"Knock and Talk" and the Fourth Amendment

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INTRODUCTION

One of the surprising things about the Republican Supreme Court's[1] criminal procedure jurisprudence is its concern for the privacy of the home. While the Court over thirty-five-plus years of Republican domination has been generally pro-police when it comes to outdoor searches as well as interrogations, it has been rather steadfast in protecting the home from warrantless intrusions by police. Even such minor intrusions into the home as monitoring a beeper located inside a drum of chemicals[2] and measuring the heat emissions of a house from outside the home[3] have required a search warrant. Likewise, arrests made inside a dwelling must be performed pursuant to an arrest warrant.[4]

But there is a large swath of police activity that intrudes into dwellings that has been widely allowed by the courts and that often renders the search and arrest warrant requirements nugatory. This is the "knock and talk" technique. Under "knock and talk," police go to people's residences, with or without probable cause, and knock on the door to obtain plain views of the interior of the house, to question the residents, to seek consent to search, and/or to arrest without a warrant, often based on what they discover during the "knock and talk." When combined with such other exceptions to the warrant requirement as "plain view," consent, and search incident to arrest, "knock and talk" is a powerful investigative technique.

This Article explains how "knock and talk," as approved by numerous United States courts of appeal as well as many state courts,[5] has severely limited the Fourth Amendment protection afforded to homes, despite the Supreme Court's stance that homes are heavily protected. Indeed, even though considerable disagreement exists among lower courts as to the extent of the "knock and talk" doctrine, it has never been directly discussed by the Court. However, what was essentially a "knock and talk" was considered and disapproved of in the often quoted, but no longer fully adhered to, 1948 case of *Johnson v. United States*.[6]

This Article argues that the lower courts, as well as the Supreme Court, should return to the principles that *Johnson* announced. It proposes three possible solutions to the intrusiveness that the "knock and talk" technique imposes on the home in descending order of severity. The first is to ban "knock and talk" entirely when a particular home or suspect is the focus of police investigation. The second is to allow

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1. The Court has had a Republican majority since Lewis Powell was sworn in on January 7, 1972. *See* SUPREME COURT HISTORICAL SOC'Y, MEMBERS OF THE SUPREME COURT OF THE UNITED STATES (2006), http://www.supremecourtus.gov/about/members.pdf.

2. *See* United States v. Karo, 468 U.S. 705 (1984).

3. *See* Kyllo v. United States, 533 U.S. 27 (2001).

4. *See* Payton v. New York, 445 U.S. 573 (1980).

5. This Article is based largely on recent circuit court decisions, but there are many more federal district and state court decisions that deal with this issue as well.

6. 333 U.S. 10 (1948).

"knock and talk," but to forbid police from using it as a means of avoiding the search and arrest warrant requirements. The third is to require warnings before police can seek consent to search homes or to arrest people at home without a warrant. The details and relative merits of these proposals are discussed in the last Part.

I. SPECIAL PROTECTION FOR THE HOME

One of the Supreme Court's favorite Fourth Amendment pronouncements is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[7]

But as Justice Scalia, concurring in the judgment in *California v. Acevedo*, pointed out in 1991, "[e]ven before today's decision, the 'warrant requirement' [has] become so riddled with exceptions that it was basically unrecognizable."[8] *Acevedo* itself exacerbated the trend by holding that a piece of personal luggage or any other container found in a vehicle can be searched on probable cause with no warrant.[9]

In addition to the vehicle search exception to the warrant requirement, no warrant is required to arrest someone in a public place,[10] to fully search them incident to that arrest, including any containers they might be carrying,[11] or to "stop and frisk" them.[12] In fact, after *Acevedo*, there is nothing left of the search warrant requirement for outdoor searches except for the perishingly small group of individuals whom police lack probable cause to arrest, who are carrying a container that police have probable cause to believe contains evidence of a crime, and who do not place the container in a vehicle.[13] These containers alone remain subject to the search warrant requirement.[14]

Moreover, during the 1970s and 1980s, the Court was vigorous in declaring various police activities that could only be described as "searches" in common parlance as not constituting "searches" at all under the Fourth Amendment. Thus, a search of an "open field" surrounded by a fence and "No Trespassing" signs,[15] a helicopter flyover conducted to look for marijuana growing in a yard,[16] and a search of trash left at the

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7. Katz v. United States, 389 U.S. 347, 357 (1967) (emphasis omitted) (footnote omitted).

8. 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (discussing Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985) (setting forth twenty exceptions to the warrant requirement)).

9. *See id.* at 580.

10. *See* United States v. Watson, 423 U.S. 411, 423–24 (1976).

11. The combined impact of *United States v. Robinson*, 414 U.S. 218 (1973) (holding that a search incident to arrest includes "full body search" of arrestee as well as search of a cigarette pack found on his person), and *Illinois v. Lafayette*, 462 U.S. 640 (1983) (holding that backpack of arrestee may be fully searched at the police station pursuant to routine police administrative procedure), leads to this conclusion.

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

13. *See* Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429, 442 (1993) (discussing the erosion of the warrant requirement for searches conducted outside the home).

14. *See id.*

15. *See* Oliver v. United States, 466 U.S. 170 (1984).

16. *See* Florida v. Riley, 488 U.S. 445 (1989).

curb for pickup[17] were all deemed "non-searches" and consequently not subject to Fourth Amendment regulation at all, much less the warrant requirement.

But throughout the same period that the Court was whittling away at the warrant requirement, and at the scope of the Fourth Amendment itself, it remained protective of the home. As noted, in the 1984 case of *United States v. Karo*, the Court, somewhat surprisingly, held that a search warrant is required in order for police to continue to monitor an electronic signal from a beeper concealed in a drum of chemicals after the drum was taken inside a house.[18] After the 1980 case of *Payton v. New York*, an arrest warrant is required to enter a home to arrest the occupant.[19] In 1981, the Court held that a search warrant is required to seek an arrestee in a third party's home.[20] The Court even held that the exigent circumstances exception to the warrant requirement does not apply to warrantless entries into the home to arrest for minor offenses[21] and imposed a "knock and announce" requirement on police who are executing search warrants for the home.[22]

Finally, in a truly striking display of the protection accorded to the home, the Court in *Kyllo v. United States* held that beaming a thermal imaging device at a home required a warrant, even though the device only detected the heat emissions from the home.[23] The dissenters, noting that heat emissions could be detected by observing the pattern of snow melting on the roof, disagreed only to the extent that the information that was disclosed by the device about the inside of the home was extremely minimal, and would have upheld the warrant requirement had there been a significant intrusion into the home.[24] The majority insisted, however, that "obtaining by sense-enhancing technology *any* information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search—at least where (as here) the technology in question is not in general public use."[25]

This concern for privacy in the home is, of course, at the root of the Fourth Amendment itself.[26] It is reflected in the 1886 case of *Boyd v. United States*, which held that the Fourth Amendment's prohibitions apply

> [T]o all invasions on the part of the government and its employés [sic] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the

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17. *See* California v. Greenwood, 486 U.S. 35 (1988).
18. 468 U.S. 705, 718 (1984).
19. 445 U.S. 573, 589–90 (1980).
20. Steagald v. United States, 451 U.S. 204, 205–06 (1981).
21. Welsh v. Wisconsin, 466 U.S. 740, 754 (1984).
22. Wilson v. Arkansas, 514 U.S. 927, 929 (1995). However, in *Hudson v. Michigan*, 547 U.S. 586 (2006), the Court effectively took back this requirement by declaring that the exclusionary rule does not apply to violations of *Wilson*. These two cases were about the *execution* of warrants and did not affect the warrant requirement itself.
23. 533 U.S. 27, 40 (2001).
24. *See id.* at 43–44 (Stevens, J., dissenting).
25. *Id.* at 34 (majority opinion) (emphasis added) (citation omitted).
26. *See generally* JACOB W. LANDYNSKI, SEARCH AND SEIZURE IN THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 25–30 (1966) (describing the history of the Fourth Amendment).

> offence [sic]; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .[27]

Likewise, in the 1914 case of *Weeks v. United States*,[28] the Court declared that evidence seized unconstitutionally cannot be used in a federal criminal trial:

> If letters and private documents [could] . . . be [unlawfully] seized [from a home without a warrant] and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution.[29]

This protective view of privacy in the home (including a hotel room) is further reflected in the 1948 decision of *Johnson v. United States*,[30] a case that is particularly germane to this discussion. In *Johnson*, Seattle police received a tip from an informant that "unknown persons were smoking opium in the Europe Hotel."[31] Lieutenant Belland and four federal narcotics agents went into the hallway of the hotel and smelled the distinctive odor of burning opium emanating from Room One.[32] Belland knocked at the door and replied that it was "Lieutenant Belland" at the door after a voice asked who was there.[33] The defendant opened the door, and Belland said, "I want to talk to you a little bit."[34] She "stepped back acquiescently" and admitted them.[35] The officer then told the defendant that she was under arrest, and the police searched the room, finding opium and smoking apparatus.[36]

The lower courts upheld the admission of the evidence,[37] but the Supreme Court reversed.[38] First, the Court found that the defendant's consent to search the room, as suggested by her opening the door and stepping back "acquiescently," was invalid because the "[e]ntry to [the] defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right."[39]

The Court, per Justice Jackson, conceded that a magistrate would have likely found that the police had probable cause to search the room,[40] but found that a magistrate should have made this determination, not the officers. In a famous passage, Justice Jackson declared:

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27. 116 U.S. 616, 630 (1886).
28. 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).
29. 232 U.S. at 393.
30. 333 U.S. 10 (1948).
31. *Id.* at 12.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 17.
39. *Id.* at 13.
40. *Id.* Thus giving rise to "plain smell" as the basis for probable cause.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.[41]

The Court further rejected the government's argument that "exigent circumstances" justified the warrantless search, observing that "[n]o reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate."[42] Lastly, the Court rejected the government's argument that the warrantless search was a valid search incident to arrest, noting that prior to the defendant opening the door, the police lacked probable cause to believe that the defendant, and not another occupant of the room, was violating the law.[43] Only when the police illegally discovered that Johnson was the sole occupant did they have probable cause to arrest her.[44]

Thus, *Johnson* stands for two propositions. First, consent to search a home cannot be valid if it is granted in "submission to authority rather than as an understanding and intentional waiver of a constitutional right," even if police make no threats or demands.[45] Second, police cannot get people to open their doors without a warrant and then use evidence obtained as a result of that opening as the basis for a valid search or arrest.[46] Thus, the Court, in effect, disapproved of a number of aspects of the "knock and talk" technique decades before the term came into general use.

