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WOLF AT THE DOOR: ISSUES OF PLACE AND RACE IN THE USE OF THE "KNOCK AND TALK" POLICING TECHNIQUE

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Abstract: The procedure known as "knock and talk" allows police to approach a dwelling, knock on the door, and ask questions of the inhabitant with the goal of obtaining entry into the dwelling. This is a popular policing technique because probable cause or a warrant is not required. This Note analyzes the effect of knock and talk on conceptions of privacy and space held by those most frequently targeted: low income and minority individuals. It argues that the curtilage doctrine, which protects the area surrounding the home, does not assist these individuals. In addition, this Note demonstrates that knock and talk can be abused in two ways: through improperly obtained consent and police-created exigent circumstances. Finally, this Note argues that the use of knock and talk undermines efforts at community policing and has the potential to harm the population it supposedly protects.

Introduction

On October 13, 2005, police officers in Lexington, Kentucky executed a "controlled buy" drug operation near an apartment complex where an informant had purchased crack cocaine from a drug dealer.[1] Upon completion of the sale, an undercover police officer signaled nearby officers to make an arrest.[2] Officers advanced toward a breezeway in the apartment complex and heard an apartment door slam shut.[3] The officers detected a strong odor of marijuana emanating

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[1] Kentucky v. King, 131 S. Ct. 1849, 1854 (2011).

[2] *Id.*

[3] *Id.* The Kentucky Supreme Court discarded the argument that "hot pursuit" justified the warrantless entry into the apartment by noting that "[a]n important element of the hot pursuit exception is the suspect's knowledge that he is, in fact, being pursued." King v. Commonwealth, 302 S.W.3d 649, 653–54 (Ky. 2010). The Kentucky Supreme Court stated that there was no evidence that the suspect knew he was being pursued. *Id.* at 653. The United States Supreme Court declined to answer the question of hot pursuit in this case. *See* King v. Commonwealth, 302 S.W.3d 649 (Ky. 2010), *cert. granted*, 131 S. Ct. 61 (Sept. 28, 2010) (No. 09–1272); Petition for Writ of Certiorari, 131 S. Ct. 61 (No. 09–1272).

from the apartment located in the back-left of the breezeway.[4] Because of the strength and location of the odor, police reasoned that the back-left apartment door had recently been opened.[5] One officer knocked loudly on it and announced his presence.[6] The officers heard movement from inside the apartment, which led them to believe that the suspect was about to destroy evidence.[7]

Instead of waiting to obtain a warrant, the officers forced entry into the apartment.[8] Inside, the police discovered Hollis King and two other individuals smoking marijuana, and a search revealed crack and powder cocaine in the apartment.[9] The officers, however, did not locate the suspected drug dealer they were chasing, as that suspect had hidden in the back-right breezeway apartment.[10] Despite entry into the wrong apartment, the officers arrested King and, subsequently, the presiding judge would not suppress the evidence from the warrantless entry and search.[11] King pled guilty to various drug offenses.[12]

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On September 26, 1994, police officers in Wisconsin were patrolling and broadly looking for what they believed to be vehicles used for drug trafficking.[13] They noticed a Honda Prelude with Florida license plates in the parking lot of a motel and decided to investigate the identity of the driver.[14] By running the license plates through a police computer system, the officers determined that the car belonged to a Mr. Solis, who had a criminal record and a suspended license.[15]

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

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* The officers kicked the door open and executed a protective sweep upon entry. *Id.* The protective sweep doctrine allows police officers to engage in a cursory search of the premises—thereby protecting the officers' safety—when they possess reasonable suspicion that the scene of arrest poses a danger. *See* Maryland v. Buie, 494 U.S. 325, 327 (1990).

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

[10] *Id.* at 1855.

[11] *Id.*

[12] *Id.* King entered a conditional guilty plea for the charges of drug trafficking in a controlled substance, possession of marijuana, and persistent felony offender (second degree), and received an eleven year prison sentence. *King*, 302 S.W.3d at 652.

[13] United States v. Jerez, 108 F.3d 684, 686 (7th Cir. 1997). Specifically, the officers were looking for "target vehicles," which are vans or two-door vehicles that have license plates from California, Texas, Florida, or Arizona. *Id.* The police consider these states to be "source states" for drug trafficking. *Id.*

[14] *Id.*

[15] *Id.* Solis was previously arrested for smuggling contraband into a jail. *Id.*

The officers returned that evening with the hope of getting Solis to consent to a search of his motel room.[16] At approximately 11 P.M., and proceeding without a warrant, the officers took turns knocking on the door but heard no noise from inside the room.[17] One of the officers stated "Police. Open up the door. We'd like to talk to you."[18] Another officer knocked on the room's window while the first continued knocking on the door.[19] Only after one-and-a-half to two minutes did the officers hear sound from within the room.[20]

The officer at the window used his flashlight to shine light between the drapes, where he saw an individual move underneath the covers of the bed.[21] Solis eventually opened the drapes and saw the officer at the window, who stated "Sheriff's Department. Can we talk to you? Would you open up the door?"[22] Solis shook his head in agreement and opened the door for the officers.[23] They displayed their police badges and asked if they could enter the room to talk to Solis.[24] Upon entry into the room, the officers noticed a marijuana cigarette and then asked if they could search the motel room.[25] Solis subsequently gestured that he would allow a search and the officers discovered large amounts of cocaine.[26] The district court denied Solis's motion to suppress and he pled guilty, reserving his right to appeal.[27]

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The police officers in these two cases, *Kentucky v. King* and *United States v. Jerez*, used the tactic of knocking on dwelling doors to gain entry.[28] While a police officer's knock on the door may not seem troubling on its face, this "knock and talk" technique is powerful and fre-

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[16] *Id.* at 686–87.
[17] *Id.* at 687.
[18] *Jerez*, 108 F.3d at 687.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Jerez*, 108 F.3d at 687.
[24] *Id.*
[25] *Id.* at 688.
[26] *Id.*
[27] *Id.* at 687. Solis had a counterpart staying with him at the hotel that also pled guilty. *Id.*
[28] *See King*, 131 S. Ct. at 1854; *Jerez*, 108 F.3d at 686–87. Even though the defendants in *Jerez* were in a motel room and not a home, the Supreme Court has held that the lawful occupant of a hotel room is protected from unreasonable searches and seizures, much like "a tenant of a house, or the occupant of a room in a boarding house . . . ." Stoner v. California, 376 U.S. 483, 490 (1964).

quently utilized.[29] As *King* and *Jerez* demonstrate, officers may search a dwelling without a warrant simply by knocking on the door and asking for permission.[30] The ease and effectiveness with which police officers can use knock and talk to conduct warrantless searches is making the technique more prevalent.[31]

King and *Jerez* have something else in common: the officers engaged in questionable policing to stop drug trafficking.[32] Both arrests occurred in areas associated with high levels of drug activity.[33] Appeals courts in both cases overturned the convictions due to the officers' Fourth Amendment right violations.[34] While these cases show the limits of knock and talk, they also demonstrate the methods police will employ to gain warrantless entry into a dwelling.[35] Normally, when consent is given or when police believe—using their own judgment—evidence is being destroyed, courts validate the dwelling's search without prior judicial review.[36]

This Note discusses two different uses for the knock and talk technique.[37] First, police can use knock and talk to search a dwelling be-

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[29] *See* Craig M. Bradley, *"Knock and Talk" and the Fourth Amendment*, 84 IND. L.J. 1099, 1099, 1104 (2009) (noting that, especially when combined with other police techniques such as plain view and search incident to arrest, "'knock and talk' is a powerful investigative technique."). For example, the *Orlando Weekly* reports that the Central Florida Orange County Sheriff's Office "alone performs an estimated 300 such [knock and talk] encounters each month on unsuspecting residents." William Dean Hinton, *Knock and Talk*, ORLANDO WKLY., Jan. 9, 2003, http://www2.orlandoweekly.com/features/story.asp?id=2940. There is an entire squad within the sheriff's office dedicated to carrying out knock and talks. *Id.*

[30] *See King*, 131 S. Ct. at 1854; *Jerez*, 108 F.3d at 687–88; Bradley, *supra* note 29, at 1099.

[31] *See* Bryan M. Abramoske, Note, *It Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations*, 41 SUFFOLK U. L. REV. 561, 564–65 (2008) (stating that "[i]n many cases, the person answering the door consents to a police search, which makes the procedure highly effective. Police have noted this effectiveness, leading to expanded use of the procedure.") (footnote omitted).

[32] *See King*, 131 S. Ct. at 1854; *Jerez*, 108 F.3d at 686–87; Bradley, *supra* note 29, at 1104.

[33] *See King*, 131 S. Ct. at 1854; *Jerez*, 108 F.3d at 686.

[34] *See King*, 131 S. Ct. at 1855; *Jerez*, 108 F.3d at 695–96.

[35] *See King*, 131 S. Ct. at 1854; *Jerez*, 108 F.3d at 686–87; Bradley, *supra* note 29, at 1104 (stating that, during knock and talks, "[o]nly when police have employed 'overbearing tactics,' such as 'drawn weapons, raised voices, or coercive demands,' have their actions been faulted") (emphasis omitted) (quoting United States v. Thomas, 430 F.3d 274, 277–78 (6th Cir. 2005) (quoting Nash v. United States, 117 F. App'x 992, 993 (2004) (*per curiam*), *vacated*, 544 U.S. 995 (2005))).

[36] *See* Bradley, *supra* note 29, at 1109–17; Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 212 (2001) ("Only if the police behave with some extreme degree of coercion beyond that inherent in the police-citizen confrontation will a court vitiate the consent.").

[37] *See* Bradley, *supra* note 29, at 1109–17. Professor Craig Bradley also discusses a third scenario, where police utilize knock and talk for the purpose of fulfilling an arrest warrant.

cause probable cause exists that a crime was, is, or will be committed.[38] This case invokes exigent circumstances—a recognized exception to the warrant requirement—to enter a dwelling when police believe evidence is being destroyed within.[39] Second, police may use knock and talk to convince a resident to consent to a search.[40] Once an individual consents, the search is deemed constitutional and any evidence discovered is admissible at trial.[41]

This Note focuses on the uses and potential abuses of knock and talk, particularly as it applies to individuals living in low income or high crime areas. Courts are allowing knock and talk to compromise privacy from intrusive police activity, even though "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ."[42] Specifically, this Note discusses the impact of pretext in law enforcement and how knock and talk can be easily used to target minorities without ex ante judicial review.[43]

Part I of this Note discusses the development of knock and talk by explaining the technique's implementation and its legal framework as

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Id. at 1117–22. While this Note focuses only on situations where police do not possess a warrant, issues of exigency and consent that can arise in Bradley's third scenario are discussed in Part III. *See id.*; *infra* Part III.A–B.

