Lange, *Caniglia*, and the Myth of Home Exceptionalism

Ric Simmons[*]

For over a hundred years, the Supreme Court has employed rhetoric in its Fourth Amendment cases that supports the concept of "home exceptionalism"—that is, the idea that protecting the home is the "very core" of the Fourth Amendment. Two cases from this year's Supreme Court term, Lange v. California *and* Caniglia v. Strom*, appear at first to support this doctrine, since a narrow reading of their holdings appears to enhance Fourth Amendment protection of the home.*

However, a closer examination of Supreme Court doctrine reveals that home exceptionalism is a myth. Although the home does receive small amounts of special protection in some areas, such as the arrest warrant requirement and the protection of curtilage, these special protections are far weaker than the Court's rhetoric implies. In fact, the recent trend is for the Court to limit the Fourth Amendment protection given to the home. Lange *and* Caniglia *are consistent with this trend, as the Court's holding in fact did little to increase the protections for the home and re-affirmed many of the doctrines that permit police to enter a home without a warrant.*

This essay is one of the first to analyze Lange *and* Caniglia*, the Court's two most recent Fourth Amendment cases. It does so by placing the cases in the proper historical and doctrinal context, first tracing the roots of home exceptionalism back to the 1800s and separating the broad language that the Court has often employed in these cases from the narrow legal rules that the cases actually establish. The essay demonstrates that* Lange *and* Caniglia *follow a well-established pattern, beginning with bold precatory language about the sanctity of the home, then delivering a narrow holding, and finally qualifying the reach of that holding with further language limiting its practical effect.*

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[*] Chief Justice Thomas J. Moyer Professor for the Administration of Justice and Rule of Law, Moritz College of Law, The Ohio State University. I would like to thank Matthew Tokson, Justin Murray, and Angela Lloyd for suggestions on an earlier draft. I also want to thank my research assistants Leah Finley, Chloe Palmer, and Ellie Burnett for their contributions to the article.

I. INTRODUCTION: HOME EXCEPTIONALISM 147

II. THE ORIGINS OF THE HOME EXCEPTIONALISM MYTH 149
  A. The Arrest Warrant Requirement 151
  B. Curtilage 152
  C. Background Social Norms 156

III. HYPER-INTRUSIVE SEARCHES AND *UNITED STATES V. JONES* 158
  A. Hyper-Intrusive Searches 158
  B. The False Start of United States v. Jones 160

IV. THE BROAD (AND EXPANDING) WARRANT EXCEPTIONS FOR HOME SEARCHES 162
  A. Consent 163
  B. Protective Sweeps 164
  C. Exigency/Hot Pursuit 165
  D. Emergency Aid 166

V. *LANGE* AND *CANIGLIA* 168
  A. *Lange*: No Need for a Categorical Rule 168
  B. *Caniglia*: Re-Branding the Community Caretaking Exception 171

VI. CONCLUSION: DATA EXCEPTIONALISM 175

I. INTRODUCTION: HOME EXCEPTIONALISM

The Fourth Amendment guarantees our right to be secure in our "persons, houses, papers, and effects."[1] For generations, the conventional wisdom has told us that houses are "first among equals" in that list.[2] The Supreme Court has repeatedly stated that the "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,"[3] and that preventing entry into the home is "the chief evil against which the wording of the Fourth Amendment is directed."[4] The sanctity of the home has deep roots in Anglo-American law, dating to Blackstone, who said that the law has a "particular and tender regard to the immunity of a man's house,"[5] and early Seventeenth Century British common law, which held that every person's home is their "castle and fortress."[6] Scholars have agreed that the home receives the highest level of

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1. U.S. CONST. amend. IV.

2. *See* Florida v. Jardines, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals.").

3. Silverman v. United States, 365 U.S. 505, 511 (1961).

4. United States v. U.S. District Court (*Keith*), 407 U.S. 297, 312 (1972); *see also* Wilson v. Layne, 526 U.S. 603, 612 (1999) (stating that protecting the home is "the core of the Fourth Amendment"); Payton v. New York, 445 U.S. 573, 601 (1980) (citing "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"); Groh v. Ramirez, 540 U.S. 551, 559 (2004) ("'[T]he right of a man to retreat into his own home and there be free from unreasonable governmental intrusion' stands '[a]t the very core of' the Fourth Amendment." (quoting Kyllo v. United States, 533 U.S. 27, 31 (2001))); *Kyllo*, 533 U.S. at 31 ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."); *Payton*, 445 U.S. at 586 ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (quoting Coolidge v. New Hampshire, 403 U.S. 443, 477 (1971))).

Although almost all of the Court's decisions involving searches of the home begin with this kind of rhetoric, it is a mistake to give this precatory language too much weight. The Court has used similar language about searches of a person. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891))).

5. 4 WILLIAM BLACKSTONE, COMMENTARIES *223 ("[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity.").

6. *See, e.g.*, Semayne's Case (1604) 77 Eng. Rep. 194, 195 ("[T]he house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law . . . if thieves come to a man's house to rob him, or murder, and the owner [or] his servants kill any of the thieves in defence of himself and his house it is not felony, and he shall lose nothing. . . .") (footnotes omitted).

Fourth Amendment protection,[7] although they disagree as to whether this higher level of protection is beneficial.[8]

The Court's two most recent cases on searches within the home seem at first to confirm this long-standing principle of home exceptionalism. In *Lange v. California*,[9] the Court rejected a categorical rule that a police officer may pursue a suspect into their home on suspicion of a misdemeanor.[10] And in *Caniglia v. Strom*,[11] the Court invalidated the search of a home that had been based on the community caretaking exception.[12]

In reality, however, the Court's Fourth Amendment jurisprudence does not provide the home with significantly greater protection than other types of private property. Although the Court has consistently used rhetoric that reinforces home exceptionalism, its actual rulings have slowly and subtly expanded the exceptions to the warrant requirement for home searches. *Lange* and *Caniglia* fit this broader pattern: although their holdings appear to increase protections for the home, in actuality they affirm the existing broad police powers to conduct these searches. In *Caniglia*, the Court provides an obligatory pronouncement that the home is the core of the Fourth Amendment's privacy guarantee, but then immediately enumerates three warrant exceptions that allow police intrusion into the home and its

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7. Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 907 (2010) (stating that "privacy in residential search and seizure receives comparatively stronger protection than many other contexts"); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1215 (2004) (arguing that the home is the centerpiece for American privacy law); Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 957 (1997) (noting that the home is "the most sacred of all areas protected by the Fourth Amendment"); Matthew Tokson, *The Emerging Principles of Fourth Amendment Privacy*, 88 GEO. WASH. L. REV. 1, 16 (2020) ("The home accordingly receives the Fourth Amendment's strongest protections. As the places or information sought by police move further away from the home or from the types of intimate activities traditionally associated with the home, Fourth Amendment law generally offers less protection, holding all else equal.").

8. *Compare* Stern, *supra* note 7, at 955–56 (concluding that the formalist emphasis on the home has led the Court to reduce protections for more substantive privacy protections) *with* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 997–1000 (1982) (arguing that the home deserves the strongest Fourth Amendment protections).

9. 141 S. Ct. 2011 (2021).

10. *Id.* at 2016. Consistent with the standard rhetoric of home exceptionalism, the Court re-affirmed that the "home is entitled to special protection." *Id.* at 2018–19 (quoting Georgia v. Randolph, 547 U.S. 103, 115 (2006)).

11. 141 S. Ct. 1596 (2021).

12. *Id.* at 1598.

curtilage[13]—and as we will see below, its list is incomplete.[14] Meanwhile, in *Lange*, the Court noted that although flight from a misdemeanor alone is insufficient to permit police entry into a home, police are typically justified in entering a home in hot pursuit of a fleeing suspected misdemeanant based on other exigencies, which are often present.[15]

Part II of this essay discusses the current extent of home exceptionalism in Fourth Amendment law, demonstrating that the home receives only a moderate level of protection compared to other types of property. Part III describes the types of searches—known as "hyper-intrusive searches"—that do in fact receive a higher level of Fourth Amendment protection. It then notes that the Supreme Court had an opportunity to elevate home searches into the category of hyper-intrusive searches in the recent case of *United States v. Jones*, but declined to do so. Part IV examines how the Supreme Court has cut back on home exceptionalism in recent decades by expanding the scope of exceptions for warrantless entry and searches of homes. Part V analyzes *Caniglia* and *Lange* in the context of this jurisprudence, and Part VI concludes by highlighting a different kind of Fourth Amendment exceptionalism for data and records that is gaining traction in the courts.

II. THE ORIGINS OF THE HOME EXCEPTIONALISM MYTH

In recent years, some commentators have criticized the doctrine of home exceptionalism, arguing that the Fourth Amendment should prioritize privacy and intimacy rather than a specific location—especially when the extent of protection that location provides will vary depending on the economic class of the individual being searched.[16] Professor Stephanie M. Stern, who coined

13. *Id.* at 1599 (noting the exigent circumstances exception (Kentucky v. King, 563 U.S. 452, 460 (2011)), which was affirmed by *Lange* a few weeks later; the emergency aid exception (Brigham City v. Stuart, 547 U.S. 398, 403 (2006)); and the rule that police officers can do whatever "any private citizen might do" (Florida v. Jardines, 569 U.S. 1, 8 (2013))).

14. The Court did not mention the consent exception, *see* Illinois v. Rodriguez, 497 U.S. 177, 181 (1990), the flyover exception for curtilage, *see* California v. Ciraolo, 476 U.S. 207, 215 (1986), and the protective sweep exception, *see* Maryland v. Buie, 494 U.S. 325, 327 (1990). *See infra* Section III.

15. *Lange*, 141 S. Ct. at 2024. The likelihood that a police officer will find some reason to justify entering a home to pursue a fleeing misdemeanant led Justice Kavanaugh to write a concurrence which noted that "there is almost no daylight in practice" between the Court's opinion and Chief Justice Roberts' concurrence, which would have established a categorical rule to always allow hot pursuit of a misdemeanant. *Id.* at 2025 (Kavanaugh, J., concurring). *See infra* notes 150–151 and accompanying text.