As noted, the Supreme Court has not addressed the scope of the "knock and talk" doctrine in the years since it was rejected in *Johnson.* However, the lower courts have

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41. *Id.* at 13–14 (footnote omitted). While the Court in *Johnson* was clearly talking about the need for a search warrant in order to protect the home, this passage was quoted at length in *Payton v. New York*, 445 U.S. 573, 586 n.24 (1980), in which the Court held that arrest warrants are required in order to make an arrest in the home. Since an arrest warrant, which does not authorize a full search of the home and allows only a limited search if the suspect comes to the door, is a lesser intrusion into the home than a search warrant, the reasoning of *Johnson* would apply equally to arrests effected without warrants.

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

43. *See id.* at 16.

44. *Id.* This view of probable cause to arrest was essentially rejected by *Maryland v. Pringle*, 540 U.S. 366 (2003), which held that police had probable cause to arrest all three occupants of a car under a "common enterprise" theory when cocaine was found in the back-seat armrest of the car and was accessible by all of the passengers. *Id.* at 372–73. The same could be said of any and all occupants of Johnson's room (though it is not clear how *Pringle* would apply to all the occupants of a house). I would concede that *Johnson*'s view of probable cause to arrest is unduly narrow, but the arrest in that case was nevertheless invalid because of the lack of meaningful consent or exigent circumstances to justify the warrantless entry into the room.

45. *See Johnson*, 333 U.S. at 13. *But see infra* text accompanying notes 108–09 (discussing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

46. *See Johnson*, 333 U.S. at 16–17.

largely ignored the dictates of *Johnson* in granting broad approval to "knock and talk" tactics employed by police.

II. "KNOCK AND TALK"

The phrase "knock and talk" has been used in hundreds of cases[47] to approve the police practice of going up to someone's door, knocking on it, and then asking the occupant questions, obtaining a "plain view" or smell of the interior, walking around the outside of the house, looking in windows, seeking consent to search, or arresting the occupant. Approval of this sort of police activity is based on the notion that police are merely doing what anyone else could do when they knock on someone's door and, as such, are not breaching the occupant's expectations of privacy.[48] Only when police have employed "overbearing tactics," such as "'drawn weapons, raised voices, or coercive demands,'" have their actions been faulted.[49]

In my view, this blanket approval of the use of "knock and talk" for a variety of purposes is incorrect. Rather, it should depend upon the nature of the inquiry. It is certainly appropriate for police to canvass a neighborhood following a crime to ascertain whether anyone has knowledge about the crime. It is similarly appropriate for police acting in their protective capacity to knock on doors in response to noise complaints, reports of fighting or violence, and so forth. And should police observe evidence in "plain view" during such encounters, it is proper for them to seize it.[50]

But the phrase "knock and talk" in police jargon generally does not refer to such unexceptionable encounters. Rather, it is a technique employed with calculation to the homes of people suspected of crimes. Police use "knock and talk" to gain access to a home without a search warrant by getting the occupant to consent to entry and search, to arrest without a warrant, to gather further evidence of a suspected crime, or to dispel such suspicion. As one court stated, "[k]nock and talk might more aptly be named

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47. *See* Fern L. Kletter, Annotation, *Construction and Application of Rule Permitting Knock and Talk Visits Under Fourth Amendment and State Constitutions*, 15 A.L.R. 6th 515 (2006). This annotation only includes cases in which the phrase "knock and talk" is used, though there are undoubtedly many cases that discuss what would appear to be a "knock and talk" without describing it as such. *Davis v. United States* is often cited as the origin of the doctrine, though it does not explicitly use the phrase "knock and talk." 327 F.2d 301, 303 (9th Cir. 1964) (explaining that anyone, "openly and peaceably, at high noon, . . . may walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof").

48. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.3(c), at 575 (4th ed. 2004) ("[I]f police utilize 'normal means of access to and egress from the house' for some legitimate purpose, such as to make inquiries of the occupant, . . . it is not a Fourth Amendment search for the police to see or hear or smell from that vantage point what is happening inside the dwelling.") (citations omitted).

49. United States v. Thomas, 430 F.3d 274, 277–78 (6th Cir. 2005) (quoting Nash v. United States, 117 F. App'x 992, 993 (2004) (per curiam), *vacated*, 544 U.S. 995 (2005)).

50. *Brigham City v. Stuart*, 547 U.S. 398 (2006), is an example of such a case. In *Stuart*, the Court upheld a warrantless entry by police when they entered a home to break up a fight after their knock was ignored. *See id.*; *see also* Rogers v. Pendleton, 249 F.3d 279, 288–90 (4th Cir. 2001) (noting that "knock and talk" for the purpose of investigating noise complaints is generally approved).

'knock and enter,' because [that] is usually the officer's goal . . . ."[51] This Article considers each type of case separately, though frequently, of course, police have more than one motive and often end up achieving more than one of the possible objectives of "knock and talk."

A. "Knock and Talk" for Investigative Purposes

What might seem to be the most reasonable application of "knock and talk" doctrine is when police suspect criminal activity at a given residence and then go to the residence—without probable cause to arrest or search—to further investigate, to develop probable cause, or perhaps to dispel their suspicion.[52]

A typical case is *United States v. Thomas*.[53] In that case, police strongly suspected Thomas of stealing anhydrous ammonia, a chemical used in the manufacture of methamphetamine.[54] Five officers went to the home where Thomas was staying to question him. Upon arrival, police deployed to the front and rear entrances of the house.[55] The officers saw a handgun and a silver canister that was similar to canisters that were used in other thefts of anhydrous ammonia in Thomas's truck, which was parked behind the house.[56] Two officers knocked on the back door to the residence, which was the entrance used by the residents, but not necessarily by the public.[57] When Thomas came to the door, they asked him to come out of the residence. Thomas complied, was immediately arrested, and was searched incident to the arrest. The search revealed "methamphetamine and a handwritten recipe for making more."[58] Police also searched the truck and found more evidence.[59]

The district court suppressed the evidence on the ground that the police behavior constituted a "constructive entry" into the house without a warrant.[60]

The Sixth Circuit reversed. It noted that

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51. Hayes v. State, 794 N.E.2d 492, 497 (Ind. Ct. App. 2003). The court further declared that "the knock and talk procedure 'pushes the envelope' and can easily be misused." *Id.*

52. In all of the reported cases, police used "knock and talk" to lead to an arrest. Cases in which the use of "knock and talk" causes suspicion to be dispelled or police to walk away empty-handed while remaining suspicious, however, are not reported. There is the possibility of a civil suit if police do more than just "knock and talk." *See, e.g.*, *Rogers*, 249 F.3d at 287 (disapproving of a search of the curtilage for underage drinkers following a noise complaint).

53. 430 F.3d 274 (6th Cir. 2005).

54. *See id.* at 275–76.

55. *See id.* at 276.

56. *Id.* Whether police had a right to look in a truck parked within the curtilage is not discussed in this case. According to the case, both the gun and the canister were visible through the open door of the truck. *Id.* Also not discussed, but presumed in the case, is that police had probable cause to arrest Thomas after looking in the truck, if not before.

57. *See id.*

58. *Id.*

59. *See id.*

60. *Id.* The district court apparently did not consider the propriety of the police trespass into the backyard of the house where the plain view into the truck was obtained. *See also infra* Part II.C (discussing issue of "constructive entry").

> the law has long permitted officers to engage in consensual encounters with suspects without violating the Fourth Amendment. . . .
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> Consensual encounters do not lose their propriety, moreover, merely because they take place at the entrance of a citizen's home. A number of courts, including this one, have recognized "knock and talk" consensual encounters as a legitimate investigative technique at the home of a suspect or an individual with information about an investigation.[61]

The appropriateness of this sort of police behavior depends upon the homeowner's "expectation of privacy."[62] As one court put it:

> In the course of urban life, we have come to expect various members of the public to enter upon [driveways, front porches, and so on,] e.g., brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, friends. Any one of them may be reasonably expected to report observations of criminal activity to the police. If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so.[63]

This is certainly true. But there is a limit to what we may reasonably expect these people to do. We do not expect them, having knocked on the door, to demand that we come out or to interrogate us about suspected crimes. We do not expect them to peer into the house in an exploratory manner when we open the door, or to go around to the back and look in the windows or in vehicles parked there if we fail to answer the door.[64] Yet this is exactly what the courts have permitted.

In *United States v. Daoust*,[65] police went to Daoust's home because they believed he might have "useful information" about drug sales. Police approached his house and knocked on the front cellar door because the front door was "inaccessible."[66] When they received no answer, the police proceeded to the back of the house, looked through the kitchen window, and saw a gun.[67] The First Circuit held that "if [the front doors are] inaccessible[,] there is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person."[68]

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61. *Thomas*, 430 F.3d at 277.

62. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

63. State v. Corbett, 516 P.2d 487, 490 (Or. Ct. App. 1973) (citation omitted); *see also* 1 LAFAVE, *supra* note 48, § 2.3(f), at 599 (quoting *Corbett* for the general principle that police may only go where visitors may go).

64. This is not to say that such people would *never* do such a thing, but it is certainly not reasonably expected that they would.

65. 916 F.2d 757 (1st Cir. 1990).

