Stuart*, 547 U.S. 398 (2006) (No. 05-502) (discussing the concept of a reasonable basis to believe, and arguing that “police intervention to render emergency aid is justified upon a showing of individualized suspicion, akin to reasonable suspicion, rather than probable cause”).

41. Brief for the United States as Amicus Curiae Supporting Petitioner at 18, *Brigham City v. Stuart*, 547 U.S. 398 (2006) (No. 05-502); see also *id.* at 18 n.18 (“Indeed, one way to conceptualize the emergency aid situation is that the basic requirement that the police have an objectively reasonable belief—*i.e.*, probable cause—does not change, but the object of the probable cause does change. Rather than requiring an objectively reasonable basis for an officer to believe a crime has been or is about to occur, the officer needs an objectively reasonable basis to believe that an emergency need for assistance exists.”).

42. *Brigham City*, 547 U.S. at 400.

than probable cause. In *Payton v. New York*, for example, in the course of holding that the police must obtain a warrant to make an in-home arrest, the Court observed that an arrest warrant allows entry into the home “when there is reason to believe the suspect is within.”<sup>43</sup> Although some Justices have interpreted this language as equivalent to a probable cause requirement,<sup>44</sup> the *Payton* majority likely intended to endorse some lesser standard of proof because it expressly rejected the need for “a search warrant based on probable cause to believe the suspect is at home.”<sup>45</sup> In fact, the lower courts have most often read the *Payton* standard as a “unique formulation” somewhat lower than probable cause.<sup>46</sup>

Likewise, in *Arizona v. Gant*, the Court extended the warrant exception for searches incident to the arrest of a vehicle’s occupants to situations where “it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”<sup>47</sup> The Court did not further clarify this standard or discuss its relationship to probable cause and reasonable suspicion. Presumably, however, the Justices did not intend to require probable cause, which would independently entitle the police to search the vehicle under the automobile exception.<sup>48</sup> Accordingly, a number of lower courts have interpreted *Gant*’s “reasonable to believe” language to require only reasonable suspicion.<sup>49</sup>

Although there are justifications for inferring that the Court did not mean to require probable cause in *Payton* and *Gant*, no similar reasoning applies in the context of exigent circumstances. As noted above, exigency has not generally been considered an exception to the probable cause requirement. And, in contrast to *Payton* and *Gant*, there is no basis for assuming the Court tacitly intended to deviate from that tradition where its exigent circumstances opinions have used terms like “reasonable belief” without specifically endorsing a reasonable suspicion standard.

Adding to the uncertainty created by the appearance of phrases such as “reasonable belief” and “reason to believe” untethered to either probable cause or reasonable suspicion, the Court has on other occasions specifically equated these terms both with reason-

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43. *Payton v. New York*, 445 U.S. 573, 602 (1980).

44. *See id.* at 616 n.13 (White, J., dissenting); *see also* *Maryland v. Buie*, 494 U.S. 325, 341 n.3 (1990) (Brennan, J., dissenting).

45. *Payton*, 445 U.S. at 602.

46. Matthew A. Edwards, *Posner’s Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299, 363 (2002); *see also* 3 LAFAVE, *supra* note 32, § 6.1(a), at 354–55 (citing conflicting cases).

47. *Arizona v. Gant*, 556 U.S. 332, 343 (2009) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment)).

48. *See* 3 LAFAVE, *supra* note 32, § 7.1(d), at 711.

49. *See id.* at 712 n.202 (citing cases).

able suspicion and with probable cause.<sup>50</sup> In fact, before the Court created the stop-and-frisk exception to the warrant requirement in *Terry v. Ohio*, the terms “probable cause,” “reasonable suspicion,” “reasonable cause,” and “reasonable belief” had roughly the same connotation and were used interchangeably.<sup>51</sup>

Linguistically, phrases such as “reasonable belief” seem more closely aligned with reasonable suspicion, and in fact, in *Terry* itself, the Court noted that an officer who has “reason to believe” a suspect is armed and dangerous may conduct a frisk, “regardless of whether he has probable cause to arrest.”<sup>52</sup> In addition, the Court used the phrase “reasonable grounds to believe” in finding that reasonable suspicion existed on the facts of *Terry*.<sup>53</sup> Similarly, the Court later characterized *Terry*’s reasonable suspicion standard in *United States v. Brignoni-Ponce* as requiring “reasonable grounds to believe” a suspect is armed and dangerous.<sup>54</sup>

By contrast, the phrase “reasonable grounds to believe” is “often interpreted as a synonym for ‘probable cause,’”<sup>55</sup> and other Supreme Court opinions have associated the term with that higher standard of proof. In *Maryland v. Pringle*, for example, the Court observed that “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”<sup>56</sup> Similarly, *Illinois v. Gates*, in describing the probable cause determination made in

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50. See generally Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 649–57 (2009) (tracing the Court’s use of the terms “probable cause,” “reasonable suspicion,” and “reasonable belief” and the Justices’ reliance on their probable cause precedents in analyzing reasonable suspicion and vice versa).

51. See Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 479–95 (1984); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 979–80 (2003); see also 4 WILLIAM BLACKSTONE, COMMENTARIES \*292 (using the term “probable suspicion” to describe the showing needed to arrest).

52. *Terry v. Ohio*, 392 U.S. 1, 27 (1968); see also *id.* (noting that “the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger”); cf. *id.* at 30 (using the phrase “reasonably to conclude” in summarizing the reasonable suspicion standard).

53. *Id.* at 30.

54. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); see *id.* at 880 (summarizing *Terry*’s reasonable suspicion standard with the term “reasonably believed”); see also *Alabama v. White*, 496 U.S. 325, 332 (1990) (using the terms “reasonable . . . to believe” and “reason to believe” in finding a sufficient showing of reasonable suspicion there); cf. *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014) (using the phrase “reasonable to think” in concluding reasonable suspicion existed in that case); *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (using the term “reasonable . . . to infer” in determining that the officer had reasonable suspicion there).

55. 3 LAFAVE, *supra* note 32, § 7.1(d), at 711.

56. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

*Ker v. California*, noted that the police had “a reasonable belief . . . that Ker was illegally in possession of marijuana.”<sup>57</sup>

The Supreme Court decisions in cases involving exigent circumstances are no exception to the general confusion that surrounds the Court’s use of terms like “reasonable to believe.” While some of the opinions described above in Part I, such as *Brigham City v. Stuart*, used this language without providing any definition or context,<sup>58</sup> others included it when the Justices clearly intended to refer both to probable cause and reasonable suspicion. In finding that the police did not have the probable cause necessary to justify the use of deadly force in *Tennessee v. Garner*, the Court concluded that the officer “could not reasonably have believed that Garner— young, slight, and unarmed—posed any threat.”<sup>59</sup> But the Court’s opinion in *Maryland v. Buie* later used similar language to define the reasonable suspicion needed to conduct a protective sweep, describing the standard as requiring “‘a reasonable belief’ . . . that the area swept harbored an individual posing a danger to the officer or others.”<sup>60</sup>

Ideally, the Court should be more precise in its choice of language. Although it is perhaps understandable that synonyms such as “reasonable to believe” or “reasonable to conclude” appear in opinions analyzing both probable cause and reasonable suspicion, the Court should avoid using those terms without first tying them specifically to either probable cause or reasonable suspicion. Where the Court has not done so, however, the fluctuations in meaning the Justices have given this language do not mandate an assumption that the Court tacitly intended to adopt a standard lower than probable cause.

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57. *Illinois v. Gates*, 462 U.S. 213, 232 n.7 (1983) (quoting *Ker v. California*, 374 U.S. 23, 36 (1963) (plurality opinion)); *see also* *District of Columbia v. Wesby*, 138 S. Ct. 577, 587, 588 (2018) (using the terms “reason to believe” and “a reasonable officer could conclude” in finding probable cause to arrest existed there); *Wyoming v. Houghton*, 526 U.S. 295, 305, 302 (1999) (refusing to require that police have “positive reason to believe” evidence may be in the possession of a passenger, in rejecting the contention that the automobile exception requires “a showing of individualized probable cause” for each container inspected); *United States v. Watson*, 423 U.S. 411, 418 (1976) (noting that “[t]he cases construing the Fourth Amendment . . . reflect the ancient common-law rule” permitting the police to make a warrantless arrest based on “reasonable ground for making the arrest”); *Ker*, 374 U.S. at 37, 40 n.12 (using the phrases “a reasonable ground for the officers’ belief” and “reason to believe” in describing probable cause); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.1 (AM. LAW INST., Proposed Official Draft 1975) (observing that an arrest is justified based on “reasonable cause to believe” the suspect committed a crime).

58. *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006); *see supra* notes 23–30 and accompanying text.

59. *Tennessee v. Garner*, 471 U.S. 1, 21 (1985).

60. *Maryland v. Buie*, 494 U.S. 325, 327 (1990) (quoting *Michigan v. Long*, 463 U.S. 1032, 1049–50 (1983)); *see also id.* at 337.