16. *See* Amelia L. Diedrich, Note, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 HASTINGS CONST. L.Q. 297,

the term "housing exceptionalism," argued that the "expansive, formalistic" protection of the physical home has led to an inefficient allocation of privacy rights.[17] She argued that home exceptionalism emphasized property interests and subordinated the interests that the Fourth Amendment should be protecting: substantive privacy interests that are based on intimate associations.[18] Under her argument, the home has been used as a proxy for privacy and intimate associations, but it is an imperfect proxy at best, and a formalist adherence to home exceptionalism ends up over-protecting some information, while under-protecting other information.[19]

These critiques have merit; the only flaw in Professor Stern's analysis is the degree to which she argues that home exceptionalism still exists; thus, her analysis reinforces the very myth that she seeks to eliminate. Other commentators do the same. Professor Matthew Tokson recently argued that the intimacy and amount of information being gathered are two of the three factors that the Supreme Court considers in deciding whether the Fourth Amendment applies to a search.[20] He derives this formula in part by citing home exceptionalism: "The Court has long considered the home to be the most intimate of places and has often discussed the private activities that

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313 (2011) ("[T]he very framework used for Fourth Amendment analysis, whether a reasonable expectation to privacy existed, is inherently classist. '[T]he Court has signaled that the reasonableness of privacy expectations in [the home and surrounding areas] is contingent upon the existence of "effective" barriers to intrusion [such as fences, security systems, enclosed garages, and other things that wealthier individuals have better access to]. In other words, one's constitutional privacy is limited by one's actual privacy.' Since poorer individuals cannot afford to erect these 'barriers to intrusion,' they are subject to less Fourth Amendment protection than those who can." (quoting Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401 (2003))); Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 240, 249–50 (2014) ("[T]hose who are homeless are forced to expose much of their behavior and belonging in public spaces in which they do not have a reasonable expectation of privacy, and thus no Fourth Amendment protection. . . . Those living in crowded apartment complexes in close proximity to others experience less privacy than others in single-family detached houses. Similarly, those living in poorly constructed structures that do not adequately conceal noises or activities within the home also experience a diminished expectation of privacy that could ultimately foreclose Fourth Amendment protection.").

17. Stern, *supra* note 7, at 908.

18. *Id.* Professor Stern was writing in 2010, two years before the Supreme Court decided *United States v. Jones*, which elevated property interests even further by resurrecting the moribund trespass doctrine to determine when a government action constituted a Fourth Amendment search. *See* 565 U.S. 400, 409 (2012). As noted above, there is little evidence that *Jones* increased the level of housing exceptionalism. *See infra* notes 87–94 and accompanying text.

19. Stern, *supra* note 7, at 920–22, 950–52.

20. Tokson, *supra* note 7, at 27. The third factor Professor Tokson isolated was the cost of the surveillance. *Id.*

occur therein. The home accordingly receives the Fourth Amendment's strongest protections."[21]

Like most myths, the concept of home exceptionalism is rooted in some measure of truth. There are three doctrines which provide the home extra protection under the Fourth Amendment, although the degree of extra protection is less robust than the Supreme Court's strong rhetoric implies. This section will analyze these three doctrines and the growing limitations that the Court is imposing on them.

A. The Arrest Warrant Requirement

Probably the most significant Fourth Amendment case supporting home exceptionalism is *Payton v. New York*, in which the Supreme Court held that police may not enter a suspect's home in order to make a warrantless arrest.[22] *Payton* relied heavily on originalist arguments, citing the common law and writings by commentators contemporaneous with the Fourth Amendment's adoption,[23] and it overruled the law and practices of a plurality of states.[24]

Payton's requirement of judicial preclearance not only protects against the significant seizure of an arrest, but also prevents the warrantless searches that would accompany a home entry and arrest. A home entry creates the opportunity for a plain view search of the home.[25] Moreover, an arrest justifies a search incident to that arrest, which includes not just the arrestee's person but also their "wingspan."[26] That wingspan includes every container within the arrestee's reach at the time of the arrest, which in a home could include

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21. *Id.* at 15–16 (footnote omitted).

22. 445 U.S. 573, 576 (1980).

23. *Id.* at 591–98. The Court analyzed numerous cases from the 17th and 18th centuries and cited nine different legal scholars whose work pre-dated the adoption of the Fourth Amendment. It also cited the writings of John Adams, *id.* at 597 n.45 ("[O]ne of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle."), and William Pitt, *id.* at 601 n.54 ("The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"). *See infra* notes 193–197 and accompanying text.

24. *Payton*, 445 U.S. at 598–99. The Court noted that twenty-four states permitted warrantless entry of the home for an arrest, while only fifteen prohibited the practice, although the Court did note that the trend was towards invalidating such searches. *Id.*

25. *See* Horton v. California, 496 U.S. 128 (1990) (applying the plain view doctrine inside a home).

26. Chimel v. California, 395 U.S. 752, 763 (1969).

dressers, bedside tables, medicine cabinets, and many other areas where intimate possessions may be stored.[27]

But *Payton*'s instance of home exceptionalism is weaker than it first appears, given the way in which circuit courts have interpreted *Payton* over the years. A majority of circuits have held that police without an arrest warrant may knock on a suspect's door and, if the suspect answers, arrest the suspect while he is on the threshold of his door.[28] These courts apply a broad interpretation of the plain view doctrine to conclude that defendants have voluntarily exposed themselves to public view when they open the door. Thus, the doorway of a home has become a "public place" for the purposes of the Fourth Amendment.[29]

B. Curtilage

Unlike other types of private property, homes are protected by the legal principle of curtilage—a shell of privacy around the home that extends the home's Fourth Amendment protections to the area surrounding the home where "intimate activities" occur.[30] The concept of curtilage derives from the common law of burglary, which treated the area immediately around the house as though it were inside the house itself.[31] The extra protection given to curtilage restricts law enforcement's investigations around a home. For example, officers cannot physically enter a suspect's driveway to remove the tarp from a motorcycle[32] or bring a drug dog to a suspect's front door to try

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27. *See, e.g.*, United States v. Cotnam, 88 F.3d 487, 496 (7th Cir. 1996) (allowing officers to search an entire motel room as a search incident to lawful arrest).

28. *See* United States v. Gori, 230 F.3d 44, 54 (2d Cir. 2000); United States v. Carrion, 809 F.2d 1120, 1128 (5th Cir. 1987); United States v. Vaneaton, 49 F.3d 1423, 1426 (9th Cir. 1995); McKinnon v. Carr, 103 F.3d 934, 935 (10th Cir. 1996). Three circuit courts have come to the opposite conclusion. *See* United States v. McCraw, 920 F.2d 224, 229 (4th Cir. 1990); Sparing v. Village of Olympia Fields, 266 F.3d 684, 690 (7th Cir. 2001); Duncan v. Storie, 869 F.2d 1100, 1103 (8th Cir. 1989). For a review and critique of the cases which allow the practice of conducting a "plain view seizure" at the doorway of a home, see 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).

29. *Gori*, 230 F.3d at 51–52 (noting that "Fourth Amendment privacy interests are most secure when an individual is at home with doors closed and curtains drawn tight," but "*Payton* does not hold or suggest that the home is a sanctuary from reasonable police investigation," so "[w]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection" (quoting United States v. Santana, 427 U.S. 38, 42 (1976))).

30. Stern, *supra* note 7, at 914 ("The expansive reach of the home beyond core living spaces is one hallmark of Fourth Amendment housing exceptionalism.").

31. United States v. Dunn, 480 U.S. 294, 300 (1987).

32. Collins v. Virginia, 138 S. Ct. 1663, 1671 (2018).

to detect the presence of narcotics.[33] However, recent decisions have reduced the protections for physical invasion onto curtilage in certain circumstances.[34] Even more significantly, physical trespass onto curtilage is becoming increasingly irrelevant to modern police investigations, which often use newer technologies to bypass the need to physically invade a home's curtilage.[35] When this happens, courts evaluate the constitutionality of the search based on the type of technology being used, rather than on the type of property being surveilled.

Two cases, *Kyllo v. United States*[36] and *Dow Chemical Co. v. United States*,[37] illustrate the diminished relevance of curtilage to Fourth Amendment jurisprudence. In *Kyllo,* the Court held that the police were not permitted to use a thermal imager to detect the heat coming out of the home, citing *Payton* for the proposition that "the Fourth Amendment 'draws a firm line at the entrance to the house.'"[38] *Kyllo* contrasted its holding with *Dow Chemical*, in which the Court held that the Fourth Amendment was not implicated when the government used enhanced aerial photography to record images of a private industrial complex.[39] The Court distinguished *Kyllo* from *Dow Chemical* by using the language of home exceptionalism, noting that the commercial space being surveilled in *Dow Chemical* "[did] not share the Fourth Amendment sanctity of the home."[40]

But a closer reading of *Kyllo* and *Dow Chemical* reveals that the type of property being searched was irrelevant to the holding of either case. First, in *Dow Chemical,* the Court noted that the "precision aerial mapping camera" used by the government was "commonly used in mapmaking," and that this

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33. Florida v. Jardines, 569 U.S. 1, 11–12 (2013).

34. *See* Stern, *supra* note 7, at 949 (arguing that "the case law reveals increasing judicial ambivalence toward the curtilage doctrine," in part because "[a]n increasing number of circuits have opted to review curtilage determinations de novo rather than apply the clear error standard"); Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1345 (2014) ("[I]n application, protection of the curtilage has been rather limited.").

35. *See, e.g.*, Laura Sullivan, *New Tools Let Police See Inside Peoples' Homes*, NPR (Jan. 21, 2015, 10:18 PM), https://www.npr.org/sections/thetwo-way/2015/01/21/378851217/new-tools-let-police-see-inside-peoples-homes [https://perma.cc/5WKC-XBMC].

36. 533 U.S. 27 (2001).

37. 476 U.S. 227 (1986).

38. *Kyllo*, 533 U.S. at 40 (quoting Payton v. New York, 445 U.S. 573, 590 (1980)).

39. *Dow Chem.*, 476 U.S. at 239.