66. *Id.* at 758.

67. *Id.* They then got a search warrant based on the viewing of the gun and the fact that Daoust was a convicted felon. *Id.* at 757.

68. *Id.* at 758; *accord* United States v. Anderson, 552 F.2d 1296, 1300 (8th Cir. 1977) (finding that evidence found by agents who went to the back of a home and saw contraband through a basement window while attempting to question suspect was admissible). *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003), and *Rogers v. Pendleton*, 249 F.3d 279 (4th

In *United States v. Hammett*,[69] the Ninth Circuit found it appropriate for police to "walk[] [completely] around the house" in order to ensure officer safety and to "attempt to locate someone with whom they could speak."[70] In *United States v. Wheeler*, the court approved of the police standing on tires to look over the fence into the back yard to see if anyone was there to question.[71]

In *Young v. City of Radcliff*,[72] the police went to question Young about shoplifting. While two police officers knocked on the front door, two others went around to the back. While standing in the curtilage and looking in the back door, they could see that Young had a gun.[73] After hearing a commotion, Young went to the back door. Due to a hearing impairment, however, he failed to respond to their command to drop the gun, and they shot him.[74] While the court found that the police's trespass on the curtilage violated the Fourth Amendment, it upheld qualified immunity for the police in the case because it was "not unreasonable" for the police to believe they were outside the curtilage.[75]

In none of the aforementioned cases were the police acting like members of the public approaching one's house. Rather, they were aggressively pursuing investigations and intruding on the homeowner's property in a manner that violated his reasonable expectation of privacy.[76] Girl Scouts, postmen, and brush salesmen don't do this sort of thing.[77] They simply knock on one's front door and, if nobody answers, they go away. If, however, such people become too intrusive, homeowners can always call the police! The courts have taken the unexceptionable behavior that ordinary citizens might engage in and turned it into a right of police to question people at their home, which in turn gives them the authority to trespass on private areas of the curtilage, look around, and peer in the windows. What protection does the curtilage afford if it is not to guard against just this sort of thing? "Knock and talk" has become a "talisman in whose presence the Fourth Amendment fades away and disappears."[78]

Not only are these decisions inconsistent with the decision in *Johnson*, they also run counter to the Supreme Court's decision in *Bond v. United States*.[79] Bond was riding

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Cir. 2001), generally agree with these cases while expressing concern that the police behavior in the cases before them may have gone too far.

69. 236 F.3d 1054 (9th Cir. 2001).

70. *Id.* at 1060.

71. 641 F.2d 1321, 1327 (9th Cir. 1981).

72. 561 F. Supp. 2d 767 (W.D. Ky. 2008).

73. *Id.* at 777.

74. *Id.* at 778.

75. *Id. But see* Daughenbaugh v. City of Tiffin, 150 F.3d 594 (6th Cir. 1998) (holding that going to the back door for a "knock and talk" about stolen goods, after there was no answer at the front door, was a trespass on the curtilage, and when the police obtained a plain view of stolen goods in the separate garage, it was invalid).

76. The definition of "reasonable expectation of privacy" is a subject of considerable uncertainty. *See* Orin Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 505 (2007). I think, however, that most will agree that the police behavior cited in these cases was a violation of a person's "reasonable expectation of privacy."

77. As noted earlier, they *could*, but one doesn't reasonably expect them to.

78. Coolidge v. New Hampshire, 403 U.S. 443, 461–62 (1971) (plurality opinion).

79. 529 U.S. 334 (2000). Interestingly, this seven-to-two decision written by Chief Justice Rehnquist, represented one of the few times in his thirty-year career on the Court where he *voted*, much less wrote an opinion, for a defendant in a nonunanimous Fourth Amendment case.

on a bus. A Border Patrol agent came on the bus to check the immigration status of the passengers. Then he went back through the bus, squeezing the soft luggage that passengers had placed in the overhead storage space above the seats. When the agent squeezed the defendant's bag he felt a '"brick-like' object," which turned out to be a "brick" of methamphetamine.[80]

The government argued, in a fashion similar to the "knock and talk" cases, that "by exposing his bag to the public, petitioner lost a reasonable expectation that his bag would not be physically manipulated."[81] But the Court rejected the government's argument, accepting instead the petitioner's argument that the agent's "physical manipulation of [the defendant's] luggage 'far exceeded the casual contact [petitioner] could have expected from other passengers.'"[82] The Court reasoned that while "a bus passenger clearly expects that his bag may be handled, he does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner."[83]

Similarly, while one expects that members of the public may come to his front door, he certainly does not expect that, if there is no answer to their knock, they will continue to examine his house and curtilage "in an exploratory manner."[84] Likewise, one does not expect that they will ask or demand that he come out.[85] Similarly, just because neighbors can see into your backyard does not mean that the police are entitled to do so by trespassing on your curtilage.[86]

Another type of investigative "knock and talk" occurs when the suspect does come to the door and the police do talk to him. The courts agree that this is permissible so long as the police behavior is not so coercive as to turn this into a "custodial interrogation."[87] Clearly the police behavior falls under the definition of "interrogation,"[88] and therefore, in most cases the only issue is whether the interrogation is "custodial." This form of investigative "knock and talk" more closely resembles the type of behavior that members of the general public, including religious proselytizers, salesmen, and politicians, might exhibit. But, these people do not come to interrogate the homeowner about criminal activity, especially in the middle of the

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See also Ornelas v. United States, 517 U.S. 690 (1996) (holding, eight-to-one with Rehnquist writing for the majority, that issues of probable cause and reasonable suspicion should be reviewed *de novo* by the court of appeals—a result that happened to favor the defendant).

80. *Bond*, 529 U.S. at 336. Justice Breyer, who wrote the *Daoust* opinion for the First Circuit, authored the dissent in *Bond*. *See id.* at 339 (Breyer, J., dissenting).

81. *Id.* at 337 (majority opinion).

82. *Id.* at 338 (citation omitted).

83. *Id.* at 338–39. *Bond* distinguished other cases where a visual inspection had been allowed on the ground that they involve "only visual, as opposed to tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection." *Id.* at 337 (pointing to *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968)). The cases discussed herein involve physical trespass on suspects' curtilage, not mere visual inspection from the street.

84. *Bond*, 529 U.S. at 339.

85. *See, e.g.*, United States v. Titemore, 335 F. Supp. 502 (D. Vt. 2004) (holding that an officer's request for the suspect to come outside was proper).

86. They could, however, get the neighbors to let them into *their* yard for a view.

87. *See, e.g.*, *id.*; United States v. Zertuche-Tobias, 953 F. Supp. 803 (S.D. Tex. 1996).

88. *See* Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (suggesting that interrogation includes "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect").

night.[89] In addition, if a homeowner tells members of the general public to leave, they usually leave. In fact, the police's physical presence is designed to put pressure on the suspect, as well as to allow the police to check for any physical evidence they may see. This is the reason why the police do not simply call on the phone. The police could also question people on the street. The notion that "a man's home is his castle" would seem to encompass the principle that police cannot come there to interrogate the occupant without legal authorization—like an arrest or search warrant.

1. Exigent Circumstances

Once "knock and talk" is allowed, the exigent circumstances issue arises. What happens if the door is opened and the police see either evidence of criminal activity or a person whom they have probable cause to arrest?[90] Are the police entitled to rush in and seize the evidence or the person? On this there is confusion. In *United States v. Scroger*,[91] the police went to Scroger's residence to investigate reports of drug activity. When the defendant answered the door, it became obvious that he was engaged in the manufacture of methamphetamine.[92] The Tenth Circuit agreed that an exigent circumstance entry to arrest was appropriate, noting that the police did not feel that they had enough evidence to constitute probable cause prior to the "knock and talk."[93] No "emergency" other than the need to arrest the suspect was discussed. This is exactly the sort of behavior the Supreme Court disapproved of in *Johnson*.

Likewise, in *United States v. Charles*,[94] the Third Circuit approved an exigent circumstances entry where the police, investigating a marijuana growing complaint, knocked on the door and smelled marijuana when the suspect opened the door. When the suspect denied them consent to enter and ran back into the house, locking the door behind her, the police broke down the door, obtained a "plain view" of the marijuana, and put this information in a search warrant.[95]

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89. *See, e.g.*, United States v. Ponce Munoz, 150 F. Supp. 2d 1125, 1133 (D. Kan. 2001) (midnight); Richards v. Commonwealth, No. 2003-CA-001922-MR, 2004 WL 1367480, at *1 (Ky. Ct. App. June 18, 2004) (2 a.m.); People v. Sweet, No. 239511, 2003 WL 22138030, at *3 (Mich. Ct. App. Sept. 16, 2003) (3 a.m.). In each of these cases, the courts approved the late night "knock and talks." *But see* United States v. Reyes-Montes, 233 F. Supp. 2d 1326, 1327–28 (D. Kan. 2002) (disapproving of a 1 a.m. "knock and talk" where four armed officers had to knock repeatedly to rouse the defendants out of bed).

90. *See infra* Part II.C. (discussing exigent circumstances).

91. 98 F.3d 1256 (10th Cir. 1996).

92. *Id.* at 1259.

93. *See id.* at 1259–60; *accord* United States v. Milikan, 404 F. Supp. 2d 924, 927–29 (E.D. Tex. 2005) (approving entry on exigent circumstances grounds when police went to a hotel room to investigate weapons violations and spotted a gun case near an occupant of the room when another answered the door).

94. 29 F. App'x 892 (3d Cir. 2002).

95. *See id.* at 894. The Second Circuit also approves exigent circumstance entries following "knock and talk." *See* United States v. MacDonald, 916 F.2d 766 (2d Cir. 1990). *But see* United States v. Coles, 437 F.3d 361, 366 (3d Cir. 2006) (noting that the police cannot deliberately create exigent circumstances through "knock and talk").

