SUBJECTIVE INTENT AND THE POLICE-CREATED EXIGENCY DOCTRINE: THE LAWLESSNESS OF THE LAWFULNESS TEST

Ben Lowry[*]

The right of privacy [is] too precious to entrust to the discretion of [the police]. [H]istory shows that the police acting on their own cannot be trusted . . . so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing . . . that the exigencies of the situation made that course imperative.

—Associate Justice William Douglas, *McDonald v. United States*[1]

I. INTRODUCTION

There are currently over 450,000 local and state police officers in the United States.[2] Of these, approximately 70% have duties that include responding to calls for service.[3] In fulfilling their duties, these "on the beat" police officers are routinely required to make discretionary decisions about how best to enforce the law, ranging from the relatively simple decision of whether to pull over a vehicle for a minor traffic violation to the comparatively more complicated decision of whether to conduct a search or seizure without a warrant.[4] Although a certain degree of police discretion is

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[*] J.D. Candidate, May 2013, Louis D. Brandeis School of Law, University of Louisville; B.A., Political Science, 2010, The Ohio State University. The author would like to thank his father, Edwin J. Lowry, Jr., for always encouraging him to do his best and giving him the opportunity to do so.

[1] McDonald v. United States, 335 U.S. 451, 455–56 (1948).

[2] BRIAN A. REEVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 6 (2010), *available at* http://www.bjs.gov/content/pub/pdf/lpd07.pdf.

[3] *Id.* at 6.

[4] *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 222 (1969) (stating that "[t]he police . . . make far more discretionary determinations . . . than any other class of administrators . . ."); *Epilogue to the Survey of the Administration of Criminal Justice*, *in* Frank Miller, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 352 (Frank J. Remington ed. 1969) (noting "the relatively wide discretion officials have in enforcing the criminal law . . ."); Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 508 (2011) ("Given that traffic laws are comprehensive and most drivers violate them at least some of the time, police have broad discretion to pull over vehicles.").

undoubtedly necessary in order to maintain an effective system of law enforcement, it also poses a serious risk of abuse.[5] Inherent in the concept of discretion is the ability to choose between alternative courses of action.[6] Thus, delegations of discretionary authority to police raise the possibility that police choices about how to enforce the law will be made not for the purpose for which the authority was originally delegated, but for other, improper ends, such as the personal benefit of police officers or the expediency of capturing a known criminal without following the meticulous and inflexible rules of criminal procedure. This possibility is particularly troublesome with respect to police discretion in the context of the Fourth Amendment, both because of the serious constitutional rights at stake and because of the legal complexity often involved in determining whether a particular search or seizure is constitutionally permissible. Nevertheless, the majority of the discretionary authority possessed by police "has to do with determining how to invoke the criminal process and when to use a variety of investigative techniques, and thus falls within the realm of fourth amendment activity."[7]

Despite the manifest potential for abuse, the United States Supreme Court has been increasingly willing to vest ordinary police officers with the authority to make discretionary decisions about whether and how to search and seize.[8] In its recent decision in *Kentucky v. King*,[9] the Supreme Court further expanded police discretionary authority by ruling that the warrantless entry of a person's home based on exigent circumstances is

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[5] *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) (noting that "the criminal justice system is characterized by extraordinary discretion . . . over enforcement . . . . In a system so dominated by discretionary decisions, discrimination is easy . . . .").

[6] *See* DAVIS, *supra* note 4, at 4 (observing that "[a] public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction").

[7] Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 445 (1990).

[8] *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (holding that the "constitutional reasonableness of traffic stops [does not] depend[ ] on the actual motivations of the individual officers involved," and thereby permitting police to conduct pretextual traffic stops); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (permitting police to temporarily seize a motorist based on an "articulable and reasonable suspicion that a motorist . . . or an occupant is . . . subject to seizure for violation of law . . ."); United States v. Watson, 423 U.S. 411, 423 (1976) (permitting police to make warrantless arrests in public places even though there was adequate opportunity to procure a warrant); Terry v. Ohio, 392 U.S. 1, 27 (1968) (permitting police officers to temporarily seize and conduct a limited search of persons without a warrant upon a showing that "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger").

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

permissible so long as the police do not create the exigency "by engaging or threatening to engage in conduct that violates the Fourth Amendment."[10] In so holding, the Court unequivocally rejected the approach taken by a majority of jurisdictions, whereby the subjective intent of police officers is crucial to the question of whether the police have impermissibly created exigent circumstances.[11] By refusing to include a subjective inquiry as part of its "lawfulness"[12] test for police-created exigencies, the Court has dramatically extended the scope of the exigent circumstances rule and significantly increased the amount of discretionary authority possessed by the police. As a result, police will now be permitted to conduct searches, seize property, and make arrests—all without a warrant—in a vast number of situations where they previously would not have had the power to do so. The fundamental question posed in this Note is whether this expansion of discretionary police authority will result in "'evenhanded law enforcement,'" as expected by the majority,[13] or whether it will instead serve only to "arm[] the police with a way routinely to dishonor the Fourth Amendment's warrant requirement . . . ," as predicted by Justice Ginsburg in her lone dissent.[14] As will be demonstrated, Justice Ginsberg is correct in her prediction that the ultimate impact of the *King* decision will be to jeopardize "the right of the people to be secure"[15] protected by the Fourth Amendment.

This Note critiques the Supreme Court's decision in *King*, focusing particularly on the Court's refusal to adopt a subjective inquiry as part of its test for police-created exigencies. Part II.A briefly reviews the *King* decision and explains the legal reasoning of the majority opinion. Part II.B provides history and background material relating to the exigent

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[10] *Id.* at 1858.

[11] *See infra* Part II.B.

[12] Although the Supreme Court never explicitly uses the term "lawfulness" to refer to the test it adopted in *King*, this designation appears to be generally accepted as an accurate and serviceable description of the test. *See, e.g.*, Reply Brief for Commonwealth of Kentucky at 1, Kentucky v. King, 131 S.Ct. 1849 (2011) (No. 09-1272). Apparently, the term "lawfulness" originated from language in the Second Circuit's opinion in *United States v. MacDonald*, 916 F.2d 766, 772 (2d Cir. 1990) (noting that "when [the police] act in an entirely *lawful* manner, they do not impermissibly create exigent circumstances" (emphasis added)).

[13] *See King*, 131 S.Ct. at 1859 (majority opinion justifying its adoption of an exclusively objective test for police-created exigencies on the grounds that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer" (quoting Horton v. California, 496 U.S. 128, 138 (1990))).

[14] *Id.* at 1864 (Ginsberg, J., dissenting).

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

circumstances rule as well as the development of the police-created exigency doctrine. Part II.C describes the different tests developed by the circuit courts for determining when police impermissibly create exigent circumstances and explains how each of these tests serves as a check on the exercise of police discretion. Next, Part III demonstrates that the lawfulness test is fundamentally inconsistent with the underlying purposes of the Fourth Amendment in general and the exigent circumstances rule in particular. Finally, Part IV argues that the Court should revisit its decision in *King* and replace the lawfulness test with a subjective inquiry that precludes the police from deliberately manufacturing exigent circumstances with the bad-faith intent to evade the warrant requirement.

II. HISTORY

A. The King *Decision*

In *King*, the Supreme Court reviewed a decision of the Kentucky Supreme Court suppressing evidence that was retrieved as a result of the warrantless entry of the defendant's home.[16] Police began investigating the defendant's apartment because they mistakenly believed that a suspected drug dealer had entered.[17] Attempting to apprehend the suspect, the police knocked loudly on the defendant's door and announced their presence.[18] Although no one responded, the police knew that there were several people inside the apartment because they "could hear people inside moving" and "it sounded as [though] things were being moved inside the apartment."[19] Because "[t]hese noises . . . led the officers to believe that drug-related evidence was about to be destroyed," the police "announced that 'they were going to make entry inside the apartment'" and proceeded to kick in the door.[20] Upon entering the apartment, the police discovered marijuana and cocaine in plain view.[21] Later, during a subsequent search, they discovered crack cocaine, cash, and drug paraphernalia.[22]

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[16] *King*, 131 S.Ct. at 1855. Technically, it was the defendant's girlfriend's home, but the defendant regularly stayed there, thus giving him standing to challenge the warrantless entry. *Id.* at 1854, n.1. For the sake of simplicity, I refer to the apartment as "the defendant's home" or "the defendant's apartment."

[17] *See id.* at 1854–55. In fact, the suspect had entered the apartment across the hallway from the defendant's apartment. *See id.* at 1855.

[18] *Id.* at 1854.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

At trial, the defendant moved to suppress all evidence obtained as a result of the warrantless entry.[23] In denying the defendant's motion, the trial court ruled that the warrantless entry was justified by the presence of exigent circumstances because "[the police] heard movement in the apartment which [they] reasonably concluded were persons in the act of destroying evidence . . . ."[24] On appeal, the Kentucky Court of Appeals upheld the defendant's conviction, also concluding that exigent circumstances justified the warrantless entry.[25] When the defendant subsequently appealed the decision of the court of appeals, the Kentucky Supreme Court granted discretionary review.[26]

Although the government continued to rely on the presence of exigent circumstances to justify the warrantless search, the Kentucky Supreme Court assumed for the purposes of its decision that exigent circumstances existed.[27] Rather than basing its decision on the existence or non-existence of exigent circumstances, the court focused its analysis on whether the police had impermissibly created the exigent circumstances.[28] The court set forth a two-part test for determining when police impermissibly create exigent circumstances.[29] First, the court asked whether the police "deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement."[30] Because it did not appear that the officers acted in bad faith, the court next asked whether "it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry."[31] Ultimately, the court concluded that the creation of the exigent circumstances was reasonably foreseeable and reversed the defendant's conviction on the grounds that the evidence obtained as a result of the warrantless entry should have been suppressed.[32]

In response to the Kentucky Supreme Court's reversal of the defendant's conviction, the Commonwealth of Kentucky petitioned the

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[23] *Id.* at 1855.

[24] *Id.*

[25] King v. Commonwealth, No. 2006-CA-002033-MR, 2008 WL 697629, at *4 (Ky. Ct. App. Mar. 14, 2008).

[26] King v. Commonwealth, 302 S.W.3d 649, 652 (Ky. 2010).

[27] *Id.* at 655.

[28] *Id.* at 655–57.

[29] *Id.* at 656.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 656 (concluding that "it was reasonably foreseeable that knocking on the apartment door and announcing 'police,' after having smelled marijuana emanating from the apartment, would create the exigent circumstance relied upon . . .").