Moreover, there is no justification for creating a third amorphous “reasonable belief” standard of proof in exigent circumstances cases, as some lower courts have done, either between probable cause and reasonable suspicion or more forgiving than reasonable suspicion.<sup>61</sup> The first approach is too confusing. Distinguishing between the so-called “common-sense” concepts of probable cause and reasonable suspicion is challenging enough.<sup>62</sup> The Court has associated probable cause with a “substantial chance”<sup>63</sup> and reasonable suspicion with “a moderate chance.”<sup>64</sup> It has also offered the unhelpful observation that reasonable suspicion is “obviously less demanding” than probable cause.<sup>65</sup> But otherwise, the Court has steadfastly resisted “[a]rticulating” the two standards “precisely”<sup>66</sup> on the ground that they are “not readily . . . reduced to a neat set of legal rules.”<sup>67</sup> Adding a third standard of suspicion somewhere between probable cause and reasonable suspicion would only exacerbate the line-drawing difficulties that already exist.

And the second approach—creating an even *less* rigorous standard than reasonable suspicion—is dangerous. If law enforcement officials cannot even supply some “articulable” suspicion, if they have only an “inchoate and unparticularized suspicion or ‘hunch,’” they have no justification for conducting a warrantless exigent circumstances search or seizure.<sup>68</sup>

Given the long line of Supreme Court opinions that have included terms such as “reason to believe” in defining both probable cause and reasonable suspicion, there is no justification for presuming that the Court’s use of similar language in its exigent circumstances opinions was meant to silently signal a retreat from the traditional probable cause requirement. As detailed in the following Part, therefore, a full search under the exigent circumstances exception should be permissible only if the police have probable cause both to enter and to believe an exigency exists.

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61. See *supra* notes 35–37 and accompanying text.

62. See *Gates*, 462 U.S. at 238 (defining probable cause); *United States v. Cortez*, 449 U.S. 411, 418 (1981) (defining reasonable suspicion).

63. *Gates*, 462 U.S. at 244 n.13; see also *id.* at 238 (defining probable cause as “a fair probability”).

64. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 371 (2009); see also *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (noting that reasonable suspicion requires “considerably less” than a preponderance of the evidence).

65. *Sokolow*, 490 U.S. at 7; see also *Alabama v. White*, 496 U.S. 325, 330 (1990) (observing that reasonable suspicion is “a less demanding standard” than probable cause in terms of the “quantity or content” of information necessary as well as the “quality” or “reliability” of that information).

66. *Ornelas v. United States*, 517 U.S. 690, 695 (1996).

67. *Id.* at 695–96 (quoting *Gates*, 462 U.S. at 232).

68. *Terry v. Ohio*, 392 U.S. 1, 21, 27 (1968).

### III. THE WAY OUT OF THE CONFLICT

To clarify the ambiguity surrounding the term “reason to believe” and resolve the conflict generated by the Supreme Court’s differing descriptions of the requisite standard of exigency, courts should ask law enforcement officials to satisfy three requirements before they may rely on the exigent circumstances warrant exception. First, there is no reason to deviate from the Supreme Court’s traditional mandate that police must have probable cause to enter the property in every exigent circumstances case. A second layer of probable cause—probable cause with regard to the exigency in question—should also be necessary for any full search. Reasonable suspicion of exigency should suffice only to support a less intrusive search: a protective sweep, a no-knock entry, or an impoundment of the premises while the police seek a warrant. Third, when police purportedly conduct a search or seizure in the interest of some non-law-enforcement concern—to render emergency aid or safeguard someone’s property—their primary motivation must be to serve that non-law-enforcement interest and not to investigate a crime. Each of these three requirements is discussed separately below.

#### A. *Probable Cause to Enter*

The Court has long made clear that exigent circumstances are an exception to the Fourth Amendment’s warrant requirement but not the probable cause requirement. As the Court explained in *Kirk v. Louisiana*, “police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.”<sup>69</sup> Therefore, the exigent circumstances exception does not justify a warrantless intrusion unless the police have probable cause to enter the property, that is, probable cause to believe that a certain individual or piece of property can be found on the premises.

The Court has not relaxed this probable cause requirement even in exigent circumstances cases involving less invasive intrusions. In its two opinions allowing the police to secure the premises while they sought a search warrant, for example, the Court made clear that the officers in both cases had probable cause to believe that

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69. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam); see also *Horton v. California*, 496 U.S. 128, 137 n.7 (1990); *United States v. Santana*, 427 U.S. 38, 42 (1976); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970); 1 DRESSLER & MICHAELS, *supra* note 3, § 11.01, at 180.

evidence of a crime could be found on the property.<sup>70</sup> Likewise, in allowing protective sweeps in *Maryland v. Buie*, the Court observed that the police had an arrest warrant in that case, as well as probable cause to believe Buie was home.<sup>71</sup>

Nevertheless, some view the Court's decision in *Brigham City v. Stuart* as silently moving away from this probable cause requirement, at least in cases involving emergency aid. In *Brigham City*, law enforcement officials made a warrantless entry into a home to assist four adults who were "attempting, with some difficulty, to restrain a juvenile" who had hit one of the adults in the face.<sup>72</sup> Although, as discussed below,<sup>73</sup> the focus of the opinion was on the relevance of the officers' subjective reasons for entering, the Court, in upholding the officers' actions, explained that they 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."<sup>74</sup>

Reasoning that the Supreme Court "failed to conduct any traditional probable cause inquiry" in *Brigham City*, the Ninth Circuit interpreted the Court's opinion as "assum[ing]" that probable cause to enter the home "exists whenever law enforcement officers have an objectively reasonable basis for concluding that an emergency is unfolding in that place."<sup>75</sup> Some scholars likewise accuse the Court of "abandon[ing] the probable cause requirement" in *Brigham City*.<sup>76</sup>

But this argument conflates the two different concepts of probable cause at work in exigent circumstances cases: whether the police have probable cause to enter the premises, and whether they

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70. See *Illinois v. McArthur*, 531 U.S. 326, 331 (2001) (listing the presence of probable cause as the first of four "circumstances, which . . . consider[ed] in combination," supported the constitutionality of the impoundment); *Segura v. United States*, 468 U.S. 796, 810 (1984) (opinion of Burger, C.J., joined by O'Connor, J.) (permitting "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought"); *id.* at 824 n.15 (Stevens, J., dissenting) (suggesting that impoundment would have been permissible from the outside in that case).

71. See *Maryland v. Buie*, 494 U.S. 325, 332 (1990).

72. *Brigham City v. Stuart*, 547 U.S. 398, 401 (2006).

73. See *infra* notes 125–37 and accompanying text.

74. *Brigham City*, 547 U.S. at 406.

75. *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008). For other courts taking this view, see *United States v. Najjar*, 451 F.3d 710, 718 (10th Cir. 2006), and *State v. Meeks*, 262 S.W.3d 710, 726 n.31 (Tenn. 2008).

76. Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 778 (2007); see also Bruce A. Antkowiak, *Saving Probable Cause*, 40 SUFFOLK U. L. REV. 569, 575 (2007) (charging that "a once-traditional part of the exigent circumstances equation becomes quite conspicuous by its absence in the opinion"); cf. Marinos, *supra* note 31, at 283 (viewing the probable cause requirement as an open question after *Brigham City*, at least where police enter a home in a non-emergency, community caretaking context).

have probable cause to believe an exigency exists. In destruction of evidence cases, these two inquiries are clearly distinct. Probable cause to believe evidence of a crime can be found in a particular location does not necessarily translate into probable cause to believe the evidence will disappear in the time it would take to obtain a warrant. In emergency aid cases, the two inquiries may flow more easily from one another. When the police see someone inside a burning building, for example, they have probable cause to enter as well as probable cause to believe an exigency exists. But the two probable cause requirements are not “superfluous,” as the Ninth Circuit suggested,<sup>77</sup> and *Brigham City*’s use of the undefined term “reasonable basis for believing” in defining the quantum of suspicion of exigency necessary in an emergency aid case does not support relaxing the traditional requirement that all exigent circumstances searches require probable cause to enter.<sup>78</sup>

Moreover, the most likely explanation for the Court’s failure to specifically address probable cause in its opinion in *Brigham City* was that it was obvious the police did have probable cause to enter there. The officers initially went to the house in response to a noise complaint, and, when they arrived, they could hear “shouting from inside,” corroborating the call they had received.<sup>79</sup> Walking up the driveway “to investigate,” they saw “two juveniles drinking beer in the backyard,” giving rise to probable cause to believe the crime of underage drinking was in progress.<sup>80</sup> At that point, the police went into the backyard and were able to see the “altercation taking place in the kitchen.”<sup>81</sup> The officers’ personal observation of the scuffle “through a screen door and windows” clearly gave them probable cause to enter.<sup>82</sup>

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77. *Snipe*, 515 F.3d at 952.

78. *Brigham City*, 547 U.S. at 400.

79. *Id.* at 401.

80. *Id.*; cf. *Florida v. Jardines*, 569 U.S. 1, 9 n.4 (2013) (holding that police do not conduct a “search” for Fourth Amendment purposes when they “approach the home in order to speak with the occupant, because all are invited to do that,” but their actions do constitute a search if they enter “in order to do nothing but conduct a search” (emphasis omitted)); *Brigham City v. Stuart*, 122 P.3d 506, 509 (Utah 2005) (noting that the trial court found as a matter of fact that “the officers, from their observations from the front of the residence, determined that it was obvious that knocking on the front door would have done no good,” and therefore “[i]t was appropriate that they proceed down the driveway alongside the house to further investigate” (quoting the trial court order)), *rev’d*, 547 U.S. 398 (2006).