[38] *See King*, 131 S. Ct. at 1860 (discussing if and when police must halt an investigation to obtain a warrant in the face of sufficient probable cause); Bradley, *supra* note 29, at 1109; 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, 651 (2003) ("Probable cause is . . . universally required in destruction of evidence exigency cases . . .").

[39] *See* Schmerber v. California, 384 U.S. 757, 770–71 (1966) (holding the determination of appellant's intoxication level through blood testing constitutional when the delay necessary to obtain a warrant threatened the destruction of evidence). *Schmerber* was the first time the Supreme Court upheld "a warrantless search conducted to prevent the destruction of evidence." Sonntag, *supra* note 38, at 632. The actual standard for implementation of the destruction of evidence exigency exception has led to inconsistency among the Circuit Courts. *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, 288 (1988) (noting that the Circuits "do not evaluate claims of exigency in the same manner"); Sonntag, *supra* note 38, at 630.

[40] *See Jerez*, 108 F.3d at 686–87; H. Morley Swingle & Kevin M. Zoellner, *"Knock and Talk" Consent Searches: If Called by a Panther, Don't Anther*, 55 J. Mo. B. 25, 25 (1999) ("The typical 'knock and talk' simply involves police officers marching up to someone's front door, knocking, and requesting consent to search the home.").

[41] *See* Christo Lassiter, *Consent to Search by Ignorant People*, 39 Tex. Tech L. Rev. 1171, 1171 (2007) ("A consent search requires neither a warrant nor probable cause, and all evidence discovered may be seized pursuant to the plain view doctrine.").

[42] *See* United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972).

[43] *See* Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 Md. L. Rev. 261, 340 (2010) (arguing that "when police do not have to give reasons for discretionary searches or seizures, conscious and unconscious racism may prevail").

developed by the Supreme Court. Part II analyzes the impact of knock and talk on race-based policing and demonstrates that it can be used to harass and target minorities and the poor. Part III examines two problematic scenarios that knock and talk creates: consent searches and searches based on the destruction of evidence. Finally, Part IV suggests that knock and talk shames and humiliates community members, particularly when they are innocent, and breeds mistrust in police. Thus, knock and talk undermines community policing and ultimately works against the community's protection.

I. A Closer Look at Knock and Talk: How It Works and Why Police Find it Useful

Knock and talk is an effective policing technique where an officer knocks on a dwelling door to speak to an inhabitant, thereby gleaning useful information or receiving permission to search the premises.[44] While officers are not allowed to intrude into the home, the doctrine of curtilage allows police officers to approach a dwelling's door to ask questions.[45]

A. *How it Works: The Knock and Talk Technique*

Knock and talk is a technique where police officers, acting without a warrant and often without probable cause, knock on the door of a dwelling and ask for permission to search.[46] Police also use knock and talk to obtain information from the inhabitant through personally questioning them.[47] This technique can be used for any dwelling, from a rural single-family home to a crowded apartment complex in an inner city.[48]

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[44] *See* Bradley, *supra* note 29, at 1111; Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 Geo. Mason U. C.R. L.J. 297, 311–12; Strauss, *supra* note 36, at 211 n.2; Marc L. Waite, Note, *Reining in "Knock and Talk" Investigations: Using* Missouri v. Seibert *to Curtail an End-Run Around the Fourth Amendment*, 41 Val. U. L. Rev. 1335, 1338–39 (2007).

[45] *See* Oliver v. United States, 466 U.S. 170, 179 (1984); United States v. Cephas, 254 F.3d 488, 493–94 (4th Cir. 2001); United States v. Tobin, 923 F.2d 1506, 1511 (11th Cir. 1991); United States v. Hersh, 464 F.2d 228, 230, 232 (9th Cir. 1972); Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 474 (3rd ed. 2004).

[46] *See* Bradley, *supra* note 29, at 1111; Leonetti, *supra* note 44, at 311–12; Waite, *supra* note 44, at 1338–39.

[47] *See* Bradley, *supra* note 29, at 1104–05.

[48] *See* Leonetti, *supra* note 44, at 302–03, 311–13 (2005) (discussing the curtilage doctrine with respect to knock and talk in an urban setting, as compared to rural and suburban neighborhoods).

Police use the knock and talk technique because it is a simple and effective way of obtaining information.[49] A large number of individuals tend to agree to a search of their home.[50] An added benefit of knock and talk is that police can seize evidence or arrest inhabitants if drugs or other evidence of crime are in the officer's plain view.[51] The officer need only look past the inhabitant or through open windows and may do so without consent for a search.[52]

Knock and talk is effective when police believe they do not have the time or sufficient probable cause necessary to obtain a warrant but suspect that those inside are involved in illegal activity.[53] Therefore, officers find it an important tool in the arsenal of policing techniques.[54]

B. *The Legal Framework Surrounding Knock and Talk*

The home is an area where protection from police intrusion is at its apogee, even though other protections from police encounters tend to ebb and flow over time.[55] Courts repeatedly reinforce the notion that the home is a person's "castle."[56] Thus, police intrusions into the

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[49] *See* Bradley, *supra* note 29, at 1104 ("It is certainly appropriate for police to canvass a neighborhood following a crime to ascertain whether anyone has knowledge about the crime.").

[50] *See* Strauss, *supra* note 36, at 211 n.2 ("In case after case, students read about suspects who supposedly told the police without hesitation to 'go right ahead and search,' when incriminating evidence was obviously going to be discovered.").

[51] *See* Bradley, *supra* note 29, at 1104.

[52] *See id.*

[53] *See* Kentucky v. King, 131 S. Ct. 1849, 1855 (2011) (noting that one officer's testimony persuaded the circuit court judge that he had to enter an apartment without a warrant, where that officer had concluded the occupants were in the act of destroying drug evidence); Swingle & Zoellner, *supra* note 40, at 25–26 (noting that knock and talk allows searches without probable cause or a warrant).

[54] *See* Hinton, *supra* note 29 (noting the usefulness of knock and talk for the Orange County Sheriff's Office).

[55] *See* Lewis v. United States, 385 U.S. 206, 211 (1966) ("Without question, the home is accorded the full range of Fourth Amendment protections."); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974) ("For clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product.").

[56] *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 94 (1998) (Scalia, J., concurring) ("The people's protection against unreasonable search and seizure in their 'houses' was drawn from the English common-law maxim, 'A man's home is *his* castle.'"); Payton v. New York, 445 U.S. 573, 601 (1980) (acknowledging the Court's "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"); Boyd v. United States, 116 U.S. 616, 624–28 (1886) (noting that, regarding the history of the Fourth Amendment, the use of exploratory searches of the home was one of the primary reasons for the American revolution against British rule).

home implicate the protections against unreasonable searches and seizures provided by the Fourth Amendment.[57]

1. The Rise of Knock and Talk

While the phrase "knock and talk" did not appear in the lexicon before 1991, earlier cases indicate that its unrestricted use would not be permitted.[58] The issue arose in *Johnson v. United States*, a case with facts similar to those in *Kentucky v. King*.[59] In *Johnson*, a confidential informant told police officers that individuals were smoking opium in a hotel room.[60] The officers approached the door to the hotel room and detected a strong odor of opium.[61] After knocking on the door, a voice on the other side asked who was there and one of the officers identified himself as a lieutenant.[62] Johnson eventually opened the door and the lieutenant said "I want to talk to you a little bit," whereupon Johnson "stepped back acquiescently and admitted [them]."[63] After Johnson denied that there was an opium smell in the room, the officers placed her under arrest.[64] A subsequent search incident to arrest uncovered opium and drug paraphernalia—both pieces of evidence admitted against her at trial.[65]

The Supreme Court held Johnson's Fourth Amendment rights violated and, in doing so, made two points relevant to current knock

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[57] *See* LaFave, *supra* note 45, at 474 ("[The home] is . . . quite clearly a place as to which there exists a justified expectation of privacy against unreasonable intrusion.").

[58] *See* Johnson v. United States, 333 U.S. 10, 12–13, 16 (1948); Swingle & Zoellner, *supra* note 40, at 25 (stating that the phrase "knock and talk" calls for "nothing more than the application of well-established Fourth Amendment principles pertaining to consent searches").

[59] *See King*, 131 S. Ct. at 1854; *Johnson*, 333 U.S. at 12.

[60] *Johnson*, 333 U.S. at 12.

[61] *Id.* The odor of illegal drugs created probable cause in both the *King* and *Johnson* cases. *King*, 131 S. Ct. at 1862; *Johnson*, 333 U.S. at 12–13. The Supreme Court has held that the odor of illegal drugs alone can create probable cause that a crime is being committed. *Johnson*, 333 U.S. at 13 (noting that a magistrate must find that the officer who smelled the drugs was "qualified to know the odor, and [the odor] is one sufficiently distinctive to identify a forbidden substance . . ."); Taylor v. United States, 286 U.S. 1, 6 (1932). Merely dissipating odors, however, do not create a destruction of evidence exigency because they "were not capable at any time of being reduced to possession for presentation to court." *Johnson*, 333 U.S. at 15.

[62] *Johnson*, 333 U.S. at 12.

[63] *Id.*

[64] *Id.*

[65] *Id.*

and talk procedure.[66] First, the Court stated that Johnson granted entry to the officers "in submission to authority rather than as an understanding and intentional waiver of a constitutional right."[67] Second, the Court held that despite the odor of opium wafting outside the hotel room, the circumstances were not such that the officers were justified in entering the room without a warrant.[68] The Court stated that "[n]o reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate."[69] The Court continued, "[i]f the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."[70]

2. Shifting to a Reasonable Expectation of Privacy Standard

Since *Johnson*'s unfavorable treatment of knock and talk in 1948, the Supreme Court's conception of privacy began to shift from an emphasis on location to a personal right.[71] The most important decision for understanding Fourth Amendment searches is the 1967 case of *Katz v. United States.*[72] In *Katz*, FBI agents had investigated Katz for possible involvement in an illegal gambling operation.[73] Without a warrant,

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[66] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."); *Johnson*, 333 U.S. at 16–17; Bradley, *supra* note 29, at 1103; David John Housholder, Note, *Reconciling Consent Searches and Fourth Amendment Jurisprudence: Incorporating Privacy into the Test for Valid Consent Searches*, 58 VAND. L. REV. 1279, 1289, 1291–94 (2005) (discussing the voluntariness requirement in granting consent for officers to search).

[67] *Johnson*, 333 U.S. at 13.