United States Supreme Court for certiorari.[33] On September 28, 2010, the Supreme Court granted Kentucky's petition.[34] Like the Kentucky Supreme Court, the Supreme Court assumed for the purposes of its decision that exigent circumstances existed.[35] Indeed, the Court made a point to declare: "We decide only the question on which the Kentucky Supreme Court ruled and on which we granted certiorari: Under what circumstances do police impermissibly create an exigency?"[36] Appreciating the narrowness of the Court's ruling is critical in order to fully understand the *King* decision. As the Court made clear, the issue of whether exigent circumstances existed was beyond the scope of its review.[37] Therefore, in analyzing and critiquing the *King* decision, the only relevant issue is the scope and structure of the police-created exigency doctrine.

In deciding the appropriate test for determining when the police impermissibly create exigent circumstances, the Court reasoned that because "warrantless searches are allowed when circumstances make it reasonable . . . to dispense with the warrant requirement[,] . . . the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense."[38] According to the Court, because a police officer's subjective intent does not alter the content of the objective circumstances under which a warrantless entry occurs, such intent should not be taken into account for the purposes of evaluating the reasonableness of police conduct when applying the exigent circumstances rule.[39] Indeed, the Court even went so far as to say that including a subjective inquiry would be "fundamentally inconsistent with [the Court's] Fourth Amendment jurisprudence."[40] Ultimately, the Court concluded that its test for police-created exigencies should depend entirely on objective considerations because "[l]egal tests based on reasonableness are generally objective" and "evenhanded law enforcement is best achieved by application of objective standards of conduct, rather than standards that

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[33] Petition for Writ of Certiorari, Kentucky v. King, 131 S.Ct. 1849 (2011) (No. 09-1272), 2010 WL 1626437.

[34] King v. Kentucky, 302 S.W.3d 649 (Ky. 2010), *cert. granted*, 78 U.S.L.W. 3644 (U.S. Sept. 28, 2010) (No.09-1272).

[35] Kentucky v. King, 131 S.Ct. 1849, 1862 (2011) ("We, too, assume for purposes of argument that an exigency existed.").

[36] *Id.* at 1862–63.

[37] *Id.*

[38] *Id.* at 1858.

[39] *See id.* at 1859.

[40] *Id.* ("'Our cases have repeatedly rejected' a subjective approach, asking only whether 'the circumstances, viewed *objectively*, justify the action.'" (quoting Brigham City v. Stuart, 547 U.S. 398, 404 (2006))).

depend on the subjective state of mind of the officer."[41] In keeping with these dictates, the Court formulated the following test for determining when the police impermissibly create exigent circumstances: "Where . . . the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry . . . is reasonable and thus allowed."[42]

Applying the lawfulness test to the facts in *King*, the Court concluded that the police had not impermissibly created the exigent circumstances because "the officers [n]either violated the Fourth Amendment [n]or threatened to do so prior to the [creation of exigent circumstances]."[43] According to the Court, when the officers knocked on the defendant's door and announced their presence, "they d[id] no more than any private citizen might do."[44] Because "[such] conduct was entirely consistent with the Fourth Amendment," the officers' actions were lawful and therefore unobjectionable under the lawfulness test.[45] Having concluded that the police did not impermissibly create the exigent circumstances, the Court reversed the judgment of the Kentucky Supreme Court and remanded for a determination on the narrow issue of whether exigent circumstances actually existed.[46]

B. The Development of the Exigent Circumstances Rule

The Fourth Amendment to the United States Constitution establishes "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[47] To protect this right, the Fourth Amendment prohibits police from making independent determinations regarding the existence of probable cause and requires that searches and seizures be authorized by a warrant issued by a neutral magistrate.[48] By requiring that the impartial judgment of a judicial officer be interjected between the citizen and the police, the Fourth Amendment guarantees that the ultimate determination of whether a search is warranted

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[41] *Id.*

[42] *Id.* at 1858.

[43] *Id.* at 1863.

[44] *Id.* at 1862.

[45] *Id.* at 1863.

[46] *Id.* at 1864. On remand, the Kentucky Supreme Court ruled that exigent circumstances did not exist because "[t]he police officers' subjective belief that evidence was being . . . destroyed [was] not supported by the record, and . . . [any such] belief was [not] objectively reasonable." King v. Commonwealth, No. 2008-SC-000274-DG, 2012 WL 1450081, at *3 (Ky. Apr. 26, 2012).

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

[48] *Id.*

will not be influenced by the prejudice of a police officer who is "engaged in the often competitive enterprise of ferreting out crime."[49]

Given the procedural importance of the warrant requirement, the United States Supreme Court has declared that warrantless searches are presumptively unreasonable.[50] However, the Court has recognized that in certain "exigent circumstances," the police may permissibly bypass the warrant requirement.[51] Exigent circumstances have been defined as situations that present a "specially pressing or urgent law enforcement need,"[52] or, alternatively, as "situations where 'real immediate and serious consequences' will 'certainly occur' if a police officer postpones action to obtain a warrant."[53] To date, the Court has recognized three sets of circumstances that are sufficiently "exigent" to excuse the police from having to obtain a warrant: (1) when police are in "hot pursuit" of a fleeing suspect,[54] (2) when the safety of police officers or other persons would be jeopardized by delaying to obtain a warrant,[55] and (3) when evidence is likely to be destroyed or otherwise removed.[56] By excepting these circumstances from the warrant requirement, the Court has recognized that the right to be secure as protected by the Fourth Amendment is outweighed by the need for immediate police action. Thus, the Court has commonly justified the exigent circumstances rule by concluding that these searches are reasonable within the meaning of the Reasonableness Clause of the

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[49] Johnson v. United States, 333 U.S. 10, 14 (1948).

[50] Brigham City v. Stuart, 547 U.S. 398, 403 (2006); Payton v. New York, 445 U.S. 573, 586 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971).

[51] Mincey v. Arizona, 437 U.S. 385, 393–94 (1978) (stating that "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment" (quoting McDonald v. United States, 335 U.S. 451, 456 (1948))); *Johnson*, 333 U.S. at 15 (declaring that "[t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with"). In addition to establishing the existence of exigent circumstances, police must also have probable cause to believe that a crime has been or is in the process of being committed in order to justify a warrantless search. *See* Kirk v. Louisiana, 536 U.S. 635, 638 (2002) (holding that, if police have not obtained a warrant, "[they] need . . . probable cause plus exigent circumstances in order to make a lawful entry into a home"); Welsh v. Wisconsin, 466 U.S. 740, 749 (1984) (stating that "warrantless [entry of] the home [is] prohibited by the Fourth Amendment, absent probable cause and exigent circumstances").

[52] Illinois v. MacArthur, 531 U.S. 326, 331 (2001).

[53] United States v. Williams, 354 F.3d 497, 503 (6th Cir. 2003) (quoting Ewolski v. City of Brunswick, 287 F.3d 492, 501 (6th Cir. 2002)).

[54] United States v. Santana, 427 U.S. 38, 42–43 (1976).

[55] *Brigham*, 547 U.S. at 403.

[56] Schmerber v. California, 384 U.S. 757, 770 (1966).

Fourth Amendment because to further delay police action would be patently unreasonable in light of the exigencies of the situation.[57]

Although the possibility of bypassing the warrant requirement based on exigent circumstances has been recognized by the Supreme Court for some time,[58] it has only been within the last forty years that the exigent circumstances rule has begun to fully mature. For the most part, this is because the Supreme Court has very seldom had occasion to review cases involving the exigent circumstances rule.[59] Perhaps the most likely explanation for this lies in the longstanding application of the *Harris-Rabinowitz* rule,[60] whereby a warrantless search could be made even in the absence of exigent circumstances simply by making a lawful arrest.[61] Because the vast majority of warrantless searches occur in the process of executing an arrest warrant, the police have often been able to rely solely on the *Harris-Rabinowitz* rule as a means of justifying warrantless searches, thus obviating the need to litigate issues relating to the exigent circumstances rule.[62] However, since the repudiation of the *Harris-Rabinowitz* rule in *Chimel v. California*,[63] many more cases have raised issues concerning the exigent circumstances rule.[64] As a result, there are now several Supreme Court cases directly addressing the exigent circumstances rule, including at least one specifically pertaining to each of the three categories of exigent circumstances recognized by the Court.[65] The remainder of this Part is dedicated to reviewing these cases as well as generally describing each category of exigent circumstances, with special attention given to the destruction or removal of evidence category, as this was the category of exigent circumstances at issue in *King*.

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[57] Kentucky v. King, 131 S.Ct. 1849, 1856 (2011); Mincey v. Arizona, 437 U.S. 385, 394 (1978).

[58] *See, e.g.*, Johnson v. United States, 333 U.S. 10 (1948); McDonald v. United States, 335 U.S. 451 (1948).

[59] *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.5 (2010) (noting "the limited and indirect treatment of [the exigent circumstances rule] by the Supreme Court").

[60] The *Harris-Rabinowitz* rule governed the permissible scope of searches incident to arrests and derived its name from Supreme Court's decisions in *Harris v. United States* and *United States v. Rabinowitz*. *See* United States v. Rabinowitz, 339 U.S. 56, 60–61 (1950); Harris v. United States, 331 U.S. 145, 151 (1947).

[61] LAFAVE, *supra* note 59 (explaining that "so long as the Harris-Rabinowitz rule was extant, a warrantless search of the premises could often be made without regard to the existence of any emergency by the simple expedient of making a lawful arrest . . .").

[62] *Id.*

[63] Chimel v. California, 395 U.S. 752, 768 (1969).

[64] *See* infra Part II.B.

[65] *See infra* Part II.B.

1. Hot Pursuit

The Supreme Court first recognized the "hot pursuit" of a fleeing suspect as an independent category of exigent circumstances in *Warden v. Hayden*.[66] Although *Warden* did not explicitly use the term "hot pursuit," the term appeared in the Court's earlier decision in *Johnson v. United States*[67] and has since been adopted by the Court as the name for this category of exigent circumstances.[68] The Supreme Court has defined "hot pursuit" as involving "some sort of chase," but not necessarily a chase that has been "extended hue and cry 'in and about (the) public streets.'"[69] Typically, the hot pursuit category is implicated when the police enter a suspect's home without a warrant after an extended chase concludes with the suspect retreating into his home.[70] Although hot pursuit is technically a distinct category of exigent circumstances, it is often accompanied by the presence of other exigent circumstances.[71] In *United States v. Santana*, for instance, the police made a warrantless entry into the defendant's home after she retreated inside in order to avoid being arrested by several police officers who had surprised her in front of her home.[72] Although the Court held that the warrantless entry was justified by hot pursuit, it added that "there was likewise a realistic expectation that any delay would result in destruction of evidence."[73] Thus, because the presence of other, more demanding exigent circumstances is often sufficient to justify a warrantless search, the hot pursuit category is probably the least frequently relied upon category of exigent circumstances.

