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Courtney Murray

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CONSTITUTIONAL LAW—FOURTH AMENDMENT: WITHOUT YOUR CLOTHES, THE FOURTH AMENDMENT GOES

I. INTRODUCTION

One December night in New England, Harry Thomas Titus was arrested in his girlfriend's home.[1] At the time of arrest, Titus was naked, crouched in a corner, wielding a sawed-off shotgun.[2] Rather than forcing Titus to FBI headquarters without clothes, officers looked around his home to find clothing.[3] In the course of their search for clothes, the officers discovered evidence that incriminated Titus.[4] In a different, but similar case, Billy Deon Butler was arrested outside his rural Oklahoma home with no shoes on.[5] There was litter and broken glass strewn across the path that led to the police vehicle.[6] In an effort to ensure the health and safety of Butler, officers went into his home for the purpose of finding shoes.[7] During this inquiry, the officers discovered evidence that incriminated Butler.[8] These fact patterns led both the Second and Tenth Circuit Court of Appeals to recognize an exigent circumstance exists when law enforcement officials need to obtain clothing for the health and safety of an arrestee.[9]

The Supreme Court of the United States has stated that a search of a person's home without a warrant is presumptively unreasonable.[10] However, certain situations are emergent enough to allow law enforcement to forgo the warrant requirement, commonly referred to as exigent circumstances.[11] The United States Circuit Courts of Appeals are at odds on the issue of whether an exigent circumstance arises when an arresting officer needs to enter the

1. *See* United States v. Titus, 445 F.2d 577, 578 (2d Cir. 1971).
2. *Id.*
3. *Id.*
4. *Id.* (discovering jackets that were worn by the robbers of a bank).
5. United States v. Butler, 980 F.2d 619, 620 (10th Cir. 1992).
6. *Id.*
7. *See id.*
8. *Id.* at 620–21 (discovering a shotgun that belonged to Butler who had previously been convicted of a felony).
9. *See id.*at 622; *Titus*, 445 F.2d at 579.
10. *See* Payton v. New York, 445 U.S. 573, 587 (1980).
11. *See* Lange v. California, 141 S. Ct. 2011, 2025 (2021) (Kavanagh. J., concurring) (stating the majority's decision that there is no categorical rule allowing an officer to enter a misdemeanant's home without a warrant "does not disturb the long-settled rule that pursuit of a fleeing felon is itself an exigent circumstance justifying warrantless entry into a home.").

home of an arrestee, without a warrant or consent,[12] to get clothes for a partially clothed arrestee.[13] For example, the United States Circuit Court of Appeals for the Sixth Circuit ruled in *United States v. Kinney*, that the arresting officers were not justified in entering the arrestee's apartment even if it was to obtain clothing.[14] On the other hand, many other circuit courts have found that there is an exigent circumstance in the same situation.[15] One such case is *United States v. Gwinn*, where the United States Circuit Court of Appeals for the Fourth Circuit held that entry into an arrestee's home was reasonable due to the potential injury the arrestee faced due to being underclothed.[16] Because of the division among the Circuit Courts, the Supreme Court should offer guidance to an arresting officer on what the scope of his or her authority is in such situations.

Accordingly, the Supreme Court should establish a test for lower courts and law enforcement to use in deciding if there is an exigent circumstance when a law enforcement official enters a home without a warrant to obtain clothing for an arrestee. The Supreme Court of the United States should find that an officer is permitted to enter the home of an arrestee, without a warrant, to gather his or her clothes, regardless of consent, when it is reasonable to believe that there is a need for additional clothing based on the totality of the circumstances.[17]

It is essential for officers to receive guidance on what they are lawfully permitted to do, while on duty.[18] This ensures that citizens are not being taken advantage of and that law enforcement is not overstepping its power.[19] When there is no set standard, there is room for discrepancy, as well as a massive gray area for lower courts.[20] Ultimately, the Supreme Court of the United States needs to resolve the issue presented above to provide the lower courts

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12. If an arresting officer obtains consent from the arrestee to enter the home without a warrant, there is no need for an exigent circumstance to be present, as consent is itself an exception to the warrant requirement. *See* Fernandez v. California, 571 U.S. 292, 298 (2014).