[68] *Id.* at 12, 14–15. The court stated that such justifying circumstances might include the likelihood of flight and the destruction or removal of evidence. *Id.* at 15. The court also noted that the search was of a permanent location, and not a vehicle. *Id.*

[69] *Id.*

[70] *Id.*

[71] *See id.* at 10–15; Bradley, *supra* note 29, at 1099 ("[W]hat was essentially a 'knock and talk' was considered and disapproved of in the often quoted, but no longer fully adhered to, 1948 case of *Johnson v. United States.*"); *see, e.g.,* Katz v. United States, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places."); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.") (citation omitted).

[72] *See* 389 U.S. at 347; Amsterdam, *supra* note 55, at 383. Amsterdam acknowledged the "extraordinary character and implications" of *Katz* when he stated that "[t]he case is, of course, now generally recognized as seminal and has rapidly become the basis of a new formula of fourth amendment coverage." *See* Amsterdam, *supra* note 55, at 383.

[73] *Katz*, 389 U.S. at 348, 356–57.

agents placed an electronic listening device on the outside of a public phone booth to listen to Katz's conversation within.[74] The agents intercepted communications regarding violations of a federal gambling statute, evidence that ultimately led to Katz's conviction.[75]

In overturning his conviction, the Supreme Court began to shift away from the common law test in *Johnson* that relied on physical trespass to determine whether a search occurred.[76] The *Katz* majority held that a warrantless, non-physical intrusion of a listening device into a public phone booth violates the Fourth Amendment freedom from unreasonable searches and seizures.[77] Justice Harlan's concurring opinion dictates the modern test, which states that the "understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[78] Thus, the analysis is both subjective and objective: did the particular person actually have an expectation of privacy, and if so, will society recognize that expectation as reasonable?[79]

3. The Curtilage Doctrine

The *Katz* mode of analysis continued to gain acceptance as the Supreme Court clarified its Fourth Amendment jurisprudence in *Oliver v. United States*.[80] Previously, the Court had held that "open fields"—property owned by an individual that is not the house—were not pro-

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[74] *Id.* at 348.

[75] *Id.*

[76] *See id.* at 353, 359; Housholder, *supra* note 66, at 1281–82 (discussing that courts prior to *Katz* focused on the presence or absence of physical entry onto property to determine Fourth Amendment violations).

[77] *See Katz*, 389 U.S. at 348–49, 359. The majority also noted that the attempt to narrowly tailor the recording to capture only Katz's conversation did not justify the warrantless search, despite the fact that a magistrate would have likely authorized it. *Id.* at 354, 356.

[78] *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *see* Housholder, *supra* note 66, at 1283.

[79] *See Katz*, 389 U.S. at 361 (Harlan, J., concurring); Robert M. Bloom, Searches, Seizures, and Warrants: A Reference Guide to the United States Constitution 46 (2003) (arguing that "'reasonable' has largely come to mean what a majority of Supreme Court Justices says is reasonable"); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted By Society,"* 42 Duke L.J. 727, 731 (1993) (empirically analyzing society's understanding of reasonableness with respect to expectations of privacy).

[80] 466 U.S. at 173.

tected by the Fourth Amendment.[81] The Court reaffirmed the open fields doctrine in *Oliver*, stating that the "expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'"[82] They emphasized the difference between open fields and curtilage, which is the "land immediately surrounding and associated with the home."[83] People have a reasonable expectation of privacy in the curtilage surrounding their dwellings, and therefore, Fourth Amendment protection applies.[84]

Knock and talk often requires police officers to walk through the curtilage of a dwelling to knock on the door.[85] Despite the Fourth Amendment protection for curtilage, the Circuit Courts of Appeals generally allow police to approach a dwelling, cross through the curtilage, and knock on the door without a warrant.[86] For example, in *Davis v. United States*, the Ninth Circuit stated:

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.[87]

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[81] *See* Hester v. United States, 265 U.S. 57, 57, 59 (1924). The Court stated that "[t]he distinction between the [open fields] and the house is as old as the common law." *Id.* at 59.

[82] *Oliver*, 466 U.S. at 179. The Court defined the term "open fields" as "any unoccupied or undeveloped area outside of the curtilage." *Id.* at 180 n.11.

[83] *Id.* at 180.

[84] *Id.* The Supreme Court clarified which portion of the property constitutes curtilage for Fourth Amendment purposes in *United States v. Dunn*, which applied the following four factors: the area's proximity to the home, whether it is included within an enclosure surrounding the home, its nature of use, and the steps taken by the resident to protect the area from public observation. *See* 480 U.S. 294, 301 (1987); *see also* Bloom, *supra* note 79, at 49 (stating that "[i]n the area just outside the home, called the *curtilage*, there is at least some expectation of privacy and therefore some Fourth Amendment protection").

[85] *See* Vanessa Rownaghi, Note, *Driving into Unreasonableness: The Driveway, the Curtilage, and Reasonable Expectations of Privacy*, 11 Am. U. J. Gender Soc. Pol'y & L. 1165, 1166 (2003) (stating that "[w]idespread acceptance of the 'knock and talk' and plain view doctrines uniquely impacts a home occupant's privacy right in the driveway."); Swingle & Zoellner, *supra* note 40, at 25.

[86] *See Oliver*, 466 U.S. at 179; *Cephas*, 254 F.3d at 493–94; *Tobin*, 923 F.2d at 1511; *Hersh*, 464 F.2d at 230, 232.

[87] 327 F.2d 301, 303 (1964); *see Cephas*, 254 F.3d at 493–94; *Tobin*, 923 F.2d at 1511; *Hersh*, 464 F.2d at 230. Though *Davis* came down before *Katz*, courts have continuously upheld as constitutional the act of crossing through curtilage and knocking on a door to

Thus, police may constitutionally approach a house, knock on the door, and question the residents inside.[88] Nevertheless, this doctrine does not grant officers free reign to practice all aspects of policing within the curtilage.[89] Generally, when police leave a path of access and move toward a dwelling's entrance, some observations into that dwelling may constitute a search.[90] The curtilage therefore serves as a buffer where a reasonable expectation of privacy exists and police do not have free reign to engage in investigatory activities.[91]

II. Race, Place, and Income: How Poverty and Race Affect Conceptions of Privacy

The curtilage doctrine may not be fair to minorities or those living in poverty because, though "on the face of it, the criminal law is color-blind and class-blind . . . , this only makes the problem worse."[92] Race and class are important factors in a Fourth Amendment analysis because courts often note when police officers operate in high-crime neighborhoods.[93] Officers often use the neighborhood crime level as a major justification for reasonable suspicion when making stops or

question residents. *See Katz*, 389 U.S. at 347; *Davis*, 327 F.2d at 301; *see, e.g.*, *Cephas*, 254 F.3d at 493–94 (citing *Davis*); *Tobin*, 923 F.2d at 1511 (citing *Davis*); *Hersh*, 464 F.2d at 230 (citing *Davis*).

[88] *See* LaFave, *supra* note 45, at 482–84; Rownaghi, *supra* note 85, at 1173–74 ("The 'knock and talk' doctrine is founded on the view that it is never objectionable for an officer to enter private property, which is presumably open to public use.").

[89] *See* LaFave, *supra* note 45, at 485–87.

[90] *See* Lorenzana v. Superior Court, 511 P.2d 33, 39–41 (Cal. 1973) (holding that observation into a dwelling was an unlawful search when police crossed a "six-foot-wide strip of property immediately adjacent to the window through which the observations were made . . ."); Olivera v. State, 315 So.2d 487, 488, 491 (Fla. Dist. Ct. App. 1975) (holding that observation of bedroom was a search when the police officer "left the sidewalk and walked across some grass.").

[91] *See* LaFave, *supra* note 45, at 485–87; Rownaghi, *supra* note 85, at 1165–66.

[92] David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 8 (1999).

[93] *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 121 (2000) (mentioning "an area known for heavy narcotics trafficking"); *see also* Andrew Guthrie Ferguson & Damien Bernache, *The "High Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 Am. U. L. Rev. 1587, 1589 (2008) ("[T]he Supreme Court of the United States has considered the character of the neighborhood to be one factor in finding 'reasonable suspicion' to stop someone.") (footnote omitted). Ferguson and Bernache argue that courts are inconsistent in defining what a "high crime area" is and that most jurisdictions simply rely on an officer's statement that the area was indeed "high crime" without any empirical evidence. *See* Ferguson & Bernache, *supra*, at 1607–09.

searches.[94] In fact, the Supreme Court held that the sole act of running away unprovoked from the police in a high crime neighborhood can justify a *Terry* stop.[95]

High crime neighborhoods may be poorer and less able to support jobs and infrastructure than the average community.[96] They also have a greater racial disparity, as "African Americans and Hispanic Americans make up almost all of the population in most of the neighborhoods the police regard as high crime areas."[97] Officers often refer to the policing of high-crime neighborhoods as "Quality of Life Policing."[98]

A. *The Low Income, High-Crime Neighborhood: Difficulties with the Curtilage Doctrine*

The curtilage doctrine, as developed in *Oliver v. United States* and *United States v. Dunn*, is understood differently in the context of urban living.[99] For example, inner cities—areas that are prone to becoming high crime neighborhoods—are often inhabited by poor individuals and members of racial minorities.[100] Most of these individuals live in

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[94] *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (holding that a police officer can stop and frisk an individual to engage in a limited search for weapons based on reasonable suspicion); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 660 (1994) (discussing location in a high crime area and movement away from police as the two most important factors in justifying a *Terry* stop). After the *Terry* decision, Amsterdam noted that "[u]nless one takes a very middle-class white view of life, here is a practice that cries out for some sort of fourth amendment regulation." Amsterdam, *supra* note 55, at 405 (footnote omitted).

[95] *See Wardlow*, 528 U.S. at 124–25. The Supreme Court intended *Terry* to allow a limited seizure and frisk for weapons "for the protection of [the officer] and others in the area . . . in an attempt to discover weapons which might be used to assault him." *See Terry*, 392 U.S. at 30.

[96] *See* Harris, *supra* note 94, at 677.

[97] *See id.* at 677–78.

[98] *See* Cole, *supra* note 92, at 44–46; *see also* David A. Harris, Profiles in Injustice: Why Racial Profiling Cannot Work 24–26, 48–49 (2002) (discussing the emergence of racial profiling from the "broken windows" theory of quality of life policing). Malcolm Gladwell discusses in detail the broken windows theory of crime, which proposes that "crime is the inevitable result of disorder." Malcolm Gladwell, The Tipping Point: How Little Things Can Make a Big Difference 141 (2002). "If a window is broken and left unrepaired, people walking by will conclude that no one cares and no one is in charge." *Id.* Gladwell argues that "crime is contagious—just as a fashion trend is contagious—that it can start with a broken window and spread to an entire community." *See id.* Gladwell discusses New York City Police Commissioner William J. Bratton's strategy to "crack down on quality-of-life crimes," stating that "[m]inor, seemingly insignificant quality-of-life crimes . . . were Tipping Points for violent crime." *See id.* at 146.