2. Emergency Aid

The emergency-aid exception permits the police to make a warrantless entry for the purpose of "render[ing] emergency assistance to an injured occupant or . . . protect[ing] an occupant from imminent injury."[74] This category of exigent circumstances is most often applicable in cases where

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[66] Warden v. Hayden, 387 U.S. 294 (1967).

[67] Johnson v. United States, 333 U.S. 10, 16 n.7 (1948).

[68] United States v. Santana, 427 U.S. 38, 42–43 (1976).

[69] *Id.* at 43.

[70] William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations-Warrantless Entries into Premises: The Legacy of* Welsh v. Wisconsin, 38 U. KAN. L. REV. 439, 468 (noting that "[m]ost reported cases in which warrantless entries have been upheld on a hot pursuit theory have involved the pursuit of suspected felons").

[71] *See Santana*, 427 U.S. at 40.

[72] *Id.* at 40.

[73] *Id.* at 43.

[74] *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

police arrive at a person's home and have reason to believe that someone inside is currently injured or is about to be injured.[75] However, it is also applicable if the lives or safety of the police themselves are endangered.[76] According to the Supreme Court, the rationale behind the emergency-aid exception is that "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."[77] Although the need to render emergency aid will justify a warrantless entry and any action necessary to quell the emergency, any warrantless search or seizure must be "strictly circumscribed by the exigencies which justify its initiation."[78] Thus, while "the police may seize any evidence that is in plain view during the course of their legitimate emergency activities,"[79] they may not extend the scope of their search any further than is necessary to determine the source of the threat and effectively prevent it.[80]

3. Destruction of Evidence

The Supreme Court first addressed the issue of whether a warrantless entry into a person's home may be justified by the destruction or removal of evidence in *Vale v. Louisiana.*[81] In *Vale*, police arrested the defendant on his front porch after they observed him selling narcotics to a man who had driven by in a car.[82] After making the arrest, the police entered the defendant's home and conducted a "protective sweep"[83] in order to determine if anyone else was present.[84] Although the police found no one else in the defendant's home, the defendant's mother and brother returned home only a few minutes later.[85] Upon their arrival, the police conducted a

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[75] *See id.* at 400–01.

[76] *See* Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (declaring that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives . . .").

[77] Mincey v. Arizona, 427 U.S. 385, 392 (1978) (quoting Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963)).

[78] *Id.* at 393 (quoting Terry v. Ohio, 392 U.S. 1, 25–26 (1968)).

[79] *Id.* (quoting Michigan v. Tyler, 436 U.S. 499, 509–10 (1978)).

[80] *See id.*

[81] Vale v. Louisiana, 399 U.S. 30 (1970).

[82] *Id.* at 32–33.

[83] "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Maryland v. Buie, 494 U.S. 325, 327 (1990).

[84] *Vale*, 399 U.S. at 33.

[85] *Id.*

more thorough search of the premises that ultimately led to the discovery of narcotics in the defendant's bedroom.[86]

In reviewing the Louisiana Supreme Court's decision to uphold the search on the grounds that it had occurred "in the immediate vicinity of arrest," the Court focused primarily on the state's argument that the search should be held valid based on the exigent circumstances rule.[87] Responding to this argument, the Court said that "[the exigent circumstances rule] could not apply to the present case, since by their own account the arresting officers satisfied themselves that no one else was in the house when they first entered the premises."[88] Because the officers had secured control of the premises prior to the arrival of the defendant's mother and brother, the subsequent presence of the defendant's mother and brother did not pose any threat that evidence might be destroyed and therefore was insufficient to justify a warrantless entry.[89] Thus, the Court concluded that the search was invalid as a violation of the Fourth Amendment because "[t]he goods ultimately seized were not in the process of destruction."[90]

The circuit courts have adopted varying interpretations of the *Vale* decision in fashioning their tests for determining when threatened destruction or removal of evidence is sufficiently exigent to justify a warrantless search.[91] Although "[i]t is difficult to categorize and compare the approaches taken by the circuits,"[92] all circuits require the police to have a factual basis for believing that evidence will be destroyed before a warrantless entry is justified.[93] Thus, "[a]n unsupported belief that an emergency exists or a belief based on surmise or conjecture is not enough" to justify a warrantless search or seizure based on the exigent circumstances rule.[94] Beyond this basic similarity, the circuits have taken a variety of different approaches to determining whether the police had a sufficient factual basis to support a reasonable belief that exigent circumstances existed. Ignoring minor deviations, the various circuits' approaches may roughly be classified into two separate groups: (1) those employing a multi-

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[86] *Id.*

[87] *Id.* at 33–34.

[88] *Id.* at 34.

[89] *See id.*

[90] *Id.* at 35.

[91] *See* Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283, 300 (1988); *see also* LAFAVE, *supra* note 59, § 6.5 (stating that "[g]enerally. . . the lower courts have not accepted the Vale formulation as controlling").

[92] Salken, *supra* note 91, at 301.

[93] See *infra* Part.II.B.3.a–b.

[94] Salken, *supra* note 91, at 303.

factored analysis; and (2) those employing a general totality-of-the-circumstances analysis.

a. Multi-Factored Analysis

Illustrative of a multi-factored analysis is the Third Circuit's test as set forth in *United States v. Rubin*.[95] In *Rubin*, the Third Circuit revisited the Supreme Court's decision in *Vale*, which had apparently required that evidence be "in the process of destruction" in order for there to be an exigency sufficient to bypass the warrant requirement.[96] According to the court, "[a]lthough the [Supreme] Court had always spoken of 'threatened' destruction or removal of evidence in previous cases involving the emergency exception, in *Vale*, it spoke for the first time of goods 'in the process of destruction.'"[97] The court then explained that "[a]lthough the language might suggest that the emergency exception must be construed to require knowledge that the evidence is actually being removed or destroyed, the omission of a single word should not be given such significance . . . ."[98]

Ultimately, the Third Circuit concluded that the Supreme Court's "in the process of destruction" formulation should not be interpreted as requiring that the police have actual knowledge that evidence is being destroyed.[99] Instead, the court set forth several factors to be used in assessing the sufficiency of exigent circumstances in destruction of evidence cases.[100] These factors include:

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that police are on their trail; (5) the ready destructibility of the contraband . . . .[101]

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[95] United States v. Rubin, 474 F.2d 262 (3d Cir. 1973). The D.C. Circuit also set forth a multi-factored analysis in *Dorman v. United States*, 435 F.2d 385, 392–93 (D.C. Cir. 1970). However, because the D.C. Circuit's current test is more similar to a totality-of-the-circumstances analysis, I chose to focus on the *Rubin* factors as an example of a multi-factored analysis. *See* United States v. McEachin, 670 F.2d 1139, 1144 (D.C. Cir. 1981).

[96] *Rubin*, 474 F.2d at 267.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 267–68 (stating that "[w]e find no requirement that officers must know of the removal or destruction in order to make the search").

[100] *Id.* at 268–69.

[101] *Id.* at 268.

In applying these factors, the court focuses on the information known to police at the time of the warrantless entry.[102] Although no one of these factors is determinative because "[t]he emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinized,"[103] a warrantless search will be upheld if, based on the court's assessment of the factors as a whole, it appears that the police "ha[d] probable cause to believe contraband [was] present and . . . reasonably conclude[d] that the evidence w[ould] be destroyed or removed before they c[ould] secure a search warrant."[104] In *Rubin*, for example, there was no evidence substantiating a "possibility of danger to police officers" or a "reasonable belief that the contraband [was] about to be removed,"[105] yet the court nevertheless held that, given the suspects' awareness of the police's presence, "the [police] . . . reasonably . . . concluded that even a short wait [to obtain a warrant] might have been too long."[106]

The *Rubin* factors were subsequently adopted by the Fourth Circuit in *United States v. Turner*.[107] Like the Third Circuit, the Fourth Circuit focuses on the information known to police at the time of the warrantless entry and does not require that every factor be present before concluding that the police reasonably believed that exigent circumstances existed.[108] In addition to the Third and Fourth Circuits, several state courts employ a multi-factored analysis identical to or strikingly similar to that set forth in *Rubin*.[109]

b. Totality-of-the-Circumstances Analysis

The remaining circuits eschew a multi-factored analysis and instead focus on whether the police reasonably believed that exigent circumstances existed under the totality of the circumstances.[110] Like the Third and Fourth

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[102] *See id.* at 268–70.
[103] *Id.* at 268.
[104] *Id.*
[105] *See id.* at 268–70.
[106] *Id.* at 269–70.
[107] United States v. Turner, 650 F.2d 526, 528 (4th Cir. 1981).
[108] *See id.* at 528–29.
[109] *See, e.g.*, People v. Boorem, 519 P.2d 939, 941 (Colo. 1974); State v. Lewis, 561 A.2d 1153, 1159 (N.J. 1989); Commonwealth v. Conn, 547 A.2d 768, 771 (Pa. Super. Ct. 1988).
[110] *See, e.g.*, United States v. Lopez, 937 F.2d 716, 722 (2d Cir. 1991) ("In determining whether exigent circumstances support a warrantless entry . . . the test . . . 'is an objective one that turns on . . . the totality of circumstances confronting law enforcement agents . . . .'") (citations omitted); United States v. Johnson, 904 F.2d 443, 448 (8th Cir. 1990) (examining totality of circumstances in concluding that exigency was sufficient to permit warrantless entry and subsequent search); United States v. Pantoja-Soto, 739 F.2d 1520, 1524 (11th Cir. 1984) (concluding, based on the totality of the circumstances, that "any delay in apprehending the suspect . . . could have increased the danger to

Circuits, these circuits have concluded that *Vale*'s "in the process of destruction" language should not be interpreted as requiring that the police have actual knowledge that evidence is being destroyed before a warrantless entry is justified.[111] However, rather than applying a rigid set of factors, these circuits employ a generally worded test that asks whether, based on the totality of the circumstances, "the [police] had reason to believe that . . . evidence was in danger of imminent destruction."[112]