In *United States v. Jones*,[96] the Fifth Circuit was more leery of the police claim of exigent circumstances, but ultimately accepted the claim. In *Jones*, the police went to an apartment house to investigate possible drug activity. When the police arrived at Jones' apartment, the screen door was shut. As the defendant answered the door, the police, peering through the screen, noticed a gun on the kitchen table.[97] Since another resident was still inside the apartment, the police entered and seized the firearm. The police ascertained that Jones was a felon and arrested him for possession of a gun.[98] The court adhered to the rule of the circuit that police may not create their own exigent circumstances.[99] The court, however, claimed that Jones created the exigent circumstance by leaving a gun where it could be seen through the screen door, even though the door could only be reached by entering the apartment building.[100]

In *United States v. Chambers*,[101] the Sixth Circuit was more restrictive. In *Chambers*, the police went to the defendant's home with "overwhelming" evidence that the defendant was operating a methamphetamine lab, and knocked on the door.[102] The woman who answered the door retreated and called out that there were police at the door.[103] Fearing that evidence would be destroyed, the police burst through the door. The Sixth Circuit affirmed the district court's suppression of the evidence, rejecting the exigent circumstance claim.[104] Furthermore, the court held that an exigent circumstance entry must be in response to an "unanticipated emergency," which means that the police cannot simply create the exigency for themselves.[105] While this appears to be in clear conflict with the Tenth and Third Circuits, a careful reading of *Chambers* suggests that the Sixth Circuit's "rule" is limited to situations where the police determined in advance that they were going to search and thus "deliberately" sought to "evade the warrant requirement."[106] The Sixth Circuit did not take the position that no exigency arising from a "knock and talk" could give rise to a legally sanctioned entry and seizure of persons or evidence.[107] A proposed solution to the exigent circumstance problem will be discussed in the last section of this Article.

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96. 239 F.3d 716 (5th Cir. 2001).

97. *See id.* at 719.

98. *See id.*

99. *See id.* at 720.

100. *See id.* at 720–21. The Fifth Circuit's commitment to the rule that police may not create exigent circumstances through a "knock and talk" is further undercut by *United States v. Anderson*, 160 F. App'x 391 (5th Cir. 2005), which approved a warrantless entry to seize narcotics and a gun that were seen when the suspect opened the door in response to a police knock.

101. 395 F.3d 563 (6th Cir. 2005).

102. *Id.* at 567.

103. *See id.* at 568.

104. *See id.* at 569.

105. *Id.* at 565.

106. *Id.* at 569.

107. *See* Bryan Abramoske, Note, *It Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations*, 41 SUFFOLK U. L. REV. 561, 573–76 (2008) (discussing the approach of various circuits).

B. "Knock and Talk" for the Purpose of Getting a Consent to Search

The police perform "knock and talks" for the purpose of getting consent to search, both when they do have probable cause and when they do not. In the first case, it saves them the trouble of getting a warrant, and in the second, it saves them both the trouble of getting a warrant and articulating probable cause—so much for the "special protection" of the home. It is not surprising that the lower courts have approved this behavior, however, because it is directly encouraged by the 1973 auto search case of *Schneckloth v. Bustamonte*:[108]

> In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. . . . And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search . . . .[109]

Thus, to hear the Court tell it, consent searches are a great thing for police and citizens alike. The Court expanded this idea further in *United States v. Drayton*,[110] suggesting that waiving one's rights and consenting to search was practically a civic duty:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place it dispels inferences of coercion.[111]

As I have previously observed, this is nonsense.[112] As Professor Marcy Strauss puts it:

> Every year I witness the same mass incredulity. Why, 100 criminal procedure students jointly wonder, would someone "voluntarily" consent to allow police officers to search the trunk of his car, knowing that massive amounts of cocaine are easily visible there? The answer, I've come to believe, is that most people don't willingly consent to police searches. Yet absent extraordinary circumstances,

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108. 412 U.S. 218 (1972).
109. *Id.* at 227–28 (footnotes omitted).
110. 536 U.S. 194 (2002).
111. *Id.* at 207.
112. *See* CRAIG BRADLEY, CRIMINAL PROCEDURE: RECENT CASES ANALYZED 75 (2007) (suggesting that "[c]onsent searches are the black hole into which Fourth Amendment rights are swallowed up and disappear").

> chances are that a court nonetheless will conclude that the consent was valid and the evidence admissible under the Fourth Amendment.[113]

Professor Tracey Maclin points out that police consider consent searches extremely easy to get, and one detective estimated that as many as ninety-eight percent of searches are by consent.[114] Even if police are initially refused consent, they can often cajole the homeowner into giving it.[115]

The only limitation imposed by the Court on consent searches is that the consent must be "voluntary."[116] The Court in *Schneckloth*, however, held that the concept of voluntariness did not include either a warning or a showing that the suspect knew that he had a right to refuse,[117] thus seeming to back away from the "understanding and intentional waiver" standard of *Johnson*.[118]

Schneckloth and *Drayton* should be distinguished from the typical "knock and talk" scenario on the grounds that neither of those cases involved consent to search a home,[119] and that the standard should be higher given the Supreme Court's often-stated special regard for the privacy of the home.[120] In fact, the search location appears to be the only meaningful distinction between *Johnson* and *Schneckloth*. *Johnson* is repeatedly cited with approval in *Schneckloth*[121] as an example of an invalid consent search where the prosecutor failed to meet his "burden of proving that the consent was . . . freely and voluntarily given."[122]

But what was the difference in the consents in *Schneckloth* and *Johnson*? In neither case were guns displayed nor threatening language used. In neither case did the suspect demur in any way when asked for consent.[123] And in neither case was the suspect warned of any right to refuse. The main difference seems to be that, whereas in

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113. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 211–12 (2002). Strauss then proposes abolishing consent searches altogether. *See id.* at 252–56.

114. Tracey Maclin, *The Good and Bad News about Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 31 n.16 (2008) (quoting RICHARD VAN DUIZEND, L. PAUL SUTTON & CHARLOTTE A. CARTER, NAT'L CTR. FOR STATE COURTS, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 69 (1984)).

115. *See id.* at 82. Maclin proposes at least disallowing this sort of cajoling.

116. *E.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 222–23 (1973).

117. *See id.* at 234.

118. Johnson v. United States, 333 U.S. 10, 13 (1948).

119. *Schneckloth*, however, made it clear in dictum that its reasoning applied to homes. *See Schneckloth*, 412 U.S. at 232 ("Consent searches . . . normally occur on the highway, or in a person's home or office . . . .").

120. The court placed a modest limit on home (and presumably other) consent searches in *Georgia v. Randolph*. 547 U.S. 103 (2006) (holding that the consent of one occupant of a home is invalid if the other occupant is present and withholds consent). It is unclear how this would apply to consent to the search of a car.

121. *See Schneckloth*, 412 U.S. at 222, 233, 234, 243 n.31.

122. *Id.* at 222.

123. *See id.* at 220. However, the Court describes the behavior in *Schneckloth* as "ask(ing)," *id.*, and in *Johnson* as "demanded under color of office," *id.* at 243 n.31 (quoting *Johnson*, 333 U.S. at 13). In *Johnson*, however, all the police did was state their identity prior to the suspect opening her door, and say "I want to talk to you" prior to her "stepp[ing] back acquiescently." *Johnson*, 333 U.S. at 12.

Schneckloth the suspect was asked to consent to search his car, in *Johnson* the police had asked the suspect to open the door of her dwelling.

The lower courts have generally approved the practice of avoiding warrant and/or probable cause requirements through "knock and talk" consents. The 2007 case of *United States v. Crapser*,[124] from the Ninth Circuit, is typical of the general deference given to these consents.[125] In *Crapser*, the police, after receiving information that the suspect may have been involved in the cooking of methamphetamine and also may have had an arrest warrant outstanding (though it turned out he did not), decided to go to the motel where he was staying to "knock and talk [their] way into obtaining consent to search the room."[126]

Four officers, of whom three were visibly armed and in uniform, knocked on the door of the motel room. When a woman pulled back the curtains and viewed them, one of the officers asked her to open the door so he could speak with her. After two minutes she did, and she and the defendant stepped outside and closed the door behind them.[127] The police moved them into two groups, with two cops and one suspect per group. The groups were spaced ten to twenty-five feet from each other on the sidewalk to the parking area. According to the court, "[d]uring this initial part of the contact, the officers did not block or physically keep Defendant or [the woman] from walking away or returning to their room, nor did the officers affirmatively assert authority over the movements of [the suspects]."[128] After about five minutes of questioning, the defendant voluntarily produced a syringe from his pocket and said, "This is all I have on me."[129] Shortly thereafter, both the defendant and the woman consented to a search of the room. Drugs and drug paraphernalia were found on the defendant and a gun was found in the room.[130]

In a two-to-one decision, the Ninth Circuit upheld the search, finding that the initial contact with the defendant, as well as the consent to search, was voluntary. The court noted that there was a "single polite knock on the door," and that the officers "made no effort to draw attention to their weapons, nor did they use any form of physical force."[131] Furthermore,

> [t]he encounter occurred in the middle of the day, on a sidewalk in public view. The entire event, up to the time Defendant produced the syringe, lasted about five minutes. . . . The police did not block Defendant or [the woman], suggest that they could not leave or return to their room, give them orders, or affirmatively assert authority over their movements.[132]

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124. 472 F.3d 1141 (9th Cir. 2007).

125. *See, e.g.*, United States v. Larson, 63 F. App'x 416 (10th Cir. 2003); United States v. Charles, 29 F. App'x 892 (3d Cir. 2002).

126. *See Crapser*, 472 F.3d at 1143.

127. *See id.*

128. *Id.* at 1144.

129. *Id.*

130. *See id.* at 1145.

131. *Id.* at 1146.