[99] *See* United States v. Dunn, 480 U.S. 294, 301 (1987); Oliver v. United States, 466 U.S. 170, 177–78 (1984); Leonetti, *supra* note 44, at 311, 318–19.

[100] *See* Harris, *supra* note 94, at 677–78.

multi-occupant dwellings, where living quarters are shared with other individuals or families.[101] In addition, buildings are often located close to public or other private property, where the curtilage does not extend.[102]

The curtilage doctrine sometimes affords little protection to apartment dwellers because courts are split as to whether one has a reasonable expectation of privacy in an apartment building's common spaces.[103] Depending on the jurisdiction, an apartment dweller's Fourth Amendment protection may only extend to the unit's door and not beyond.[104] The Supreme Court has recognized that apartment dwellers have a reasonable expectation of privacy within their units.[105] A landlord or building owner cannot permit police to search an individual unit without the inhabitant's consent.[106] Thus, the curtilage doctrine seems to grant little protection to apartment dwellers because they cannot exclude others from common spaces outside of the unit.[107] Carrie Leonetti aptly demonstrates the problem: two roommates sharing a unit in an apartment building may exclude each other from their respective bedrooms but not from shared common areas.[108] The fact that the roommates share common areas, however, does not mean that a police officer can search the common areas without a warrant.[109]

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[101] *See* Leonetti, *supra* note 44, at 310, 318–19.

[102] *See* LaFave, *supra* note 45, at 483–87 (discussing the various doctrinal problems of multi-unit dwellings and the expectation of privacy entitled therein).

[103] *See* McDonald v. United States, 335 U.S. 451, 454 (1948); LaFave, *supra* note 45, at 488–89, 492 ("It is not a search for an officer to look into an apartment while in a common passageway or other common area of the apartment complex, or to listen from an adjoining apartment."); Leonetti, *supra* note 44, at 317–19. *Compare* United States v. Nohara, 3 F.3d 1239, 1240–41 (9th Cir. 1993) (finding no reasonable expectation of privacy in the hallway of an apartment building), *with* United States v. Carriger, 541 F.2d 545, 547 (6th Cir. 1976) (finding a reasonable expectation of privacy in the hallway of a locked apartment building). *McDonald* would probably have a different outcome if the landlady had legally admitted police into the common space of the house where the suspects had rented a room. *See* LaFave, *supra* note 45, at 492.

[104] *See* Leonetti, *supra* note 44, at 310; Sean M. Lewis, Note, *The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?*, 101 Mich. L. Rev. 273, 274–75, 298–300 (2002) (noting that only the Sixth Circuit guarantees a privacy right to a tenant in the locked areas of an apartment building that are common to all residents of that building).

[105] *See* Miller v. United States, 357 U.S. 301, 303, 313–14 (1958).

[106] *See* Stoner v. California, 376 U.S. 483, 489 (1964); Chapman v. United States, 365 U.S. 610, 610–12, 618 (1961).

[107] *See* LaFave, *supra* note 45, at 488–89.

[108] *See* Leonetti, *supra* note 44, at 316.

[109] *See id.*

There are two reasons why knock and talk is easier to implement in an apartment complex compared to a single family home.[110] First, when police are legally in an apartment complex—investigating a different crime, for example—any unit within the building is subject to knock and talk.[111] Second, a landlord may permit entry into otherwise protected common spaces.[112] Neither of these circumstances exists for single-family homes.[113]

B. *Power and Pretext: The Legacy of* Whren v. United States

In *Whren v. United States*, plainclothes police officers in an unmarked car were patrolling a "high drug area" of Washington D.C.[114] They noticed a Nissan Pathfinder stopped at a stop sign for more than twenty seconds.[115] When the officers performed a u-turn and drove toward the Pathfinder, the vehicle turned to the right without signaling and drove off at an "unreasonable" speed.[116] The officers caught up with the Pathfinder and one officer approached on foot as it waited at a traffic light.[117] The officer saw bags in plain view, filled with what he believed to be crack cocaine, and arrested the occupants.[118]

On appeal to the Supreme Court, the vehicle occupants argued that the police officers stopped them for the pretextual reason of race and not for a traffic violation.[119] Writing for a unanimous Court, Justice Scalia rejected this argument, holding that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[120] The Court also stated that challenges to discriminatory police practices must be made using the Equal Protection Clause and not the Fourth

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[110] *See id.* at 310–11, 319–20.

[111] *See id.* at 314. Such investigations may include the use of a drug sniffing dog near an adjacent apartment. *See id.*

[112] *See* LaFave, *supra* note 45, at 778 ("[E]ven where the tenant has exclusive possession of a certain room or set of rooms, the landlord may nonetheless allow a search of other parts of the building, such as a common passageway . . . or a storage area shared by the several tenants or by the landlord and tenant.").

[113] *See* Kentucky v. King, 131 S. Ct. 1849, 1854 (2011); United States v. Kelly, 551 F.2d 760, 764 (8th Cir. 1977) (holding that an apartment manager could consent to the search of common areas in the apartment building); Lewis, *supra* note 104, at 298–300 (noting that residents of private homes enjoy greater protection than residents of multi-unit apartment buildings).

[114] Whren v. United States, 517 U.S. 806, 808 (1996).

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 808–09.

[119] *See Whren*, 517 U.S. at 810–11.

[120] *Id.* at 813.

Amendment.[121] Before 1996, Police may have been knocking on the door of pretextual policing, but *Whren* kicked the door wide open.[122]

Whren makes challenges to knock and talk difficult when it is used to target low income and minority individuals.[123] This is because its legacy has spread beyond the pretextual stop and "deems officers' motivations constitutionally irrelevant in search and seizure decisions."[124] Therefore, implicit targeting of racial minorities and the poor through quality of life policing is considered constitutional.[125]

Whren creates difficulty for defendants looking to prove subjective discrimination because they must do so under the Equal Protection Clause.[126] This is a difficult task in light of *McCleskey v. Kemp*, where the Supreme Court rejected a statistically objective Equal Protection challenge to the death penalty.[127] In *McCleskey*, the Court rejected evidence demonstrating that the death penalty is disproportionately applied to African American convicts as merely a correlation between punishment and race.[128] Thus, "only evidence of racial animus of the most direct nature in the defendant's own case could prove an equal protection violation . . . ."[129] Therefore, absent a direct admission of racial bias, *Whren* and *McCleskey* foreclose proof of an officer's racial animus.[130]

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[121] *See id.*

[122] *See id.*; *see also* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 225–30 (1983) (discussing the police's use of race in determining probable cause or reasonable suspicion).

[123] *See Whren*, 517 U.S. at 813; David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 553–54 (1997); Harris, *supra* note 94, at 677–78.

[124] *See* Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 465 (2002).

[125] *See Whren*, 517 U.S. at 813; COLE, *supra* note 92, at 40 (the *Whren* standard "frees a police officer to target members of minority groups for selective enforcement") (quoting United States v. Dotero-Ospina, 71 F.3d 783, 790 (10th Cir. 1995) (en banc) (Seymour, J., dissenting)); Harris, *supra* note 94, at 677–78. Professor David Cole also notes that "'consent' searches, pretextual traffic stops, and 'quality of life' policing are all disproportionately used against black citizens." COLE, *supra* note 92, at 8; *see also* Peter A. Lyle, Note, *Racial Profiling and the Fourth Amendment: Applying the Minority Victim Perspective to Ensure Equal Protection Under the Law*, 21 B.C. THIRD WORLD L.J. 243, 247 (2001) (discussing courts' unresponsiveness to the concerns of African-Americans during searches and seizures by police, particularly allegations of discriminatory intent behind racial profiling techniques).

[126] *See Whren*, 517 U.S. at 813; Harris, *supra* note 123, at 677–78.

[127] *See* 481 U.S. 279, 319 (1987).

[128] *See id.* at 286–87, 312.

[129] *See* Harris, *supra* note 123, at 552.

[130] *See Whren*, 517 U.S. at 813; Harris, *supra* note 123, at 550, 552.

III. Knock and Talk and the Diminishment of Privacy

The standard for waiver of citizens' rights to be "secure in their . . . houses . . . against unreasonable searches and seizures" is lower than that for waiver of other constitutionally protected rights.[131] Courts maintain a low threshold for what constitutes voluntary consent to a search regardless of compelling circumstances, and instead look to police misconduct to determine voluntariness.[132] Even though the Supreme Court recognized the inherent coercive nature of custodial questioning and instituted the *Miranda* warning, no such warning is required in knock and talk practice.[133] Instead, officers may conduct a knock and talk and even enter the dwelling without a warrant if exigent circumstances—like the impending destruction of evidence—exist.[134] The very fact, however, that the police are at the front door will, in some situations, create the destruction of evidence exigency that allows the officers to enter.[135] Furthermore, the Supreme Court held in *Kentucky v. King* that police are incapable of creating exigent circumstances when engaging in legal police activity.[136]

A. *Knock and Talk and the Consent Search*

Law enforcement officers prefer to receive consent to search because "[i]t is certainly easier to obtain consent from an intimidated, ignorant citizen than to obtain the requisite level of individualized suspicion necessary to justify a search."[137] Once consent is granted, police can legally search without a warrant, reasonable suspicion, or probable cause.[138] This Fourth Amendment right, however, is not always waived when an individual consents to a search.[139]

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[131] *See* U.S. Const. amend. IV; Lassiter, *supra* note 41, at 1174–77.

[132] *See* Strauss, *supra* note 36, at 222–25.

[133] *See* Miranda v. Arizona, 384 U.S. 436, 468–69 (1966); Bradley, *supra* note 29, at 1127.

[134] *See* Sonntag, *supra* note 38, at 629.

[135] *See* Bradley, *supra* note 29, at 1099 ("Under 'knock and talk,' police go to people's residences, with or without probable cause, and knock on the door to obtain plain views of the interior of the house, to question the residents, to seek consent to search, and/or to arrest without a warrant, often based on what they discover during the 'knock and talk.'").

[136] *See* Kentucky v. King, 131 S. Ct. 1849, 1862 (2011).

[137] *See* Lassiter, *supra* note 41, at 1172.

[138] *See* Bloom, *supra* note 79, at 113; LaFave, *supra* note 45, at 596, 599.

[139] *See* Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 Wash. U.L.Q. 175, 176 (1991).