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officers" and therefore "[e]xigent circumstances justified the . . . warrantless entry . . ."); United States v. Elkins, 732 F.2d 1280, 1284 (6th Cir. 1984) ("[A] warrantless entry will be sustained when the circumstances . . . were such as to lead a person of reasonable caution to conclude that evidence . . . would probably be destroyed within the time necessary to obtain a search warrant."); United States v. Thompson, 700 F.2d 944, 947–48 (5th Cir. 1983) ("[T]he government must demonstrate that the agents had reason to believe that the evidence was in danger of imminent destruction."); United States v. Cuaron, 700 F.2d 582, 586 (10th Cir. 1983) (concluding that "[a court] should 'evaluate the circumstances as they would have appeared to prudent, cautious and trained officers'" (quoting United States v. Erb, 596 F.2d 412, 419 (10th Cir. 1979))); United States v. McEachin, 670 F.2d 1139, 1144 (D.C. Cir. 1981) ("In determining whether the Government has met its burden of demonstrating that the 'exigencies of the situation' made a warrantless search 'imperative,' we must be guided 'by the realities of the situation presented by the record.'" (quoting Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971))); United States v. Edwards, 602 F.2d 458, 468 (1st Cir. 1979) (citing United States v. Flickinger, 573 F.2d 1349 (9th Cir. 1978), and engaging in similar totality-of-the-circumstances inquiry in determining sufficiency of exigent circumstances); *Flickinger*, 573 F.2d at 1356 ("[r]eviewing the totality of the circumstances" in determining whether exigent circumstances justify warrantless entry); United States v. Rosselli, 506 F.2d 627, 630 (7th Cir. 1974) ("[A] warrantless search is not justified unless the agents 'reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant.'" (quoting *Rubin*, 474 F.2d at 268)). Although the Second Circuit applies a totality-of-the-circumstances test, it has nevertheless developed an "illustrative" set of factors that it frequently references in determining the reasonableness of the police's belief that exigent circumstances existed. *Lopez*, 937 F.2d at 722. Similarly, the Fifth Circuit treats the *Rubin* factors as "relevant to . . . its evaluation of the exigenc[ies] of the situation." *Thompson*, 700 F.2d at 948.

[111] *See, e.g.*, *Lopez*, 937 F.2d at 723–24 (concluding that the district court's factual finding that there was some chance that evidence was to be destroyed and therefore, no time for the police to obtain a warrant, was not clearly erroneous); *Johnson*, 904 F.2d at 447 ("It is irrelevant that there was a distinct possibility . . . that the exigent circumstances created by the likelihood of evidence being destroyed [was] therefore foreseeable."); *Pantoja-Soto*, 739 F.2d at 1524 ("[A]ny delay in apprehending the suspect . . . [may have] allowed destruction of evidence" and therefore "[e]xigent circumstances justified the . . . warrantless entry . . . ."); *Elkins*, 732 F.2d at 1284 ("[A] warrantless entry will be sustained when the circumstances . . . were such as to lead a person of reasonable caution to conclude that evidence . . . would probably be destroyed within the time necessary to obtain a search warrant."); *Thompson*, 700 F.2d at 947–48 ("[T]he government must demonstrate that the agents had reason to believe that the evidence was in danger of imminent destruction."); *Cuaron*, 700 F.2d at 586 ("When officers have reason to believe that criminal evidence may be destroyed, or removed, before a warrant can be obtained, the circumstances are considered sufficiently critical . . . to secure the evidence while a warrant is sought."); *McEachin*, 670 F.2d at 1145 (finding that a previous case that noted "staking out the premises while obtaining a warrant would have risked loss of evidence and endangered the police" controlled); *Edwards*, 602 F.2d at 468 ("[T]he possibility that evidence will be destroyed by defendants . . . has been recognized as sufficient exigency to justify warrantless entry."); *Flickinger*, 573 F.2d at 1354–55 ("The critical question is whether . . . evidence was in imminent danger of being destroyed."); *Rosselli*, 506 F.2d at 630 ("A warrantless search is not justified unless the agents 'reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant.'" (quoting *Rubin*, 474 F.2d at 268)).

[112] *Thompson*, 700 F.2d at 947–48.

As a practical matter, however, even these circuits focus their inquiry on certain factors that indicate the reasonableness or unreasonableness of the police's belief that exigent circumstances existed. In *United States v. Flickinger*, for instance, the Ninth Circuit relied heavily on the fact that "the [police] had no specific reason to believe that the occupants were on notice of their danger and were likely to destroy evidence" in concluding that the threat of destruction or removal of evidence did not support a reasonable police belief that exigent circumstances existed.[113] This focus on the "occupants [being] on notice of their danger" is highly reminiscent of *Rubin*'s fourth prong, which asks whether the police had "information indicating the possessors of the contraband [were] aware that police [were] on their trail."[114] Other facts that these circuits consider in assessing the reasonableness of the police's belief that exigent circumstances existed include the amount of time necessary for police to obtain a warrant[115] and the likelihood that evidence will actually be removed or destroyed,[116] both of which are also similar to factors considered by circuits employing a multi-factored analysis.[117] Thus, despite the superficial difference between the two, there is typically no difference in result regardless of whether a multi-factored analysis or a totality-of-the-circumstances analysis is being applied.

C. The Police-Created Exigency Doctrine

Although the sheer breadth of the exigent circumstances rule greatly increases the potential for police abuse of discretionary authority, such abuse has been tempered to some extent by development of the "police-created exigency doctrine," an exception to the exigent circumstances rule that prohibits the police from relying on exigencies of their own creation as a means of bypassing the warrant requirement. Although the circuit courts have developed numerous unique versions of the police-created exigency doctrine, there is general agreement that there must be something more than a simple causal relationship between the police conduct at issue and the resulting exigent circumstances in order for police to be deemed to have impermissibly created exigent circumstances.[118] As one court has noted, the

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[113] *Flickinger*, 573 F.2d at 1355.

[114] *Rubin*, 474 F.2d at 268.

[115] *See, e.g.*, *McEachin*, 670 F.2d at 1146 ("The amount of time necessary to obtain a warrant by traditional means has always been considered in determining whether circumstances are exigent.").

[116] *See, e.g.*, *Rosselli*, 506 F.2d at 630.

[117] *See supra* Part II.B.3.a.

[118] Kentucky v. King, 131 S. Ct. 1849, 1857 (2011) (noting that "the lower courts have held that the police-created exigency doctrine requires more than simple causation").

reason for this requirement is that "in some sense the police always create the exigent circumstances that justify warrantless entries and arrests."[119] Because police conduct so often results in the creation of exigent circumstances, a simple causation test would effectively eradicate the exigent circumstances exception to the warrant requirement.[120]

Beyond tolerating simple causation, courts have widely varied in their tests for determining when police impermissibly create exigent circumstances. Indeed, the case law on this subject has fragmented so much that at least five distinct tests have developed in the federal circuit courts.[121] In addition to these, several other tests have been developed by state courts.[122] Notwithstanding this wide diversity, every jurisdiction's test for police-created exigencies has a single common aim: guiding and controlling the exercise of police discretion as they go about investigating crime in situations where exigent circumstances are likely to arise. In order to most effectively regulate police discretion, the vast majority of jurisdictions have included a subjective inquiry as part of their test for police-created exigencies, asking whether the police deliberately created the exigent circumstances with the bad-faith intent of bypassing the warrant requirement.[123] By refusing to allow police to deliberately create exigent circumstances, these jurisdictions greatly restrict the ability of police to conduct warrantless searches and seizures pursuant to the exigent circumstances rule and thereby preserve the precautionary function of the neutral, detached magistrate. This Part summarizes the various tests developed by the federal circuit courts, focusing particularly on their requirements regarding subjective intent.

1. Unreasonable Delay in Obtaining a Warrant

The Seventh Circuit's test for determining when police impermissibly create exigent circumstances asks only whether the police officers unreasonably or purposefully delayed in obtaining a warrant.[124] This test imposes two requirements on the exercise of police discretion. First, the

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[119] United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990).

[120] This is especially true with respect to the destruction-of-evidence exception because "in the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the destruction is fear that the evidence will fall into the hands of law enforcement." *King*, 131 S. Ct. at 1857.

[121] *See infra* Part II.C.

[122] *See, e.g.*, King v. Commonwealth, 302 S.W.3d 649, 656 (Ky. 2010), *rev'd*, 131 S. Ct. 1849 (2011); State v. Santana, 586 A.2d 77, 82–83 (N.H. 1991); Commonwealth v. Melendez, 676 A.2d 226, 229 (Pa. 1996).

[123] *See infra* Part II.C.

[124] *See* United States v. Berkwitt, 619 F.2d 649, 654 (7th Cir. 1980).

police may not deliberately delay in obtaining a warrant with the hopes that exigent circumstances will arise.[125] Second, the police must attempt to secure a warrant within a reasonable time after their investigation has yielded sufficient evidence to establish probable cause upon which a warrant may be issued.[126] By focusing on the ability of the police to obtain a warrant prior to the creation of exigent circumstances, this test emphasizes the temporal aspect of police-created exigencies. Whereas other circuits' tests consider the reasonableness of the police conduct in its entirety, the unreasonable delay test revolves solely around the reasonableness of police conduct with respect to the decision of *when* to obtain a warrant. Thus, if "[t]he record amply demonstrates [that] the agents did not purposefully wait for 'exigent circumstances' to arise to avoid the necessity of obtaining a warrant,"[127] then the unreasonable delay test does not preclude police from relying on the exigent circumstances rule as a means of bypassing the warrant requirement.

By requiring that the police seek a warrant within a reasonable amount of time after gathering evidence sufficient to establish probable cause, the unreasonable delay test ensures that the police do not take advantage of the exigent circumstances rule by habitually "sitting" on probable cause while engaging in investigatory tactics likely to lead to the creation of exigent circumstances. Thus, in addition to controlling police discretion by prohibiting the deliberate creation of exigent circumstances, the unreasonable delay test forces the police to obtain a warrant at a much earlier stage in their investigation than they might otherwise desire.

2. Unreasonable Delay in Obtaining a Warrant Plus Bad-Faith Intent to Evade the Warrant Requirement

The First, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits incorporate the unreasonable delay test into their analysis, but require also that there be "some showing of deliberate conduct on the part of the police evincing an

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[125] *See id.*
[126] *See id.*
[127] *Id.*

effort intentionally to evade the warrant requirement."[128] Thus, even if the police unreasonably delay in obtaining a warrant, a warrantless entry will not be prohibited unless the purpose of the delay was to wait for exigent circumstances to develop.[129] Although this test is substantially similar to the unreasonable delay test, it is important to highlight the emphasis placed by these circuits on the subjective component of the police-created exigency doctrine. By explicitly requiring proof of the subjective intentions of the police officers, this test exemplifies the police-created exigency doctrine's traditional emphasis on precluding the police from deliberately manufacturing exigent circumstances with the bad-faith intent to evade the warrant requirement.