81. *Brigham City*, 547 U.S. at 400.

82. *Id.*; see 2 LAFAYE, *supra* note 32, § 3.5(a), at 331–32 (observing that courts assessing probable cause “generally presume[]” police officers “to be reliable”). *But cf.* *Bascuas*, *supra* note 76, at 779 (asserting, without citation or explanation, that “the police may have learned of the brawl only by trespassing” because they “saw the fight only after entering into the backyard and peering into a window”).

In fact, the Utah Supreme Court pointed out that the existence of probable cause was “unchallenged”<sup>83</sup> and therefore “not at issue” in *Brigham City*.<sup>84</sup> As a result, it was not surprising that the Supreme Court did not devote substantial attention to the question of probable cause. But the issue did not go unmentioned. In the Supreme Court’s single reference to probable cause, the Justices seemingly endorsed the state supreme court’s conclusion that probable cause to enter is a prerequisite for the exigent circumstances exception to the warrant requirement: “*This exception applies, the [state supreme] court explained, where police have probable cause and where ‘a reasonable person [would] believe that the entry was necessary to prevent physical harm to the officers or other persons.’*”<sup>85</sup>

Accordingly, the view that *Brigham City* silently signaled the Court’s intent to depart from tradition and allow exigent circumstances searches unsupported by probable cause to enter is not a plausible reading of the opinion. As a result, all exigent circumstances searches—no matter how great or small the intrusion involved—should require probable cause to believe a particular person or property can be found on the premises.

### B. *Probable Cause of Exigency*

The entry and search of premises under the exigent circumstances exception should require probable cause not only to enter, but also to believe that exigent circumstances exist—that is, probable cause that “‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.”<sup>86</sup> Before they conduct a full search, therefore, the police should have probable cause to believe that a warrantless entry is necessary to prevent the

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83. *Brigham City*, 122 P.3d at 509–10 (listing the existence of “probable cause . . . to enter into the backyard” as one of the trial judge’s “findings of fact,” noting that the appellate court “determined that Brigham City had not challenged the trial court’s findings of fact,” and limiting “[o]ur review . . . to the correctness of the legal conclusion . . . that no exigent circumstances justified the officers’ entry into the home” because “[t]he accuracy of the subsidiary facts relied upon by the court of appeals was unchallenged” (quoting the trial court order)).

84. *Id.* at 511 (“Here, the officers’ observation of the consumption of alcohol by underage youths and the blow struck by the juvenile in the kitchen of the dwelling were sufficient to establish probable cause and thus are not at issue. Brigham City instead challenges the court of appeals’s determination that exigent circumstances did not exist.”).

85. *Brigham City*, 547 U.S. at 402 (second alteration in original) (emphasis added) (quoting *Brigham City*, 122 P.3d at 514); see also Transcript of Oral Argument at 5, *Brigham City v. Stuart*, 547 U.S. 398 (2006) (No. 05-502) (Justice Ginsburg notes that the officers “checked to . . . determine that there was probable cause to enter”).

86. *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

imminent destruction of evidence,<sup>87</sup> the imminent escape of a suspect, or imminent injury to the officers or some member of the public.<sup>88</sup>

Reasonable suspicion of exigency should justify only a less invasive Fourth Amendment intrusion. Thus, the Court's rulings allowing police to conduct a protective sweep<sup>89</sup> or make a no-knock entry<sup>90</sup> based on reasonable suspicion are justifiable. A protective sweep is not "a full search of the premises," but instead allows only "a cursory inspection" of places where persons posing a danger to the police might be found.<sup>91</sup> And a no-knock entry allows law enforcement officials to enter without announcing their presence when they already have a warrant or some other justification for being on the property.<sup>92</sup> Similarly, although the Court has not identified the precise showing necessary to allow the police to secure the premises while they seek a search warrant,<sup>93</sup> an impoundment is "a significantly less restrictive restraint" than an arrest or search and should likewise be permitted based on reasonable suspicion that allowing the residents unrestrained access to their home would, for example, lead to the destruction of evidence.<sup>94</sup> For a full search,

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87. This is not to suggest that such entries are permissible in cases involving minor offenses. See *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (refusing to permit a warrantless entry to preserve evidence of "a noncriminal, civil forfeiture offense for which no imprisonment is possible").

88. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (noting that exigent circumstances "include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence"); *Kentucky v. King*, 563 U.S. 452, 460 (2011) (same).

89. See *Maryland v. Buie*, 494 U.S. 325, 336 (1990) (described *supra* notes 19–20 and accompanying text).

90. See *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (described *supra* notes 21–22 and accompanying text).

91. *Buie*, 494 U.S. at 335. The Court also emphasized in *Buie* that the police were already lawfully in the house: "[p]ossessing an arrest warrant and probable cause to believe Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might be found." *Id.* at 332–33. Nevertheless, some lower courts have extended *Buie* and allow the police to enter in order to conduct a protective sweep. Compare *United States v. Wilson*, 306 F.3d 231, 238 (5th Cir. 2002) (allowing such an entry), with *United States v. Timmann*, 741 F.3d 1170, 1181 (11th Cir. 2013) (taking the contrary position). See generally 3 LAFAVE, *supra* note 32, § 6.4(c), at 504–08.

92. See *Richards*, 520 U.S. at 393 n.5 (characterizing a no-knock entry as "less intrusive than . . . a warrantless search").

93. See *Illinois v. McArthur*, 531 U.S. 326, 328 (2001) (using the undefined term "reasonably believed") (described *supra* notes 25–26 and accompanying text).

94. *McArthur*, 531 U.S. at 332; see also *id.* at 336 (observing that "[t]emporarily keeping a person from entering his home" is "a consequence whenever police stop a person on the street"); *Segura v. United States*, 468 U.S. 796, 810 (1984) (opinion of Burger, C.J., joined by O'Connor, J.) (describing an impoundment as "a seizure" that, unlike a search, "affects only possessory interests, not privacy interests"); cf. *Sonntag*, *supra* note 31, at 635–38 (likewise distinguishing protective sweeps, no-knock entries, and impoundments, though assuming that the Supreme Court has clearly required only reasonable suspicion in all three cases).

This is not to say that an impoundment should necessarily be permitted when it intrudes on the interests of innocent persons, an issue the Supreme Court has not addressed.

however, probable cause of exigency “strikes the appropriate balance” between law enforcement interests and the individual’s privacy interests.<sup>95</sup> As discussed above, the Court’s use of the undefined term “reasonable basis for believing” in cases like *Brigham City v. Stuart* does not require a different result.<sup>96</sup>

Nevertheless, one of the early pieces of scholarship to address the appropriate standard of exigency proposed requiring only reasonable suspicion that evidence would be destroyed in order to trigger the exigent circumstances exception.<sup>97</sup> Rejecting probable cause as “too rigorous,” the author reasoned that mandating that “it must be ‘more probable than not’ that an emergency exists” creates an unacceptable “risk . . . that the evidence will be lost.”<sup>98</sup> But the Court has never defined probable cause literally, that is, as requiring a likelihood greater than fifty percent. In fact, the Court has repeatedly refused to quantify the concept of probable cause,<sup>99</sup> and considers the probable cause standard to be met by a showing of only a “fair probability” or “substantial chance of criminal activity.”<sup>100</sup>

Several other commentators have advocated imposing different standards of proof depending on the nature of the exigency involved. These scholars would require police to have probable cause in destruction of evidence cases but only reasonable suspicion in emergency aid and/or community caretaking cases.<sup>101</sup>

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*See* *McArthur*, 531 U.S. at 328 (noting that the police had probable cause that the individual affected by the impoundment “had hidden marijuana in his home”); *Segura*, 468 U.S. at 813 (opinion of Burger, C.J., joined by O’Connor, J.) (pointing out that the apartment’s residents were under arrest, so that “[t]he actual interference with their possessory interests” was “virtually nonexistent”).

95. *Richards*, 520 U.S. at 394.

96. *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006); *see supra* notes 23–24 & 39–68 accompanying text.

97. *See* Salken, *supra* note 31, at 325; *cf.* Sonntag, *supra* note 31, at 651 (proposing that “probable cause . . . based on articulable facts” be required in destruction of evidence cases).

98. Salken, *supra* note 31, at 327 n.205.

99. *See* *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (observing that probable cause is “incapable of precise definition or quantification into percentages”); *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (admonishing that “[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place” in assessing probable cause).

100. *Gates*, 426 U.S. at 238, 244 n.13.