Normally, the standard for waiver of a constitutionally protected right is very high.[140] The Supreme Court set the standard in *Johnson v. Zerbst*, defining waiver as "ordinarily an intentional relinquishment or abandonment of a known right or privilege."[141] In the seminal case of *Schneckloth v. Bustamonte*, however, this standard changed for consent searches.[142] In *Schneckloth*, the police asked to search a vehicle, received consent, and discovered evidence used to convict the defendants.[143] The district court denied a writ of habeas corpus, but the Ninth Circuit Court of Appeals reversed, requiring proof of (1) uncoerced consent, and (2) that the respondent knew consent could be "freely and effectively withheld."[144] The Supreme Court, however, reversed, stating that "the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[145]

Therefore, an individual's knowledge of the right to withhold consent is not dispositive of the voluntariness of the consent granted.[146] Officers need not inform individuals of their right to refuse consent because it is impractical and hampers the effectiveness of investigations.[147] Thus, the Supreme Court distinguished waiver of a Fourth Amendment right to be free from unreasonable searches and seizures from other rights afforded to defendants in criminal actions because of "the context of the safeguards of a fair criminal trial."[148]

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[140] *See id.* at 1174–75 (comparing the higher standard for waiver with the lower standard for voluntariness).

[141] 304 U.S. 458, 464 (1938). This case, however, dealt with the question of waiver of a Sixth Amendment right. *Id.* at 459.

[142] *See* 412 U.S. 218, 227–33 (1973); *see also* LaFave, *supra* note 45, at 608 (stating that *Schneckloth* is "the Supreme Court's most detailed examination of the theoretical basis of the consent search concept . . .").

[143] *See Schneckloth*, 412 U.S. at 220–21. The California Court of Appeals for the First Appellate District affirmed the conviction and the Supreme Court of California denied review. *See id.* Even though the Court acknowledged the special protection of the home given by the Fourth Amendment, the *Schneckloth* doctrine allows for searches of the home with the same ease as for vehicles and other locations. *See* Bradley, *supra* note 29, at 1112–13 ("The lower courts have generally approved the practice of avoiding warrant and/or probable cause requirements through 'knock and talk' consents.").

[144] *Schneckloth*, 412 U.S. at 221–22.

[145] *Id.* at 226. Some of the other factors that the Court cited were "youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." *Id.* (citations omitted).

[146] *See id.* at 227.

[147] *See id.* at 231–32.

[148] *Id.* at 235.

B. *Criticism of the* Schneckloth *Doctrine: Lower Standards for Higher Stakes*

Scholars have criticized the *Schneckloth* doctrine for two reasons.[149] First, the standard of waiver—not requiring informed consent—is lower for searches and seizures than for other constitutionally-protected rights.[150] Second, the courts have rarely engaged in detailed analysis as to whether the government met its burden to prove the lowered standard of waiver.[151]

1. A Lower Standard of Waiver

Scholars question why the right "against unreasonable searches and seizures" has a lower standard of waiver than other constitutionally-protected rights, like the right to a jury trial or the privilege against self-incrimination.[152] The higher standard applies when the accused already has an attorney's advice, but the lower standard is used when consenting to searches without any legal guidance.[153] Thus, the lower standard allows individuals to unwittingly or unknowingly waive their Fourth Amendment rights.[154]

Citizens will often waive their Fourth Amendment rights when confronted by an armed and authoritative representative of the State.[155] Few legitimate reasons exist for a person engaged in illegal

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[149] *See, e.g.*, Michael J. Friedman, *Another Stab at* Schneckloth*: The Problem of Limited Consent Searches and Plain View Searches*, 89 J. Crim. L. & Criminology 313, 346 (1998) ("The current law of limited consent searches and plain view seizures combines to create a wide avenue for police to gain entry by substituting deceit for probable cause."); Lassiter, *supra* note 41, at 1180 ("Since *Schneckloth v. Bustamonte*, issues of racial profiling, recognition of inherent power imbalance, and concerns about erosion of Fourth Amendment protections have fueled a continuing analysis in evaluating the police-citizen confrontations."); Strauss, *supra* note 36, at 235 ("In sum, the voluntariness standard in *Schneckloth* has led to confusion at best and inadequate protection for suspects' Fourth Amendment rights at worst. It is poorly understood, and in practice, the subjective factors emphasized in *Schneckloth* are often ignored or minimized.").

[150] *See* U.S. Const. amend. IV; Lassiter, *supra* note 41, at 1174–77.

[151] *See Schneckloth*, 412 U.S. at 230; Strauss, *supra* note 36, at 221–22.

[152] U.S. Const. amend. IV; *see* Lassiter, *supra* note 41, at 1174–77 (explaining the reasons for a higher standard for rights necessary to guarantee a fair trial, but criticizing the test for consent).

[153] *See* Halbert v. Michigan, 545 U.S. 605, 609–10 (2005) (holding that defendant could not waive his right to counsel for appeal when pleading nolo contendere); United States v. Jerez, 108 F.3d 684, 686–88 (7th Cir. 1997); Lassiter, *supra* note 41, at 1175.

[154] *See* Lassiter, *supra* note 41, at 1175.

[155] *See id.* at 1175–77, 1189. Christo Lassiter cited *State v. Brown*, a Supreme Court of Arkansas case in which the court stated that "[i]t is the intimidation effect of multiple police officers appearing at a home dweller's doorstep, sometimes in uniform and armed, and requesting consent to search without advising the home dweller of his or her right to

activity to consent to being searched.[156] Even innocent suspects have little reason to consent, aside from demonstrating that they have nothing to hide, especially in inner cities where residents may take a negative view toward the police.[157]

2. Lack of Consent and Police Misconduct

Courts rarely engage in detailed analyses of whether the government meets its burden to prove a suspect's consent.[158] In a three-year study of courts deciding consent issues, there were "only a handful of cases—out of hundreds of decisions—in which the court analyzed the suspect's particular subjective factors."[159] An even smaller fraction of the cases found that the suspect did not consent.[160] Courts have found voluntary consent even in cases where the subjective factors would seem compelling, like low I.Q. or poor command of the English language.[161]

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refuse consent that presents the constitutional problem." *Id.* at 1189 (quoting State v. Brown, 156 S.W.3d 722, 726 (Ark. 2004)). Justice Marshall expressed concerns about this inherently coercive interaction in his dissenting opinion in *Florida v. Bostick*. *See* 501 U.S. 429,446 (1991) (Marshall, J., dissenting). In his dissent, Justice Marshall quoted a Florida court, that held "[t]he spectre of American citizens being asked, by badge-wielding police, for identification, travel papers—in short a *raison d'etre*—is foreign to *any* fair reading of the Constitution, and its guarantee of human liberties." *Id.* at 443 (quoting Bostick v. State, 554 So. 2d 1153, 1158 (Fla. 1989) (quoting State v. Kerwick, 512 So. 2d 347, 348–49 (Fla. App. 1987) (quoting trial court order))). *Bostick* involved a suspicionless consent search on an interstate bus, where the officers wore bright green "raid" jackets and visibly displayed their badges—one officer even held a gun in a weapons pouch—while blocking the aisle that would have allowed Bostick to exit the bus. *Id.* at 444, 446.

[156] *See* Lassiter, *supra* note 41, at 1177. Lassiter suggests some plausible reasons:

> (1) a desire to be exposed as a first step toward forgiveness and rehabilitation; (2) a desire to expose the wrongdoings of associates, relatives, and others in shared spaces; (3) a desire to avoid further suspicion and delay; and (4) perhaps, at some level, a forlorn sense of informal de facto plea bargaining with the law enforcement officer.

Id.; *see also* Cole, *supra* note 92, at 19 (stating in its discussion of *Bostick* that "no 'reasonable person' would agree to a search of a bag that contained a pound of cocaine if he really believed he was free to say no without adverse consequences"); Strauss, *supra* note 36, at 239 (stating that when individuals consent to a search, they have "so much to lose personally by conceding to the officer.").

[157] *See* David T. McTaggart, *Reciprocity on the Streets: Reflections on the Fourth Amendment and the Duty to Cooperate with the Police*, 76 N.Y.U. L. Rev. 1233, 1234 (2001) ("Widespread abuse of police discretion has polarized the relationship between police and residents of urban communities, leaving each entity to regard the other with distrust and suspicion.").

[158] *See Schneckloth*, 412 U.S. at 230; Strauss, *supra* note 36, at 221–22.

[159] *See* Strauss, *supra* note 36, at 222.

[160] *See id.*

[161] *See id.* at 222–24. Strauss discussed *United States v. Hall*, where the suspect's I.Q. of 76 and psychological problems did not invalidate his ability to consent. *See* 969 F.2d 1102,

In the few cases where consent was not voluntary, courts eschewed subjective knowledge and focused instead on police misconduct.[162]

C. *Two Fourth Amendments: Coercion versus Confidence*

The *Schneckloth* consent doctrine instituted a system where police may exploit a citizen's ignorance of constitutional rights.[163] This "creates two Fourth Amendments—one for people who are aware of their right to say no and confident enough to assert that right against a police officer, and another for those who do not know their rights or are afraid to assert them."[164] Even after consent is refused, police officers may be able to convince suspects to change their minds.[165]

There are two diverging perspectives regarding the nature of consent to search: some see the request as an honest appeal but others regard it as a demand where choice is illusory.[166] The Supreme Court regards an officer and suspect's interaction on equal terms: if the individual wishes to terminate the encounter, then the officer will oblige.[167] Individuals met with requests for a search, however, often regard them as commands, where the individual's ability to terminate the

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1102, 1108 (D.C. Cir. 1992); Strauss, *supra* note 36, at 222–24. She also discussed *Semelis v. State*, where the suspect's illiteracy and serious problems understanding English were not sufficient to overturn a finding of voluntary consent. *See* 493 S.E.2d 17, 20 (Ga. Ct. App. 1997); Strauss, *supra* note 36, at 222 n.37.

[162] *See* Strauss, *supra* note 36, at 225. Police misconduct includes "threats to the suspect or his family, deprivation of necessities until the suspect consents, asserting an absolute right to search, and an unusual and extreme show of force." *Id.*

[163] *See* Lassiter, *supra* note 41, at 1177–80. Lassiter notes that "[p]olice officers are trained to exude confidence and command encounters lest they spiral out of control. Still, the most important factor in gaining consent is the cocksureness in asking for consent when no other option is apparent." *Id.* at 1177.

[164] Cole, *supra* note 92, at 31.

[165] *See* Bradley, *supra* note 29, at 1112 ("Even if police are initially refused consent, they can often cajole the homeowner into giving it.").