3. Foreseeability of Resulting Exigent Circumstances

The Fourth and Eighth Circuits have adopted a test that precludes the police from conducting warrantless searches based on exigent circumstances when the exigent results of the police officers' actions were reasonably foreseeable.[130] Essentially, this test requires that the police cease

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[128] *See* United States v. Zogmaister, 90 Fed. App'x. 325, 332 (10th Cir. 2004) (concluding that "[the police] improperly created their own exigency" because "[t]he officers' course of action represent[ed] a clear example of the government creating its own exigency and thus attempting to circumvent the Fourth Amendment's requirements"); Ewolski v. City of Brunswick, 287 F.3d 492, 504 (6th Cir. 2002) (requiring "some showing of deliberate conduct on the part of the police evincing an effort to intentionally evade the warrant requirement"); United States v. VonWillie, 59 F.3d 922, 926 (9th Cir. 1995) (noting that "[t]he [police-created exigency doctrine] has been applied only in cases where exigencies arose 'because of unreasonable and deliberate [conduct] by officers,' in which the officers 'consciously established the condition which the government now points to as an exigent circumstance'"); United States v. Robin, 923 F.2d 1506, 1511 (11th Cir. 1991) ("[A] warrantless search is illegal when police possess probable cause but instead of obtaining a warrant create exigent circumstances."); United States v. Socey, 846 F.2d 1439, 1449 (D.C. Cir. 1988) ("As long as police measures are not deliberately designed to invent exigent circumstances, we will not second-guess their effectiveness."); United States v. Cresta, 825 F.2d 538, 553 (1st Cir. 1987) (concluding that the police did not impermissibly create exigent circumstances because "the agents could not have controlled the time at which the fake delivery took place, which is a necessary element to a finding that the government deliberately created the exigent circumstances").

[129] *Socey*, 846 F.2d at 1449 ("[A]s long as police measures are not deliberately designed to invent exigent circumstances, we will not second-guess their effectiveness.").

[130] United States v. Mowatt, 513 F.3d 395, 402 (4th Cir. 2008) (holding that police impermissibly created exigent circumstances because "they set up the wholly foreseeable risk that the occupants, upon being notified of the officers' presence, would seek to destroy the evidence of their crimes"); United States v. Duchi, 906 F.2d 1278, 1285 (8th Cir. 1990) (holding that police impermissibly created exigent circumstances because "[t]he heightened danger of destruction [caused by police action] was . . . reasonably foreseeable"). It is important to note that, in addition to the reasonable foreseeability analysis, the Fourth and Eighth Circuits employ tests similar to those of the other circuits, such as the unreasonable delay test and the bad faith test. *See Mowatt*, 513 F.3d at 401 (criticizing police's failure to obtain a warrant because the "officers . . . offered no justification for not seeking a warrant prior to knocking on the door, other than the slight delay or inconvenience [of] obtaining a

their investigation and attempt to secure a search warrant if they believe that they are confronted with circumstances wherein it is likely that exigent circumstances will arise if they proceed any further with their investigation.[131] By precluding police from using investigative tactics that may foreseeably result in exigent circumstances, this test restrains police discretion by forcing police to think through the consequences of their investigative tactics and avoid using any tactics that are likely to result in exigent circumstances. Thus, under the reasonable foreseeability test, the police are "not . . . allowed to plead [their] own lack of preparation" as justification for a warrantless entry.[132] Instead, they may only conduct a warrantless search or seizure based on exigent circumstances in the rare case that they are responding to a genuine emergency resulting independently of police action that foreseeably created exigent circumstances.

4. Bad Faith and Unreasonable Police Action

The Third and Fifth Circuits have developed a two-part test for determining when police impermissibly create exigent circumstances.[133] Under this test, the court first asks "whether the [police] deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement."[134] If the police acted in bad faith, then any evidence obtained as a result of the warrantless entry will be suppressed on that ground alone.[135] However, "even if they did not . . . [act] . . . in bad faith," the evidence may nevertheless be excluded under the second part of the test, which asks "whether [the police's] actions . . . were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement."[136] This second part of the test focuses on "the reasonableness and propriety of the officers' actions and investigative tactics leading up to the warrantless search."[137] In assessing the reasonableness of the investigative tactics used by police, these circuits consider several factors,

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warrant . . ."); *Duchi*, 906 F.2d at 1284 (stating that "[t]here is no question that the deliberate creation of urgent circumstances is unacceptable").

[131] *See Mowatt*, 513 F.3d at 402; *Duchi*, 906 F.2d at 1285.

[132] United States v. Collazo, 732 F.2d 1200, 1204 (4th Cir. 1984).

[133] United States v. Coles, 437 F.3d 361, 370 (3d Cir. 2006); United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004).

[134] *Gould*, 364 F.3d at 590. Although the Third Circuit has not explicitly adopted a subjective inquiry, it is implicit in its decision in *Coles* that its test contains a subjective component. See *Coles*, 437 F.3d at 373 (Roth, J., dissenting) (stating that the test set forth by the majority "can only be implemented via an inquiry into the subjective intent of the officers who created the exigency").

[135] See *Gould*, 364 F.3d at 590.

[136] *Id.*

[137] *Coles*, 437 F.3d at 368.

including the existence of probable cause, the amount of time necessary to secure a warrant, and the foreseeability of the resulting exigent circumstances.[138] Although no particular combination of these factors is necessary in order for the police to be deemed to have impermissibly created exigent circumstances, the court will so conclude if it appears that "the police had no legitimate reason to utilize the [tactics employed]," but nevertheless proceeded to do so in the face of circumstances that made it likely that an exigency might arise.[139]

Because this test prevents all manner of deliberate police abuse of the exigent circumstances rule, it provides very little opportunity for police to circumvent the warrant requirement except in genuine emergencies. Furthermore, by combining the unreasonable delay test and the reasonable foreseeability test into a single reasonableness inquiry, the Third and Fifth Circuits' test provides a comprehensive framework for regulating police discretion. This powerful combination means that police must obtain a warrant more often than under the other circuits' tests, thus leaving far less room for the exercise of police discretion in conducting warrantless searches and seizures under the exigent circumstances rule.

5. Lawfulness of Police Action

The Second Circuit's test, known as the "lawfulness" test, completely divorces subjective intent from the police-created exigency doctrine, asking only whether police acted in a lawful manner prior to the creation of exigent circumstances.[140] Under the lawfulness test, police officers are free to deliberately create exigent circumstances so long as they do not do so by engaging in illegal action or otherwise violating the Fourth Amendment.[141] In support of the lawfulness test, the Second Circuit has said that "[e]xigent [c]ircumstances are not to be disregarded simply because the suspects chose to respond to the agents' lawful conduct by attempting to . . . destroy evidence."[142] Like the Second Circuit, the Supreme Court in *King* also characterized the defendant's decision to destroy evidence as a superseding cause that breaks the link of causation between the police conduct and the resulting exigent circumstances.[143]

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[138] *See* United States v. Thompson, 700 F.2d 944, 949–51 (5th Cir. 1983).

[139] *Coles*, 437 F.3d at 370.

[140] United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990) (en banc) (holding that "when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances").

[141] *See id.*

[142] *Id.* at 771.

[143] Kentucky v. King, 131 S.Ct. 1849, 1862 (2011) (noting that "[o]ccupants who choose not to

Clearly, the Second Circuit's formulation of the police-created exigency doctrine is the least exacting in terms of controlling police discretion. Indeed, the only limit on police discretion imposed by the lawfulness test is the requirement that the police act in a "lawful manner."[144] Because the police are already required to act in a lawful manner, this "lawfulness" limit is really not much of a limit at all. Thus, "[the lawfulness test] allows the police more freedom in their behaviors"[145] than the other circuits' tests, thereby affording the police far more discretionary authority in conducting warrantless searches and seizures pursuant to the exigent circumstances rule.

III. ANALYSIS

As discussed in the preceding Part, the police-created exigency doctrine was developed primarily as a mechanism for regulating the exercise of police discretion in conducting warrantless searches and seizures pursuant to the exigent circumstances rule.[146] In order to effectively regulate police discretion, the vast majority of circuit courts focused their test for determining when police impermissibly create exigent circumstances on the subjective intent of the police.[147] This focus on police intent in the context of the police-created exigency doctrine is rooted in an interpretation of the Fourth Amendment that views the arbitrary exercise of police discretion as the principal evil that the Amendment was intended to remedy.[148] By refusing to include a subjective inquiry as part of its test for police-created exigencies, the Supreme Court wholly ignored this fundamental principle embodied by the Fourth Amendment. As a result, police officers will now be permitted to deliberately evade the warrant requirement by manufacturing exigent circumstances, thereby removing the protection afforded by having a neutral, detached magistrate review the permissibility of searches and seizures. Moreover, by choosing to focus solely on the lawfulness of police conduct, the Court has adopted an approach that demeans the purpose of the exigent circumstances rule by permitting the police to conduct warrantless searches and seizures based on circumstances

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stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the . . . search that may ensue").

[144] *MacDonald*, 916 F.2d at 772

[145] Katherine A. Carmon, *Don't Act Like You Smell Pot! (At Least, Not in the Fourth Circuit): Police-Created Exigent Circumstances in Fourth Amendment Jurisprudence*, 87 N.C. L. REV. 621, 635 (2009).

[146] *See supra* Part II.C.

[147] *See supra* Part II.C.

[148] *Infra* Part III.A.

that are patently *not* exigent in that they would have never arisen absent the iniquitous or unnecessarily invasive conduct of the police.

A. The Fourth Amendment and the Police-Created Exigency Doctrine

The lawfulness test is fundamentally inconsistent with the Fourth Amendment because it permits the police to search and seize without prior judicial authorization to an extent that would have been abhorrent to the Framers. The principal aim of the Fourth Amendment was to minimize the number of opportunities for police to exercise significant discretionary authority in determining whether to search and seize.[149] Because the police-created exigency doctrine as developed by the circuit courts served precisely this same purpose by precluding police from deliberately manufacturing exigent circumstances,[150] the Supreme Court should not have refused to follow the circuits' lead by failing to include a subjective inquiry as part of its test for police-created exigencies. As will be demonstrated, any test for police-created exigencies that does not take into account the subjective intent of police officers fails to adequately protect "the right of the people to be secure"[151] by permitting the police to exercise virtually unregulated discretion in conducting warrantless searches and seizures pursuant to the exigent circumstances rule.