132. *Id.*

Moreover, the court concluded that "[e]ven if the initial encounter was a seizure, it was a *Terry* stop supported by reasonable suspicion,"[133] justified because the suspect "voluntarily" exited the motel room.[134]

In dissent, Judge Reinhardt declared that "the majority opinion further weakens our Fourth Amendment protections—whatever is left of them."[135] He noted that the test as to the voluntariness of consent, according to *Florida v. Bostick*,[136] is whether a reasonable person approached by police would have believed that he was "not at liberty to ignore the police presence and go about his business."[137] In *Orhorhaghe v. INS*,[138] the Ninth Circuit further elaborated on *Bostick* by considering five factors:

> (1) the number of officers involved; (2) whether the officers' weapons were displayed; (3) whether the encounter occurred in a public or non-public setting; (4) whether the officers' officious or authoritative manner would imply that compliance would be compelled; and (5) whether the officers advised the detainee of his right to terminate the encounter.[139]

Considering all of this, Judge Reinhardt concluded that the defendant was not "at liberty to ignore the police presence and to go about his business."[140] Indeed, it is difficult to imagine a situation in which one would feel free to ignore the presence of police banging on his door and "go about his business." As the Second Circuit put it, in finding no consent where the suspect opened the door in response to a knock from three armed agents:

> [t]o hold otherwise would be to present occupants with an unfair dilemma, to say the least—either open the door and thereby forfeit cherished privacy interests or refuse to open the door and thereby run the risk of creating the appearance of an "exigency" sufficient to justify a forcible entry.[141]

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133. *Id.* at 1147.

134. *Id.* at 1149.

135. *Id.* (Reinhardt, J., dissenting).

136. 501 U.S. 429 (1991).

137. *Id.* at 437 (quoting Michigan v. Chesternut, 486 U.S. 567, 569 (1988)). The Court, while treating these as equivalent formulations, also stated the test another way in *Bostick*: "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 436.

138. 38 F.3d 488 (9th Cir. 1994).

139. *Crapser*, 472 F.3d at 1150 (Reinhardt, J., dissenting) (quoting United States v. Washington, 387 F.3d 1060, 1068 (9th Cir. 2004)) (describing the *Orhorhaghe* factors). The majority quoted *United States v. Jones*, 286 F.3d 1146, 1152 (9th Cir. 2002), which described the five factors significantly differently. *See id.* at 1149 (majority opinion). *Orhorhaghe* contains a more extensive discussion that could be summarized in various ways. Presumably, the summary from *Washington* represents the law of the circuit.

140. *Crapser*, 472 F.3d at 1153 (Reinhardt, J., dissenting) (quoting *Orhorhaghe*, 38 F.3d at 494).

141. United States v. Reed, 572 F.2d 412, 423 n.9 (2d Cir. 1978). *But see* United States v. Gori, 230 F.3d 44, 53 (2d Cir. 2000) (holding that by opening the door to a delivery person's knock, the suspect sacrificed his expectations of privacy and could be ordered out of the apartment and arrested without a warrant).

Some courts have approved even more aggressive police tactics in obtaining "consent." In *United States v. Dickerson*,[142] four police officers with guns drawn knocked on the defendant's door. After repeated knocking, the naked defendant came to the door and opened it about one foot.[143] One police officer stuck his foot in the opening and requested entry. The defendant responded by saying he needed to get dressed, whereupon the police asked if they could come in while he did. Upon their request, the defendant admitted them.[144] The Seventh Circuit found defendant's consent to be voluntary.[145]

Moreover, once consent is obtained, courts approve the use of a "protective sweep" to allow police to go into areas not authorized by the consent. For example, in *United States v. Gould*,[146] the police went to the defendant's trailer. His roommate admitted them and told them that the defendant was asleep in the master bedroom. While the court held that the police lacked real or apparent consent to enter the master bedroom,[147] it upheld the entry of the bedroom on the ground that this was a "protective sweep" authorized by *Maryland v. Buie*,[148] even though *Buie* was limited to searches incident to arrest.[149]

Some courts have disallowed such aggressive behavior as used in *Crapser* and *Dickerson*. For example, in *United States v. Jerez*,[150] a different panel of the Seventh Circuit struck down a consent search when the police had knocked on a hotel room door and window for three minutes in the middle of the night and called out, "Police. Open up the door. We'd like to talk to you."[151] The court held that the occupant was "seized," under *Terry v. Ohio*,[152] when he complied with this request[153] and that the seizure was illegal because it was not based on reasonable suspicion.[154] He could not "reasonably have believed that he was . . . free to disregard the police presence and go

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142. 975 F.2d 1245 (7th Cir. 1992).

143. *Id.* at 1247.

144. *See id.*; *see also* Nash v. United States, 117 F. App'x 992, 993 (6th Cir. 2004) (per curiam) (holding that the defendant's being handcuffed and surrounded by police did not invalidate consent to search, noting that "no testimony . . . indicates drawn weapons, raised voices or coercive demands on the part of the police"), *vacated*, 544 U.S. 995 (2005).

145. *See Dickerson*, 975 F.2d at 1249. To be fair, the court recognized that on their face, the facts of this case seemed to require that the police behavior be struck down. The court noted, however, that the police were investigating a very recent bank robbery, had strong evidence that the suspect was the perpetrator, and believed that his nakedness was an attempt to establish an "I was in bed with my girlfriend" alibi. *Id.*

146. 364 F.3d 578 (5th Cir. 2004) (en banc).

147. *See id.* at 589.

148. 494 U.S. 325 (1990).

149. *Id.* at 327; *Gould*, 364 F.3d at 581. The police did have a reasonable suspicion of danger in *Gould*. *Gould*, 364 F.3d at 591.

150. 108 F.3d 684 (7th Cir. 1997).

151. *Id.* at 687.

152. 392 U.S. 1 (1968).

153. *Jerez*, 108 F.3d at 690.

154. *See id.* at 693.

about his business."[155] While I agree with the outcome of this case, I reject the court's suggestion that the police conduct would have been allowed if they had had reasonable suspicion,[156] as discussed below. In dissent, Judge Coffey vigorously argued that the police behavior was acceptable and also based on reasonable suspicion.[157]

Johnson should be recalled at this point. All that the policeman did there was knock on the door, reply "Lieutenant Belland" when asked who was there, and then express a desire to talk to her when Johnson opened the door.[158] Her acquiescence in the police's entry was held to be in "submission to authority" and therefore not a valid consent.[159] The requirement of aggressive police behavior by the courts of appeal before consents will be invalidated, while arguably true to *Schneckloth*, is inconsistent with *Johnson* and *Bostick*, as well as with any notion that "a man's home is his castle." Whatever may be said of consents to search luggage and cars, consents to search homes, offices, and hotel rooms should be more tightly regulated.

A number of courts have suggested, as did *Jerez*, that reasonable suspicion may be the key to these cases: if the police have reasonable suspicion, they can "seize" the defendant and then obtain a valid consent to search.[160] The Ninth Circuit, however, has rejected this suggestion:

> *Terry*'s twin rationales for a brief investigatory detention—the evasive nature of the activities police observe on the street and the limited nature of the intrusion—appear to be inapplicable to an encounter at a suspect's home. Officers on the beat may lose a suspect before the officers have gathered enough information to have probable cause for an arrest. In contrast, officers who know where a suspect lives have the opportunity to investigate until they develop probable cause, all the while knowing where to find the suspect. Because "[n]owhere is the protective force of the fourth amendment more powerful than [within] the sanctity of the home," the second rationale for a *Terry*-stop seems almost absent by definition when the intrusion is at a suspect's home.[161]

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155. *Id.* at 689 (quoting Michigan v. Chesternut, 486 U.S. 567, 576 (1988)); *cf.* United States v. Chambers, 395 F.3d 563 (6th Cir. 2005) (holding that defendant's consent was no good after police had already broken in illegally and arrested him).

156. Professor Stuntz has pointed out that "the real standard applied in [consent] cases . . . is not the 'reasonable person' test that courts cite but rather a kind of *Jeopardy* rule: if the officer puts his command in the form of a question, consent is deemed voluntary and the evidence comes in." William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064 (1995). Similarly, Professor Weinreb has written that "[t]he product of *Schneckloth* is likely to be still another series of fourth amendment cases in which the courts provide a lengthy factual description followed by a conclusion (most likely, in the current climate, that consent was voluntarily given), without anything to connect the two." Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 57 (1974). This has proved to be prescient.

157. *See Jerez*, 108 F.3d at 696–721 (Coffey, J., dissenting).

158. *See* Johnson v. United States, 333 U.S. 10, 12 (1948); *supra* notes 30–35 and accompanying text.

159. *Johnson*, 333 U.S. at 13; *supra* note 39 and accompanying text.

160. *See, e.g.*, United States v. Crapser, 472 F.3d 1141 (9th Cir. 2007); United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001).

161. United States v. Washington, 387 F.3d 1060, 1067–68 (9th Cir. 2004) (internal citations omitted) (alterations in original). *Crapser* distinguished *Washington* on the ground

Moreover, the fact that police had reasonable suspicion to detain someone at his residence would make the consent no more "voluntary" than if they lacked it, and if they grabbed or frisked him prior to seeking consent, it would seem to make any such consent considerably less voluntary.

Other courts have suggested, though not held, that approaches to houses for the purpose of obtaining consent, or for "knock and talk" in general, may only be justified in the first place if the police have reasonable suspicion.[162] This would be a reasonable limitation on consent searches of automobiles, where police, having stopped a car for a traffic violation, often seek consent for no articulable reason.[163] But when police go to a house seeking consent to search, they ordinarily have a substantial suspicion before they bother to make the trip. Consequently, any "reasonable suspicion" limitation would not offer much further protection for the privacy of the home.