[166] *Compare* Florida v. Royer, 460 U.S. 491, 497–98 (1983) (holding that a "person approached [by police] . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way"), *with* Strauss, *supra* note 36, at 240–41 (noting that most people interpret requests as demands, particularly when requests are made by authority figures).

[167] *See* Housholder, *supra* note 66, at 1303–04 (discussing validation of the consent search as being grounded in notions of autonomy of the individual, and "even an ill-advised or foolish decision would have to be honored, in order to fully respect the individual."); *see, e.g., Royer*, 460 U.S. at 497–98; *Schneckloth* 412 U.S. at 232 ("It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.") (quoting *Miranda*, 384 U.S. at 477–78).

encounter is purely illusory.[168] Courts have expressed a hesitance to recognize an encounter's inherently coercive nature even in knock and talk instances in constitutionally protected dwellings.[169]

For many individuals, the mere presence of an armed and uniformed police officer at their doorstep is coercive, particularly because many do not know the constitutional limits of law enforcement.[170] Studies show that "man's innate tendency to obey authority can impair his decision making and, ultimately, dull the understanding with which he exercises his constitutional rights."[171] For example, Stanley Milgram's *Behavioral Study of Obedience* demonstrated the willingness of individuals to obey instructions inconsistent with their own moral beliefs simply because they came, without physical threat, from an authority figure.[172] Thus, requests to search homes are likely coercive because police officers have authority and, perhaps unintentionally, implicitly display means to enforce that authority.[173] Psychological findings like Milgram's "cast[] serious doubt [on the Supreme Court's stance] . . . that

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[168] *See* Strauss, *supra* note 36, at 240–41. For example, Strauss states that "if a police officer came up to a person about to park his car and said, 'Would you mind moving your car?', most persons would do so, believing that they *had* to move their car." *See id.* at 241; *see also* Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 249–50 (1991) ("Common sense teaches that most of us do not have the chutzpuh or stupidity to tell a police officer to 'get lost' after he has stopped us and asked for identification or questioned us about possible criminal conduct.").

[169] *See* United States v. Dickerson, 975 F.2d 1245, 1247, 1249 (7th Cir. 1992) (holding that consent to search home was voluntary when four police officers knocked loudly on its front door with their guns drawn and one officer stuck his foot in the door when an inhabitant of the dwelling opened it slightly); Adrian J. Barrio, *Rethinking* Schneckloth v. Bustamonte*: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 228 (discussing the presumption that non-custody of a suspect implies lack of coercion to necessitate a *Miranda* warning).

[170] *See* COLE, *supra* note 92, at 34; Lassiter, *supra* note 41, at 1189–91. Cole also questions whether the ability to say no to a police request for consent is a choice at all for African-Americans and Hispanics, where fear of violent retaliation is a real concern. *See* COLE, *supra* note 92, at 33–34. In light of this, Tracey Maclin notes that "[a]n understandable and rational response . . . would be for black men to decline to cooperate and to question the officer's right to conduct [a] stop." Maclin, *supra* note 168, at 261–62. He recognizes, however, that "[t]he realities of the street . . . make challenging an officer's authority out of the question for a black man." *Id.* at 262.

[171] Barrio, *supra* note 169, at 233.

[172] *See id.* at 237. *See generally* Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963).

[173] *See* Barrio, *supra* note 166, at 241–42.

custody is a necessary prerequisite for a finding of psychological coercion."[174]

The Supreme Court created a Constitutional safeguard in *Miranda v. Arizona* by requiring warnings to dispel any coercion of those in custody.[175] Police, however, need not give any similar warning to an individual during knock and talk.[176] This design is intentional, argues Professor Tracey Maclin, because the *Schneckloth* Court was determined "not to create another *Miranda*."[177]

D. *Knock and Talk and the Creation of Exigent Circumstances*

The Supreme Court has permitted multiple exceptions—based on exigent circumstances—to the Fourth Amendment's command that "no warrants shall issue, but upon probable cause."[178] One such exigent circumstance is the destruction of evidence, where police officers can enter private residences to seize evidence that they believe is being destroyed.[179] Police must have probable cause of a crime before entering

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[174] *Id.* at 240; *see also* Strauss, *supra* note 36, at 239 (noting that the Milgram study does not analogize perfectly to the issue of consent searches, but points out that "people follow or obey a 'request' made by police officers in authority positions in situations where there is not only no ostensible benefit to do so, there is likely harm.").

[175] *Miranda*, 384 U.S. at 468–69.

[176] *See* Bradley, *supra* note 29, at 1127.

[177] Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 McGeorge L. Rev. 27, 54 (2008).

[178] U.S. Const. amend. IV; *see* Sonntag, *supra* note 38, at 629–30.

[179] *See* Sonntag, *supra* note 38, at 629. Other exigent circumstances that allow for a warrantless entry include hot pursuit of a fleeing suspect and protection of the public or police. *See* John Mark Huff, *Warrantless Entries and Searches Under Exigent Circumstances: Why Are They Justified and What Types of Circumstances Are Considered Exigent?*, 87 U. Det. Mercy L. Rev. 373 (2010). In addition, the Court sanctioned the "search incident to arrest" doctrine, allowing for an officer to conduct a limited search for weapons upon arrest of a suspect to protect himself and the public. *See* Chimel v. California, 395 U.S. 752, 762–63 (1969). This search is limited only to the area within the suspect's immediate control and cannot extend further than "the area from within which [the suspect] might gain possession of a weapon . . . ." *Id.* Also, the Supreme Court has sanctioned warrantless searches of automobiles upon probable cause since the 1920s. *See* Carroll v. United States, 267 U.S. 132, 153 (1925) (recognizing "a necessary difference between a search of a . . . dwelling house . . . and a search of a[n] . . . automobile, for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought"). This so-called automobile exception is, at its heart, a search based on exigent circumstances. *See* Chambers v. Maroney, 399 U.S. 42, 51 (1970) ("*Carroll* . . . holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.").

to stop the destruction of evidence.[180] In knock and talk situations, however, officers often obtain probable cause only after crossing through curtilage or approaching the front door.[181] Even if police already have probable cause, they may choose to approach the door of a dwelling without a warrant and try knock and talk.[182] The officer's act of knocking on the door, however, sometimes forces suspects to destroy evidence that would otherwise be preserved, and thereby creates the very exigency that allows them to enter.[183]

The destruction of evidence exigency doctrine has its roots in *Schmerber v. California*.[184] In *Schmerber*, police detained the suspect at a hospital after a car accident for drunken driving.[185] Despite the suspect's refusal, police instructed hospital workers to withdraw blood to test for intoxication.[186] The Court upheld the search into the suspect's body as lawful, stating that "[t]he officer in the present case . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the 'destruction of evidence.'"[187] The Supreme Court reasoned that the suspect's blood alcohol content would dissi-

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[180] *See* Vale v. Louisiana, 399 U.S. 30, 34 (1970) ("[O]nly in 'a few specifically established and well-delineated' situations may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it.") (citing Katz v. United States, 389 U.S. at 357).

[181] *See King*, 131 S. Ct. at 1854; Bradley, *supra* note 29, at 1099, 1104.

[182] *See* Bradley, *supra* note 29, at 1099 ("Under 'knock and talk,' police go to people's residences, with or without probable cause, and knock on the door to obtain plain views of the interior of the house, to question the residents, to seek consent to search, and/or to arrest without a warrant, often based on what they discover during the 'knock and talk.'").

[183] *See id.*; Swingle & Zoellner, *supra* note 40, at 28 (describing the facts of *United States v. Scroger*, 98 F.3d 1256 (10th Cir. 1996), by stating that "police officers responding to a call about a suspected methamphetamine laboratory who are met at the door by an overpowering chemical smell, together with a man whose hands are stained with red phosphorous and who is carrying a hot plate, who tries to slam the door in their faces, may pursue the man into the house").

[184] *See* Schmerber v. California, 384 U.S. 757, 770–71 (1966); Sonntag, *supra* note 38, at 632.

[185] *Schmerber*, 384 U.S. at 758.

[186] *Id.* at 758–59.

[187] *Id.* at 770 (quoting Preston v. United States, 376 U.S. 364, 367 (1964)). Critics derided the *Schmerber* opinion for its lack of clarity on the underlying constitutional basis for the search, as the search could have been incident to arrest or necessitated by exigent circumstances. *See* Salken, *supra* note 39, at 293 ("[D]oes the word 'incident' suggest that the search was justified under the more traditional search-incident-to-arrest exception . . . ?"); Sonntag, *supra* note 38, at 633 ("[W]hether it was destruction of evidence, search incident to arrest, or a combination of the two that justified the warrantless search is not readily apparent.").

pate while authorities got a warrant, thus destroying the evidence of intoxication.[188]

The Supreme Court declined to clarify the destruction of evidence exigency standard when it again arose in *Vale v. Louisiana*.[189] In *Vale*, the Court held the destruction of evidence exigency not available when, upon entering the dwelling, officers found nobody within to destroy the evidence.[190] The Court did not object to the initial entry into the dwelling, even though the search for evidence within the dwelling was illegal.[191] Taken to its extreme, *Vale*'s nebulous standard permits police to enter virtually any dwelling with only a minimal or non-existent threat that evidence may be destroyed.[192]

E. Kentucky v. King *and its Effect on Exigent Circumstances*

In *King*, the Supreme Court decided the extent of the destruction of evidence exigency requirement and resolved a circuit split over when police impermissibly create exigent circumstances.[193] The Court, assuming the existence of exigent circumstances, held that the Fourth Amendment is not violated when officers "do not gain entry to premises by means of an actual or threatened violation . . . ."[194] This, in turn, reduces the protection of individuals from warrantless policing tactics.[195]

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[188] *See Schmerber*, 384 U.S. at 770–71. The court also noted that this search involved an intrusion into the body, and distinguished the inquiry from the law of search and seizure in the property context. *See id.* at 767–68. Nevertheless, the Court cited to *Schmerber* in cases involving intrusions into non-bodily property. *See, e.g.*, Welsh v. Wisconsin, 466 U.S. 740, 742–43, 750 (1984); Vasquez v. United States, 454 U.S. 975, 988 (1981) (Brennan, J., dissenting).

[189] *See Vale*, 399 U.S. at 35; Salken, *supra* note 39, at 297 ("*Vale* can be cited in virtually every case in which one wishes to argue that threatened destruction of evidence justifies a warrantless entry, and its ambiguities frequently allow it to be cited by both sides.").

[190] *See Vale*, 399 U.S. at 34.

[191] *See id.*; Salken, *supra* note 39, at 295 ("[T]he Court may have tacitly viewed the initial entry and limited search as justified in the circumstances.").