101. *See* Bradley, *Sensible Emergency Doctrine*, *supra* note 34, at 62; Stamm, *supra* note 31, at 1447–48; Michael J.Z. Mannheim, *Thoughts on Kentucky v. King*, PRAWFSBLAWG (May 17, 2011, 2:31 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/05/thoughts-on-kentucky-v-king.html>; *cf.* Matthew Bell, *Fourth Amendment Reasonableness: Why Utah Courts Should Embrace the Community Caretaking Exception to the Warrant Requirement*, 10 BOALT J. CRIM. L. 3, ¶ 33 (2005) (proposing that an evaluation of probable cause be restricted to criminal investigations, and “a reasonableness standard” be applied to community caretaking searches); John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. CRIM. L. & CRIMINOLOGY 433, 438–40 (1999) (likewise rejecting a probable cause standard for community caretaking and emergency aid searches, and instead suggest-

One justification offered for this distinction is that police actions in the latter circumstances do not rise to the level of “searches” and “seizures” within the meaning of the Fourth Amendment.<sup>102</sup> But police conduct that does not constitute a search or a seizure is not governed by the Fourth Amendment at all and therefore should not require probable cause, reasonable suspicion, or any particular quantum of proof.<sup>103</sup>

Moreover, characterizing emergency aid intrusions as neither searches nor seizures is problematic. Certainly, the Court has made clear that police may approach an individual in public and ask a few questions without conducting a Fourth Amendment seizure.<sup>104</sup> But any situation in which the reasonable person would not “feel free to decline the officers’ requests or otherwise terminate the encounter”<sup>105</sup> does effect a Fourth Amendment seizure—regardless of whether the officer wants to ask “May I search your bag?” or “Are you in distress and in need of help?”<sup>106</sup>

Likewise, once the police have violated a reasonable expectation of privacy,<sup>107</sup> they have conducted a “search” for Fourth Amendment purposes irrespective of whether they are acting to uncover evidence of a crime or to promote some other social good.<sup>108</sup> The Court has made that clear when addressing the permissibility of administrative searches. As the Court pointed out in discussing housing code inspections in *Camara v. Municipal Court*, it would “surely [be] anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”<sup>109</sup>

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ing that those searches be justified based on “an objectionably reasonable basis for a belief in the immediate need for police assistance”).

102. See Decker, *supra* note 101, at 439; see also Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1495 n.40 (2009) (citing cases taking this position).

103. See, e.g., *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (noting that an “encounter [which] is consensual” and does not constitute a “seizure” “will not trigger Fourth Amendment scrutiny” and “no reasonable suspicion is required”); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356 (1974) (pointing out that “[l]aw enforcement practices are not required by the fourth amendment to be reasonable unless they are either ‘searches’ or ‘seizures’”). See generally 1 DRESSLER & MICHAELS, *supra* note 3, § 6.01[A], at 67–68; 1 LAFAVE, *supra* note 32, § 2.1, at 562.

104. See, e.g., *United States v. Drayton*, 536 U.S. 194, 200–01 (2001).

105. *Id.* at 202 (quoting *Bostick*, 501 U.S. at 436).

106. See, e.g., Dimino, *supra* note 102, at 1497–98.

107. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

108. See, e.g., 3 LAFAVE, *supra* note 32, § 6.6, at 595 n.1; Dimino, *supra* note 102, at 1497.

109. *Camara v. Mun. Court*, 387 U.S. 523, 530 (1967); see also *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 616–17 (1989) (concluding that drug testing railroad employees in the interest of public safety rose to the level of a Fourth Amendment search); *Michigan v. Tyler*, 436 U.S. 499, 506 (1978) (rejecting the position that entries “to ascertain the cause of a fire rather than to look for evidence of a crime” do not constitute searches under the Fourth Amendment).

A second justification proffered for allowing emergency aid and/or community caretaking searches on a lesser showing of exigency is that destruction of evidence cases differ from situations “when lives (and limbs) are at stake.”<sup>110</sup> Although a great deal of controversy surrounds the relationship among the concepts of exigent circumstances, emergency aid, and community caretaking—whether they are three<sup>111</sup> (or two)<sup>112</sup> separate exceptions to the warrant requirement or they all fit within the umbrella of the exigent circumstances exception<sup>113</sup>—the Court has wisely chosen not to differentiate among them. In *Kentucky v. King*, for example, the Court noted that exigency is “[o]ne well-recognized exception” to the warrant requirement and then listed the preservation of evidence, hot pursuit, and emergency aid as the “several exigencies” the Court has recognized.<sup>114</sup>

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110. Bradley, *Sensible Emergency Doctrine*, *supra* note 34, at 62; *see also* Stamm, *supra* note 31, at 1447 (arguing that “no imminent danger to officers or the public” is involved in a destruction of evidence case).

111. Those subscribing to this view generally take the position that exigent circumstances searches are aimed at serving law enforcement goals and that community caretaking searches require less exigency than emergency aid searches. *See, e.g.*, *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 559–61 (7th Cir. 2014); *State v. Carlson*, 548 N.W.2d 138, 141 & n.3 (Iowa 1996); *State v. Neighbors*, 328 P.3d 1081, 1086, 1091 (Kan. 2014); *State v. Pinkard*, 785 N.W.2d 592, 600 & n.8, 605 n.13 (Wis. 2010); 3 LAFAVE, *supra* note 32, § 6.6(a), at 596 n.7; Bell, *supra* note 101, ¶¶ 8, 12, 20; Gregory T. Holding, Comment, *Stop Hammering Fourth Amendment Rights: Reshaping the Community Caretaking Exception with the Physical Intrusion Standard*, 97 MARQ. L. REV. 123, 136, 152–53 (2013).

In addition, some courts and commentators, relying on references in the Supreme Court’s first community caretaking opinion, *Cady v. Dombrowski*, 413 U.S. 433, 442 (1973), to “[t]he constitutional difference” between searching automobiles and searching “houses and similar structures,” refuse to permit community caretaking searches of homes. *See, e.g.*, *Sutterfield*, 751 F.3d at 555–57 (citing conflicting cases); *Neighbors*, 328 P.3d at 1089 (citing cases taking this position); Holding, *supra*, at 162; Marinos, *supra* note 31, at 293. For the contrary position, *see, for example*, *Pinkard*, 785 N.W.2d at 597–601; David Fox, Note, *The Community Caretaking Exception: How the Courts Can Allow the Police to Keep Us Safe Without Opening the Floodgates to Abuse*, 63 WAYNE L. REV. 407, 421 (2018). *Cady v. Dombrowski* is also discussed *infra* notes 157–61 and accompanying text.

112. For the view that emergency aid and community caretaking constitute one category, *see, for example*, *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006); *State v. Fausel*, 993 A.2d 455, 465–66 (Conn. 2010); *People v. Slaughter*, 803 N.W.2d 171, 177 n.20, 185–86 (Mich. 2011); *State v. Ryon*, 108 P.3d 1032, 1042–43, 1043 n.4 (N.M. 2005); 1 DRESSLER & MICHAELS, *supra* note 3, § 11.01, at 180; Decker, *supra* note 101, at 443–44; Fox, *supra* note 111, at 419–21; Mary Elisabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325, 329, 331–32 (1999). *Cf.* Stamm, *supra* note 31, at 1431 (separating “public-safety” and “evidence-gathering” exigencies, though not discussing community caretaking).

For the view that emergency aid and exigent circumstances constitute one category, *see, for example*, *United States v. Holloway*, 290 F.3d 1331, 1334–37 (11th Cir. 2002) (equating emergency aid and exigency, though not discussing community caretaking); *Commonwealth v. Duncan*, 7 N.E.3d 469, 472 n.3, 472–73 (Mass. 2014); Dimino, *supra* note 102, at 1507–09; Marinos, *supra* note 31, at 282–83.

113. *See, e.g.*, *State v. Meeks*, 262 S.W.3d 710, 723 & n.16 (Tenn. 2008).

114. *Kentucky v. King*, 563 U.S. 452, 460 (2011); *see* *Carpenter v. United States*, 138 S. Ct. 2206, 2222–23 (2018) (quoting *King* with approval); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citing precedents authorizing warrantless exigent circumstances searches and

At some level, all police work is designed to promote the public safety, whether officers are rescuing someone from a burning building, protecting the community from the risks associated with the escape of a dangerous criminal, or ensuring that prosecutors have the evidence they need to secure convictions.<sup>115</sup> As a result, the purported differences among the various categories of exigency easily break down.<sup>116</sup> Police who make a warrantless entry to rescue a kidnapped child or to stop an assault or burglary in progress are obviously protecting the safety of the victims, but they are also investigating a crime.<sup>117</sup> And it is not obvious why a more lenient standard of exigency should apply in a case like *Brigham City*, where law enforcement officials were trying to help four adults restrain an out-of-control minor,<sup>118</sup> than where police officers make a warrantless entry to prevent a serial killer from destroying evidence of a homicide.<sup>119</sup>

Language in *Maryland v. Buie* contrasting searches to uncover evidence with searches to protect police officers does not call for a different conclusion.<sup>120</sup> The Court's opinion in that case did point out in a footnote that a protective sweep, like a *Terry* stop-and-frisk,

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then noting, "[o]ne exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury"; *Schmerber v. California* 384 U.S. 757, 770 (1966) (using the term "emergency" in discussing the destruction of evidence); *see also Meeks*, 262 S.W.3d at 723 n.16 (observing that *Brigham City* "embedded the emergency aid exception deep within the exigent circumstances exception"); Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801, 812–13 (2007) (pointing out that *Brigham City* "goes a considerable way toward collapsing any distinction" between emergency aid and exigent circumstances searches, "at least in the significant subset of cases where exigency derives from the risk of physical harm to a person"). *But see* Marinos, *supra* note 31, at 282–83 (rejecting this view of *Brigham City*).