40. *Kyllo*, 533 U.S. at 37. The Court made the same distinction earlier in the case, pointing out that *Dow Chemical* noted that "it [is] important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened." *Id.* at 33 (quoting *Dow Chem.*, 476 U.S. at 237 n.4).

type of surveillance could easily be duplicated by any private citizen.[41] Foreshadowing the test that it would set forth in *Kyllo*, the *Dow Chemical* Court noted in dicta that "[i]t may well be . . . that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public . . . might be constitutionally proscribed absent a warrant."[42] Thus, the material difference between *Dow Chemical* and *Kyllo* was not the area being searched, but the sophistication of the technology used to surveil the private property. Unlike the thermal imager that the Court would evaluate later in *Kyllo*, the camera used in *Dow Chemical* was "not . . . revealing of intimate details:"

> Although [the photographs] undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions; other protections such as trade secret laws are available to protect commercial activities from private surveillance by competitors.[43]

Fifteen years later, the *Kyllo* Court faced this exact question: whether the police conducted a "search" when they used a sophisticated electronic device that was "not in general public use" in order to learn information "that would previously have been unknowable without physical intrusion."[44] In that case, the Court fulfilled its own prediction and held that the use of such technology was in fact a search.[45]

The reasoning and language of *Dow Chemical* demonstrate that if *Kyllo*'s surveillance technique had been used on the inside of a commercial building, the result would have been the same as in *Kyllo*. But what about the reverse situation—what if the government had used *Dow Chemical*'s surveillance technique—aerial surveillance—to spy on the curtilage outside the home? Again, the Court in *Dow Chemical* used language that implies that the curtilage of the home enjoys a special status, noting that "[t]he intimate activities associated with family privacy and the home and its curtilage

41. *Dow Chem.*, 476 U.S. at 229, 231; *see also id.* at 238 ("Here, EPA was not employing some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking.").

42. *Id.* at 238.

43. *Id.* at 238–39.

44. *Kyllo*, 533 U.S. at 40.

45. *Id.*

simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant."[46] But as before, the Court's holdings speak louder than its words: when police surveilled a home's curtilage from an airplane at an altitude of 1,000 feet[47] or even a helicopter hovering at 400 feet,[48] the result was the same as it was for the industrial park in *Dow Chemical*—the surveillance did not implicate the Fourth Amendment. The critical distinction for the Court was not the type of area being surveilled, but the method used to surveil it. Surveillance using a thermal imager is a search, but surveillance using the naked eye or a telephoto camera is not.[49]

Meanwhile, police have been using aerial surveillance for decades[50] to circumvent the curtilage restriction. As police increasingly make use of drone surveillance,[51] or real-time citywide aerial surveillance,[52] or even the use of publicly available satellite photos such as those found on Google Earth,[53] the protective value of the curtilage will continue to shrink.

46. *Dow Chem.*, 476 U.S. at 236.

47. California v. Ciraolo, 476 U.S. 207, 213–14 (1986).

48. Florida v. Riley, 488 U.S. 445, 450–52 (1989).

49. *See, e.g.*, *Ciraolo*, 476 U.S. at 213 ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.").

50. *See, e.g.*, *Riley*, 488 U.S. at 448 (police circled over defendant's property using a helicopter); People v. Pollock, 796 P.2d 63 (Colo. App. 1990) (police observed defendant's property from a helicopter overhead); State v. Davis, 360 P.3d 1161 (N.M. 2015) (police conducted aerial surveillance of greenhouse with low-flying helicopter).

51. As of March 2020, over 1,100 law enforcement agencies (not including those at the federal level) had at least one drone. *See* DAN GETTINGER, CTR. FOR THE STUDY OF THE DRONE AT BARD COLL., PUBLIC SAFETY DRONES 1 (3d ed. 2020), https://dronecenter.bard.edu/files/2020/03/CSD-Public-Safety-Drones-3rd-Edition-Web.pdf [https://perma.cc/JGY2-WGM3]. Some states require police to obtain a warrant before using a drone, while others restrict the ways in which police can use drones, but in the majority of jurisdictions they are still unregulated. Faine Greenwood, *How To Regulate Police Use of Drones*, BROOKINGS INST.: TECH STREAM (Sept. 24, 2020), https://www.brookings.edu/techstream/how-to-regulate-police-use-of-drones/ [https://perma.cc/TA7V-N7VQ]; S. Alex Spelman, Note, *Drones: Updating the Fourth Amendment and the Technological Trespass Doctrine*, 16 NEV. L.J. 373, 384–86 (2015).

52. Kelsey Campbell-Dollaghan, *Police Are Testing a "Live Google Earth" To Watch Crime as It Happens*, GIZMODO (Apr. 14, 2014, 2:20 PM), https://gizmodo.com/police-are-testing-a-live-google-earth-to-watch-crime-1563010340 [https://perma.cc/PM7Y-HLH5].

53. Daniel Terdiman, *How Law Enforcement Uses Google Earth*, CNET (Sept. 14, 2007, 10:57 AM), https://www.cnet.com/news/how-law-enforcement-uses-google-earth/ [https://perma.cc/Z3H2-39KM]; Martha Kang, *Can Police Use Google Earth Images Without Warrant? They Already Do*, KNKX (Apr. 4, 2013, 6:00 AM), https://www.knkx.org/law/2013-04-04/can-police-use-google-earth-images-without-warrant-they-already-do [https://perma.cc/XFK4-25FL].

C. Background Social Norms

A final way in which the home receives some extra protection is through the doctrine of background social norms. The most recent example of this can be found in *Florida v. Jardines*, in which the Court held that police use of a drug detection dog at the door of a person's home constituted a Fourth Amendment search.[54] As usual, the *Jardines* Court prefaced its analysis by stating that "the home is first among equals" in Fourth Amendment jurisprudence.[55] The Court grounded its holding on the social norms expected when a person (including a police officer) comes to the front door of a home.[56] The Court noted that homeowners give an "implicit license" for visitors to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave,"[57] but that "the background social norms that invite a visitor to the front door do not invite him there to conduct a search."[58] Thus, the social norms specific to homes create a high level of expected privacy (under the "reasonable expectation of privacy" test found in *Katz*)[59] and a low standard for physical trespass (under the "physical trespass" test found in *Jones*).[60]

However, these background social norms protect other private spaces as well, such as private businesses and offices. Like the front porch of a home, many businesses are open to the general public, at least during certain hours, and during those hours, police may do what any other members of the public can do, such as "examin[e] . . . wares that [are] intentionally exposed to all who frequent the place of business . . . ."[61] However, if a commercial premises is not open to the public, the state may not conduct a warrantless search of the building.[62] Even if a commercial establishment is open to the public, a police officer without a warrant may not examine anything more than that which an ordinary customer could examine.[63]

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54. 569 U.S. 1, 9–10 (2013).

55. *Id.* at 6.

56. *Id.* at 8–9.

57. *Id.* at 8.

58. *Id.* at 9.

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

60. United States v. Jones, 565 U.S. 400, 406–07 (2012).

61. Maryland v. Macon, 472 U.S. 463, 469 (1985); *see also* Lewis v. United States, 385 U.S. 206, 211 (1966) ("A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant.").

62. See v. City of Seattle, 387 U.S. 541, 545 (1967).

63. *See* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979) ("[T]here is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees."). In *Lo-Ji Sales*, the Court

Because of these same social norms, almost all private industries that are not open to the public are given the same protections as a home. There are a few well-delineated exceptions for heavily regulated industries, such as liquor sales,[64] firearms sales,[65] mining,[66] and running an automobile junkyard,[67] but the most recent of those exceptions was carved out nearly thirty-five years ago, and the Court has repeatedly dismissed government attempts to expand the category ever since then.[68] Beyond these exceptions, the Court has repeatedly held that the Fourth Amendment fully protects private workspaces.[69] In *City of Los Angeles v. Patel*, the Court held that police had to obtain judicial preclearance before examining a hotel's guest registry, even if the police are conducting an administrative search rather than a criminal investigation.[70] In *Mancusi v. DeForte*, the Court held that a warrantless search of a union office was unconstitutional because the defendant could "reasonably have expected" that only his co-workers, their guests, and his superiors would enter the office space.[71] In *Marshall v.*

held that the government conducted a Fourth Amendment search of the store, even though it was open at the time, because the government agent looked for obscene materials "not as a customer, but without the payment a member of the public would be required to make" and also "in examining the books and in the manner of viewing the containers in which the films were packaged for sale, he was not seeing them as a customer would ordinarily see them." *Id.* The Court contrasted the government's actions in *Lo-Ji Sales* with its permissible conduct in *Heller v. New York*, 413 U.S. 483 (1973), in which the government agent "viewed a film in a theater as an ordinary paying patron." *Lo-Ji Sales*, 442 U.S. at 327.

64. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

65. United States v. Biswell, 406 U.S. 311, 311, 317 (1972).

66. Donovan v. Dewey, 452 U.S. 594, 596 (1981).

67. New York v. Burger, 482 U.S. 691, 712 (1987).

68. *See, e.g.*, City of Los Angeles v. Patel, 576 U.S. 409, 424 (2015) (calling the exceptions for "pervasively regulated" industries a narrow one, and holding that "[u]nlike liquor sales, firearms dealing, mining, or running an automobile junkyard, nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare" (citations omitted)); Marshall v. Barlow's, 436 U.S. 307, 313 (1978) (noting that the exceptions for "pervasively regulated" industries and "closely regulated" industries represent "relatively unique circumstances" in which the proprietor has "voluntarily chosen to subject himself to a full arsenal of governmental regulation" (citations omitted)).

69. *See, e.g.*, Camara v. Mun. Ct. of San Francisco, 387 U.S. 523, 528–29 (1967); Mancusi v. DeForte, 392 U.S. 364, 369 (1968); *Marshall*, 436 U.S. at 313; *Patel*, 576 U.S at 420.

70. 576 U.S. at 420–21.

71. 392 U.S. at 369. The Court held that the defendant had standing to object to the search even though he shared his office with a number of other employees:

> It seems to us that the situation was not fundamentally changed because DeForte shared an office with other union officers. DeForte still could reasonably have expected that only those persons and their personal or

Barlow's, the Court held that safety inspectors needed a warrant in order to inspect the working areas of an electrical and plumbing installation business.[72] The *Marshall* Court provided an originalist justification for its holding, noting that the "general warrants" that the Fourth Amendment was meant to prevent engendered a "particular offensiveness [that] was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists."[73]

Thus, instead of the home receiving the "highest level" of Fourth Amendment protection, as the Court repeatedly states. the home receives a something akin to a moderate level of protection: more than automobiles,[74] heavily regulated industries,[75] and schools,[76] but roughly equivalent to that granted to other types of private property.

III. HYPER-INTRUSIVE SEARCHES AND *UNITED STATES V. JONES*

A. Hyper-Intrusive Searches

There are, in fact, certain types of searches that receive a higher level of Fourth Amendment protection than any other kind of surveillance. This category includes conducting covert video surveillance of private property,

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> business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups.