13. *See* discussion *infra* Section III.

14. United States v. Kinney, 638 F.2d 941, 945 (6th Cir. 1981) (reasoning since the arrestee did not consent to the officer getting the clothes, the officer was not allowed to re-enter).

15. United States v. Gwinn, 219 F.3d 326, 329 (4th Cir. 2000); *see* United States v. Butler, 980 F.2d 619, 621–22 (10th Cir. 1992); United States v. Wilson, 306 F.3d 231, 241 (5th Cir. 2002).

16. *Gwinn*, 219 F.3d at 333.

17. *See* discussion *infra* Section IV.

18. *See* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 213–14 (2017) (explaining that police officers need guidance on the use of force, and proposing a revitalized standard from the Fourth Amendment).

19. *See* Frank G. Zarb, Jr., Note, *Police Liability for Creating the Need to Use Deadly Force in Self-Defense.*, 86 MICH. L. REV. 1982, 2001 (1988) (urging that police need clear guidance on the use of force and should be held to a gross negligence standard when they abuse such power).

20. *See* discussion *infra* Section III.

with guidance. This can be done by finding that there is an exigent circumstance if police officers need to gather clothing for an underclothed arrestee using a totality of the circumstances approach.[21] Where a case-by-case analysis of the exigency is still required, as the Supreme Court is reluctant to grant categorical exceptions to the warrant requirement,[22] establishing a test will aid law enforcement in the decision-making process.

Section II of this Note provides an overview of the Fourth Amendment and the niceties of its application and examines the history of exigent circumstances as an exception to the warrant requirement. Section III analyzes cases among the United States Circuit Court of Appeals that have been presented this issue and the reasoning behind the decisions. Finally, Section IV provides a resolution, using the totality of the circumstances approach, that courts and law enforcement can use to determine if there is an exception to the implied warrant requirement of the Fourth Amendment, namely an exigent circumstance, when an officer arrests a person who is partially clothed.

II. BACKGROUND

The Fourth Amendment of the United States Constitution reads in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[23] The Supreme Court has explained that this language means a search performed by law enforcement without a warrant is presumptively unreasonable and violates a person's Fourth Amendment right.[24] The government, however, can rebut this presumption by proving there is an applicable exception to the warrant requirement.[25]

A. The Three Ways a Search within the Meaning of the Fourth Amendment Can Occur.

What exactly is considered a search within the meaning of the Fourth Amendment has varied over time, as the Supreme Court of the United States has come to different conclusions in cases arising under this issue.[26] However,

21. United States v. Delva, 858 F.3d 135, 153 (2d Cir. 2017) (describing a "'case specific inquiry' that looks to the 'totality of the circumstances'").

22. *See* Kentucky v. King, 563 U.S. 452, 461–65 (2011).

23. U.S. CONST. amend. IV.

24. *Id.*; Payton v. New York, 445 U.S. 573, 586–87 (1980).

25. Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment.*, 44 VAND. L. REV. 473, 521 (1991).

26. *See generally* Olmstead v. United States, 277 U.S. 438 (1928) (establishing the trespass doctrine); Katz v. United States, 389 U.S. 347 (1967) (establishing the privacy doctrine and overruling the trespass doctrine); United States v. Jones, 565 U.S. 400 (2012) (re-

there are currently three recognized searches under the Fourth Amendment.[27]

1. Olmstead, Trespass Doctrine: 1928

In *Olmstead v. United States*, the Supreme Court established the trespass doctrine.[28] The doctrine states that a search occurs within the meaning of the Fourth Amendment when the government occupies private property for the purpose of obtaining information.[29] Based on the *Olmstead* reasoning, this occupation of private property had to be physical.[30] The Court deemed that wiretapping was not a search because "[t]here was no entry into the houses or offices . . . ."[31] The trespass doctrine was rooted in the idea of a search occurring when there was physical occupancy on a person's private property.[32] However, the Warren court challenged this narrow interpretation of a search thirty-nine years later, leading to an expansion of Fourth Amendment protections.[33]