115. *See, e.g., Dimino, supra* note 102, at 1493; *cf. Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (emphasizing the need to analyze the "immediate" rather than the "ultimate . . . purpose" of an administrative search because "law enforcement involvement always serves some broader social purpose or objective").

116. *See, e.g., 1 DRESSLER & MICHAELS, supra* note 3, § 11.01, at 181. *Compare Decker, supra* note 101, at 511 (treating entries both to apprehend a fleeing suspect and to prevent the destruction of evidence as "crime solving" searches), *with Stamm, supra* note 31, at 1431 (categorizing the prevention of flight as an emergency aid search).

117. *See Decker, supra* note 101, at 470–73, 479–90, 490–94 (listing these as examples of permissible emergency aid searches).

118. *See Brigham City*, 547 U.S. at 401.

119. *Cf. Brief for the United States as Amicus Curiae Supporting Petitioner, supra* note 41, at 12 (criticizing the approach of "artificially dichotomizing emergencies" as "rarely fruitful (but invariably litigation-generating)"); Tuerkheimer, *supra* note 114, at 813 n.64 ("question[ing] . . . whether judicial application of an 'exigent circumstances' versus an 'emergency aid' framework has practical consequences," noting that "the imposition of an 'exigent circumstances' exception versus an 'emergency exception' rubric has not generally dictated outcomes" in courts' decisions).

120. *But cf. Brief for Petitioner, supra* note 40, at 18 n.2 (citing *Buie* in arguing that "[t]he reasonable suspicion standard for emergency aid intrusions is consistent with the standard applied by this Court to other exigent circumstances that are justified by the need to protect the safety of officers or others").

is distinguishable from a “search[] for evidence plain and simple” and is justifiable on a showing of only reasonable suspicion because it is “limited to what is necessary to protect the safety of officers and others.”<sup>121</sup> But the Court’s focus was on the invasiveness, rather than the purpose, of the intrusion, and the Court then went on to differentiate a protective sweep from a search incident to arrest—which is designed to protect *both* the officer and the evidence (as well as to prevent flight)<sup>122</sup>—because of “the more limited intrusion contemplated by a protective sweep.”<sup>123</sup> *Buie* therefore does not support requiring less than probable cause of exigency when, instead of a cursory sweep, the police engage in a “‘top-to-bottom’ search” under the exigent circumstances exception, even in the interest of promoting safety concerns.<sup>124</sup>

Rather, as *Buie* suggests, the quantum of suspicion necessary for a warrantless exigent circumstances search or seizure should hinge on the nature of the intrusion and not the type of exigency involved. Probable cause to believe exigent circumstances exist should be required before police use deadly force to apprehend a suspect or conduct a full search, whether the search is intended to prevent the destruction of evidence or to provide emergency aid. Reasonable suspicion of exigency should justify only less invasive exigent circumstances intrusions—protective sweeps, no-knock entries, and impoundments.

It remains to consider whether the constitutionality of the different varieties of exigent circumstances searches should turn on the police officer’s reasons for entering. That issue is the subject of the next section.

### C. *Subjective Motivation for Entering*

Although the first two elements of the approach endorsed in this Article do not deviate from Supreme Court precedent, that is not true of the third and final element. In arguing that entries purportedly justified by the need to provide emergency aid or serve some other non-law-enforcement concern should be permissible only if the officers’ primary reason for entering was actually to offer assistance, this Article maintains that the Court’s decision to the contrary in *Brigham City v. Stuart* was incorrect.<sup>125</sup>

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121. *Maryland v. Buie*, 494 U.S. 325, 335 n.3 (1990).

122. *See, e.g., Chimel v. California*, 395 U.S. 752, 762–63 (1969).

123. *Buie*, 494 U.S. at 336.

124. *Id.*

125. *Brigham City v. Stuart*, 547 U.S. 398, 404–05 (2006).

What *Brigham City* failed to recognize is that this subset of exigent circumstances searches are essentially administrative, or “special needs,” searches. Just as administrative inspections are regulatory searches that have a “primary purpose” distinct from “the general interest in crime control”<sup>126</sup>—i.e., that serve “special needs, beyond the normal need for law enforcement”<sup>127</sup>—non-law-enforcement exigent circumstances searches aim to protect someone’s person or property rather than uncover evidence of a crime. As a result, consistency with the Court’s administrative inspection precedents calls for an evaluation of the officers’ subjective motives to ensure that these emergency aid/community caretaking searches are not pretextual investigatory searches.<sup>128</sup> Requiring a proper

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

127. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment), *quoted in* *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002). For criticism of the Court’s distinction between special needs and criminal law enforcement, see, for example, Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1025 (calling the line “illusory” and “unwise”); David H. Kaye, *A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases*, 15 U. PA. J. CONST. L. 1095, 1126 (2013) (finding it “a little odd to consider motive . . . when non-law enforcement interests alone are pursued, but not when both law enforcement and non-law enforcement interests reinforce each other”); Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 89 (referring to the distinction as “chimerical and irrelevant”). *But cf.* Scott E. Sundby, *Protecting the Citizen “Whilst He Is Quiet”: Suspicionless Searches, “Special Needs” and General Warrants*, 74 MISS. L.J. 501, 551 (2004) (linking the Court’s decision to take on a “judicial oversight” “role as an active ‘policy magistrate’” in these cases to “the concerns over general warrants that gave rise to the Fourth Amendment”).

128. For others endorsing a subjective requirement in at least some exigent circumstances cases, see Bell, *supra* note 101, ¶ 33 (proposing that courts analyzing community caretaking searches “apply a reasonableness standard, coupled with [a] good faith requirement”); Bradley, *Reasonable Policeman*, *supra* note 34, at 371–72 (agreeing with *Brigham City* that motivation is irrelevant when “police are acting for the protection of themselves or others,” but arguing that “an actual belief” of exigency is necessary in hot pursuit and destruction of evidence cases); Decker, *supra* note 101, at 532 (advocating that officers performing community caretaking and emergency aid searches must be acting, “at least in part, on a subjective motivation to aid or protect life or property” and must also “reasonably believe” their assistance is “needed immediately”); Dimino, *supra* note 102, at 1529 (recommending that community caretaking searches include both a subjective and an objective component, i.e., that the officer “subjectively held a belief that was objectively reasonable”); Edward G. Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFF. L. REV. 419, 426 (1973) (maintaining that police conducting emergency assistance searches must “not enter with an accompanying intent to either arrest or search” and must also have “reasonable grounds to believe that there is an urgent need for such assistance”); Fox, *supra* note 111, at 435 (suggesting that an officer’s “subjective motivations” be considered in evaluating community caretaking searches of a home but that “the plain view doctrine . . . be suspended” in such cases); Mark Goreczny, Note, *Taking Care While Doing Right by the Fourth Amendment: A Pragmatic Approach to the Community Caretaker Exception*, 14 CARDOZO PUB. L. POL’Y & ETHICS J. 229, 250, 257–58 (2015) (proposing that community caretaking searches require “reasonable grounds to believe” in the need for assistance, as well as proof that the police were not “primarily motivated by intent to arrest and seize evidence,” and that only “evidence found in plain view, related to the community caretaking reason for entry” of a home, be admissible); Naumann, *supra* note 112, at 364 (advocating that courts evaluate both “objective and subjective reasonableness” in community caretaking cases); Mannheimer, *supra* note 101 (endorsing a standard of reasonable suspicion plus mo-

purpose is especially critical if courts reject the twin probable cause requirements proposed in this Article and impose a lower standard of proof for those exigent circumstances searches that serve non-law-enforcement interests.<sup>129</sup>

The Court's opinion in *Brigham City* did not focus on the quantum of evidence needed to trigger the exigent circumstances exception to the warrant requirement, but instead on the relevance of a police officer's underlying purpose when conducting an emergency aid search. Relying on Fourth Amendment precedent that refused to consider law enforcement officials' "subjective motivation,"<sup>130</sup> the Court concluded that "[i]t . . . does not matter . . . whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence."<sup>131</sup>

The Court acknowledged, however, that its previous opinions in the area of administrative inspections have analyzed "*programmatic*

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to assist for community caretaking searches). *But cf.* *Marinos*, *supra* note 31, at 287 (recommending that a non-emergency community caretaking search of a home require "an objective determination that a criminal investigation will not be part of the particular search" rather than consideration of the searching officers' actual subjective motivation). For a lower court opinion requiring proof of purpose in emergency aid cases despite the Court's holding in *Brigham City*, see *People v. Slaughter*, 803 N.W.2d 171, 179–82, 179 n.28 (Mich. 2011) (relying on *Michigan v. Tyler*, 436 U.S. 499 (1978), discussed *infra* text accompanying notes 143–45, and *Cady v. Dombrowski*, 413 U.S. 433 (1973), discussed *infra* text accompanying notes 157–61). See generally George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 *Miss. L.J.* 373, 477, 479 (2006) (arguing broadly that Fourth Amendment intrusions should be deemed reasonable only if the "general legal theories" used to justify the police conduct "were actually and subjectively within the analysis engaged in by the officers in deciding to take that action," unless the prosecution can show some alternative justification that the officers "would have considered . . . and acted in reliance on" had they "not proceeded on the legal conclusion they actually relied upon").