Of course, the best resource for determining the Framers' intentions regarding warrantless searches and seizures such as those authorized by the exigent circumstances rule would be the text of the Fourth Amendment itself. Unfortunately, however, the Fourth Amendment's text is notoriously cryptic, and thus not particularly helpful.[152] Aside from the difficulty of understanding the interplay between the Reasonableness Clause and the Warrant Clause, there is nothing in the Fourth Amendment's text that speaks to the propriety of, or even acknowledges the possibility of, warrantless searches and seizures.[153] For the most part, this is because there was little reason for the Framers to be concerned about warrantless invasions in light of the relatively meager authority of police officers at

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[149] *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 577–84 (1999).

[150] *See supra* Part II.C and accompanying notes 119–24.

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

[152] *See* Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 LAW & CONTEMP. PROBS. 1, 4 (2010) ("[T]he text of the Fourth Amendment . . . sheds little light on the Framers' understanding of criminal arrest and search standards.").

[153] *See* U.S. CONST. amend. IV.

common law.[154] Indeed, the Framers would have thought it unimaginable that a police officer would possess sufficient authority to search a person's home or seize a person's property without a warrant. During the framing generation, "proactive criminal law enforcement had not yet developed . . . [and] even post-crime investigation by officers was minimal."[155] Instead, the primary duty of police officers was "to preserve order by keeping an eye on taverns, controlling drunks, apprehending vagrants, and responding to 'affrays' (fights) and other disturbances . . . ."[156] Because the police did not independently investigate crime, "the mobilization of criminal justice depended almost entirely on private initiation of criminal prosecutions."[157] As a result, there was simply no opportunity for police officers to initiate warrantless searches and seizures because any such action required prior authorization by a justice of the peace.[158] Given that the authority of framing-era police officers depended entirely on warrants issued by justices of the peace, the Framers believed that "control of the warrant authority . . . would suffice to preserve the right to be secure in person and house."[159] Thus, the Framers saw no need to include a provision specifically dealing with warrantless searches and seizures by police because, in their experience, such invasions were extremely unlikely to occur.[160]

Notwithstanding the fact that the Framers did not specifically intend the Fourth Amendment to apply to warrantless searches and seizures, interpretation of the Fourth Amendment in light of its paradigmatic cases yields but one conclusion—namely, that the Framers would not have tolerated the extent to which the lawfulness test vests ordinary police officers with discretionary authority in determining whether to search and seize. Paradigmatic case interpretation is based on the idea that the meaning of constitutional provisions can only be fully understood in light of their foundational applications.[161] As one scholar has explained, "the

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[154] Davies, *supra* note 149, at 552.

[155] *Id.* at 620.

[156] *Id.* at 621.

[157] *Id.* at 622.

[158] *Id.* at 623.

[159] *Id.* at 553–54.

[160] *Id.* at 578 (concluding that "the Framers were not unconcerned about warrantless intrusions because they had any confidence in officers' judgment—rather, they were unconcerned with warrantless intrusions because they did not perceive ordinary officers as possessing any significant discretionary authority at common law to initiate arrests or searches").

[161] *See generally* Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977 (2006). Rubenfeld explains the art of paradigmatic case interpretation with the following example:

> Suppose Odette commits herself never again to deceive Swann, her husband. Shortly thereafter, the handsome Duke proposes to Odette that he and she spend a night together. Odette wants to say yes. . . . So she has to decide whether spending a night with Duke would

'*foundational* or *core* applications' of a provision . . . 'serve as *paradigm cases* [that] provide the reference points for the construction of doctrinal frameworks.'"[162] When interpreting the Fourth Amendment, the relevant foundational application is the prohibition of general warrants because such warrants were widely considered by the Framers as the greatest threat to the right to be secure.[163] Indeed, most scholars agree that "[t]he Fourth Amendment was enacted above all to forbid 'general warrants.'"[164] Thus, paradigmatic case interpretation requires examination of the historical circumstances leading to the proscription of general warrants and, more importantly, the reasons given in support of so proscribing them.

General warrants are warrants that "do not specify the place or sphere of a search" and thus "grant[] unrestricted discretion to executing officers" to search unspecified places or to seize unspecified persons.[165] The most common type of general warrant used during the framing era authorized widespread searches for stolen property and fugitives, but general warrants were also used for a variety of other types of searches and seizures, including those necessary to enforce customs and excise taxes.[166] Although general warrants came in a variety of different forms, they all shared the

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> count as an act of deceiving Swann.
>
> It occurs to Odette to reason as follows. "To deceive means affirmatively to misrepresent something, not merely to fail to tell something. Therefore, spending a night with Duke will not be an act of deceiving Swann so long as I never affirmatively lie about it." On this basis, Odette says yes to Duke and tells herself she is not violating her commitment to Swann.
>
> . . . But consider the following additional fact. When Odette made her commitment, the reason she did so was that she had just spent the night with the handsome Duke, without telling Swann about it. She wanted to impose an obligation on herself never to repeat this act . . . .
>
> In other words, Odette's commitment had a foundational Application Understanding. And it so happens that this foundational Application Understanding dealt with the very same course of action she has now "interpreted" her commitment to permit. Once we know this additional fact, it becomes fair to say that Odette has pulled a sleight of hand with her interpretation. She has not really interpreted her commitment at all. She has violated it under the guise of interpreting it.

Id. at 1993–94 (emphasis added).

[162] H. Jefferson Powell, *Grand Visions in an Age of Conflict*, 115 YALE L.J. 2067, 2083 (2006) (emphasis added) (quoting JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 14–16 (2005)).

[163] Davies, *supra* note 149, at 649–50 (explaining that "[b]ecause they took the importance of warrant authority for granted, [the Framers] perceived the task for the constitutional text solely as banning the legalization of general warrants . . . ").

[164] Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 123 (2008); *see also* M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. REV. 905, 912 (2010) (noting that "[t]he immediate aim of the Fourth Amendment was to ban general warrants . . .").

[165] Michael, *supra* note 164, at 925.

[166] *See* Davies, *supra* note 152, at 28.

undesirable characteristics of being "unparticularized, unsworn search warrants, unsupported by probable cause."[167]

The Framers' hostility towards general warrants was rooted in their experiences with them during two major controversies preceding the American Revolution. The first, and perhaps most influential, was the writs of assistance controversy in the colonies. Writs of assistance were a form of general warrant used by English customs officers that "attested to the authority of the bearer to search places in which the bearer suspected uncustomed goods were hidden."[168] Like general warrants, writs of assistance were unparticularized, unsworn, and unsupported by probable cause.[169] Unlike general warrants, however, writs of assistance were "not returnable . . . after execution," but instead were "good as a continuous license and authority during the whole lifetime of the reigning sovereign."[170] Thus, "[t]he discretion delegated to the official was . . . practically . . . unlimited. The writ empowered the officer . . . to search, at [his] will, wherever [he] suspected uncustomed goods to be . . . ."[171]

Colonial opposition to the writs of assistance is exemplified by James Otis's eloquent and widely publicized argument against their legality in Paxton's case. In Paxton's case, Otis represented several Boston merchants who were opposed to renewal of the writs of assistance after the death of George II in 1760.[172] Decrying the illegality of the writs of assistance, Otis characterized the writs as conferring "'a power that place[d] the liberty of every man in the hands of every petty officer'" by permitting police "to enter . . . houses when they please."[173] According to Otis, such "vast powers" transformed officers into "tyrants,"[174] thereby raising the specter that "writs of assistance would 'totally annihilate' . . . 'the freedom of one's house.'"[175] Although Otis and the Boston merchants ultimately lost the case, Otis's condemnation of general warrants had a profound influence on

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[167] Rubenfield, *supra* note 164.

[168] Davies, *supra* note 149, at 561, n.18. "[The writ of assistance] took its name from its command that all peace officers and any other persons who were present 'be assisting' in the performance of the search." *Id.*

[169] Rubenfeld, *supra* note 164, at 123.

[170] NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54 (1970).

[171] *Id.*

[172] Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 946 (1997).

[173] Davies, *supra* note 149, at 581.

[174] *Id.*

[175] Maclin, *supra* note 172, at 946.

revolutionary thought and has been widely recognized as a precipitating cause of the American Revolution.[176]

The writs of assistance became even more infamous when they spread to other colonies after passage of the Townshend Revenue Act of 1767. The Townshend Revenue Act "empower[ed] . . . the highest court in each colony to issue writs of assistance" and thus was intended to make it easier for customs officials to obtain writs of assistance.[177] However, when customs officials petitioned colonial courts for writs of assistance, they were met with unexpected hostility from colonial judges who, notwithstanding the specific statutory authority for the writs, doubted their legality.[178] Some judges simply ignored the officers' requests or otherwise refused to address the legality of the writs by declining to issue them on procedural grounds.[179] Several judges, however, openly refused to issue the writs and held them to be illegal on the grounds "that arming officers . . . with so extensive a power, to be exercised totally at their own discretion, would be of dangerous consequences and was not warranted by Law," and that it was "unconstitutional to lodge such a Writ in the hands of the officer which gave him unlimited power to act under it according to his own arbitrary Discretion."[180] This "near-uniform defeat of writs of assistance in colonial courts signified . . . a consensus against general warrants by the American judiciary"[181] and, more importantly, by the colonists themselves.

The other major controversy that alerted the Framers to the dangers of general warrants were the Wilkesite cases in England. The Wilkesite cases began when the English government issued a general warrant directing officials to arrest whoever was responsible for several seditious articles.[182] The warrants authorized the officials to search the homes of whomever they determined were responsible for the articles and seize any seditious papers in their possession.[183] Ultimately, the warrants were used to arrest and search the homes of opposition politician John Wilkes and his supporters, who quickly responded by suing the officers for trespass.[184]

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[176] *See, e.g.*, Letter from John Adams to William Tudor (Mar. 29, 1817), *in* 10 THE WORKS OF JOHN ADAMS 247–48 (Boston: Little, Brown and Co. 1856) ("But Otis was a flame of fire! . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take up arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.").

[177] Tracy Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV 1049, 1054 (2011).

[178] Davies, *supra* note 149, at 581.

[179] Maclin & Mirabella, *supra* note 177, at 1054.

[180] Davies, *supra* note 149, at 581.

[181] Maclin & Mirabella, *supra* note 177, at 1054.

[182] Michael, *supra* note 164, at 909–10.

[183] *Id.* at 910.