C. "Knock and Talk" for the Purpose of Arrest

Arrests in the home are governed by *Payton v. New York*,[164] which held that in order for the police to arrest someone in their home they must have an arrest warrant and reason to believe the suspect is within.[165] Nevertheless the police constantly use "knock and talk" to get around this requirement. These tactics have created considerable confusion among the lower courts as to just what police behavior is allowed. There are conflicts in the circuits as to whether the initial knock can give rise to exigent circumstances, which then allow the warrant requirement to be waived, as previously discussed.[166] There are further conflicts as to whether the police standing outside and demanding or asking that the suspect come out constitutes an arrest, and whether, if the suspect comes to the door, the police may step or reach over the threshold in order to arrest him.

One type of situation has been clearly resolved. In *United States v. Santana*[167] the police arrived at Santana's house with probable cause that she had in her possession marked money used to make a recent heroin "buy."[168] As they pulled up in front of Santana's house, they saw her standing on the threshold of the front door. As soon as she saw them, she ran into the house. The police followed in hot pursuit and arrested her in the vestibule.[169] The Court held that, by standing on the threshold, Santana was "not merely visible to the public but as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house."[170] Consequently, her

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that, in *Crapser*, the suspect had voluntarily exited the motel before he was "seized." *See Crapser*, 472 F.3d at 1147.

162. *See, e.g.*, *Jones*, 239 F.3d at 721; United States v. Tobin, 923 F.2d 1506, 1511 (11th Cir. 1991) ("Reasonable suspicion cannot justify the warrantless search of a house, but it can justify the agents' approaching the house to question the occupants.").

163. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

164. 445 U.S. 573 (1980).

165. *See id.* at 589–90.

166. *See supra* Part II.A.1.

167. 427 U.S. 38 (1976).

168. *See id.* at 39–40.

169. *See id.* at 40.

170. *Id.* at 42.

flight into the house created an exigent circumstance, which allowed the police to follow in hot pursuit.[171]

In the usual case, however, the suspect is not standing outside when the police arrive, and police lack exigent circumstances to make a warrantless entry. Rather, they seek to avoid the warrant requirement through "knock and talk"—even though they may have probable cause—hoping that either the suspect will submit to arrest, exit the house, or that exigent circumstances will arise. For example, in *Thomas*, discussed previously,[172] five policemen, having gone to the place where Thomas lived to investigate the theft of anhydrous ammonia, knocked on the door. When they saw Thomas inside, they asked him to come out, and then immediately arrested him. The District Court ruled that this was a "constructive entry" in violation of the arrest warrant requirement of *Payton*.[173] But the Sixth Circuit reversed on the ground that this was a "consensual encounter": "No testimony . . . indicate[d] drawn weapons, raised voices, or coercive demands on the part of the police."[174] Where there is such a show of force, courts are more likely to consider the opening of the door involuntary and the arrest invalid.[175]

But whether or not the police engage in extremely aggressive behavior is not the point. *Payton* requires a warrant to arrest someone at his home, period. Whether the police arrest him by standing at the door and asking, ordering, or insisting with drawn guns that he come out is irrelevant.

Several circuits have held that if the suspect opens the door in response to a police knock, it is not considered a *Payton* violation for the police to arrest him on the spot without a warrant.[176] The reasoning is that, once the suspect comes to the door, he is in "plain view" as in *Santana*, and consequently the police have the right to seize him. Under this reasoning, it would not seem to matter whether the suspect voluntarily acceded to the arrest, or whether the police had to step into the vestibule to arrest him. In *United States v. Vaneaton*,[177] for example, the police had just obtained probable cause that a person they were seeking to arrest was staying at a nearby motel. They

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171. *Id.* at 42–43.

172. *See supra* notes 53–61 and accompanying text.

173. United States v. Thomas, 430 F.3d 274, 276 (6th Cir. 2005).

174. *Id.* at 278 (describing a "typical consensual encounter").

175. *See, e.g.*, Sharrar v. Felsing, 128 F.3d 810, 819 (3d Cir. 1997) (arguing that "[n]o reasonable person would have believed that he was free to remain in the house" when the police surrounded the house, pointed machine guns at the windows, and ordered the occupants out); United States v. Morgan, 743 F.2d 1158, 1161 (6th Cir. 1984) (finding coercion where ten officers surrounded the house, blocked the suspect's car, "flooded the house with spotlights and summoned Morgan from his mother's house with the blaring call of a bullhorn").

176. *See, e.g.*, United States v. Gori, 230 F.3d 44, 54 (2d Cir. 2000). In *Gori*, however, it was a delivery person, not the police, who knocked on the door. The police then ordered the residents out at gunpoint. The court placed weight on the fact that it was the knock of an "invitee" rather than police that caused the door to be opened. *See also* McKinnon v. Carr, 103 F.3d 934 (10th Cir. 1996); United States v. Peters, 912 F.2d 208, 210 (8th Cir. 1990) ("When an individual voluntarily opens the door of his or her place of residence in response to a simple knock, the individual is knowingly exposing to the public anything that can be seen through that open door and thus is not afforded fourth amendment protection."); United States v. Carrion, 809 F.2d 1120 (5th Cir. 1987).

177. 49 F.3d 1423 (9th Cir. 1995).

immediately traveled to the motel, knocked on the door, and, when Vaneaton answered the door, arrested him. The Ninth Circuit held that, "by opening the door as he did, Vaneaton exposed himself in a public place,"[178] and approved the arrest as well as the search incident thereto.

Other courts reject this approach, holding as the Seventh Circuit did, that "a person does not surrender reasonable expectations of privacy in the home by simply answering a knock at the door."[179] As Judge Posner explained:

> Since few people will refuse to open the door to the police, the effect of the rule of [the Second and Ninth Circuits] is to undermine, for no good reason that we can see, the principle that a warrant is required for entry into the home, in the absence of consent or compelling circumstances. Those cases equate knowledge (what the officer obtains from the plain view) with a right to enter, and by so doing permit the rule of *Payton* to be evaded.[180]

Thus while the Seventh Circuit rejects the notion that simply coming to the door in response to a police knock creates both a plain view and an automatic right to enter under an exigent circumstance theory, it does not deny the right of the police to knock and obtain a plain view of the suspect or contraband if he or it can be seen when the door is opened. It simply requires an additional showing of exigent circumstances before the police can enter without a warrant,[181] something that often will not be difficult for the police to show, depending upon what "exigent circumstances" means. Still, the Seventh Circuit's rule avoids the most blatant violation of the *Payton* principle.

It would seem that the dispute among the circuits on this point should be settled in favor of the Seventh, by *New York v. Harris*,[182] decided by the Supreme Court in 1990. In *Harris*, the police, with probable cause to arrest, but no warrant, knocked on Harris's door, "displaying their guns and badges. Harris let them enter."[183] There was no dispute that this arrest was illegal, and that Harris's statement to the police immediately following the arrest was inadmissible, despite his receipt of *Miranda*

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178. *Id.* at 1427. The court seems to place some weight on the fact that Vaneaton knew, through looking out the window, that it was the police.

179. Sparing v. Vill. of Olympia Fields, 266 F.3d 684, 690 (7th Cir. 2001); *accord* McClish v. Nugent, 483 F.3d 1231 (11th Cir. 2007) (where suspect answered the door and was standing just inside, police reaching in and grabbing him was a *Payton* violation); United States v. McCraw, 920 F.2d 224, 229 (4th Cir. 1990) (opening the door partway to determine who is knocking is not a consent to entry); Duncan v. Storie, 869 F.2d 1100, 1103 (8th Cir. 1989); *see also* Evan B. Citron, Note, *Say Hello and Wave Goodbye: The Legitimacy of Plain View Seizures at the Threshold of the Home*, 74 FORDHAM L. REV. 2761 (2006) (thorough discussion of this conflict); Jennifer Marino, Comment, *Does* Payton *Apply?: Absent Consent or Exigent Circumstance, Are Warrantless, In-Home Police Seizures and Arrests of Persons Seen Through an Open Door of the Home Legal?*, 2005 U. CHI. LEGAL F. 569 (further discussion of these issues).

180. Hadley v. Williams, 368 F.3d 747, 750 (7th Cir. 2004).

181. *Id.*

182. 495 U.S. 14 (1990).

183. *Id.* at 15.

warnings.[184] It is clear that it was not the "display of guns and badges" that rendered this arrest illegal, but rather the failure of the police to come with an arrest warrant:

> *Payton* . . . drew a line at the entrance to the home. This special solicitude was necessary because "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." The arrest warrant was required to "interpose the magistrate's determination of probable cause" to arrest before the officers could enter a house to effect an arrest.[185]

Harris seems clear: police may not effect a valid arrest by coming to the door of a house with probable cause and, when the suspect comes to the door, arresting him. Yet the courts that permit this sort of thing ignore *Harris*, which is better known for its holding that the illegal arrest does not invalidate subsequent statements made outside the house after proper *Miranda* warnings.

It is likewise manifest from *Payton*'s companion case, *Riddick v. New York*,[186] that if someone else in the household opens the door in response to the police knock, and the defendant is spotted through the door, the police are not entitled to enter and arrest him without a warrant or some showing of exigent circumstances beyond the mere desire to arrest the suspect. Why should it matter who opens the door?

Many courts that adhere to what has been termed the "sanctity of the home" approach, disallowing this sort of police conduct,[187] further hold that it is not necessary for the police to cross the threshold to violate *Payton*: if the suspect comes to the door in response to the police knock, and the police inform him that he is under arrest, then this is also a violation, even if he then comes out willingly.[188]

But Professor LaFave argues that this is both contrary to the language of *Payton*, which holds only that the "threshold may not reasonably be crossed without a warrant"[189] and also contrary to its rationale.[190] LaFave points out that

> the warrant requirement makes sense only in terms of the *entry*, rather than the arrest; the arrest itself is no "more threatening or humiliating than a street arrest." This certainly means that *if* the arrest can be accomplished without entry, it should be deemed lawful notwithstanding the absence of a warrant *even if* the arrestee was just inside rather than on the threshold at the time.[191]

LaFave bolsters this argument by pointing out that these cases should not be resolved by such "metaphysical subtleties" as whether the defendant was "'in' the

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184. The only dispute was whether a subsequent statement made at the police station was admissible. The Court held that it was. *See id.* at 19.