129. For courts taking this position, see *supra* notes 33–37 and accompanying text.

130. *Brigham City*, 547 U.S. at 404. For discussion of the Supreme Court's inconsistent use of subjective versus objective police officer standards in its Fourth Amendment decisions, see Kit Kinports, *Criminal Procedure in Perspective*, 98 *J. CRIM. L. & CRIMINOLOGY* 71, 78–88 (2007).

131. *Brigham City*, 547 U.S. at 405; see also *Michigan v. Fisher*, 558 U.S. 45, 49 (2009) (per curiam) (relying on *Brigham City* in holding that the constitutionality of an emergency aid search does not depend on whether the officer "subjectively believe[d]" that someone in the house was "seriously injured"); cf. *Fernandez v. California*, 571 U.S. 292, 302 (2014) (citing *Brigham City* to support the proposition that the permissibility of removing a cotenant who objects to a consent search in, for example, cases of suspected domestic violence does not turn on "the subjective intent" of the officers but rather on whether "the removal of the potential objector is objectively reasonable"); *Kentucky v. King*, 563 U.S. 452, 464 (2011) (citing *Brigham City* and *Fisher* in rejecting the view that the exigent circumstances exception is unavailable if the police "deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement" (quoting *King v. Commonwealth*, 302 S.W.3d 649, 656 (Ky. 2010) (internal quotation marks omitted), *rev'd*, 563 U.S. 452 (2011))). *But cf.* *Segura v. United States*, 468 U.S. 796, 812 (1984) (opinion of Burger, C.J., joined by O'Connor, J.) (noting, in approving the duration of a nineteen-hour impoundment of an apartment, that there was "no suggestion that the officers, in bad faith, purposely delayed obtaining the warrant").

purpose.”<sup>132</sup> The Supreme Court has generally upheld the constitutionality of administrative search schemes only if, in addition to including some mechanism to limit the discretion of the individual inspectors,<sup>133</sup> the searches are “designed to serve ‘special needs, beyond the normal need for law enforcement,’” rather than pretextual searches for evidence.<sup>134</sup> Thus, *Brigham City* cited, for example, *City of Indianapolis v. Edmond*, which struck down a drug checkpoint because—unlike a sobriety checkpoint based on “highway safety concern[s]”<sup>135</sup>—“the primary purpose” of the narcotics checkpoint was “to detect evidence of ordinary criminal wrongdoing.”<sup>136</sup> Likewise, the Court invalidated a public hospital’s

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132. *Brigham City*, 547 U.S. at 405 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 46 (2000)).

133. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 658, 659 n.18, 661 (1979) (though recognizing that the state’s “vital interest” in highway safety was “distinguishable from the general interest in crime control,” the Court went on to require some method of constraining “the unbridled discretion of law enforcement officials”). *But cf.* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 279 (2011) (“document[ing] the dilution of protections against arbitrariness within administrative search doctrine”).

The Court’s opinions have fluctuated between treating discretion minimization as a separate hurdle that an administrative inspection must clear and considering it as one of the factors used in determining whether the inspection survives a balancing test that “weigh[s] the intrusion on the individual’s interest in privacy against the ‘special needs’ that support[]” the search. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). For cases taking the former approach, see, for example, *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (observing that, “in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker” to protect against pretextual searches); *New York v. Burger*, 482 U.S. 691, 703 (1987) (holding that the constitutionality of an administrative inspection turns on “a constitutionally adequate substitute for a warrant” that “limit[s] the discretion of the inspecting officers” (quoting *Donovan v. Dewey*, 452 U.S. 594, 602–03 (1980))); *Colorado v. Bertine*, 479 U.S. 367, 374 n.6, 376 n.7 (1987) (pointing out that “[o]ur decisions have always adhered to the requirement that inventories be conducted according to standardized criteria” to “circumscribe the discretion of individual officers”); *Prouse*, 440 U.S. at 661 (noting, in requiring reasonable suspicion for a highway safety traffic stop, that the Court “in previous [administrative inspection] cases has insisted that the discretion of the official in the field be circumscribed, at least to some extent”); *Camara v. Mun. Court*, 387 U.S. 523, 532–33, 536–37 (1967) (separately analyzing discretion minimization and the balancing test). For decisions discussing discretion as one of the relevant factors in applying the balancing test, see, for example, *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 449–53 (1990) (reasoning that the lack of discretion given to the officials on the scene minimized the intrusiveness of a DUI checkpoint), and *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–67 (1989) (rejecting the need for a warrant because no discretion was exercised in determining which employees to drug test).

134. *Edmond*, 531 U.S. at 37 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (internal quotation marks omitted in original)). *But cf.* Brensike Primus, *supra* note 133, at 257 (charging that “the rules governing administrative searches are notoriously unclear”); Clancy, *supra* note 127, at 1022 n.298 (calling the Court’s special needs doctrine “formless,” “more a facade for policy results than an analytical framework supporting reasoned decisionmaking”).

135. *Sitz*, 496 U.S. at 447 (upholding a DUI checkpoint).

136. *Edmond*, 531 U.S. at 41, 43. The Court left open whether the Indianapolis checkpoint would have been permissible if its “primary purpose” had been “checking licenses or driver sobriety” with “a secondary purpose of interdicting narcotics.” *Id.* at 47 n.2.

program of drug testing pregnant women because “the immediate objective of the searches was to generate evidence for law enforcement purposes,” and therefore the program “simply [did] not fit within the closely guarded category of ‘special needs.’”<sup>137</sup>

Despite *Brigham City*’s emphasis on *Edmond*’s use of the word “programmatically,” other Supreme Court opinions evaluating the constitutionality of administrative searches have in fact been concerned with the motives of the individual who actually conducted the inspection.<sup>138</sup> The Court’s first administrative search decision, *Camara v. Municipal Court*, for example, directed that city officials obtain administrative area warrants for housing inspections lest residents be “subject to the discretion of the official in the field.”<sup>139</sup> Similarly, in *Delaware v. Prouse*, the Court required reasonable suspicion to support a highway safety automobile stop involving a license and registration check so as to prevent police officers from exercising “standardless and unconstrained discretion.”<sup>140</sup> And in upholding the administrative search of an automobile junkyard in *New York v. Burger*, the Court ruled that the statute authorizing the inspection “must limit the discretion of the inspecting officers” in order to pass constitutional scrutiny.<sup>141</sup> In addition, the *Burger* Court made clear that it found “no reason to believe that *the instant inspection* was actually a ‘pretext’ for obtaining evidence” of a crime.<sup>142</sup>

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137. *Ferguson*, 532 U.S. at 83–84 (emphasis omitted). *But cf.* *Kaye*, *supra* note 127, at 1125 (arguing that both *Edmond* and *Ferguson* were “single-motive cases involving single-purpose programs” and therefore the Court’s “‘primary purpose’ language is dicta”).

138. See generally *Brenske Primus*, *supra* note 133, at 260–61. *Brenske Primus* describes, and criticizes, the Court’s “entanglement” of two different types of inspections into “a single category” of searches that are “both labeled ‘administrative’”: “dragnet intrusions,” such as checkpoints and housing inspections, which permit “searches or seizures of every person, place, or thing in a specific location or involved in a specific activity”; and “special subpopulation searches,” which allow searches of “certain people (or people acting in certain capacities)” based on “individualized suspicion” that does not “rise to the level of probable cause.” *Id.*

139. *Camara v. Mun. Court*, 387 U.S. 523, 532 (1967). For further discussion of the showing required to obtain these warrants, see *infra* notes 165–66 and accompanying text.

140. *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

141. *New York v. Burger*, 482 U.S. 691, 703 (1987) (articulating the requirements necessary for a statute to “provid[e] a constitutionally adequate substitute for a warrant” (alteration in original) (quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1981))).

142. *Id.* at 716 n.27 (emphasis added); see also *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452–53 (2015) (requiring “an opportunity for precompliance review” before police may view a hotel registry so as to prevent the “intolerable risk” that these administrative searches can be “used as a pretext to harass hotel operators and their guests”); *City of Ontario v. Quon*, 560 U.S. 746, 761 (2010) (concluding that the search of a municipal employee’s text messages was based on a permissible “noninvestigatory work-related purpose” given the specific reasons why the chief of police “ordered the search” (quoting *O’Connor v. Ortega*, 480 U.S. 709, 725 (1987) (plurality opinion))); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (holding that reasonable suspicion is needed to stop vehicles close to the border to check for undocumented immigrants in order to ensure that the people living

Perhaps most on point, the Court's opinion in *Michigan v. Tyler* specifically recognized the relevance of an individual inspector's motive in "the context of investigatory fire searches," which, the Court noted, are "*not programmatic* but are responsive to individual events."<sup>143</sup> The Court observed that administrative inspections to determine the cause of a fire were distinguishable from the "routine building inspections" at issue in *Camara*, which could be governed by "broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections."<sup>144</sup> Rather, the permissibility of fire inspections turned on the motivation of the person conducting the search. An administrative warrant suffices, the Court explained, when "the purpose of the investigation is to determine the cause and to prevent such fires from occurring or recurring," but a traditional search warrant is required when "the authorities are seeking evidence to be used in a criminal prosecution."<sup>145</sup>

Thus, while an evaluation of the overall programmatic purpose of an administrative inspection scheme might be appropriate in cases involving roadblocks or building inspections—where the protocol for choosing which vehicles to stop and which properties to search is determined in advance, usually by higher-level supervisors<sup>146</sup>—that approach does not suffice in cases such as *Tyler* and *Brigham City*, where all relevant decisions are necessarily made in the heat of the moment by the actors conducting the search or seizure.<sup>147</sup> Warrantless entries to provide emergency aid, like entries

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in those communities are not subjected to "potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers"); *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) (requiring probable cause to search a car near the border in order to limit the "unfettered discretion" of Border Patrol agents); Sundby, *supra* note 127, at 515 (noting that the Court's "early 'special need' cases . . . tended to focus on guarding against 'standardless and unconstrained discretion' being granted to the officer in the field rather than on scrutinizing the policy judgment of the need for the search in the first place" (quoting *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 454 (1990) (internal quotation marks omitted in original))).