[184] *Id.*

The judicial opinions issued by the presiding justices in the Wilkesite cases were permeated with language denouncing the illegality of general warrants. Although the justices gave several reasons for holding the warrants illegal, their remarks consistently focused on the discretionary authority the warrants gave to ordinary, or "petty," police officers. In *Wilkes v. Wood*, for instance, Lord Chief Justice Pratt condemned the general warrant on the grounds that "a discretionary power given to [police officers] to search wherever their suspicions may chance to fall . . . is totally subversive to the liberty of the subject."[185] Similarly, in *Leach v. Money*, Lord Mansfield said that "[a]s to the validity of the [general] warrant[,] . . . [i]t is not fit[] that the receiving or judging of the information should be left to the discretion of the officer."[186] Instead, Mansfield declared that "[t]he magistrate ought to judge; and should give certain directions to the officer."[187]

Americans learned of the Wilkesite cases via several news reports published in London and throughout the colonies.[188] These reports greatly irked the colonists, who were outraged at the prospect that general warrants might be upheld as a permissible method of authorizing searches and seizures.[189] In due course, the colonists embraced Wilkes and his supporters as heroes in the fight against the use of general warrants.[190] During John Wilkes's incarceration, several prominent American groups sent letters and gifts to Wilkes expressing their support for his cause.[191] Eventually, Wilkes's popularity grew so much that "Wilkes and Liberty" emerged as a rallying cry among both the colonists and English Whigs.[192] Thus, even though the Wilkesite cases took place an ocean apart from the colonies, they nevertheless had an extraordinary impact on the framing generation, and their influence on the development of the Fourth Amendment cannot be understated.

The Framers' experiences during the writs of assistance controversy and the Wilkesite cases apprised them of the dangerousness of general warrants and ultimately led them to forever illegalize such warrants through

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[185] Wilkes v. Wood, (1763) 98 Eng. Rep. 489, (C.P.) 498; Lofft 18.

[186] Money v. Leach, (1765) 97 Eng. Rep. 1075, (K.B.) 1088, *available at* http://press-pubs.uchicago.edu/founders/documents/amendIVs7.html.

[187] *Id.*

[188] Davies, *supra* note 149, at 563.

[189] Michael Longyear, Note, *To Attach or Not to Attach: The Continuing Confusion Regarding Search Warrants and the Incorporation of Supporting Documents*, 76 FORDHAM L. REV. 387, 392 (2007).

[190] *See* PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 47 (2005).

[191] *Id.*

[192] *Id.* at 46.

enactment of the Fourth Amendment.[193] The content and nature of these experiences provide the necessary context for understanding how the Framers would have intended that the Fourth Amendment apply to warrantless searches and seizures such as those authorized by the exigent circumstances rule. As the above-quoted excerpts from the writs of assistance controversy and the Wilkesite cases demonstrate, the primary reason general warrants were considered dangerous was their conferral of discretionary authority on ordinary police officers. This fundamental principle—that police should have only a ministerial role in searching and seizing, rather than one that permits the exercise of significant discretion—is of critical importance if the Fourth Amendment is to be reliably interpreted and applied in novel situations that the Framers could not have anticipated. Viewed in this light, it is overwhelmingly clear that the lawfulness test cannot be squared with the fundamental values underlying the Fourth Amendment. As described above, the lawfulness test is unique from other circuits' tests for police-created exigencies in that it affords police practically unbridled discretion in conducting warrantless searches and seizures pursuant to the exigent circumstances rule.[194] By giving police free reign to deliberately manufacture exigent circumstances, thereby allowing them to search and seize without a warrant, the lawfulness test subverts the very purpose for which the Fourth Amendment was enacted: to control police discretion by mandating the intervention of a neutral, detached magistrate before police are authorized to search and seize. This lack of effective safeguards for controlling the exercise of police discretion is the mainspring of the lawlessness of the lawfulness test.

Arguably, police discretion in conducting searches and seizures pursuant to the exigent circumstances rule is regulated to some extent by the requirement that the police establish probable cause,[195] as well the requirement that the police provide a factual basis for their belief that exigent circumstances existed.[196] However, given the extraordinary number of state and federal crimes as well as the increasing effectiveness of the investigative tools used by the police, the requirement that the police establish probable cause does not adequately curb the exercise of police discretion because the police can easily establish probable cause that *some* crime has been committed. This is especially true considering the fact that

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

[194] *See supra* Part.II.C.5.

[195] *See supra* note 51 and accompanying text for a brief explanation of the requirement that the police establish probable cause in order to justify a warrantless search or seizure based on exigent circumstances.

[196] *See infra* Part II.B.

the Court has significantly lowered the standard for establishing probable cause, requiring only that police establish a "fair probability" of criminality under the totality of the circumstances.[197] As for the need to provide a factual basis for the belief that exigent circumstances existed, the lawfulness test essentially negates any influence that this requirement may have previously had on police discretion by permitting the police to deliberately create exigent circumstances, thereby making it far easier to substantiate a reasonable police belief in the existence of exigent circumstances. Clearly, these flimsy "safeguards" cannot effectively control police discretion to the extent mandated by the Fourth Amendment. Given the Framers' evident distrust of ordinary police officers, it is difficult to imagine that they would have accepted such a pervasive role for police in determining whether and how to search and seize. Thus, in light of the paradigmatic applications of the Fourth Amendment, the lawfulness test accords police officers far more discretion than the Framers would have deemed tolerable.

B. The Exigency Paradox

Apart from its inconsistency with the fundamental values protected by the Fourth Amendment, application of the lawfulness test produces paradoxical results by permitting the police to bypass the warrant requirement based on supposedly exigent circumstances, despite the fact that they deliberately manufactured those circumstances for the purpose of evading the warrant requirement. Because this is clearly inconsistent with the underlying justifications for the exigent circumstances rule, the Court has significantly confused its exigent circumstances jurisprudence by adopting the lawfulness test.

As explained above, the exigent circumstances rule was originally developed in order to allow police to act without prior judicial authorization in certain "exigent circumstances."[198] Exigent circumstances have been defined as situations that present a "specially pressing or urgent law enforcement need,"[199] or, alternatively, as situations where "'immediate and serious consequences' will 'certainly occur' if a police officer postpones action to obtain a warrant."[200] Although it is true that exigent circumstances

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[197] Illinois. v. Gates, 462 U.S. 213, 238 (1983) (probable cause exists if information known to officers established a "fair probability" of criminality).

[198] *See supra* Part II.B.

[199] Illinois v. MacArthur, 531 U.S. 326, 331 (2001).

[200] United States v. Williams, 354 F.3d 497, 503 (6th Cir. 2003) (quoting Ewolski v. City of Brunswick, 287 F.3d 492, 501 (6th Cir. 2002)).

manufactured by the police may very well result in "immediate and serious consequences," there can be no "specially pressing or urgent law enforcement need" when the police could have prevented the exigent circumstances altogether by simply refraining from deliberately creating exigent circumstances. As the First Circuit put it in *Niro v. United States*, "Haste does not become necessary in the present sense [i]f the need for it has been brought about by deliberate [police action]."[201] Thus, for the purpose of applying the exigent circumstances rule, police officers who manufacture exigent circumstances are not similarly situated to police officers who react to exigent circumstances not of their own creation in that the former are the ultimate source of the threat posed by the circumstances, whereas the latter are merely trying to avert the consequences of an external threat. By refusing to include a subjective inquiry as part of its lawfulness test, the Supreme Court wholly ignored this critical analytical distinction and thereby unduly extended the scope of the exigent circumstances rule to an extent that is inconsistent with its original justifications.

The distinction between exigencies resulting independently of police conduct and exigencies resulting because of police conduct has been recognized and finds support in recent commentary on the *King* decision.[202] For instance, in a recent article, Professor Orin Kerr describes the fundamental inconsistency of the lawfulness test with the exigent circumstances rule by objecting that "[t]he point of having a doctrine on police-created exigencies is to recognize that police-created exigencies are not true exigencies. If the police opt to do the thing that creates the emergency, then there was no genuine emergency."[203] According to Kerr, because the exigent circumstances rule was intended to give police special authority in genuine emergencies, it follows that the police should not be permitted to exercise such authority when the circumstances are not truly exigent.[204] Thus, Kerr concludes that "a rule that the police can do whatever they want that is 'lawful' without [impermissibly] creating exigent circumstances seems totally unmoored from the purpose of the exigent circumstances exception."[205]

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[201] Niro v. United States, 388 F.2d 535, 540 (1st Cir. 1968).

[202] Sherry F. Colb, *The U.S. Supreme Court Considers Whether Police Can Make Their Own Exigency in the Fourth Amendment Context*, FINDLAW (Dec. 8, 2010), http://writ.lp.findlaw.com/colb/20101208.html; Orin Kerr, *Police-Created Exigent Circumstances in* Kentucky v. King, SCOTUSBLOG (Jan. 5, 2011, 1:44 AM), http://www.scotusblog.com/?p=111396.

[203] Kerr, *supra* note 202.

[204] *Id.*

[205] *Id.*

Taking a somewhat different approach, Professor Sherry Colb has explained the dissimilarity between genuine emergencies and police-created exigencies by way of analogy to the concept of proximate cause.[206] According to Colb, the police should not be permitted to rely on exigent circumstances as a means of bypassing the warrant requirement if their own action was the proximate cause of the emergency.[207] To illustrate her point, Colb provides an example involving the hypothetical "Dr. Doe," an emergency medical doctor who must arrive at the hospital by 9:00 AM or else risk endangering the lives of his patients.[208] Because Dr. Doe's presence at the hospital is so important, he is granted an exemption from the speed limit if he is running late and must speed to arrive at work by 9:00 AM. Colb explains that:

> If Dr. Doe leaves his house . . . at 7:30 a.m. but encounters an unexpected traffic jam on the way to work, he might be excused for speeding. . . . If, on the other hand, he leaves his house at 8:35 a.m. (because he was enjoying a funny television program and decided that he could still get to work on time by speeding), we could expect that he would not be excused from having violated the speed limit.
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> In both cases, Dr. Doe was in a situation that required speeding to avoid the life-threatening prospect of late arrival. Yet we can attribute the emergency, in the first case, to traffic, and in the second case, to Dr. Doe's neglectful behavior. His behavior was, in this sense, the proximate cause of the second emergency, but not of the first.[209]

Colb's example elucidates an important difference between genuine emergencies and police-created exigencies: whereas genuine emergencies are unavoidable in that they result from unforeseeable external circumstances, such as the hypothetical traffic jam, police-created exigencies *are* avoidable insofar as they are the product of "neglectful behavior," such as Dr. Doe's decision to delay leaving for work to watch television, which could have easily been prevented by more responsible decision-making. Like Dr. Doe, police who deliberately manufacture exigent circumstances are not using their emergency privileges in a responsible manner. Quite to the contrary, they are abusing these privileges

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[206] Colb, *supra* note 202.
[207] *Id.*
[208] *Id.*
[209] *Id.*

by taking advantage of them in situations and for purposes that are not in keeping with the reasons that they were originally given to them.