185. *Id.* at 18 (citations omitted).

186. 445 U.S. 573, 578 (1980).

187. Citron, *supra* note 179, at 2762.

188. *See* 3 LAFAVE, *supra* note 48, § 6.1(e), at 301 n.156 (collecting cases).

189. Payton v. New York, 445 U.S. 573, 590 (1980).

190. *Cf.* United States v. Berkowitz, 927 F.2d 1376, 1387 (7th Cir. 1991) ("If the person recognizes and submits to [police] authority, the arrestee, in effect has forfeited the privacy of his home to a certain extent.").

191. 3 LAFAVE, *supra* note 48, § 6.1(e), at 302 (quoting MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 307 (1975) (emphasis in original)).

doorway rather than 'at' it, or 'on'" the threshold rather than "by" it.[192] Since "in the vast majority of such confrontations the person will submit to the police," this will relieve the police from "having to obtain arrest warrants in a large number of cases in advance, and the warrant process is therefore not overtaxed."[193]

LaFave recognizes that this creates a new problem: what to do if the person, upon seeing the police, retreats back into the residence. LaFave says that in such a case, the police should be required to "withdraw and return another time with a warrant."[194] This is asking for an unusual degree of restraint by police who are, under LaFave's approach, legitimately seeking a suspect whom they have probable cause to arrest. Most courts would likely find exigent circumstances to justify chasing down the suspect in this situation, arguing that, unlike Riddick, he was trying to get away.

Still, if one accepts the basic propriety of police going to people's houses in hopes of getting them to submit to warrantless arrests, despite the holding of *Payton*, then LaFave's solution is reasonable. But I do not accept that. As we have seen, police, whatever their motive in conducting the "knock and talk" originally, use it as a means of intruding on the suspect's privacy in numerous ways. Thus in hoping to effect a "voluntary" arrest, the police will also obtain plain views and smells from the suspect's residence, go around the back to look for him, and perhaps be allowed to look in outbuildings if he does not answer the door.[195]

More importantly, if the police can arrest a suspect, either by ordering or asking her to come to the door, or by hoping that she comes voluntarily, they will then be able to search the entrance area from whence she came, incident to the arrest.[196] Moreover, they will be able to make a "protective sweep" of the room from which she emerged, without any showing of additional suspicion, and upon a showing of reasonable suspicion of danger, extend that sweep into other rooms of the house, seizing all evidence in plain view as they go.[197] It is these sorts of intrusions that the *Payton* arrest warrant requirement, as well as the holding of *Johnson*, protect against.

Police should not be allowed to avoid the arrest warrant requirement by seeking "voluntary cooperation" at the door to the suspect's residence, with all of the additional intrusions that such a "knock and talk" entails. If the police want to encourage people to give themselves up voluntarily, they can call on the telephone and invite them to do so, including calling from a cell phone while positioned directly outside the suspect's curtilage. Or they can wait for him to come out on his own. In either of these latter two situations, they will not be able to search inside the house or perform protective sweeps incident to the arrest,[198] nor obtain special access to the activities inside the house by

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192. *Id.* § 6.1(e), at 303.

193. *Id.* § 6.1(e), at 304.

194. *Id.*

195. *See supra* Part II.A.

196. This would be the "area within his immediate control" prior to the arrest under the dubious reasoning of *Chimel v. California*, 395 U.S. 752, 763 (1969).

197. *See* Maryland v. Buie, 494 U.S. 325 (1990). Even when the police arrest someone just outside his door, the courts are in agreement that, upon reasonable suspicion of danger from within, they can enter and perform a protective sweep. *See, e.g.*, Sharrar v. Felsing, 128 F.3d 810, 820 (3d Cir. 1997). Such reasonable suspicion would rarely arise if the arrest occurred on the public sidewalk outside the house rather than at the entryway.

198. *See* Vale v. Louisiana, 399 U.S. 30, 33–34 (1970).

causing the front door to be opened or by trespassing on the curtilage. Moreover, the suspect will be dressed for the outside, so it will not be necessary to follow him into the house while he dresses. Ordinarily, however, as *Payton* holds, they should come with an arrest warrant or arrest him outside.

III. SOLUTIONS

At first blush, it is not obviously unreasonable for the police to come to someone's door and knock on it, like anyone else could do. This explains the universal acceptance of the "knock and talk" tactic by courts around the country. But as this Article shows, "knock and talk" repeatedly leads to serious intrusions into the privacy of the homeowner, and to regular avoidance by police of the arrest and search warrant requirements. It has also led to widespread confusion among the courts as to precisely which police behaviors are acceptable and which are prohibited. A number of courts have expressed serious reservations about various police tactics while continuing to allow the general "knock and talk" practice.[199]

This is an area in which police need "clear rules to follow."[200] The current method of evaluating each case based on the aggressiveness of the police behavior or the voluntariness of the suspect's cooperation has produced widely divergent and, in my view, frequently unacceptable results. As the Supreme Court put it in *Oliver v. United States*[201] in adopting the clear rule that "open fields" are outside the scope of the Fourth Amendment entirely:

> Under [the case-by-case] approach, police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded . . . . The lawfulness of a search would turn on "[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions."[202]

Similar remarks could be made about the "knock and talk" cases.

Ordinarily when the Supreme Court declares the need for clear rules for police, it is on its way to announcing a clear rule that is beneficial to police and detrimental to privacy interests.[203] But there is no reason why this must necessarily be so. Accordingly, I propose, and defend, three relatively clear rules to limit "knock and talk," in descending order of severity.

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199. For examples of some of these types of cases, see *supra* Part II.

200. *Cf.* Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.").

201. 466 U.S. 170 (1984).

202. *Id.* at 181 (quoting New York v. Belton, 453 U.S. 454, 458 (1981) (internal quotation marks omitted) (second alteration in original)).

203. *See, e.g.*, *Oliver*, 466 U.S. 170.

A. The Outright Ban

Once the police investigation has focused on a particular subject or subjects, the police should not be allowed to go to their dwelling without a warrant. It does not matter whether the police's purpose is to question them, to seek consent to search, or to arrest them. As discussed, once police go onto the front porch of a house, or the hallway outside an apartment, they are already intruding on the privacy of the homeowner in a way that other visitors do not.[204] Police can, of course, acting in their protective capacity, respond to noise complaints, complaints of fights, etc., because these either do not involve criminal investigations focused on particular individuals or are justified by exigent circumstances.[205] Likewise it is appropriate for police to canvass an area following a crime seeking out information from householders as to what they may have witnessed, since this investigation has not focused on a particular subject and they are not going, as far as they know, to his dwelling. Finally, if police have probable cause and exigent circumstances in advance, they can go to dwellings to arrest and search as usual.

Obviously, such a rule would hamper police investigations, but then, so do the Fourth Amendment's warrant and probable cause requirements. It would be much easier for police to dispense with the inconvenient and demanding warrant requirement all the time, rather than merely much of the time, as courts currently allow through the "knock and talk" cases. And stopping and searching cars whenever they felt like it would likewise be a useful investigative technique for police.

So what would police be allowed to do in a post-"knock and talk" regime? First, as discussed, they could use the telephone to seek information or consents to search, and to invite people to surrender to arrest.[206] While this technique would undoubtedly be less effective,[207] that is because it would lack the unacceptably coercive impact that the police's physical presence has on the homeowner. Thus the unconcerning line that the Supreme Court currently draws between consent searches that are "voluntary," even though obviously induced by police pressure, and those that are involuntary would become clearer. It is much easier to refuse consent to search your house on the telephone than it is when the police are looming over you at your front door and thus

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204. *See supra* notes 62–64 and accompanying text.

205. What if there is an anonymous tip that someone is being murdered or severely beaten at a particular address? Since the tip is from an unknown source it is not enough for probable cause. Exigent circumstances—an exception to the warrant, but not the probable cause requirement—would not apply. Since this is a true emergency, with lives at stake, I have no difficulty authorizing the police, acting in their protective capacity, going to the house, knocking on the door, and even entering without a warrant if they still have reason to believe that the emergency is ongoing. *See* Brigham City v. Stuart, 547 U.S. 398 (2006) (police entry was reasonable to respond to threat of violence). None of the "knock and talk" cases considered in this Article involve such an emergency.

206. *See supra* text accompanying note 195.

207. As Judge Evans put it, concurring in *United States v. Johnson*: "If the police use a shortcut and the need to protect themselves arises, they run the risk of not being able to use, in court, evidence they stumble on. . . . As I see it, the seeds of this bad search were sown when the police decided to use the 'knock and talk' technique." 170 F.3d 708, 721 (7th Cir. 1999) (Evans, J., concurring) (striking down a frisk associated with a "knock and talk").

more obviously voluntary if you do consent at a distance. Nor would I object to cell phone calls from the street, outside the curtilage. (Of course, this only works if the suspect has a phone and the police know the number).[208]

The same can be said for "voluntary" accession to a police request by phone that you submit to arrest. Many suspects, when faced with the choice of acceding to an arrest by coming out voluntarily or waiting for the police to enter their home with an arrest warrant, would still likely choose the former option. Since the suspect does not encounter the police until he is *outside* the house, there would be no occasion for the police to search the interior incident to the arrest or through a protective sweep.[209] Nor would it be necessary for the police to go into the house to observe the defendant as he dressed for the outdoors, as is frequently required when he is arrested at his doorway.[210] If the suspect refuses, the police can surround the house while they go for a warrant.

It is only "knock and talk" at *suspects*' homes that is prohibited by this rule. It is perfectly appropriate to go to the neighbor's house to find out what they know about the suspect, or to request a view from their yard, in order to obtain probable cause to put in an arrest or search warrant application (assuming that the investigation is not aimed at the neighbor as well). But if it turns out that the suspect lives at the location that the police visit, the burden should be on the government to establish that the police did not know it.