Id. Public workspaces are treated somewhat differently, since they often have written employment policies that allow the supervisors (who are government employees and thus state actors) to conduct reasonable work-related searches. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 728 (1987).

72. 436 U.S. at 325.

73. *Id.* at 311 (citations omitted).

74. Automobiles are exempt from the warrant requirement due to their mobility and the large amount of government regulation that they are subjected to. Carroll v. United States, 267 U.S. 132, 153 (1925). Both *Jardines* and *Caniglia* are specifically cases in which the Court allowed a specific kind of search (drug detection dogs and community caretaking, respectively) in the automobile context, but not in the home context. *See* Florida v. Jardines, 569 U.S. 1, 14 n.1 (2013) (Kagan, J., concurring) ("[W]e have held, over and over again, that people's expectations of privacy are much lower in their cars than in their homes." (citations omitted)); Caniglia v. Strom, 141 S. Ct. 1596, 1599 (2021) ("*Cady* also involved a warrantless search for a firearm. But the location of that search was an impounded vehicle—not a home—a 'constitutional difference' that the opinion repeatedly stressed." (citing Cady v. Dombrowski, 413 U.S. 433, 439 (1973))).

75. *See supra* notes 64–67 and accompanying text.

76. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (holding that students have a lower expectation of privacy in schools, and that school officials have a greater power to search because of the need to maintain an educational environment).

searches which intrude on a suspect's bodily integrity, and no-knock search warrants.[77] Congress has also passed laws that create extra protections against other forms of hyper-intrusive searches, such as wiretapping[78] and delayed notice search warrants.[79] For all of these hyper-intrusive searches, courts or legislatures require police to meet a higher standard than probable cause in order to conduct the search. For example, a search warrant to remove evidence, like a bullet, from a suspect's body requires more than just probable cause; it also requires balancing the community's interest in solving the crime against the extent of the intrusion upon a suspect's dignitary interests and safety.[80] Various circuit courts have held that search warrants authorizing covert video surveillance require more than the particularity and probable cause necessary for standard warrants. In order to conduct covert video surveillance, the government must demonstrate, among other things, that other investigative procedures are unlikely to succeed, or are too dangerous (the "least intrusive means" requirement) and that the surveillance will be conducted in a way that minimizes the chances of obtaining information irrelevant to the crime charged (the "minimization" requirement).[81] Federal

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77. *See* Ric Simmons, *Can Winston Save Us from Big Brother? The Need for Judicial Consistency in Regulating Hyper-Intrusive Searches*, 55 RUTGERS L. REV. 547, 549, 550–51 (2003) (regulating wiretapping). Only one of these types of searches—no-knock warrants—has anything to do with the search of a home, and that is primarily because of the lack of notice that such searches involve. In setting out the rule requiring an extra showing before permitting a no-knock search warrant, the Court noted that at the time of the framing of the Fourth Amendment, there was "a common-law admonition that an officer 'ought to signify the cause of his coming,'" since such an announcement "generally would avoid 'the destruction or breaking of any house . . . by which great damage and inconvenience might ensue.'" Wilson v. Arkansas, 514 U.S. 927, 935–36 (1995) (quoting Semayne's Case, (1604) 77 Eng. Rep. 194, 195–96). And at any rate, the extra requirement for a no-knock search warrant—that police make a showing that the usual knock-and-announce procedure could result in extra danger for the police or destruction of evidence—has little practical effect. One survey noted that judges approved of 97% of no-knock warrant requests. *See* Aya Gruber, *Policing and "Bluelining"*, 58 HOUS. L. REV. 867, 924, 926 (2021).

78. *See* 18 U.S.C. § 2511.

79. *See* 18 U.S.C. § 3103a. These warrants are sometimes known as "sneak and peek" search warrants, since the suspect does not know the search is occurring at the time of the search. *See* United States v. Mikos, 539 F.3d 706, 709 (7th Cir. 2008).

80. Winston v. Lee, 470 U.S. 753, 760–63 (1985).

81. *See* United States v. Torres, 752 F.2d 875, 885 (7th Cir. 1984); United States v. Biasucci, 786 F.2d 504, 510 (2d Cir. 1986); United States v. Cuevas-Sanchez, 821 F.2d 248, 252 (5th Cir. 1987); United States v. Mesa-Rincon, 911 F.2d 1433, 1442 (10th Cir. 1990); United States v. Koyomejian, 970 F.2d 536, 542 (9th Cir. 1992); United States v. Williams, 124 F.3d 411, 416 (3d Cir. 1997). The extra requirements for covert video surveillance were created to regulate wiretapping when Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III). *See* Simmons, *supra* note 77, at 554. Title III is codified at 18 U.S.C. § 2511. 18 U.S.C. § 2511. Title III did not include video surveillance requirements because the technology

statutes impose the same requirements on any law enforcement officer who wants to wiretap a telephone.[82]

The Supreme Court or Congress could elevate home searches into this category of hyper-intrusive searches by increasing the requirements for a search warrant for a home, but neither body has chosen to do so. In order to obtain a warrant to search a home, law enforcement officers need only meet the traditional standards of probable cause and particularity. In practice, judges do not adjust this standard depending on whether the search warrant is for a home or for another type of private property. A recent survey of federal magistrates indicates that magistrates require the same level of certainty to meet the "probable cause" standard for evaluating the search of an automobile as they do when evaluating a warrant application to search a home.[83]

B. The False Start of United States v. Jones

There was a doctrinal opening for the Supreme Court to elevate the status of home searches ten years ago, when the Court decided *United States*

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to conduct that kind of surveillance was still at a very primitive level. Over the next few decades, as law enforcement began using covert video surveillance more frequently, circuit courts "borrowed" the statutory requirements for wiretapping and held that they were also the Fourth Amendment requirements for covert video surveillance. *See* Simmons, *supra* note 77, at 556–60.

82. § 2511.

83. RIC SIMMONS, SMART SURVEILLANCE: HOW TO INTERPRET THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 76 (2019) (showing that the average level of certainty demanded by magistrates when evaluating probable cause for an automobile search was 52.1%, and the average level of certainty demanded by magistrates when evaluating probable cause for a warrant to search a home was 52.4%). Over a quarter of the magistrates who responded to the survey indicated that their standard would vary depending on the circumstances, but almost all of them indicated that this variation would depend on the severity of the crime being investigated, not the location being searched. *Id.*

Interestingly, when lay people were asked the same question, they also responded that there should be the same level of certainty required for an automobile search as for a search of a home, although they would prefer a much higher level of certainty than magistrates actually require (70.2% for automobiles and 72.7% for homes). *Id.* This is consistent with surveys conducted by Professors Christopher Slobogin and Joseph E. Schumacher, which found that lay people believe that some areas of the home, such as a bedroom, deserve higher levels of privacy, but others, such as a garage or backyard, do not. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings" Recognized and Permitted by Society*, 42 DUKE L.J. 727, 738 tbl.1 (1993); *see also* Stern, *supra* note 7, at 909 ("The empirical evidence also does not support strict protection of the *physical* home based on a personhood interest or the assumption that the home's inviolacy is vital to identity and psychological flourishing. Even subjective expectations of privacy suggest a relative view of home privacy and call into question the privileging of all things residential.").

v. Jones.[84] Before *Jones*, government surveillance implicated the Fourth Amendment only if it infringed on the suspect's reasonable expectation of privacy, pursuant to the 1967 case *Katz v. United States*.[85] *Jones* resurrected an older test for determining whether surveillance constituted a Fourth Amendment search, holding that in addition to *Katz's* privacy test, government surveillance implicates the Fourth Amendment if it "physically intrud[es] on a constitutionally protected area."[86] Since property interests and rights against trespass are of particular importance for the home when compared to other types of private property, such as automobiles or other chattel, lower courts could have used *Jones* to heighten protection for the home and thus increase the amount of home exceptionalism under the Fourth Amendment.

However, there is little evidence that *Jones* has had any effect on home searches. In the nine years since *Jones* was decided, its property-based test has been used in approximately three dozen federal appellate court cases, including fifteen cases involving a search of the home, and in none of these cases did a court rely on the *Jones* test to increase protections for the home. In other words, there was no case in which the court would not have found a search under the *Katz* test but did find a search under the *Jones* test.[87] In

84. 565 U.S. 400 (2012).

85. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

86. *Jones*, 565 U.S. at 406 n.3.

87. Out of thirteen cases in which *Jones* was applied to the home, only nine (69%) found that the government surveillance was a "search" under the Fourth Amendment. Florida v. Jardines, 569 U.S. 1, 11 (2013); Morgan v. Fairfield County, 903 F.3d 553, 567 (6th Cir. 2018); United States v. Bain, 874 F.3d 1, 8 (1st Cir. 2017); United States v. Correa, 908 F.3d 208, 211 (7th Cir. 2018); Hicks v. Scott, 958 F.3d 421, 433 (6th Cir. 2020); Collins v. Virginia, 138 S. Ct. 1663, 1675 (2018); Batt v. Buccilli, 725 F. App'x 23, 25 (2d Cir. 2018); Whalen v. McMullen, 907 F.3d 1139, 1152 (9th Cir. 2018); Mendez v. County of Los Angeles, 897 F.3d 1067, 1084 (9th Cir. 2018). The other four cases ruled that there was no search under either the *Jones* test or the *Katz* test. *See* United States v. Trice, 966 F.3d 506, 520 (6th Cir. 2020); United States v. Sweeney, 821 F.3d 893, 902 (7th Cir. 2016); Stone v. Martin, 720 F. App'x 132, 135 (3d Cir. 2017); United States v. Mitchell, 720 F. App'x 146, 150 (4th Cir. 2018).

By comparison, courts applying the *Jones* test have determined that the surveillance was a "search" in 73% of the cases which involve a car. In eight cases, courts determined a search had occurred under the *Jones* test. 565 U.S. at 404; United States v. Richmond, 915 F.3d 352, 359 (5th Cir. 2019); United States v. Dixon, 984 F.3d 814, 816 (9th Cir. 2020); Taylor v. City of Saginaw, 922 F.3d 328, 332 (6th Cir. 2019); United States v. Ngumezi, 980 F.3d 1285, 1286 (9th Cir. 2020); United States v. Painter, 701 F. App'x 660, 661 (9th Cir. 2017); United States v. Petruk, 929 F.3d 952, 959 (8th Cir.), *cert. denied*, 140 S. Ct. 510 (2019); Grady v. North Carolina, 575 U.S. 306, 310 (2015). In contrast, in only three cases courts determined a search had not occurred under the *Jones* test: United States v. May-Shaw, 955 F.3d 563, 569 (6th Cir. 2020); United States v. Sanchez, 955 F.3d 669, 676–77 (8th Cir. 2020); United States v. Vargas, 915 F.3d 417, 419 (7th Cir. 2019)."