Albeit in different ways, each of these articles recognizes and condemns the paradoxical results of the lawfulness test. Although the exigent circumstances rule was designed to be flexible so as to accommodate the interests of law enforcement in genuine emergencies, the lawfulness test abuses this flexibility by extending the exigent circumstances rule in a manner that is fundamentally inconsistent with its underlying justifications. Because this inconsistency muddles and confuses the Supreme Court's exigent circumstances jurisprudence, the lawfulness test needs to be reconsidered and, ultimately, restructured by the Court in the future.

IV. RESOLUTION

In an appropriate case, the Supreme Court should revisit its decision in *King* and abandon the lawfulness test. In lieu of the lawfulness test, the Court should substitute a test that precludes the police from deliberately manufacturing exigent circumstances with the bad-faith intent to evade the warrant requirement.[210] Such a test would more faithfully serve the underlying values protected by the Fourth Amendment by more effectively regulating the exercise of police discretion and thereby preserving the precautionary function of the neutral, detached magistrate.

In *King*, the Supreme Court reviewed several of the circuits' tests for determining when police impermissibly create exigent circumstances and rejected all of them except for the lawfulness test.[211] The Court offered various reasons for rejecting the circuits' tests. According to the Court, "Adoption of a reasonable foreseeability test would . . . introduce an unacceptable degree of unpredictability" by "creat[ing] . . . unwarranted difficulties for law enforcement officers who must make quick decisions in the field, as well as for judges who would be required to determine after the fact whether the destruction of evidence . . . was reasonably foreseeable based on what the officers knew at the time."[212] As for the unreasonable

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[210] See *supra* Part.II.C.4. for a description of a subjective inquiry that inquires into bad faith on the part of police.

[211] Kentucky v. King, 131 S.Ct. 1849, 1859–61 (2011).

[212] *King*, 131 S.Ct. at 1859–1860. The Court "illustrates the difficulties that [a reasonable foreseeability test] would produce" with the following example based on the facts presented in *King*:

> Suppose that the officers in the present case did not smell marijuana smoke and thus knew only that there was a 50% chance that the fleeing suspect had entered the apartment on the left rather than the apartment on the right. Under those circumstances, would it have been reasonably foreseeable that the occupants of the apartment on the left would seek to destroy

delay test, the Court said that its strict requirement that police obtain a warrant as early in their investigation as possible would "unjustifiably interfere[] with legitimate law enforcement strategies" because "[t]here are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired."[213] Finally, regarding the unreasonable police action test, the Court felt that it "fail[ed] to provide clear guidance for law enforcement officers and authorize[d] courts to make judgments on matters that are the province of . . . federal and state law enforcement agencies."[214]

The Court's objections to these tests are well taken. With respect to the reasonable foreseeability test and the unreasonable police action test, the Court is correct that these tests are too nebulous to provide adequate guidance to police officers on the front lines of law enforcement. Moreover, by retrospectively second-guessing police action, these tests impose unrealistic expectations on police officers who do not have the benefit of hindsight when making split-second decisions in quickly-developing situations. Likewise, the unreasonable delay test unduly restricts the investigative freedom of the police by preventing them from pursuing "legitimate law enforcement strategies," such as "speak[ing] with the occupants of a dwelling before deciding whether it is worthwhile to seek authorization for a search" or "obtain[ing] more evidence before submitting what might otherwise be considered a marginal warrant application."[215] Thus, although these tests are well suited to regulate police discretion, they cannot realistically be implemented without sacrificing the certainty, consistency, and investigative independence necessary to maintain an effective system of law enforcement.

> evidence upon learning that the police were at the door? Or suppose that the officers knew only that the suspect had disappeared into one of the apartments on a floor with 3, 5, 10, or even 20 units? If the police chose a door at random and knocked for the purpose of asking the occupants if they knew a person who fit the description of the suspect, would it have been reasonably foreseeable that the occupants would seek to destroy evidence?

Id. at 1859–60.

[213] *Id.* at 1860.

[214] *Id.* at 1861.

[215] *Id.* at 1860. The Court also identified several other "legitimate law enforcement strategies" that would be prohibited by the unreasonable delay test. For instance, "the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant," or "prosecutors may w[ant] [the police] to wait until they acquire evidence that can justify a search that is broader in scope than the search that a judicial officer is likely to authorize based on the evidence then available," or "[the police] may not want to execute a search that will disclose the existence of an investigation because doing so may interfere with the acquisition of additional evidence against those already under suspicion or evidence about additional but as yet unknown participants in a criminal scheme." *Id.*

The Court's rationale for rejecting a subjective inquiry, on the other hand, is painfully unconvincing. According to the Court, a subjective inquiry would be "fundamentally inconsistent with [its] Fourth Amendment jurisprudence" because the Court "ha[s] repeatedly rejected a subjective approach" on the grounds that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."[216] Although it is true that the Court has generally rejected subjective standards in the Fourth Amendment context, this fails to justify its refusal to include a subjective inquiry as part of its test for police-created exigencies. Whereas traditional Fourth Amendment analysis requires the use of objective standards due to the Court's longstanding recognition that "[s]ubjective intentions play no role in ordinary, probable-cause analysis,"[217] the police-created exigency doctrine is unique in that it deals with the reasonableness of police action at a level that is one step removed from that involved in "ordinary, probable-cause analysis."[218] Rather than examining the objective circumstances and concluding, based on those circumstances, whether the police action was reasonable, the police-created exigency doctrine examines the relationship between the police action and the resulting exigent circumstances and seeks to determine, based on the nature of the police action, whether the existence of the exigent circumstances is fairly attributable to the police action.[219] As is evidenced by the fact that the majority of the circuit courts included a subjective inquiry as part of their tests for determining when police impermissibly create exigent circumstances,[220] the subjective intent of police officers is a crucial element of any meaningful assessment of the nature of police action and its relationship with the resulting exigent circumstances. Thus, because the focus of the police-created exigency doctrine is on the nature of the police action itself, rather than on the objective circumstances under which the police acted, there is an important distinction between the police-created exigency doctrine and ordinary probable cause analysis. This distinction requires a unique method of analysis for evaluating the nature of police action, and therefore justifies the use of a subjective inquiry notwithstanding the Court's traditional aversion to subjective standards in the context of the Fourth Amendment.

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[216] *Id.* at 1859.
[217] Whren v. United States, 517 U.S. 806, 813 (1996).
[218] *Id.* at 813.
[219] *See supra* Part II.C.
[220] *Id.*

Furthermore, unlike the reasonable foreseeability test and the unreasonable police action test, a subjective inquiry would not "fail to provide clear guidance for law enforcement officers" or otherwise "introduce an unacceptable degree of unpredictability" into the police-created exigency doctrine.[221] Indeed, there is nothing unclear or ambiguous about precluding police from deliberately manufacturing exigent circumstances. To the contrary, a subjective inquiry provides a bright-line rule that is easy for judges to apply and cannot be mistakenly violated by well-intentioned police officers. Nor would a subjective inquiry, like the unreasonable delay test, "unjustifiably interfere[] with legitimate law enforcement strategies."[222] After all, the only law enforcement strategy that a subjective inquiry would interfere with is the deliberate manufacturing of exigent circumstances for the purpose of bypassing the warrant requirement. Thus, in addition to withstanding the Court's general criticism of subjective standards, the bad-faith test does not suffer from the same pitfalls as the other circuits' tests.

Some commentators have objected that the evidentiary difficulty inherent in determining a person's state of mind outweighs any potential benefit of engaging in a subjective inquiry.[223] However, such an objection fails to appreciate the full significance of the police-created exigency doctrine as a rule of law. As a rule of law, the police-created exigency doctrine guides the behavior of the people whose conduct it regulates.[224] In the case of the police-created exigency doctrine, the relevant class of people is the police because it is their conduct that ultimately determines the permissibility of a warrantless search or seizure based on exigent circumstances.[225] By ignoring subjective intent, the lawfulness test conveys a subtle message to the police that they are free to deliberately violate citizens' constitutional rights by manufacturing exigent circumstances as a means of bypassing the warrant requirement. Police officers receiving this message will be less concerned about violating citizens' constitutional rights and, consequently, more prone to do so. Thus, in assessing the relative benefits and burdens of including a subjective inquiry as part of the police-created exigency doctrine, the likelihood that police intent will be

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[221] *King*, 131 S.Ct. at 1859–61.

[222] *Id.* at 1860.

[223] *See* Brian M. Ambramoske, 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, 579-80 (2008).

[224] *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 (1997).

[225] *See supra* Part II.C.

accurately established in an adjudicative setting is not the only relevant criterion. Because the Supreme Court's test for police-created exigencies will affect the way that police exercise their discretion, any test adopted by the Court should send a clear warning to the police that they will be held accountable for their actions and that, if they choose to deliberately violate a person's constitutional rights by manufacturing exigent circumstances, any evidence so obtained will be suppressed from trial. By adopting a test that effectively conveys this message, the Supreme Court could rectify its mistake in *King* and reaffirm its commitment to one of the Fourth Amendment's first principles—namely, that ordinary police officers should not be permitted to exercise significant discretion in determining whether and how to search and seize.

V. CONCLUSION

By refusing to include a subjective inquiry as part of its lawfulness test for police-created exigencies, the Supreme Court ignored the fundamental values underlying the Fourth Amendment and significantly confused its exigent circumstances jurisprudence. As a result, the Supreme Court has jeopardized "[t]he right of the people to be secure"[226] by "arm[ing] the police with a way routinely to dishonor the Fourth Amendment's warrant requirement . . . ."[227] Rather than limit the police-created exigency doctrine to merely evaluating the lawfulness of police conduct, the Supreme Court should adopt a test that focuses on the subjective intentions of the police. Such a test would ensure that the exigent circumstances rule is reserved for genuine emergencies, thereby disincentivizing police from manufacturing exigent circumstances as a means of bypassing the warrant requirement and preventing them from exercising significant discretion in determining whether and how to search and seize.

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[226] U.S. CONST. amend. IV.
[227] *King*, 131 S.Ct. at 1864 (Ginsburg, J., dissenting).