[192] *See* Salken, *supra* note 39, at 295–97 (stating that mere arrest of a suspect outside of a dwelling may be enough to fulfill the *Vale* standard and permit officers to search the dwelling for those inside who may destroy evidence).

[193] *King*, 131 S. Ct. at 1862; *see* United States v. Coles, 437 F.3d 361, 370 (3rd Cir. 2006); United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004); United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990); United States v. Webster, 750 F.2d 307, 327 (5th Cir. 1984).

[194] *King*, 131 S. Ct. at 1862.

[195] *See id.*; Salken, *supra* note 39, at 288 (arguing that, without guidance from the Supreme Court, circuit courts have been too expansive in their interpretation of the exigent circumstances exception).

Each of the split circuits' proposed tests creates difficulties.[196] For example, the Eighth Circuit takes the position that police tend to create exigent circumstances with any action they take.[197] Therefore, the use of knock and talk is a means of seeking information or consent to search, and destruction of evidence is not a foreseeable result.[198]

Courts are also likely to rely on the officer's judgment in determining whether the sounds heard from within the apartment were indeed the destruction of evidence.[199] For example, the trial court in *King* permitted a warrantless entry into an apartment because the officers believed that "evidence was possibly being destroyed based on the sound

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[196] *See* Salken, *supra* note 39, at 324 (noting that, in discussing the importance of individual constitutional rights, "[m]ost of the circuits do not encourage police officers to seek warrants whenever possible"). The Second Circuit is the most deferential of the circuit courts in determining whether police can enter a dwelling based on destruction of evidence exigent circumstances. *See* King v. Commonwealth, 302 S.W.3d 649, 656 (Ky. 2010); United States v. MacDonald, 916 F.2d 766, 772 (2nd Cir. 1990) ("[T]he fact that the agent may be 'interested' in having the occupants react in a way that provides exigent circumstances and may 'fully expect[]' such a reaction does not invalidate action that is otherwise lawful.") (quoting Horton v. California, 496 U.S. 128, 129 (1990)). As long as the police officers act in a lawful manner, they are incapable of impermissibly creating exigent circumstances. *See MacDonald*, 916 F.2d at 772. Bryan Abramoske notes that the Court in *MacDonald* does not provide a definition of lawfulness. *See* Abramoske, *supra* note 31, at 576. The Third, Fifth, and Eighth circuits have held that an officer's bad faith is not always required to impermissibly create exigent circumstances, looking in part to the reasonableness of the officer's actions. *See Coles*, 437 F.3d at 370; *Gould*, 364 F.3d at 590; *Duchi*, 906 F.2d at 1284.

[197] *See Duchi*, 906 F.2d at 1284.

[198] *See* Abramoske, *supra* note 31, at 579–80 (suggesting that courts should apply an objective test to determine whether police officers intentionally created exigent circumstances). Abramoske notes that "[i]t is often difficult . . . for courts to precisely determine what an officer intended to accomplish during an investigation." *Id.* at 579. In addition, "[b]y the time a case reaches the court, police officers can think of justifications for why they used an investigative tactic, even if those reasons did not actually factor into their conduct." *Id.* After spending a year in the company of New York City police officers, Columbia Law Professor H. Richard Uviller noted:

> When cops lie, however, detection is apt to be difficult. In many cases, the cop steps up to the plate as the heavy hitter, badge shining, tone official, demeanor cool. Without apparent strain or bravado, the cop on the stand may appear as a modest hero, a competent collector of evidence, a precise narrator of the critical events. The incidents the cop relates are usually known only to one or two other cops, who might coordinate their recollections. Even when possible to procure, contradiction of the cop's version from other witnesses is often weak and flawed by bias.

H. Richard Uviller, Tempered Zeal: A Columbia Law Professor's Year on the Streets with the New York City Police 112 (1988).

[199] *See King*, 131 S. Ct. at 1862; Salken, *supra* note 39, at 288 (outlining the three different approaches that courts use, all of which involve crediting police testimony to some extent).

of movement inside the apartment."[200] That standard could allow police to enter a dwelling on almost any sound of movement or even a toilet flush.[201] Justice Sotomayor expressed this concern during *King*'s oral argument, stating that "any police officer will come in and say: In my experience, most drug dealers destroy the evidence when we knock."[202]

The Supreme Court resolved the circuit split by stating that police cannot impermissibly create exigent circumstances unless they attempt to "gain entry to premises by means of an actual or threatened violation of the Fourth Amendment."[203] In the closest the Court has come to directly discussing knock and talk, it noted that the inhabitants need not come to the door, speak with officers, or allow a search.[204] In *King*, however, the Supreme Court held that no actual or threatened violation of the Fourth Amendment occurred, despite the officers' threat to make a forced entry into the apartment.[205]

While the Court emphasized that they assumed exigency for the sake of argument, the *King* decision creates more difficulty for suspects looking to cast doubt upon claims of exigent circumstances.[206] Police testimony is often very persuasive at trial and there is frequently little opportunity or ability to impeach an officer on the stand.[207] Thus, juries or judges are likely to defer to an officer's judgment that exigent circumstances existed when he or she entered the dwelling.[208] Officers

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

[201] *See* Salken, *supra* note 39, at 326 ("[C]ourts may find that destruction of evidence in narcotics cases is so prevalent that warrantless searches will be permitted whenever there is probable cause to believe narcotics are present."). Geoffrey Sonntag argues that the Supreme "Court should adopt a standard called the 'probable cause-probable cause' rule." Sonntag, *supra* note 38, at 651. This rule would require that police not only have probable cause to believe that a crime is being committed within a dwelling, but in addition, probable cause to believe that evidence is actually being destroyed before engaging in a warrantless entry. *See id.* at 651–52.

[202] Transcript of Oral Argument at 13, Kentucky v. King, 131 S. Ct. 61 (2010) (No. 09–1272).

[203] *King*, 131 S. Ct. at 1862.

[204] *See id.* The Supreme Court, like the Kentucky Supreme Court, assumed for the sake of argument than an actual exigency existed. *See id.*

[205] *Id.* at 1854, 1862.

[206] *See id.* at 1862; Linda Greenhouse, *Justice in Dreamland*, N.Y. Times (May 18, 2011, 9:42 PM), http://opinionator.blogs.nytimes.com/2011/05/18/justice-in-dreamland/ (examining the exigent circumstances analysis in *King*). Linda Greenhouse discusses the disconnect between how the Supreme Court views citizen-police interactions and how citizens themselves view them, stating "I don't know about other people, but I have never found an uninvited encounter with the police to be a source of comfort." *Id.*

[207] *See* Uviller, *supra* note 198, at 112.

[208] *See King*, 131 S. Ct. at 1865 (Ginsburg, J., dissenting) ("How 'secure' do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing

may also take advantage of this deference and rely more on their own judgment to determine whether exigent circumstances exist, thereby circumventing the warrant process.[209]

IV. Storming the Castle: Knocking Down the Fourth Amendment in Inner Cities

The Supreme Court seems unlikely to consider the realities and effects of knock and talk, regardless of whether its application is in a discriminatory manner.[210] Simply because a particular policing technique is considered constitutional, however, does not necessarily mean it should be used.[211] Knock and talk reduces the level of trust between citizens of the inner cities and the police that are supposed to protect them.[212] It diminishes the sense of safety and security that those citizens have within their dwellings.[213] The warrant requirement is important in policing the boundaries between law enforcement and the constitu-

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sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity?").

[209] *See* Greenhouse, *supra* note 206 ("If instead of pounding on the door, the [Kentucky Supreme Court] noted, the police had quietly gone to a magistrate and obtained a search warrant, the people in the apartment would have had no reason to start scurrying around destroying their valuable contraband.").

[210] *See* Maclin, *supra* note 177, at 54 (arguing that the Court in *Schneckloth v. Bustamonte* was attempting to avoid the creation of another *Miranda* warning). *See generally* Kentucky v. King, 131 S. Ct. 1849 (2011) (omitting mention of the phrase "knock and talk" in its opinion).

[211] *See* Cole, *supra* note 92, at 53 (arguing that the "Court's removal of meaningful Fourth Amendment review allows the police to rely on unparticularized discretion, unsubstantiated hunches, and nonindividualized suspicion. Racial prejudice and stereotypes linking racial minorities to crime rush to fill the void").

[212] *See id.* at 46 (discussing indiscriminate police stops and the hostility and mistrust that it fosters towards police); Bradley, *supra* note 29, at 1104–05; Maclin, *supra* note 168, at 255–57.

[213] *See* Henry Pierson Curtis, *Cops 'Knock and Talk' Tactic Draws Flak After Near-Fatal Shooting*, Orlando Sentinel, Oct. 2, 2010, http://articles.orlandosentinel.com (follow the "Index by Date" hyperlink; then select "2010" in the "Year" field, "Oct" in the "Month" field, and "2" in the "Day" field; then follow "Cops' 'knock-and-talk' tactic draws flak after near-fatal shooting" hyperlink). In one instance, a homeowner—fearful of recently escaped convicts—answered an early-morning knock at his door armed with a shotgun; he did not know that the knock came from a police officer and, when the officer's flashlight blinded him, he fired the shotgun but missed the officer. *Id.* In response, the officer quickly drew his gun and shot the homeowner through the chin. *Id.* The officer had stopped by the house in a routine knock and talk procedure. *Id.* Doug Ward, director of a police-leadership program at Johns Hopkins University said "[y]ou have to wonder if it's a wise policy . . . . Going to the house at that time of the morning is inherently dangerous for the officers and the residents." *Id.*

tionally protected rights of American citizens.[214] When society allows police to circumvent the warrant requirement, it implicitly creates two Fourth Amendments: one for minorities and the poor—the likely targets of knock and talk—and one for everybody else.[215]

Knock and talk brings the tensions between police and inner city citizens to their front doors.[216] The special protection of the home for minorities and the poor is significantly reduced when knock and talk is disproportionately applied.[217] The curtilage doctrine, coupled with the lack of curtilage in most inner city dwellings, allows police to get closer to city dwellers than to suburban or rural residents.[218] Frequent use of knock and talk in this environment can create the perception that one's home, considered by the Supreme Court to be one's "castle," is constantly under siege by the police.[219]

Discussing the legacy of *Whren v. United States*, David A. Harris stated that "[w]hatever else the Fourth Amendment does or used to do, it will no longer serve as a tool to prevent racially biased policing."[220] This applies to knock and talk, as its almost unquestioned acceptance by courts has arguably facilitated and encouraged racially-based policing.[221] *Whren* prevents courts from looking at the actual motivation of

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[214] *See* Johnson v. United States, 333 U.S. 10, 13–14 (1948) (holding that "[t]he point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of fettering out crime").