2. Katz, Reasonable Expectation of Privacy Doctrine: 1967

In 1967, the Supreme Court established the privacy doctrine in *Katz v. United States*.[34] The privacy doctrine states that a search within the meaning of the Fourth Amendment occurs when a twofold requirement is met.[35] First, a person must have manifested a subjective belief that the object of the alleged search is private.[36] Second, the subjective belief in privacy must be something that society is ready to recognize as objectively reasonable.[37] This interpretation of a search replaced the paradigm that there must be a physical intrusion

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establishing the trespass doctrine); Kyllo v. United States, 533 U.S. 27 (2001) (establishing that trespass can occur when law enforcement uses certain types of sense enhancing technology).

27. *See* cases cited *supra* note 26 and accompanying text.

28. *See Olmstead*, 277 U.S. at 466.

29. *See id.*

30. Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 73. (2012).

31. *Olmstead*, 277 U.S. at 464.

32. *See* Kerr, *supra* note 30.

33. *See* Joshua Schow, Comment, *Defying Expectations: A Case For Abandoning Katz by Adopting a Digital Trespass Doctrine*, 49 STETSON L. REV. 339, 344 (2020); *U.S. Supreme Court Opinions by Chief Justice and Year*, JUSTIA, https://supreme.justia.com/cases/federal/us/ (last visited Sept. 05, 2023) (showing Earl Warren was Chief Justice of the Supreme Court of the United States from 1953–1969).

34. *See* Katz v. United States, 389 U.S. 347, 354 (1967).

35. *Id.* at 361 (Harlan. J., concurring).

36. *Id.* (Harlan. J., concurring).

37. *Id.* (Harlan. J., concurring).

by law enforcement and instead established an approach based upon a reasonable expectation of privacy.[38]

3. *Jones, Resurrecting the Trespass Doctrine: 2012*

The *Katz* decision ultimately overruled the *Olmstead* trespass doctrine;[39] however, in 2012, the Supreme Court of the United States re-established the trespass doctrine in *Jones v. United States*.[40] According to Justice Scalia's majority opinion, *Katz* merely supplemented the *Olmstead* decision and did not overturn it.[41] Nonetheless, scholars have found that the only time that *Olmstead* was cited in case law was to point out that *Katz* overruled it.[42]

4. *Kyllo, Virtual Trespass: 2001*

The Supreme Court set out a third way in which a search can occur within the meaning of the Fourth Amendment in *Kyllo v. United States*.[43] Under *Kyllo*, a search occurs when a law enforcement official uses sense-enhancing technology, that is not in general public use, to discover details about the inside of a home that would otherwise not be discoverable unless law enforcement were physically inside the home.[44]

Once solely rooted in property, now also rooted in people,[45] the meaning of a search within the Fourth Amendment has changed drastically over time, in order to "keep pace with the march of science."[46]

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38. Kevin Emas & Tamara Pallas, *United States v. Jones: Does* Katz *Still Have Nine Lives?*, 24 ST. THOMAS L. REV. 116, 118 (2012).

39. *See Katz*, 389 U.S. at 353; United States v. Jones, 565 U.S. 400, 428 (2012) (Alito., J., Ginsburg, J., Breyer. J., and Kagan. J., concurring).

40. *See Jones*, 565 U.S. at 406–8.

41. *Id.*

42. Timothy C. MacDonnell, *The Rhetoric of the Fourth Amendment: Toward a More Persuasive Fourth Amendment*, 73 WASH. & LEE L. REV. 1869, 1904 (2016).

43. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001).

44. *Id.*

45. *See* Katz v. United States, 389 U.S. 347, 351 (1967).

46. Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 691 (2011) (quoting United States v. Garcia, 474 F.3d 994, 997 (7th Cir. 2007) (stating that "Fourth Amendment law is doctrinal evolution designed to conform with a changing society and changing conceptions of privacy"); Alexandra Carthew, Comment, *Searches And Seizures - Fourth Amendment And Reasonableness In General: Protection of Privacy Interests In The Digital Age*, 94 N.D. L. REV. 197, 201 (2019) (stating that when the Supreme Court decided Olmsted the protections were "firmly rooted in property rights, reasoning that a Fourth Amendment violation could not exist without an actual search or seizure of a person, their material effects, or a physical invasion of a person's home.").