Similarly, this rule would have no effect on police activities outside the curtilage, for it is designed to protect the privacy of the home. Thus police can continue to question, stop and frisk, and arrest people on the street, obtain plain views and smells from the street, and stop, search, or seek consent to search automobiles,[211] just as they do now.

A possible source of some confusion in this rule is the "focus" requirement.[212] In the vast majority of cases, it is easy to tell whether the police are making general inquiries about a crime, or have zeroed in on a particular house or suspect and are knocking and talking for one of the purposes discussed in this Article. But there are cases, like a classic murder mystery, where there are a number of people who are possible suspects. In other words, the police visit is more than a general canvass, but less than an investigation focused on a particular individual. But to state the problem is to solve it: no "focus" here. If the crime is one that involves a number of people, then *not* all these people can be the focus. When the number of suspects is reduced to two, however, both are the focus.

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208. On the other hand, hailing the suspect with a bullhorn seems too coercive.

209. *See* Vale v. Louisiana, 399 U.S. 30 (1970). Unless, of course, they had reasonable suspicion of danger within the house. *See* Maryland v. Buie, 494 U.S. 325 (1990).

210. *See, e.g.*, United States v. Dickerson, 975 F.2d 1245 (7th Cir. 1992); *see supra* text accompanying notes 143–45.

211. Though, as indicated earlier, I share with others concerns about the "voluntariness" of consents to search in general. *See supra* notes 111–14 and accompanying text.

212. The "focus" requirement of *Escobedo v. Illinois*, 378 U.S. 478, 491–92 (1964), was confusing because it would seem that everyone taken in for questioning by the police is a focus of the investigation. Here it will ordinarily be obvious, when police come to your door, whether you, or your dwelling, are a focus of the investigation or not.

I recognize that this is an extreme rule and one that the Supreme Court would be unlikely to accept. The question is whether any more moderate limitations on "knock and talk" would work. Perhaps the most obvious one would be a rule forbidding police with probable cause from using "knock and talk" to avoid the arrest and search warrant requirements, while allowing police to continue to use "knock and talk" for investigative purposes.

The difficulty with such an approach is that it would put the police in the unusual position of arguing that they *did not* have probable cause to engage in a particular activity (since if they did they should have gotten a warrant) rather than arguing, as they now do, that they *did*.[213] It would be easy for police to not disclose all of the evidence that they had before knocking on someone's door for "investigative purposes" and then engaging in the same plain view discoveries and consent seeking that they do now. And, of course, police frequently will not be sure whether their information amounts to probable cause or not and would understandably seek a "good faith" exception.[214] These issues would lead to endless litigation, which could be avoided by the simple rule that police are not allowed to go onto your curtilage, including your front door, at all.[215]

B. No Entries, Consents, or Arrests

As currently approved, "knock and talk" investigations achieve two things for the police. First, they put the police in position to obtain plain views, sounds, and smells from people's curtilage, as well as getting incriminating answers to questions. Second, they allow police to avoid the probable cause and warrant requirements by obtaining consents to search, and to avoid the arrest warrant requirement. (Presumably, an arrest without probable cause is no good even if one consents to it.) These practices are apparently widespread, and they undercut the fundamental notion of the Fourth Amendment that homes are entitled to the special protection of a judicially authorized warrant.

A more limited rule would allow "knock and talk," including allowing the police to obtain information for later use in a warrant. But it would not permit the police to enter due to exigent circumstances created by the "knock and talk," seek consents, or make arrests, *regardless of whether they had probable cause*. If the police want to get in to search or want to arrest, they must conform to the warrant requirement. Of course, arrests based on preexisting exigent circumstances, including hot pursuit, would still be allowed,[216] as in *Santana*, but exigent circumstances arising on the spot during a "knock and talk" would not allow entry, even if the result is that evidence gets flushed down the toilet. Police should have come with a warrant in the first place if this was a

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213. *See* United States v. Ross, 456 U.S. 798 (1982) (abandoning an experiment in which police were required to do just this as to auto searches by the misbegotten holding in *Robbins v. California*, 453 U.S. 420 (1981), which it overruled).

214. *See* United States v. Leon, 468 U.S. 897 (1984).

215. Subject to the canvassing and emergency/protective exceptions noted above. *See supra* note 205 and accompanying text.

216. This approach reflects the "only pre-existing exigent circumstances" position of the Sixth Circuit in *United States v. Chambers*, 395 F.3d 563 (6th Cir. 2005), but adds a "no consent/arrest seeking" limitation.

concern. This is similar to the position of the Third, Fifth, and Sixth Circuits, but broader since those circuits seem to require that police "deliberately" create exigent circumstances to avoid getting a warrant.[217]

If "knock and talk" is looked upon not as a "right" of the police, but as an exception to the right of the homeowner not to be disturbed by the police without a warrant, then it is appropriate to cabin the exception in a way that preserves the warrant requirement. Whatever may be said of consents to search cars, consents to search homes, and warrantless arrests in homes should not be allowed, as *Johnson* suggested.

This rule avoids problems with "focus," since "knock and talk" is to be generally allowed. It does allow the police to snoop around your house, but this snooping should be strictly limited to the front porch and door.[218] It takes care of the most egregious cases, where police get around the warrant requirement by getting consents to search of dubious voluntariness. It also avoids warrantless arrests due to "exigent circumstances" caused by the police's own intrusive behavior or by making the suspect feel that he has no real choice but to submit. By banning *all* "knock and talk" consents and arrests, it necessarily bans the involuntary ones.[219] In so doing, it resolves the conflicts in the circuits as to both the exigent circumstance issue (only preexisting exigent circumstances count) and the scope of the police's arrest power during "knock and talk"[220] (no arrest power).

Contrary to an outright ban, this proposal raises questions concerning exigent circumstances both when evidence is spotted and when there is a threat to police safety. What are the police to do if a suspect comes to the door with a gun in his belt, or the police see a gun on a table and another person sitting there?[221] The answer must be that if there is a genuine threat to police safety, then the police must enter to defuse it. But this is an exigent circumstance created by the "knock and talk," and hence should not lead to evidence that the police can use in court. If police observe evidence in plain view from outside during a "knock and talk," they can order the residents out of the house, or otherwise control them, while they seek a warrant.[222]

These exigent circumstance problems will arise often and will make this doctrine much less clear than an outright ban. But it does offer protection against the most blatant warrant-avoidance tactics of the police.

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217. *See* United States v. Coles, 437 F.3d 361, 367 (3d Cir. 2006) ("[E]xigent circumstances [must] exist *before* police decide to knock and announce themselves at the door.") (emphasis in original). However, the decision in *Coles* was influenced by the fact that the police had preexisting probable cause and should have gotten a warrant. *Accord Chambers*, 395 F.3d 563; United States v. Jones, 239 F.3d 716 (5th Cir. 2001).

218. Except by telephone, some cases will arise where there is confusion as to which is the "front" door. Let the police bear the burden of showing that they reasonably believed that the door they chose was the one the public would use.

219. Since requests for consent or arrest made by phone from outside the curtilage do not involve "knock and talk," they would also be allowed under this approach.

220. For example, can the police cross the threshold to make an arrest?

221. This question envisions a situation similar to that in *Jones*, 239 F.3d 716, though in *Jones* the other man was seated not at the table but on a couch near the gun.

222. *See* Illinois v. McArthur, 531 U.S. 326, 332 (2001) (police reasonably prevented suspect from reentering his trailer while they sought a warrant).

C. Warnings Required

An even more limited approach would be to simply require warnings to accompany both requests for consent searches and warrantless arrests.[223] That is, police could only invite people to submit to search or arrest while warning them that they were not required to acquiesce. It would be appropriate for police to point out that if the suspect submitted to an arrest and came outside, it would not be necessary for the police to enter the house, as they would if they came back with an arrest warrant.[224] Despite the Court's rejection of a warning requirement in *Schneckloth*[225] and *Drayton*,[226] which did not involve residential premises, this would be consistent with the Court's often-repeated view that homes require special protection.

Such a warning requirement would be better than nothing. However, given the limited success of the *Miranda* warnings,[227] it is unlikely that a warning requirement would have a significant impact. Arguably, such warnings would be more effective than the *Miranda* warnings since a suspect would be more willing to stand up to police at his home than when he was in custody. A number of "knock and talk" cases involving refusals to consent, even without warnings, show that such refusals are not unusual.[228] Cutting the other way is that the lines of opposition are more clearly drawn after one is arrested. Prior to that time, one may still want to appear as though he has nothing to hide.

CONCLUSION

"Knock and talk" has become a talisman before which the Fourth Amendment "fades away and disappears."[229] The many cases discussed show that courts are consistently approving police behavior that intrudes unreasonably upon the privacy of the home. How to deal with this problem is a difficult question. Hence my suggestion of three possible remedies, in decreasing order of home-protectiveness, all of which would limit the intrusiveness of "knock and talk."

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223. At least two states, Arkansas and Washington, have this requirement. *See* Kletter, *supra* note 47, at 33.

224. Currently it is unclear whether, if the suspect submits to arrest in the entryway, or steps outside, the police may search that entryway incident to arrest. It should be made clear that such cooperative submission means that no search incident or protective sweep inside the house is allowed, absent reasonable suspicion of danger.

225. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

226. United States v. Drayton, 536 U.S. 194 (2002).

227. *See generally* THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING (Richard A. Leo & George C. Thomas III eds., 1998) (summarizing studies about the impact of the *Miranda* warnings).

228. *See, e.g.*, People v. Pelham, No. F041050, 2003 WL 22026551, at *1 (Cal. Ct. App. Aug. 29, 2003); Redden v. State, 850 N.E.2d 451 (Ind. Ct. App. 2006).

229. Coolidge v. New Hampshire, 403 U.S. 443, 461–62 (1971) (plurality opinion).