[215] *See* Cole, *supra* note 92, at 31, 44–45.

[216] *See* Maclin, *supra* note 168, at 256–57 ("Black males learn at an early age that confrontations with the police should be avoided . . . ."); Swingle & Zoellner, *supra* note 40, at 25.

[217] *See* Lewis v. United States, 385 U.S. 206, 211 (1966); Amsterdam, *supra* note 55, at 349; Bradley, *supra* note 29, at 1122 (arguing that "'knock and talk' repeatedly leads to serious intrusions into the privacy of the homeowner, and to regular avoidance by police of the arrest and search warrant requirements."); Foley, *supra* note 43, at 339–41.

[218] *See* Leonetti, *supra* note 44, at 310–11, 316–17 ("If privacy is confined only to areas that are exclusively occupied by a single tenant, then most Americans would be left with only a few hundred square feet in which to confine themselves from the increasing governmental intrusions of modern life.").

[219] *See* Minnesota v. Carter, 525 U.S. 83, 94 (1998); Cole, *supra* note 92, at 44; Leonetti, *supra* note 44, at 313–14 (noting the intimidation that occurs when multiple police officers descend upon a dwelling during the night).

[220] David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. Pa. J. Const. L. 367, 376 (2001).

[221] *See* Cole, *supra* note 92, at 44–45; Bradley, *supra* note 29, at 1099 (noting the vast acceptance of knock and talk in both courts of appeal and state courts); Harris, *supra* note 94, at 677–78; Leonetti, *supra* note 44, at 311–12.

police officers, while *McCleskey v. Kemp* may prevent any disparate impact statistical challenges.[222]

Knock and talk, however, still has a negative effect when applied disproportionately to citizens of inner city neighborhoods.[223] For example, targeting minority populations with techniques such as knock and talk can perpetuate negative stereotypes and distrust of authority within the community.[224] Knock and talk relies heavily on the discretion of police officers, with no probable cause or warrant requirement to serve as a check on their actions.[225] Therefore, police often rely on intuition or hunches in deciding on which doors to knock.[226] Subtle and uncon-

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[222] *See* Whren v. United States, 517 U.S. 806, 813 (1996); McCleskey v. Kemp, 481 U.S. 279, 292–93 (1987).

[223] *See* Cole, *supra* note 92, at 44–45 (noting that quality of life policing "relies heavily on inherently discretionary police judgments about which communities to target, which individuals to stop, and whether to use heavy-handed or light-handed treatment for routine infractions"). Cole questions the benefit of this approach, asking "do the reduced crime rates justify subjecting inner-city residents to more frequent and intrusive searches and seizures?" *Id.* at 45. Scholars have debated whether "quality of life" policing has been successful in reducing the levels of crime in areas with high levels of illegal activity. *See id.* at 44–45; Sarah Lyons & Nastassia Walsh, Justice Policy Institute, Money Well Spent: How Positive Social Investments Will Reduce Incarceration Rates, Improve Public Safety, and Promote the Well-Being of Communities 21 (2010). In Washington, D.C., for example, there has been an increase in spending on policing as compared to a decrease in spending on social services and programs. Lyons & Walsh, *supra,* at 9. Spending on corrections increased by 25.3% from 2005 to 2009, while spending on social programs such as the D.C. Public Schools, the Department of Mental Health, and the Department of Housing and Community Development decreased 17.86%, 19.48%, and 30.42%, respectively, from 2008 to 2010. *Id.* at 9–10. These spending changes occurred despite a decrease in crime rates, with 2009 marking one of the lowest homicide rates in the history of the city. *Id.* at 11. With respect to the increase in arrests, African-Americans are overrepresented in the criminal justice system, making up eighty-nine percent of those in custody, despite making up only fifty-four percent of the population. *Id.* at 11, 17. Sarah Lyons and Nastassia Walsh recommend that law enforcement efforts should focus "on the most serious offenses rather than quality of life offenses" and "[a]ddress racial and income disparities in arrest and incarceration practices." *Id.* at 21. Even if quality of life policing sometimes successfully reduces crime in cities or neighborhoods, its effect on the targeted population should still be noted. *See* Harris, *supra* note 98, at 126–28. Harris notes that, for community policing to be successful, trust is required between the community and the police officers who work in that community. *See id.* Policing methods that "create the perception of racial and other biases in law enforcement," however, destroy that trust. *Id.* at 128.

[224] *See* Bradley, *supra* note 29, at 1104–05; Foley, *supra* note 43, at 339.

[225] *See* Bradley, *supra* note 29, at 1099, 1104–05. The Supreme Court has held that a hunch does not rise to the level of reasonable suspicion, but reasonable suspicion is not required to engage in a knock and talk. *See* David Louis Raybin, *Who's There? The Parameters of Police "Knock and Talk" Tactics*, 43 Tenn. B.J. 12, 13 (2007).

[226] *See* Bradley, *supra* note 29, at 1104–05 (arguing that knock and talk is a targeted technique used by police to enter the homes of individuals suspected of crimes, even during the investigatory stages).

scious biases of officers and society at large may perpetuate stereotypes that members of a certain race or community are subject to intrusive police action.[227] Knock and talk is generally used to detect drug activity in inner cities, but "one wonders . . . if police would find similar law-breaking if they focused on affluent Caucasian neighborhoods."[228]

When negative stereotypes are perpetuated, a sense of antagonism can develop between the police and the public they are supposed to protect.[229] Maclin states that "[t]oday, when the pressure to 'get tough' on crime is mixed with biased, over-aggressive, and sometimes hostile police conduct, it is not surprising that tensions between the police and the local community explode in black neighborhoods."[230] Because of

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[227] *See* Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (holding that an objective standard of the officer's seizure of an individual is required because "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction."); Foley, *supra* note 43, at 339–41 (stating that "when police do not have to give reasons for discretionary searches or seizures, conscious and unconscious racism may prevail."). The Honorable Harold Baer, Jr., a federal judge of the Southern District of New York, criticized the discretion allowed to police for using "hunches" in targeting individuals suspected of crime. *See* Harold Baer, Jr., *Got a Bad Feeling? Is That Enough? The Irrationality of Police Hunches*, 4 J.L. Econ. & Pol'y 91, 100 (2007). Judge Baer argues that "[u]nlike the ordinary citizen, police officers face hostile and frightening situations daily and consequently fall easy victim to unconscious feelings of bias, prejudice, and the availability heuristic." *Id.* Judge Baer states that "even the most well-intentioned police officer has unconscious biases, which adversely affect her ability to form accurate hunches." *Id.* at 99.

[228] Foley, *supra* note 43, at 341 (stating that police "would find cocaine, marijuana, prescription drugs—the whole apothecary. But these affluent whites just do not look like criminals to many people in our society, especially to the police") (footnote omitted). Professor Albert Alschuler discusses five reasons why courts should not defer to police officer hunches: unreliability, racial bias, disparate racial burden, perjury of police officers, and lack of reviewability. *See* Albert W. Alschuler, *The Upside and Downside of Police Hunches and Expertise*, 4 J.L. Econ. & Pol'y 115, 119 (2007). With respect to disparate racial burden (or racial taxation), Alschuler notes that "[r]ational hunches that maximize the number of arrests and give taxpayers the most bang for the buck can subject innocent blacks to unwanted encounters with the police at a far higher rate than innocent whites." *Id.* at 127–28.

[229] *See* Cole, *supra* note 92, at 170–71 ("Where a community views the criminal law as just, such cooperation can be assumed. But where a community views the law as unjust, enforcement is subverted."). Polls affirm these perceptions, as a U.S. Justice Department Survey administered in 1995 found that thirty-one percent of blacks nationwide expressed "a great deal or quite a lot" of confidence in the police, compared to sixty-five percent of whites. *Id.* at 170–71. The Supreme Court glossed over this antagonism in *King* by stating that "[o]fficers are permitted—indeed, encouraged—to identify themselves to citizens, and 'in many circumstances this is cause for assurance, not discomfort.'" *See King*, 131 S. Ct. at 1861 (quoting United States v. Drayton, 536 U.S. 194, 204 (2002)). The Court went on to state that "[c]itizens who are startled by an unexpected knock on the door or by the sight of unknown persons in plain clothes on their doorstep may be relieved to learn that these persons are police officers." *Id.*

[230] Maclin, *supra* note 168, at 243–44.

these tensions, individuals living in inner cities are more likely to see police as hostile, even if they are not doing anything illegal.[231] When viewed in the context of the inner city, the justification for knock and talk as a consensual encounter between state and citizen is implausible.[232] The minority citizen faces two choices when a police officer comes knocking on his door: consent to the officer despite an unfriendly and hostile presence, or reject and heighten suspicions.[233] Ultimately, knock and talk has few limitations, but that does not mean it should be a commonly employed policing technique.[234]

Conclusion

Scholars have pontificated about pretextual stops of minorities on the roadways, but police also target minorities in other locations. Knock and talk is one tool in the arsenal of police techniques that can be an extremely powerful means to obtain information and evidence. Because of the settled case law, the Supreme Court seems unlikely to address the problems inherent in knock and talk. Courts that reaffirm its constitutionality neglect to note its effects on communities.

Furthermore the curtilage doctrine does not provide sufficient protection to high-density, multiple occupancy apartment buildings. Because warrant and probable cause requirements do not apply to knock and talk, there is no restriction on its targets or frequency of use. While knock and talk is successful in obtaining evidence of criminal behavior, society should question whether it is willing to sacrifice the sanctity of the home for the sake of uncovering criminality.

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[231] *See* Harris, *supra* note 98, at 11, 117; Harris, *supra* note 94, at 677–78; Maclin, *supra* note 168, at 255–57. Harris argues that "racial profiling and other racially biased methods of law enforcement corrode the basic legitimacy of the entire American system of justice, from policing to the courts to the law itself." *See* Harris, *supra* note 98, at 117. He also discusses how high-discretion police tactics "allow police to detain, question, and search people who have exhibited no concrete evidence of wrongdoing . . . ." *Id.* at 11.

[232] *See* Strauss, *supra* note 36, at 244.

[233] *See* Harris, *supra* note 98, at 36–37 (describing how police obtain consent to search vehicles on the highway); Harris, *supra* note 94, at 677–78; Maclin, *supra* note 168, at 255–57; Swingle & Zoellner, *supra* note 40, at 25. Harris states that, for many African-Americans, "[i]f you don't give consent, the officer will push you. If you persist, the officer will imply that you have something to hide . . . ." Harris, *supra* note 98, at 36–37.

[234] *See* Bradley, *supra* note 29, at 1104 (noting that officers are scrutinized when a police action includes severe coercion, such as yelling and drawn firearms).