B. The Warrant Clause within the Fourth Amendment and its Requirements.

Once a search within the meaning of the Fourth Amendment has been established, one must inquire as to whether the official who performed the search had a warrant.[47] The Supreme Court of the United States has inferred, based on the text of the Fourth Amendment, that a warrant is generally required in order to search a person or his or her property.[48] However, because "the ultimate touchstone of the Fourth Amendment is reasonableness," there are times when it is reasonable for a law enforcement official to forgo the general warrant requirement and perform a search.[49] Accordingly, one of these reasonable exceptions to the warrant requirement is known as exigent circumstances.[50]

C. A Brief History of Exigent Circumstances

Exigent circumstances are one of the many exceptions to the warrant requirement. The Supreme Court of the United States has adopted multiple different exigent circumstances, holding warrantless searches occurring under specific circumstances permissible.[51] In creating the exigent circumstances, courts have a duty to "balance[] the privacy interest involved against the extent to which adhering to the warrant requirement would unduly hamper effective law enforcement."[52] There must be a situation that is emergent enough to justify the absence of a warrant, paired with probable cause that a crime occurred, in order to successfully have an exigent circumstance.[53] The immediacy requirement is the core of an exigent circumstance.[54] The Supreme Court of the United States stated that "a warrantless search is allowed . . . when there is a compelling need for official action and no time to secure a warrant."[55] Examples of exigent circumstances that have been defined by the

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47. *See* Kentucky v. King, 563 U.S. 452, 459 (2011).
48. *Id.*; *I. Investigations and Police Practices*, 50 GEO. L.J. ANN. REV. CRIM. PROC. 3, 3 (2021).
49. *King*, 563 U.S. at 459 (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (1943)).
50. *Id.* at 460.
51. *See id.* (establishing warrantless entry when destruction of evidence is imminent); *see* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298–99 (1967) (establishing warrantless entry of officers in hot pursuit); Stuart, 547 U.S. at 403 (establishing warrantless entry when an occupant is injured or threatened with imminent injury); Birchfield v. North Dakota, 579 U.S. 438, 474 (2016) (establishing warrantless breath test for blood alcohol content).
52. ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE 157–58 (Rachel E. Barkow et al. eds., 4th ed. 2022).
53. *Id.* at 158.
54. Mitchell v. Wisconsin, 139 S Ct. 2525, 2529 (2019).
55. *Id.*

Supreme Court are: an officer in hot pursuit of a fleeing felon,[56] potential destruction of evidence,[57] endangerment to the police or occupants of a home.[58]

In recent decisions regarding exigent circumstances, the Supreme Court has deferred to a "totality of circumstances" approach to determine whether there is an exigency.[59] In *Missouri v. McNeely*, the Supreme Court of the United States restrained from using a per se rule to establish whether a law enforcement officer may obtain a blood alcohol test without a warrant.[60] However, Chief Justice Roberts predicted that the Supreme Court's refusal to establish a set rule would cause further issues among the lower courts and law enforcement..[61] Using the totality of circumstances approach to determine if there is an exigent circumstance was not at issue though; Chief Justice Roberts stated in his opinion that "the Court should be able to offer guidance on how police should handle" these issues.[62] Not only should the Supreme Court be able to offer guidance to law enforcement, but it should also set standards for lower courts to follow in unison.

III. THE CIRCUIT COURT SPLIT ON WHETHER AN OFFICER MAY ENTER AN ARRESTEE'S HOME WITHOUT A WARRANT TO OBTAIN CLOTHING.

There are currently six circuits that have found an exigency exists when a police officer needs to enter the home of an arrestee to obtain adequate clothing for the arrestee.[63] On the other hand, two circuits have explicitly stated there is not an exigent circumstance in this situation.[64]