143. *Michigan v. Tyler*, 436 U.S. 499, 507 (1978) (emphasis added).

144. *Id.*

145. *Id.* at 508 (quoting *People v. Tyler*, 250 N.W.2d 467, 477 (Mich. 1977), *aff'd*, 436 U.S. 499 (1978)).

146. *See, e.g., Sitz*, 496 U.S. at 453 (observing that the location of the DUI checkpoints was "selected pursuant to guidelines" created by an Advisory Committee and the police "stop[ped] every approaching vehicle"); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 n.17 (1978) (referring to the safety inspection of a workplace as a search conducted pursuant to a "general schedule" (quoting Brief for Petitioner at 9 n.7, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (No. 76-1143))); *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (noting that "[t]he location of a fixed [immigration] checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources"); *see also* 5 LAFAVE, *supra* note 32, § 10.8(d), at 437-40 (surveying lower court opinions addressing checkpoints).

147. *Cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (warning that "the purpose inquiry in this context is to be conducted only at the programmatic level and is not an

to investigate the cause of a fire, should be upheld only when “the officer’s purpose is . . . to attend to the special needs . . . for which the administrative inspection is justified,”<sup>148</sup> and not when the police engage in “searches that are not made for those purposes,” such as searches for evidence.<sup>149</sup> In non-law-enforcement exigent circumstances cases, therefore, an analysis of the individual officer’s subjective motivation is needed to ensure that the searches are in fact primarily intended to provide assistance and not to investigate a crime.

In addition to these administrative search precedents, the Court’s opinions assessing the constitutionality of inventory searches—administrative-like inspections<sup>150</sup> designed to safeguard a car owner’s property, protect police departments from claims of lost property, and preserve officer and public safety<sup>151</sup>—have expressed concern that the individual officials performing the inventories must not be engaging in pretextual searches for law enforcement purposes. In *South Dakota v. Opperman*, for example, the

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invitation to probe the minds of individual officers acting at the scene” of the narcotics checkpoint).

148. *Ashcroft v. al-Kidd*, 563 U.S. 731, 737 (2011).

149. *Whren v. United States*, 517 U.S. 806, 812 (1996).

150. See 3 LAFAVE, *supra* note 32, § 7.4(a), at 848 (analogizing inventories to “other types of inspections or regulatory searches”); cf. 1 DRESSLER & MICHAELS, *supra* note 3, § 15.01[A], at 237 n.2 (noting that inventory searches “could reasonably fit” under the administrative search rubric, but developed as an “independent” warrant exception “[l]argely for [the] historical reason[]” that the initial administrative inspection cases “focused on activities of non-police officers” (emphasis omitted)); Brensike Primus, *supra* note 133, at 303 (agreeing that inventory searches are a “special type” of administrative search “[i]n substance,” but arguing that “the inventory search exception has long been carved off from the larger body of drug-net administrative searches”).

Brensike Primus acknowledges that the Court’s inventory search opinions “sometimes [make] a passing reference to administrative search cases,” but she concludes that the Court “does not situate the inventory search exception in . . . its administrative search doctrine.” *Id.* at 304. In support of this argument, she correctly points out that the Court has referred to the inventory search as “a well-defined exception to the warrant requirement,” *Colorado v. Bertine*, 479 U.S. 367, 371 (1987), and that the Court’s initial inventory search opinion “drew from its cases recognizing . . . the automobile exception” instead of “rely[ing] on its administrative search precedent.” Brensike Primus, *supra*, at 303 n.254 (citing *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976)). But *Opperman* specifically referred to inventory searches as an exercise of police officers’ “routine administrative caretaking functions.” *Opperman*, 428 U.S. at 370 n.5. Moreover, while the Court in *Opperman* did “distinguish[] automobile inspections from administrative search cases,” Brensike Primus, *supra*, at 304 n.256 (citing *Opperman*, 428 U.S. at 367 n.2), the cited footnote merely refused to apply *Camara*’s warrant requirement to automobile searches. In fact, the footnote implied that inventory searches are a species of administrative inspection, noting that *Camara* required a warrant to search a home “to ascertain health or safety conditions,” but that “this procedure has never been held applicable to automobile inspections for safety purposes.” *Opperman*, 428 U.S. at 367 n.2 (emphasis added). Given the functional similarity between administrative inspections and inventory searches, it makes sense to include “noncriminal,” “noninvestigative” inventory searches under the administrative search umbrella. *Id.* at 370 n.5; see also *infra* notes 162–63 and accompanying text (explaining the link between inventory and community caretaking searches).

151. See *Bertine*, 479 U.S. at 372; *Opperman*, 428 U.S. at 369, 376 n.10.

majority observed that “this 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 and its contents.”<sup>152</sup> The Court upheld the inventory search at issue in *Opperman*, finding “no suggestion whatever” that the search conducted there was “a pretext concealing an investigatory police motive.”<sup>153</sup> When the constitutionality of the inventory search of an impounded automobile next reached the Court in *Colorado v. Bertine*, the Court likewise commented that “reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment” and that, on the facts before it, “[t]here was no showing that the police chose to impound Bertine’s van in order to investigate suspected criminal activity.”<sup>154</sup> And in its most recent discussion of these searches, the Court in *Florida v. Wells* summarized its inventory search precedents as “forbidding uncanalized discretion to police officers.”<sup>155</sup> Given the language in this line of cases, some lower courts asked to evaluate the permissibility of an inventory search have properly engaged in an assessment of the motives of the individual officers who conducted the search.<sup>156</sup>

Not only did the Supreme Court in *Brigham City* deviate from its case law governing inventory and other administrative searches, but it also neglected to even mention the Court’s first community caretaking opinion, *Cady v. Dombrowski*, which similarly focused on the searching officer’s “specific motivation” for acting.<sup>157</sup> The Court in *Cady* defined “community caretaking functions” as “totally divorced from the detection, investigation, or acquisition of evidence

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152. *Opperman*, 428 U.S. at 373; see also *id.* at 370 n.5 (referring to permissible inventory searches as “routine, non-criminal procedures” where “no claim is made that the protective procedures are a subterfuge for criminal investigations”); *id.* at 370 n.6 (characterizing inventory searches as occurring in a “benign noncriminal context”).

153. *Id.* at 376.

154. *Bertine*, 479 U.S. at 374, 376 (emphasis added); see also *id.* at 372 (“[T]here was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation.”); *id.* at 375 (noting that “[n]othing . . . prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity”).

155. *Florida v. Wells*, 495 U.S. 1, 4 (1990); see also *id.* (“Our view that standardized criteria or established routine must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.” (citations omitted)).

156. See 3 LAFAVE, *supra* note 32, § 7.4(a), at 852–54 & nn.83–85 (citing cases); see also *id.* at 851 (rejecting the proposition that “any inventory undertaken in compliance with a police department regulation is lawful”). *But cf.* Dix, *supra* note 128, at 439–40, 439 n.271 (reading *Brigham City*’s reference to “programmatically purpose” and use of a “see also” citation to *Wells* as “strongly hint[ing]” that subjective motivation is no longer relevant in inventory search cases (quoting *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006))).

157. *Cady v. Dombrowski*, 413 U.S. 433, 444 (1973).

relating to the violation of a criminal statute.”<sup>158</sup> In upholding the search of an arrested police officer’s vehicle after the car had been towed to a garage, the Court emphasized that the “purpose of [the search] was to look for respondent’s service revolver” and “the justification” was therefore “concern for the safety of the general public.”<sup>159</sup> Even if *Brigham City*’s failure to cite *Cady* can be attributed to the Court’s assumption that community caretaking searches are limited to automobiles or do not involve the same sense of urgency as emergency aid cases,<sup>160</sup> there is still considerable overlap between the rationales underlying community caretaking and emergency aid searches.<sup>161</sup> *Brigham City*’s unexplained departure from *Cady*’s reliance on the searching officer’s motivation is therefore troubling.