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holding that government surveillance is not a search under *Jones*, courts have allowed police to place a camera across the hallway from the defendant's apartment door;[88] search the basement of the defendant's apartment building;[89] enter private property marked "Keep Out" and protected by a locked gate;[90] obtain consent to enter a home without identifying themselves as police officers;[91] and sniff the outside of the defendant's windowsill."[92] In many of these cases, the courts referred to Jones in considering the jurisprudence surrounding searches of homes, and as one court acknowledged: "Neither *Jones* nor the common law provide[ ] sharp boundaries for the meaning of trespass for our purposes."[93] But in each of these cases, the courts ruled that the result was the same under the new *Jones* rule as it was under the old *Katz* rule and held that the government surveillance of the home was not a search under the Fourth Amendment.[94]

IV. THE BROAD (AND EXPANDING) WARRANT EXCEPTIONS FOR HOME SEARCHES

In order to obtain a search warrant for a home, police must meet the same probable cause standard that exists for almost every other kind of search.[95] Of course, the warrant requirement has many exceptions, and thus one way that the Supreme Court could have increased the privacy protections for the home would be to limit the applicability of these exceptions when they are applied

88. *Trice*, 966 F.3d. at 515 (holding that the hallway outside a person's apartment is not curtilage).

89. *Sweeney*, 821 F.3d at 899–900 (holding that the police were not trespassing against the tenant defendant, but only against the owner of the building).

90. *Stone*, 720 F. Appx. at 134–36 (applying the same test for "open fields" that existed before *Jones* was decided).

91. *Wooden*, 945 F.3d at 503–04 (holding that "undercover status does not amount to deception under ordinary trespass principles").

92. *Mitchell*, 720 F. App'x at 149–52 (holding that an officer sniffing at the curtilage of the home was not a search, as compared to a trained drug dog sniffing at the curtilage of a home).

93. *Sweeney*, 821 F.3d at 899.

94. *See, e.g.*, *Trice*, 966 F.3d. at 514–16; *Sweeney*, 821 F.3d at 902–03. The only Supreme Court case to apply *Jones* to a home was *Florida v. Jardines*, 569 U.S. 1 (2013), discussed in the next section. Three Justices wrote a concurrence in *Jardines* pointing out that the result of the case would have been the same under the *Katz* test as it was under the *Jones* test. *Id.* at 13–14 (Kagan, J., concurring). The four Justices in dissent also argued that the result should be the same under the *Katz* test and the *Jones* test. *Id.* at 23–26 (Alito, J., dissenting). The majority opinion itself explicitly refused to reach the *Katz* question. *Id.* at 11 (majority opinion).

95. Camara v. Mun. Ct., 387 U.S. 523, 534 (1967). There is a category of warrants for so-called administrative searches, undertaken for regulatory purposes, which do not require the same level of suspicion as traditional warrants. *See infra* notes 120–124 and accompanying text. A warrant for an administrative search will be granted as long as the legislative or administrative standards governing the search protocol are reasonable. *See Camara*, 387 U.S. at 538.

to the home. The Court itself has claimed this is the case, telling us that warrant exceptions permitting entry into the home are "jealously and carefully drawn."[96] Once again, however, the actual holdings of the Court do not match this aspirational language: for most of the exceptions to the warrant requirement, whether it is consent, protective sweeps, exigent circumstances, or emergency aid, courts have refused to apply a different standard for homes. In fact, over the past few decades, the Supreme Court has broadened the exceptions to the warrant requirement in the context of the home, giving police more opportunities to enter and search the home without a warrant.

A. Consent

Consent may be the most commonly used exception to the warrant requirement. Like the "social norms" test, the consent exception is another doctrine in which applying the same rule for homes and businesses could provide greater protection for homes. Under the consent exception, any individual who has joint access or control of a property can provide consent to search that property.[97] Thus, a worker in a business cannot rely on having robust privacy in their workspace, since co-employees, managers, or co-owners all have the authority to authorize a search of the workspace.[98] In contrast, the number of people who can consent to the search of a home is limited to family members, roommates, and co-tenants.[99] However, over the past thirty years, the Supreme Court has expanded the ability of police to obtain consent in the home context.

In 1990, for example, the Court held that as long as a police officer reasonably believes that a person has authority to consent to a search of a residence, it is irrelevant whether the person actually *does* have such authority.[100] Later, the Court addressed the question of co-residents who

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96. Georgia v. Randolph, 547 U.S. 103, 109 (2006) (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).

97. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). The Supreme Court has also ruled that, under the "apparent authority" doctrine, consent is valid as long as the police reasonably believe that the consenting individual has the authority to consent, even if the person in fact does not have that authority. *Id.* at 188.

98. *See, e.g.*, Mancusi v. DeForte, 392 U.S. 364, 370 (1968) ("[The defendant] had little expectation of absolute privacy, since the owner and those authorized by him were free to enter.").

99. *See* United States v. Matlock, 415 U.S. 164, 169–71 (1974) (holding that consent to search home may be given either by the defendant residing at the home or by "third party who possessed common authority over or other sufficient relationship to the premises"). Even if a co-resident does consent to a search of a residence, they can only authorize a search of the areas that they generally have access to—so, for example, a tenant generally cannot authorize a search of their co-tenant's bedroom. *Id.* at 171 n.7.

100. *Rodriguez*, 497 U.S. at 188–89.

disagree about whether to consent to a search. Initially, the Court held that if one resident consents but the other objects, the consent is invalid.[101] Less than ten years later, the Court partially retreated from this principle, holding that if the police legally remove the objecting co-resident from the scene and then obtain permission from the remaining resident to search the home, then the consent is valid—even if the purpose of removing the objecting co-resident was to obtain that consent.[102] Thus, as long as the police have probable cause to believe that the objecting co-resident has committed a crime, even if that probable cause is provided by the consenting co-resident, the police can arrest the objecting co-resident and proceed with the search of the home.

B. Protective Sweeps

Once police are legally in a home for any reason, the protective sweep doctrine allows them to search anywhere in the home where an individual may be hiding, as long as the police have a reasonable suspicion to believe that they may find an individual who poses a danger to the officers. The Supreme Court first recognized this doctrine in 1990 in *Maryland v. Buie*, in which police were executing an arrest warrant.[103] After the police apprehended the defendant, who was the subject of the warrant, they entered another room of the house in order to ensure that there was nobody there who could endanger the officers during the arrest.[104] The Court acknowledged that allowing a protective sweep in the suspect's home was "not a *de minimis*" intrusion,[105] but held that the risk of danger to the police was "as great, if not greater than" in roadside investigatory encounters because "an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf.'"[106]

Buie specifically involved a protective sweep during the execution of an arrest warrant. But predictably, the lower courts expanded the doctrine to cover any situation in which the police were lawfully in a home, including consent[107] or execution of a search warrant that specified an item that was in

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101. *Randolph*, 547 U.S. at 120.

102. Fernandez v. California, 571 U.S. 292, 302–03, 306 (2014).

103. 494 U.S. 325, 336–37 (1990).

104. *Id.* at 328.

105. *Id.* at 334.

106. *Id.* at 333.

107. *See* United States v. Patrick, 959 F.2d 991, 996 (D.C. Cir. 1992); United States v. Garcia, 997 F.2d 1273, 1282 (9th Cir. 1993); United States v. Gould, 364 F.3d 578, 585 (5th Cir. 2004); United States v. Taylor, 248 F.3d 506, 513-14 (6th Cir. 2001); United States v. Hassock, 631 F.3d 79, 86–87 (2d Cir. 2011); *see also* Leslie A. O'Brien, Note, *Finding a Reasonable Approach to the Extension of the Protective Sweep Doctrine in Non-Arrest Situations*, 82 N.Y.U. L. REV. 1139, 1141, 1156–57 (2007); Jamie Ruf, Note, *Expanding Protective Sweeps Within the Home*, 43 AM. CRIM. L. REV. 143, 157–58 (2006).

a specific room of the house.[108] In most of these cases, the circuit courts began by emphasizing that the home deserved special protection under the Fourth Amendment,[109] but nevertheless held that this special protection was outweighed by the need to ensure officer safety.

C. Exigency/Hot Pursuit

If police have a reasonable and objective basis for believing that immediate action is required to prevent the destruction of evidence or harm to an occupant, they may enter a home without a warrant to conduct a search or make an arrest.[110] This doctrine applies if a defendant committed an armed robbery minutes earlier and fled inside his home[111] or if a defendant is merely a suspected drug dealer who takes a few steps backwards into her home when confronted by police while standing in her doorway.[112] Once the police are inside the home under the exigency exception, they are permitted to search not just for the suspect himself, but also any weapons that might be present in the home to ensure that "police ha[ve] control of all weapons which could be used against them or to effect an escape."[113]

Prior to *Lange*, the most recent exigent circumstances case involving a home was the 2011 case of *Kentucky v. King*.[114] *King* broadened the exigency exception to include situations in which the police themselves cause the exigent circumstances. In *King*, the police announced their presence and knocked on the door of a suspected crack cocaine dealer.[115] The police then heard the sound of "things . . . being moved around inside the apartment," which created a reasonable belief that evidence was being destroyed inside the home, leading the police to enter without a warrant.[116] The Court held that

108. United States v. Daoust, 916 F.2d 757, 758–59 (1st Cir. 1990).

109. *See, e.g.*, *Gould*, 364 F.3d at 583 ("We recognize that, as stated in *United States v. United States District Court for E.D. Mich.*, and reiterated in *Payton*, 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed' and 'the Fourth Amendment has drawn a firm line at the entrance to the house.'") (internal citations omitted).

110. Kentucky v. King, 563 U.S. 452, 460 (2011).

111. Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (police officers need not "delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others").

112. United States v. Santana, 427 U.S. 38, 43 ("Once [the defendant] saw the police, there was . . . a realistic expectation that any delay would result in destruction of evidence.").

113. *Hayden*, 387 U.S. at 299.

114. 563 U.S. 452 (2011).

115. *Id.* at 456.