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56. *See* Lange v. California, 141 S. Ct. 2011, 2024 (2021).
57. Kentucky v. King, 563 U.S. 452 (2011).
58. Brigham City v. Stuart, 547 U.S. 398, 403 (2006).
59. *Id.* at 151.
60. *Id*. at 153.
61. *Id.* at 173–74 (Roberts, C.J., concurring in part and dissenting in part).
62. *Id.* at 166 (Roberts, C.J., concurring in part and dissenting in part).
63. United States v. Nascimento, 491 F.3d 25, 50 (1st Cir. 2007); United States v. Di Stefano, 555 F.2d 1094, 1101 (2d Cir. 1977); United States v. Gwinn, 219 F.3d 326, 333 (4th Cir. 2000); United States v. Wilson, 306 F.3d 231, 241 (5th Cir. 2002), *overruled on other grounds by* U.S. v. Gould, 364 F.3d 578 (5th Cir. 2004); *see* United States v. Butler, 980 F.2d 619, 621 (10th Cir. 1992).
64. *See* United States v. Kinney, 638 F.2d 941, 945 (6th Cir. 1981); United States v. Whitten, 706 F.2d 1000, 1016 (9th Cir. 1983), *overruled on other grounds by* United States v. Perez, 116 F.3d 840 (9th Cir. 1983).

A. The Circuits in Favor: First, Second, Fourth, Fifth, Eighth, & Tenth Circuits

There are currently six circuits that have found an exigent circumstance exists when an officer arrests an underclothed arrestee. The following parts of this Section elucidate each of the cases in which the rule was implemented.

1. The Second Circuit

One of the first cases deciphering whether there is an exigent circumstance present when an officer needs to dress an arrestee in a state of dishabille comes from the Second Circuit in 1971.[65] In *United States v. Titus,* the Second Circuit found that officers were bound to find clothing for the partially dressed arrestee.[66] The court reasoned that gathering clothes for the arrestee is preferable to taking the arrestee "nude to FBI headquarters on a December night."[67] Ultimately, any evidence in plain view of the officers at the time of gathering clothes for the arrestee was admissible, under the plain view doctrine.[68]

Relying on *Titus* in 1977, the Second Circuit found that "officers [have] a duty to find clothing for" an arrestee to wear or to permit the arrestee to do so himself or herself.[69] In *United States v. Di Stefano*, an officer placed Sally Di Stefano under arrest in her home while she was clad in only a bathrobe.[70] The officer escorted Di Stefano to her bedroom in order for her to obtain adequate clothing.[71] While in the bedroom, allowing Di Stefano to dress, the officer saw, in plain view, evidence of a crime.[72] The court refused to suppress the evidence, finding that the officer needing to accompany Di Stefano in her bedroom, while she got dressed, was an exigent circumstance.[73] While this was still a search, as Di Stefano's privacy was violated when the officer went into the room with her to dress, the court found that this search was reasonable under the circumstances.[74] The court reasoned that since the officer had a duty

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65. *See* United States v. Titus, 445 F.2d 577, 579 (2d Cir. 1971).
66. *Id.*
67. *Id.*
68. *Id.*; *see* Horton v. California, 496 U.S. 128, 136–37 (1990) ("First, not only must the item be in plain view; its incriminating character must also be 'immediately apparent' . . . Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.").
69. United States v. Di Stefano, 555 F.2d 1094, 1101 (2d Cir. 1977).
70. *Id.* at 1097.
71. *Id.*
72. *Id.*
73. *See id.* at 1101.
74. *See id.; See* Payton v. New York, 445 U.S. 573, 586–87 (1980) (stating that searching or seizing without a warrant is presumptively unreasonable; however; the government can rebut this presumption by proving that there is one or more applicable exception to the warrant requirement).

to ensure Di Stefano was properly clothed, the officer was justified in being in the room "to maintain a watchful eye."[75] The officer's presence was to ensure that no evidence was destroyed nor weapons procured in the process of Di Stefano dressing.[76] The court found that the officer entered the bedroom with Di Stefano solely to maintain control over her, and the discovery of evidence was coincidental to that duty.[77]

Once again reaffirming that there may be an exigency when an officer needs to re-enter or remain on a premises "for the purpose of having the arrestee properly clothed," the Second Circuit in *United States v. Delva* listed out factors that it takes into account when determining if, in general, exigencies exist.[78] These factors include:

> (1) The gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; (6) and the peaceful circumstances of the entry.[79]

The factors presented are non-exhaustive and represent a sample of the types of information that should be considered under the totality of the circumstances.[80] Not all the factors must be present in order to find an exigency; a single factor will suffice in some situations, whereas a combination of the factors will in another.[81]

2. The Tenth Circuit

In 1992, the same question came before the Tenth Circuit Court of Appeals.[82] Although it gave a different reasoning than the Second Circuit, the Tenth Circuit in *United States v. Butler* still found that there may be an exigent circumstance when officers need to enter a home to gather clothing for an arrestee.[83] In *Butler*, Billy Dean Butler was arrested outside of his home without shoes on.[84] The officer noticed that there was broken glass on the ground near Butler's feet and given that there was no other route to get to the patrol

75. *Di Stefano*, 555 F.2d at 1101.
76. *Id.*
77. *Id.*
78. United States v. Delva, 858 F.3d 135, 154 (2d Cir. 2017).
79. *Id.*
80. *Id.*
81. *Id.*
82. *See* United States v. Butler, 980 F.2d 619, 621 (10th Cir. 1992).
83. *See id.*
84. *Id.* at 620.

car, decided that Butler needed shoes.[85] The officer asked Butler if he had shoes and Butler stated that his shoes were in his home.[86] Butler led the officer to the shoes, where the officer noticed a gun in plain view.[87] The court refused to suppress the gun as evidence, reasoning that when there is a significant threat to the health and safety of an arrestee, and the warrantless entry is not pretextual, then an exigent circumstance arises.[88]

3. *The Fourth Circuit*

In 2000, joining the Second and Tenth Circuits' decisions, the Fourth Circuit Court of Appeals concluded that under certain circumstances "an officer is authorized to take reasonable steps to address the safety of [an] arrestee and that [an] arrestee's partially clothed status may constitute an exigency . . . ."[89] In *United States v. Gwinn*, an officer arrested Dennis Gwinn outside of his home while he was wearing only jeans.[90] Because Gwinn was not wearing shoes or a shirt, the officer went back into the house to get clothes.[91] The officer asked another occupant of the house where Gwinn's shirt and shoes were.[92] The occupant obtained a shirt and pointed at a pair of boots for Gwinn, which the officer grabbed and found a gun inside.[93] The court determined that the entry was allowed due to an exigent circumstance based on five factors.[94] First, there was an "objective need to protect Gwinn against the substantial risk of injury to his feet and of the chill in the absence of a shirt."[95] Second, there was no evidence that the re-entry was pretextual.[96] Third, the intrusion was slight and temporary.[97] Fourth, the intrusion was strictly limited to the purpose of retrieving shoes and clothing.[98] Fifth, the purpose of re-entry was not to promote a government interest, but to ensure the safety of an arrestee while he was in the custody of a government actor.[99] The court again stated that it "caution[s] against using a clothing exception as a cover for entries made for other purposes."[100] Using these factors, the Fourth

85. *Id.*
86. *Id.*
87. *Id.*
88. *Butler*, 980 F.2d at 622.
89. United States v. Gwinn, 219 F.3d 326, 333 (4th Cir. 2000).
90. *Id.* at 329.
91. *Id.* at 330.
92. *Id.*
93. *Id.*
94. *Id.* at 333–34.
95. *Gwinn*, 219 F.3d at 334.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 334–35.

Circuit ruled that the gun found by the officer was admissible as evidence since there was an exigent circumstance based upon the officer's need to obtain clothing for Gwinn.[101]

The Fourth Circuit's reasoning followed more closely to the standard set out by the Tenth Circuit.[102] However, neither circuit addressed if officers have a "duty to find clothing" for an partially clothed arrestee, as the Second Circuit ruled.[103] The Tenth and Fourth Circuits have taken into consideration the totality of the circumstances approach based upon certain factors and found that in particular situations it is permissible to conduct a warrantless entry to gather clothing for an arrestee under the exigent circumstance exception;[104] however, the rule is not categorical, unlike the Second Circuit's rule.[105]