Moreover, subsequent Supreme Court opinions have viewed *Cady v. Dombrowski* as an impoundment case. In recognizing the constitutionality of warrantless inventory searches in *Opperman*, for example, the Court relied on *Cady* and described an inventory search as “a caretaking search of a lawfully impounded automobile.”<sup>162</sup> The fact that the Court sees the administrative-like inventory search as falling within the community caretaking umbrella thus provides further support for likewise treating all non-law-enforcement exigent circumstances searches as a type of administrative inspection and incorporating a subjective motivation requirement.<sup>163</sup>

Analogizing emergency aid searches to inventory searches does not undermine the probable cause standards endorsed above. Admittedly, the Court’s inventory search precedents have admonished that “[t]he policies behind the warrant requirement are not implicated in an inventory search, nor is the related concept of probable cause.”<sup>164</sup> But the Court *has* required a form of probable cause in other administrative search cases. Reasoning that the

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158. *Id.* at 441.

159. *Id.* at 437, 447; *see also id.* at 443 (noting that the search was “‘standard procedure in [that police] department,’ to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands” (alteration in original) (quoting the lower courts)).

160. *See supra* note 111.

161. *See supra* notes 111–14 and accompanying text.

162. *South Dakota v. Opperman*, 428 U.S. 364, 375 (1976) (emphasis added); *see id.* at 370 n.5 (observing that an inventory search serves “routine administrative caretaking functions”); *see also Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (likewise citing *Cady* and referring to “police caretaking procedures designed to secure and protect vehicles and their contents within police custody”).

163. *Cf. Dimino, supra* note 102, at 1522 (describing administrative searches as “examples of community caretaking,” though arguing that they differ because administrative inspectors “serve those non-law-enforcement purposes by enforcing the law”).

164. *Bertine*, 479 U.S. at 371; *see also Opperman*, 428 U.S. at 370 n.5 (noting that “[t]he standard of probable cause is peculiarly related to criminal investigations, not routine, non-criminal procedures”).

Fourth Amendment's "test of 'probable cause' . . . can take into account the nature of the search that is being sought,"<sup>165</sup> the Court held in *Camara v. Municipal Court* that the probable cause necessary to support the administrative warrants needed for housing inspections "exist[s] if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."<sup>166</sup> Likewise, in discussing the permissibility of administrative searches to determine the cause of a fire, the Court in *Michigan v. Tyler* relied on *Camara* and observed that "[t]he showing of probable cause . . . may vary with the object and intrusiveness of the search."<sup>167</sup> Thus, requiring probable cause for non-law-enforcement exigent circumstances searches is not inconsistent with viewing them as administrative inspections.

More fundamentally, a showing of probable cause is unnecessary in inventory search cases because the Court has relied on an alternative method of limiting the discretion of the officers who conduct those searches: they must have been "following standardized procedures."<sup>168</sup> Police departments cannot create standard operating procedures for cases involving exigent circumstances because the existence of an exigency by definition "must be determined case by case based on the totality of the circumstances."<sup>169</sup> The probable cause standards advocated in this Article thus substitute for regularized procedures in satisfying the Court's requirement that administrative searches must include some mechanism to cabin the discretion of the individual inspectors.<sup>170</sup>

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165. *Camara v. Mun. Court*, 387 U.S. 523, 538 (1967) (quoting *Frank v. Maryland*, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting)).

166. *Id.* Although there is some scholarly support for requiring *Camara*-type administrative warrants for at least certain community caretaking searches, see Marinos, *supra* note 31, at 283–89, others have pointed out that these cases "arise on the spur of the moment . . . without [the] forewarning" necessary to enable police to obtain a warrant. Dimino, *supra* note 102, at 1521. For other sources rejecting a warrant requirement in non-law-enforcement exigent circumstances cases, see *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 563–66 (7th Cir. 2014); Decker, *supra* note 101, at 532; Holding, *supra* note 111, at 155–58.

167. *Michigan v. Tyler*, 436 U.S. 499, 506 (1978).

168. *Bertine*, 479 U.S. at 372; see also *Florida v. Wells*, 495 U.S. 1, 4 (1990) (likewise requiring that police follow standard practices in determining which containers to open during an inventory search).

169. *Missouri v. McNeely*, 569 U.S. 141, 145 (2013); see also Dimino, *supra* note 102, at 1527 (pointing out that "protocols for dealing with community-caretaking situations . . . would be a poor fit for many of the events police officers must encounter").

170. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) (requiring probable cause to conduct an administrative search of a vehicle near the border in order to limit the discretion exercised by law enforcement officials); cf. *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (concluding that reasonable suspicion is needed to justify the administrative inspection of a student's purse); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (holding that reasonable suspicion is necessary to stop vehicles close to the border in order to constrain inspectors' discretion); *Brenske Primus*, *supra* note 133, at 272 (noting that, in some of its administrative search opinions, the Court has "relied on a post hoc analysis of . . . the government's showing of individualized suspicion" in order to "cabin executive discre-

When law enforcement officials make a warrantless exigent circumstances entry to protect someone's person or property, they are, in essence, conducting an administrative search. Drawing from the Supreme Court precedent assessing the constitutionality of other administrative inspections, courts should permit this subset of exigent circumstances searches only if there is some discretion-limiting mechanism in place (here, probable cause) and if the police acted for the proper reasons. These exigent circumstances searches should therefore survive constitutional scrutiny only if the officer's primary motive for entering was to provide assistance or serve some other non-law-enforcement interest.

Although ascertaining an actor's motive can be difficult,<sup>171</sup> the Court pointed out in *City of Indianapolis v. Edmond* that "courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful."<sup>172</sup> In addition, the Court's administrative inspection rulings have instructed judges to "consider all the available evidence in order to determine the relevant primary purpose."<sup>173</sup> Thus, courts can analyze, for example, whether the actions taken and the questions asked by officers who purportedly made an emergency aid entry were consistent with the primary goal of providing assistance or, instead, suggested a motive to uncover evidence of a crime.<sup>174</sup>

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tion"). *But cf.* Dimino, *supra* note 102, at 1528 (viewing a subjective motivation requirement as a sufficient "discretion-limiting" mechanism); Fox, *supra* note 111, at 425 (same).

171. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 46 (2000) (acknowledging "the challenges inherent in a purpose inquiry"); see also *supra* notes 115–19 and accompanying text.

172. *Edmond*, 531 U.S. at 46–47; see also Dix, *supra* note 128, at 472 (finding "no obvious reason why expeditions into the minds of police officers should be any more difficult or expensive" than mens rea "inquir[ies] into the minds of those accused of crime"). *But cf.* Kaye, *supra* note 127, at 1126, 1120 (describing "[m]ixed-motive or primary-purpose analysis" as "notoriously slippery" and "a major headache in many areas of the law," and therefore arguing that "multipurpose search regimes should be eligible for special-needs balancing").

173. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001); see also *Edmond*, 531 U.S. at 46 (observing that "we examine the available evidence to determine the primary purpose of the checkpoint program"); Dix, *supra* note 128, at 473 (noting that "circumstantial evidence—specifically . . . the officer's conduct . . .—could permit an inference" as to the officer's subjective state of mind).

174. See *Michigan v. Fisher*, 558 U.S. 45, 49 (2009) (per curiam) (summarizing the defendant's argument that the officers there "could not have been motivated by a perceived need to provide medical assistance, since they never summoned emergency medical personnel"); *Brigham City v. Stuart*, 547 U.S. 398, 402 (2006) (describing the state supreme court's observation that the police "had not sought to assist the injured adult, but instead had acted 'exclusively in their law enforcement capacity'" (quoting *Brigham City v. Stuart*, 122 P.3d 506, 513 (Utah 2005), *rev'd*, 547 U.S. 398 (2006))); *cf.* *Michigan v. Tyler*, 436 U.S. 499, 507 (1978) (suggesting "relevant factors" to evaluate the permissibility of an administrative entry to investigate a fire scene, including "[t]he number of prior entries, the scope of the search, the time of day when it is proposed to be made, [and] the lapse of time since the fire").

## CONCLUSION

For decades, the Supreme Court has failed to clarify what showing of exigency is needed to trigger the exigent circumstances exception to the warrant requirement. At times requiring probable cause or reasonable suspicion, the Court on other occasions has used vague and undefined terms like “reason to believe” without situating that standard on the probable cause/reasonable suspicion continuum. Not surprisingly, the conflicting signals coming from the Justices have led to disagreements among the lower courts.

In resolving that conflict, this Article has argued that two distinct findings of probable cause should be required to support a warrantless exigent circumstances search. First, there is no justification, and no support in the Court’s precedents, for departing from the traditional mandate that police need probable cause to enter for any exigent circumstances search. Second, probable cause of exigency—probable cause to believe that some untoward consequence would arise if the officers took the time to obtain a warrant—should also be necessary for any full search. Reasonable suspicion of exigency should suffice only for less invasive intrusions, such as protective sweeps, no-knock entries, and impoundments of the premises while police seek a warrant.

Finally, when the police want to rely on non-law-enforcement interests to make a warrantless exigent circumstances entry—the so-called emergency aid and community caretaking searches—they are essentially conducting an administrative inspection. Consistency with the Court’s Fourth Amendment rulings in that area therefore requires a third justification. Ensuring that these intrusions truly are intended to further their administrative purpose of providing assistance, and are not pretextual searches for evidence, calls for overruling the Court’s decision in *Brigham City v. Stuart* that an individual officer’s subjective motivations are irrelevant. When evaluating this subset of exigent circumstances searches, then, courts should also analyze whether the officer’s primary reason for entering was to offer assistance or instead to investigate a crime.