116. *Id.* at 457.

the officers' warrantless entry was legal, since the police acted reasonably at all times during the encounter.[117]

D. Emergency Aid

The emergency aid exception resembles the exigent circumstances exception, but applies to cases in which police enter a home for a non-law enforcement purpose—that is, not to apprehend a criminal who may be about to harm others or destroy evidence, but rather to assist an individual who needs emergency care or to prevent a person from coming to imminent harm.[118] In this sense, the emergency aid exception is similar to the special needs doctrine, which allows government officials conducting a search for a non-law enforcement purpose to act based on a reasonableness balancing test rather than the traditional Fourth Amendment requirements.[119]

The special needs doctrine has evolved over the past half-century. When first developed by the Supreme Court in the 1960s, it was known as the administrative search doctrine,[120] and the distinction between searches for law enforcement purposes and for "administrative" purposes was clear. The Court initially applied the exception to health inspectors,[121] safety inspectors,[122] and other administrators, usually in the context of heavily regulated industries such as liquor stores[123] and mines.[124] But beginning in the 1980s, the doctrine was expanded to allow police to search junkyards for stolen vehicles,[125] set up roadblocks to apprehend drunk drivers,[126] and search the bags of subway passengers to catch terrorists.[127]

The evolution of the emergency aid exception for home searches has followed the same pattern as the special needs searches. When the Supreme Court first recognized that the emergency aid doctrine could apply to home entries in *Mincey v. Arizona*, it held that the exception applied only when the officers "reasonably believe that a person within is in need of immediate

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117. *Id.* at 472. Although the police did recover drugs, they actually entered a different apartment than the one belonging to the suspected crack cocaine dealer they were tracking. *Id.* at 456.

118. Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

119. *See, e.g.*, Camara v. Mun. Ct., 387 U.S. 523, 536–38 (1967).

120. *Id.* at 534.

121. *Id.*

122. Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978).

123. Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970).

124. Donovan v. Dewey, 452 U.S. 594, 606 (1981).

125. New York v. Burger, 482 U.S. 691, 712 (1987).

126. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447, 455 (1990).

127. Am.-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652-GAO, 2004 WL 1682859, at *2, *4 (D. Mass. July 28, 2004).

aid."[128] The Court cited over a dozen state and circuit court cases recognizing the emergency aid doctrine,[129] almost all of which gave examples of police officers responding to fires or pleas for help with the purpose of providing emergency aid.[130] But in its next emergency aid case in 2016, the Court approved the use of the doctrine as a pretext, holding that the actual belief of the police officers was irrelevant as long as the objective facts support an emergency entry.[131] Thus, even if police conduct a warrantless entry with the purpose of making an arrest, their actions are constitutional if a court later determines that a reasonable officer would have perceived that an emergency existed. As noted in the next section, yet another limiting principle of *Mincey* was thrown into doubt by *Caniglia*, when the Court signaled that the emergency aid exception likely applies even if there is no immediate need for aid.[132]

These last two exceptions—exigent circumstances and emergency aid—are directly related to *Lange* and *Caniglia*, the two most recent Supreme Court cases regarding warrantless entry of the home. The next section analyzes these two cases in the context of the broader doctrine of home searches.

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128. 437 U.S. 385, 392 (1978).

129. *Id.* at 392 & nn. 6–7 ("Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.") (citations omitted).

130. *See, e.g.*, Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963) ("[A] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. *The need to protect or preserve life or avoid serious injury* is justification for what would be otherwise illegal absent an exigency or emergency.") (emphasis added); People v. Hill, 528 P.2d 1, 19 (Cal. 1974) ("A warrantless entry of a dwelling is constitutionally permissible where the officers' conduct is prompted by the *motive* of preserving life and reasonably appears to be necessary for that purpose.") (emphasis added).

131. *See* Brigham City v. Stuart, 547 U.S. 398 (2006). In *Brigham City*, the police observed an assault through the screen door and windows of a house. *Id.* at 401. The police officers entered the home and made a number of arrests, arguing that they acted with the non-law enforcement reason of preventing further injury to the victim of the assault. *Id.* at 404. The defendant argued that this was a pretext, and that the police entered with the purpose of apprehending him for his criminal activity. *Id.* at 405. The Court ruled that the actual intent of the police was immaterial, since under these objective facts, the police were entitled to enter the home for the special needs purpose. *Id.* at 406–07. This ruling was consistent with the longstanding doctrine that courts will ignore the subjective motivations of law enforcement and only consider whether their actions are legal given the objective circumstances of the case. *Id.*; *see, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996).

132. *See infra* notes 178–188 and accompanying text.

V. *LANGE* AND *CANIGLIA*

This term's two Supreme Court cases on home entries conform to the usual pattern of Fourth Amendment home jurisprudence: each case repeats the familiar rhetoric of home exceptionalism, each delivers a ruling that appears at first to support that rhetoric, but then each emphasizes and reinforces the limitations and exceptions to that ruling.

A. Lange*: No Need for a Categorical Rule*

In *Lange v. California*, a police officer observed the defendant driving while repeatedly honking his horn.[133] The officer turned on his overhead lights to indicate that Lange should pull over, but instead Lange drove another four seconds to his home, then onto his driveway and into his garage.[134] Undeterred, the officer followed Lange into the garage, questioned him, gave him a sobriety test, and ultimately arrested him for driving under the influence.[135]

The question before the Court in *Lange v. California* was "whether the pursuit of a fleeing misdemeanant always—or more legally put—categorically—qualifies as an exigent circumstance."[136] This question had split both state courts and circuit courts.[137] Seven of the justices rejected a categorical rule, but in very first paragraph of the majority opinion they conceded that even without the categorical rule, "[a] great many misdemeanor pursuits [will] involve exigencies allowing warrantless entry."[138]

The *Lange* Court began its analysis with familiar language from four prior cases confirming that the home receives special protection under the Fourth Amendment.[139] But it quickly pivoted to the extent of the exigent

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133. 141 S. Ct. 2011, 2016 (2021).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 2017 n.1.

138. *Id.* at 2016.

139. *Id.* at 2018 ("[W]hen it comes to the Fourth Amendment, the home is first among equals." (quoting Florida v. Jardines, 569 U.S. 1, 6 (2013))); Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018) (stating that the "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable government intrusion" (quoting *Jardines*, 569 U.S. at 6)); Payton v. New York, 445 U.S. 573, 585, 587 (1980) ("Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment" and "physical entry of the home is the chief evil against which [it] is directed." (first quoting Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970); and then quoting United

circumstances exception, as established by the 1976 case of *United States v. Santana*.[140] In *Santana*, police officers arrested a suspected drug dealer after she retreated into her home.[141] The *Santana* Court held that there was "a realistic expectation that any delay would result in the destruction of evidence" which created an exigency allowing the warrantless entry into her home.[142] Citing dicta found in later cases, the amicus attorney supporting the government position in *Lange*[143] argued that *Santana*'s holding should be broadened to allow for a warrantless home entry against any fleeing suspect.[144] The Court refused to expand *Santana*'s rule, instead confirming the principle that the exigent circumstances exception is applied on a "case-by-case basis."[145] The Court then repeated—on four separate occasions—its initial acknowledgement that, in applying the case-by-case test, courts will typically allow police to enter a home in hot pursuit of a fleeing misdemeanant.[146] In the Court's estimation, there will usually be direct evidence or a valid inference that a fleeing suspect is "intent on discarding evidence" or has a "willingness to flee yet again, while the police await a warrant"[147] or may cause "imminent harms of violence."[148]

In his concurrence, Justice Kavanaugh (who also joined the majority opinion[149]) went even further than the majority. He noted that "cases of fleeing misdemeanants will *almost always* also involve a recognized exigent circumstance—such as a risk of escape, destruction of evidence, or harm to others—that will still justify warrantless entry into a home."[150] Thus the case-by-case approach adopted by the majority "will still allow the police to make

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States v. U.S. Dist. Ct., 407 U.S. 297, 313 (1972))); Georgia v. Randolph, 547 U.S. 103, 109, 115 (2006) ("[T]he home is entitled to special protection," and all warrant exceptions permitting home entry are "jealously and carefully drawn." (first quoting Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring); and then quoting Jones v. United States, 357 U.S. 493, 499 (1958))).

140. 427 U.S. 38, 43 (1976).

141. *Id.* at 40–41.

142. *Id.* at 42–43.

143. Although the state of California won the case in both of the lower courts, it declined to argue the case in the United States Supreme Court, and so the Court appointed an amicus to argue the government position. Lange v. California, 141 S. Ct. 2011, 2016–17 (2021).

144. *Id.* at 2019.

145. *Id.* (quoting Birchfield v. North Dakota, 136 S. Ct. 2160, 2174 (2016)).

146. *Id.* at 2021 ("We have no doubt that in a great many cases flight creates a need for police to act swiftly" and "non-emergency situations may be atypical" and "[the case-by-case] approach will in many, if not most, cases allow a warrantless home entry."); *id.* at 2024 ("On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home.").

147. *Id.* at 2021.

148. *Id.* at 2024.

149. *See id.* at 2013.

150. *Id.* at 2025 (Kavanaugh, J., concurring) (emphasis added).

a warrantless entry into a home nine times out of [ten] or more in cases involving pursuit of a fleeing misdemeanant."[151] Given the likelihood that police can convince judges that one of these recognized exigencies exists for a fleeing suspect, Justice Kavanaugh's ratio is likely an understatement. In almost any drug case—misdemeanor or felony—the courts will likely allow for a warrantless entry based on the acknowledged possibility of destruction of the evidence. In any case involving violence—misdemeanor or felony—the police can argue that the defendant poses a danger of violence to others in the home. And in nearly any other case, courts are likely to apply the sensible inference that a defendant who flees from the police demonstrates a "willingness to flee yet again."

Given this reality, the *Lange* majority was probably correct to classify Chief Justice Roberts' concurrence as "alarmism."[152] Chief Justice Roberts favored a categorical rule establishing that the exigency of flight alone—from any level of crime—would justify the police entering a home without a warrant.[153] As he pointed out in his concurrence, it will almost always be reasonable to assume that a suspect who flees into his home is likely to destroy evidence or continue fleeing, thus providing the extra exigency necessary for warrantless entry.[154]

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151. *Id.*(internal quotations omitted). This leads Justice Kavanaugh to argue that there is "almost no daylight in practice" between the majority's case-by-case test and the categorical rule that the majority rejected. *Id.* The majority signals some degree of agreement with this position, noting that the only difference between its case-by-case approach and the categorical rule it rejected is in "cases involving flight alone." *Id.* at 2021 n.3 (majority opinion).

152. *Id.* at 2021 n.3.

153. *Id.* at 2028 (Roberts, C.J., concurring). Chief Justice Roberts's decision reads more like a dissent than a concurring opinion since he flatly disagreed with the only legal principle established by the majority. However, his opinion is technically a concurring opinion since both he and the majority believed the lower court erred in applying a categorical rule for all fleeing suspects. Chief Justice Roberts believed that a categorical rule should exist but that there are six exceptions to the rule, as he points out in section 1.C. of his concurrence. Thus, the case should be remanded for the lower court to consider: whether (1) police "manufacture[d] an unnecessary pursuit;" (2) "a reasonable officer would [have] believe[d] that the suspect fled into the home to 'thwart an otherwise proper arrest;'" (3) the manner of entry was reasonable; (4) the officer stayed longer than necessary to effect the arrest; (5) the arrest was "unusually harmful to [Lange's] privacy or even physical interests;" and (6) this pursuit actually constituted "hot" pursuit. *Id.* at 2033–34. None of these factors seem even remotely applicable given *Lange*'s fact pattern, but since the lower court did not expressly consider and reject them, Chief Justice Roberts agreed with the majority that a remand was necessary in this case. Thanks to Professor Michael Mannheimer for helping with this analysis.

154. *Id.* at 2032.

B. Caniglia*: Re-Branding the Community Caretaking Exception*

Caniglia v. Strom began with an argument between a husband and a wife.[155] During the argument, the husband retrieved a handgun from his bedroom, placed it in front of his wife, and asked her to shoot him "and get it over with."[156] The wife instead left the house.[157] The next day, when she was unable to reach her husband, the wife contacted the police, who met with the husband on his porch and convinced him to voluntarily go to a hospital for a psychiatric evaluation.[158] After he was gone, the police searched his home without the consent of the husband or wife and seized two firearms.[159] The husband later challenged this search and seizure, claiming that the officers violated his Fourth Amendment rights.[160]

As in *Lange*, the government's argument in *Caniglia* strongly relied on a specific precedent from the 1970s: in this case, the 1973 decision *Cady v. Dombrowski*.[161] In *Cady*, the Court approved the search of an impounded vehicle that occurred while the police were conducting a "community caretaking function."[162] *Cady* was one of the decisions that laid the groundwork for the special needs doctrine,[163] decided at a time when the Court was still determining the contours of that particular warrant exception. Indeed, the *Cady* Court never used the term "special needs" or "administrative search" and only once used the term "community caretaking."[164] In fact, the term "community caretaking" was only used by the Court in one other case—which also involved the inventory search of an automobile[165]—before *Caniglia* abolished the doctrine altogether. The *Cady* Court highlighted the fact that the reason for the search was not to advance a law enforcement purpose but out of "concern for the safety of the general public."[166] It was this language that the First Circuit cited when it sided with

155. 141 S. Ct. 1596, 1598 (2021).
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. 413 U.S. 433 (1973).
162. *Id.* at 441, 446.
163. *See supra* notes 119–127 and accompanying text.
164. *Cady*, 413 U.S. at 441.
165. South Dakota v. Opperman, 428 U.S. 364, 368 (1976). The term was also used once in a dissent in another case involving the inventory search of an automobile. Colorado v. Bertine, 479 U.S. 367, 381 (1987) (Marshall, J., dissenting).
166. *Cady*, 413 U.S. at 447. The police had reason to believe that the car contained a firearm that could endanger the public if it were kept unguarded in an impounded vehicle. *Id.* at 443.

the government in *Caniglia*.[167] In doing so, the First Circuit also embraced the "community caretaking" exception that *Cady* allegedly created.[168]

The Supreme Court rejected the lower court's argument and ruled that the search was unconstitutional.[169] The majority opinion, which is barely over two pages long, can be interpreted in one of three ways. The interpretation that is most consistent with the theory of home exceptionalism is that the community caretaking exception applies to cars, but not homes.[170] As is customary in home entry cases, the opinion began with the standard confirmation that the "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[171] The opinion then repeatedly drew a distinction between cars and homes, concluding that "[w]hat is reasonable for vehicles is different from what is reasonable for homes."[172]

The second interpretation of *Caniglia* has little to do with home exceptionalism. Under this view, the Court abolished the community caretaking exception altogether—or, more accurately, claimed that such an exception never existed. At one point the majority critiqued the First Circuit for applying a "community caretaking" rule, putting the term in air quotes as though it were a novel idea created by the lower court.[173] The majority then reviewed the legitimate reasons that the police may enter a home: warrant, consent, hot pursuit, and exigency—a list that conspicuously excluded community caretaking.[174] The Court then concluded that since none of the established justifications for warrantless home entry apply in the *Caniglia* fact pattern, the search was unconstitutional.[175] Later in the opinion, the Court confirmed that the job of police "requires [them] to perform noncriminal 'community caretaking functions,'" but then explained that this acknowledgement is merely "a recognition that these tasks exist, and not an

167. Caniglia v. Strom, 953 F.3d 112, 123–28, 132–33 (1st Cir. 2020).

168. *Id.* at 121–23, 122 n.5, 131.

169. Caniglia v. Strom, 141 S. Ct. 1596, 1598 (2021).

170. However, because almost every piece of property receives greater Fourth Amendment protection than an automobile, so holding that the home is in that broad category provides little doctrinal support on its own for an assertion that the home receives special protection.

171. *Caniglia*, 141 S. Ct. at 1599 (quoting Florida v. Jardines, 569 U.S. 1, 6 (2013)).

172. *Id.* at 1599–600 ("*Cady*'s unmistakable distinction between vehicles and homes also places into proper context its reference to 'community caretaking . . . .' [T]he location of that search [in *Cady*] was an impounded vehicle—not a home . . . . *Cady* expressly contrasted its treatment of a vehicle already under police control with a search of a car 'parked adjacent to the dwelling place of the owner.'" (quoting Cady v. Dombrowski, 413 U.S. 433, 446–47 (1973))).

173. *Id.*

174. *Id.* at 1599.

175. *Id.* at 1599–600.

open-ended license to perform them anywhere."[176] The strongest support for this second interpretation comes from Justice Alito's concurring opinion, in which he clarified that the majority held that there "is no special Fourth Amendment rule for a broad category of cases involving 'community caretaking,'" and argued that *Cady* did not recognize any such exception.[177]

The third interpretation is more nuanced and provides no support for the theory of home exceptionalism. Under this interpretation, the *Caniglia* Court did not actually abolish the community caretaking exception; it simply re-branded the doctrine as a more expansive version of the "emergency aid" exception. The majority opinion initiates the re-branding by citing to *Brigham City*, noting that the precedent lists numerous instances of emergency assistance that will allow for a warrantless entry into a home.[178] Chief Justice Roberts focused on *Brigham City* in his concurring opinion, concluding that the exception permits a warrantless entry when there is "an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger"[179]—and notably not mentioning any requirement that the need for medical assistance be urgent or that danger is imminent.

Justice Alito's concurrence did not take issue with the holding of *Cady*; it merely objected to the term "community caretaking," since the term could include an unlimited variety of police activities.[180] Justice Alito mused extensively about how courts should rule on warrantless entries conducted "for the purpose of ascertaining whether a resident is in urgent need of medical attention and cannot summon help."[181] His argument focused on a hypothetical elderly woman who might fall or otherwise become incapacitated in her own home, and he concluded that if the Fourth Amendment were applied too strictly, "there is a fair chance she would not be found alive."[182] Justice Alito pointed out that this woman and others like

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176. *Id.* at 1600.

177. *Id.* (Alito, J., concurring).

178. *Id.* at 1599 (majority opinion) (citing Brigham City v. Stuart, 547 U.S. 398 (2006)). *Brigham City* lists "to assist persons who are seriously injured or threatened with such injury," and "to fight a fire and investigate its cause," as well as "to engage in 'hot pursuit' of a fleeing suspect." 547 U.S. at 403.

179. *Caniglia*, 141 S. Ct. at 1600 (Roberts, C.J., concurring) (quoting Michigan v. Fisher, 558 U.S. 45, 49 (2009)).

180. *Id.* (Alito, J., concurring). Indeed, *Cady* is probably best thought of in today's terminology as an "inventory search"—a common practice by police after they impound a car, and one which courts routinely approve as a special needs search. *See* South Dakota v. Opperman, 428 U.S. 364, 372 (1976); Colorado v. Bertine, 479 U.S. 367, 367 (1987); People v. Trusty, 516 P.2d 423, 426 (Colo. 1973); People v. Sullivan, 272 N.E.2d 464, 469 (N.Y. 1971).

181. *Caniglia*, 141 S. Ct. at 1601.

182. Justice Alito engages in a bit of overheated rhetoric at this thought: "This imaginary woman may have regarded her house as her castle, but it is doubtful that she would have wanted it to be the place where she died alone and in agony." *Id.* at 1602.

her would not be saved by the current exigent circumstances doctrine, since "circumstances are exigent only when there is not enough time to get a warrant."[183]

Finally, Justice Kavanaugh's concurrence noted that the majority decision "does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of aid," including those who may commit suicide or those who have fallen and suffered a serious injury.[184] Justice Kavanaugh pointed out that the lower courts have allowed warrantless home entries for these purposes for years, and he did not see any reason why that should change.[185] He argued that as long as police have "an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now," there is no need to demonstrate that "the harm has already occurred or is mere moments away."[186] He gave three examples: a woman who calls 911 and says she is contemplating suicide; an elderly man who misses church services and fails to answer the phone, and unattended young children inside a home.[187] As long as officers' actions are reasonable in each of these scenarios, Justice Kavanaugh would allow a home entry. Thus, he concluded that the *Caniglia* decision is "more labeling than substance."[188]

The language and examples used by all three *Caniglia* concurrences demonstrate an intention to broaden the "emergency aid" doctrine to include reasonable interventions that do not involve imminent danger—in other words, to allow home entries that would otherwise have been covered by the now-defunct "community caretaking" exception.

In short, although both *Lange* and *Caniglia* initially appear to further home exceptionalism, the details of each case demonstrate that neither provides the home with any extra protection. *Lange* refused to broaden an existing exception for home entry, instead applying the same standard (evaluation on a case-by-case basis) that exists for exigent circumstances in searches that do not involve the home.[189] And although *Caniglia* confirmed that police have

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183. *Id.*

184. *Id.* at 1602–03 (Kavanaugh, J., concurring).

185. *Id.* at 1603–04.

186. *Id.* at 1604.

187. *Id.* at 1604–05.

188. *Id.* at 1603. Justice Kavanaugh further emphasized this point in a later case in the term, *Sanders v. United States*, 141 S. Ct. 1646 (2021). In *Sanders*, the Court remanded without a decision in light of the *Caniglia* decision, but Justice Kavanaugh took the time to write an explanatory concurrence.

189. Lange v. California, 141 S. Ct. 2011, 2024 (2021).

broader powers to search impounded cars than homes, in the end it merely re-categorized a particular type of warrantless home entry.[190]

VI. CONCLUSION: DATA EXCEPTIONALISM

The Supreme Court has employed the rhetoric of home exceptionalism for over one hundred and thirty years. In the 1886 case of *Boyd v. United States*, the Supreme Court cited two British cases from the 1760s in which government agents who entered homes pursuant to "general warrants" were found liable for trespass.[191] The Court quoted one of the cases, in which the British court held that "[n]o man can set his foot upon my ground without my license, but he is liable to an action[,] though the damage be nothing[,] which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil."[192]

These eighteenth century British decisions, along with the contemporaneous colonial grievances against the "general warrants" that the British were using against the colonists, has given home exceptionalism something of an originalist pedigree.[193] As noted earlier, one of the Supreme Court cases that gave rise to the theory of home exceptionalism relied in part on originalist arguments.[194] But like other aspects of home exceptionalism, the originalist argument fades upon closer scrutiny. There is strong evidence that the drafters of the Fourth Amendment did not seek to protect the home above all other types of property;[195] even British law at the time did not prioritize the sanctity of the home, at least not when the government was investigating a criminal case.[196] And the colonial objections to "general

190. *Caniglia*,141 S. Ct. at 1599–600.

191. 116 U.S. 616, 626–30 (1886).

192. *Id.* at 627 (quoting Entick v. Carrington (1765) 95 Eng. Rep. 807; 19 St. Tr. 1029).

193. *See, e.g.*, Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1315–16 (2016) (arguing that the Framers, like their previous English counterparts, did consider the home a sacred place to be offered more protection than other places); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1759–60 (2000) (arguing that the English "Castle Doctrine" should be included as part of the Fourth Amendment, since it was part of the English law of arrest and trespass that underlies the Fourth Amendment).

194. Payton v. New York, 445 U.S. 573, 591–98. *See supra* notes 23–24 and accompanying text.

195. William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 380–88 (1980) (arguing that the goal of the Fourth Amendment was not to abolish the practice of general warrants within the home but rather to allow it with discrimination against those of lower socioeconomic status).

196. *See* Steagald v. United States, 451 U.S. 204, 229–30 (1981) (Rehnquist, J., dissenting) ("The basic error in the Court's treatment of the common law is its reliance on the adage that 'a

warrants" were not specific to the home; British customs agents employed these broad warrants to conduct raids against homes and warehouses alike.[197] It is far more likely that the founding fathers meant to prioritize "papers" rather than "homes," since these British raids were often used to seize incriminating documents from the owners of the homes and businesses being raided.[198] Tellingly, the *Boyd* case that first quoted the British language about home exceptionalism did not even involve home entry. The government attempted to convict the defendant by using certain business records, which had been subpoenaed; the Court rejected the government's efforts, using language about the records that was as strong as any declaration of home exceptionalism: "[p]apers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure . . . they will hardly bear an inspection . . . ."[199] The two British cases that *Boyd* cites did involve home entry, but the focus of the searches was not the home itself: government agents were searching for "books and papers" in one and "searching and examining . . . papers" in the other.[200]

Defenders of home exceptionalism often argue that the home deserves special attention because it is more likely to be associated with private, intimate activities than other areas.[201] But our most private, intimate activities are most likely associated with our papers and documents—or with their modern equivalent: information on our cell phones; oral and written conversations we exchange over the telephone and e-mail; and data stored on our computers.

It should therefore come as no surprise that in recent years the Supreme Court has nurtured a different type of Fourth Amendment exceptionalism by slowly adding a new category of surveillance to the category of hyper-intrusive searches: searches of our electronic data and communications.

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man's home is his castle.' Though there is undoubtedly early case support for this in the common law, it cannot be accepted as an uncritical statement of black letter law which answers all questions . . . . It is clear that the privilege of the home did not extend when the King was a party, *i.e.*, when a warrant in a criminal case had been issued.") (citations omitted).

197. *See* Stern, *supra* note 7, at 935–36 (arguing any special priority given to protecting the home was to merely to prevent the "general warrants" used by customs agents to raid both homes and warehouses); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 216–28 (1993) (pointing out that the drafters of the Fourth Amendment were concerned with general writs, which were used against homes and businesses alike).

198. *See* Boyd v. United States, 116 U.S. 616, 625–28 (1886).

199. *Id.* at 628 (quoting Entick v. Carrington (1765) 95 Eng. Rep. 807; 19 St. Tr. 1029).

200. *Id.* at 626.

201. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 37 (2001) (stating that "*all* details" in the home are "intimate details"); United States v. Dunn 480 U.S. 294, 307 (1987) (Brennan, J., dissenting) (stating that one of the distinctions between curtilage and open fields was that the former is the site of "intimate activity" and the "privacies of life") (quoting *Boyd*, 116 U.S. at 630).

The necessity for greater judicial protections for this category of searches became evident when courts were asked to apply the third-party doctrine to electronic surveillance. The third-party doctrine was established in 1966, when an informant visited the labor leader Jimmy Hoffa in his hotel room and heard Hoffa make incriminating statements.[202] The informant later reported these statements to prosecutors, who then used the statements against Hoffa at trial.[203] The Court held that these statements were not protected by the Fourth Amendment, even though they were made in the Hoffa's hotel room, the functional equivalent of a home.[204] Consistent with *Hoffa*, the police have applied the third-party doctrine to the use of informants in homes countless times in the ensuing decades, with no resistance from the courts.[205] However, once the third-party doctrine was applied to data stored with third-party companies, commentators began to critique the third-party doctrine,[206] and ultimately courts began to roll back the doctrine.[207] This movement culminated in the case of *Carpenter v. United States*, in which the

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202. Hoffa v. United States, 385 U.S. 293 (1966).

203. *Id.* at 295.

204. *Id.* at 303. *Hoffa* was decided before *Katz v. United States*, 389 U.S. 347 (1967), which created the reasonable expectation of privacy test, but the Court later confirmed that *Hoffa* was consistent with the *Katz* test, since a person does not have a "justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police." United States v. White, 401 U.S. 745, 749 (1971). In a further strike against home exceptionalism, the companion case to *Hoffa* noted that it is irrelevant where a conversation with an informant occurs: "[W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street." Lewis v. United States, 385 U.S. 206, 211 (1966).

205. *See, e.g.*, United States v. Janis, 831 F.2d 773 (8th Cir. 1987) (allowing an informant to enter a home and purchase marijuana); United States v. Thompson, 811 F.3d 944 (7th Cir. 2016) (allowing an informant to surreptitiously videotape inside the defendant's home).

206. *See, e.g.*, Susan W. Brenner & Leo L. Clarke, *Fourth Amendment Protection for Shared Privacy Rights in Stored Transactional Data*, 14 J.L. & POL'Y 211 (2006); Susan Freiwald, *First Principles of Communications Privacy*, 2007 STAN. TECH. L. REV. 3, 6–7 (2007); Matthew D. Lawless, Comment, *The Third Party Doctrine Redux: Internet Search Records and the Case for a "Crazy Quilt" of Fourth Amendment Protection*, UCLA J.L. & TECH., Spring 2007, at 1, 3–4. Justice Sotomayor also famously criticized the third-party doctrine in her *Jones* concurrence, solely on the ground that the doctrine was "ill suited to the digital age" because people "reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." United States v. Jones, 565 U.S. 400, 417–18 (2012) (Sotomayor, J., concurring) ("I for one doubt that people would accept without complaint the warrantless disclosure to the government of a list of every Web site they had visited in the last week, or month, or year.").

207. *See, e.g.*, Quon v. Arch Wireless Operating Co., 529 F.3d 892, 909 (9th Cir. 2008) (holding that the Fourth Amendment protected texts that were stored by a third party servicer), *rev'd on other grounds*, *sub nom.* City of Ontario v. Quon, 560 U.S. 746 (2010); United States v. Warshak, 631 F.3d 266, 285–88 (6th Cir. 2010) (holding that the Fourth Amendment protects e-mails that are stored on a third party server).

Supreme Court held that the third-party doctrine does not apply to cell site location information shared with a cell phone company.[208]

The effect of the *Carpenter* case stands in sharp contrast to the *Jones* case, which resurrected the "trespass" test and allegedly elevated the importance of private property in Fourth Amendment jurisprudence.[209] As noted above,[210] *Jones* ended up having little influence on Fourth Amendment doctrine. *Lange* and *Caniglia* are merely the latest in a string of cases that have failed to use the trespass test to expand the protection of the home.[211] In contrast, *Carpenter* built on an existing foundation of data exceptionalism that started with *Riley v. California*, which explicitly established Fourth Amendment exceptionalism for cell phones.[212] In holding that cell phones could not be searched under the search incident to lawful arrest doctrine, the *Riley* Court, like the *Payton* Court decades before, used originalist arguments, comparing police searches of cell phones to the overly broad powers granted by the "general warrants" and "writs of assistance" that offended the founding fathers.[213] When *Riley* is combined with *Carpenter*, which effectively abolished the third-party doctrine for digital information shared with a third party, a new type of exceptionalism, completely unrelated to the home, comes into focus.

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208. 138 S. Ct. 2206, 2223 (2018).

209. *Jones*, 565 U.S. at 404–05 (majority opinion).

210. *See supra* Section III.

211. As noted earlier, in the nine years since *Jones* was decided, its property-based test has been cited in less than three dozen federal appellate court cases, including thirteen cases involving a search of the home. These courts have determined that the government surveillance at issue was a search under the *Jones* test in 69% of the cases in which a home was being searched and 73% of the cases in which a car was being searched, as courts consistently refused to use *Jones* to increase the protection due to the home. *See supra* note 87 and accompanying text.

212. 573 U.S. 373, 393 (2014) (holding that the search incident to lawful arrest doctrine does not apply to cell phones, in part because cell phones "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse").

213. *Id.* at 403.