4. *The Eighth and Fifth Circuits*

Two years later, both the Eighth and Fifth Circuits held that an arrestee's partially clothed status may constitute an exigent circumstance.[106] In the Eighth Circuit case, *United States v. Debuse*, Todd Debuse was arrested outside of his home without shoes on.[107] Debuse asked officers if he could obtain shoes.[108] The officers escorted Debuse back into his home and saw a gun in plain view.[109] Since Debuse was a felon, the gun was seized as evidence.[110] While this case did not require the application of an exigent circumstance—as the arrestee asked to get the shoes, which is parallel to consent—the court still established that there can be an exigent circumstance in this situation.[111] The court, citing *Gwinn*, stated that even absent an affirmative indication that the arrestee wants to obtain clothing, an "arrestee's partially clothed status may constitute an exigency justifying officers temporary reentry into [an]

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101. *Gwinn*, 219 F.3d at 334–35.

102. *See id.* at 334; United States v. Butler, 980 F.2d 619 (10th Cir. 1992).

103. United States v. Di Stefano, 555 F.2d 1094, 1101 (2d Cir. 1977); *see Gwinn*, 219 F.3d at 333; *Butler*, 980 F.2d at 621.

104. *See Gwinn*, 219 F.3d at 333–34; *Butler*, 980 F.2d at 621–22.

105. *See Gwinn*, 219 F.3d at 333–34; *Butler*, 980 F.2d at 620; *Di Stefano*, 555 F.2d at 1101. The Second Circuit's rationale that law enforcement owes a duty of care to an arrestee makes the exigency seem categorical, as in every instance that an arrestee is underclothed the officer must get clothing, whereas the Fourth Circuit's rationale requires the officer to consider multiple factors before deciding if the situation arises to the level of an exigency. *See Gwinn*, 219 F.3d at 333–34; *Butler*, 980 F.2d at 620; *Di Stefano*, 555 F.2d at 1101.

106. United States v. Debuse, 289 F.3d 1072, 1074 (8th Cir. 2002); *see* United States v. Wilson, 306 F.3d 231, 241 (5th Cir. 2002).

107. *Debuse*, 289 F.3d at 1074.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (citing United States v. Gwinn, 219 F.3d 326, 333 (4th Cir. 2000).

arrestee's home to retrieve clothes."[112] Moreover, the arresting officer must enter under a carefully circumscribed area to minimize intrusion, and the entrance cannot be to further an investigation.[113]

The Fifth Circuit in *United States v. Wilson*, also found an exigent circumstance when an officer arrested an underclothed person.[114] Here, Alonzo Jackson was arrested outside of his apartment wearing only boxer shorts.[115] The officers asked Jackson if anyone else was in the apartment, and he confirmed someone was inside.[116] An officer then entered the apartment with Jackson and found Bryain Wilson on the floor.[117] The officer observed a gun sticking out of Wilson's pocket, and "as a person previously convicted of a crime punishable by imprisonment for a term exceeding one year," the officer had the authority to seize the firearm.[118] The officer stated that one of the reasons he entered the apartment was for safety purposes and the other was "to get some clothing for Jackson prior to transporting him."[119] In this situation, the court found that the safety hazard that is posed by transporting an underclothed arrestee places a "duty on law enforcement to obtain proper clothing."[120] The court reasoned that the officer was merely aiming to provide clothing for the arrestee to prevent the possibility of injury during his charge.[121] While the place of arrest may not have been surrounded by blatantly hazardous materials, the court found that public sidewalks and streets still pose a threat of injury to feet and other exposed areas.[122]

Although the Eighth and Fifth Circuits decided these cases in the same year, the two courts took different approaches in the reasoning behind why an officer may enter a home to obtain clothing for an arrestee.[123] The Eighth Circuit followed the exact reasoning in *Gwinn,*[124] whereas the Fifth Circuit combined the "duty to obtain appropriate clothing" reasoning from *Di Stefano,* with the safety precautions mentioned in *Butler*.[125]

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112. *Id.* (quoting *Gwinn*, 219 F.3d at 333).
113. United States v. McMullin, 576 F.3d 810, 817 (8th Cir. 2009) (citing. Gwinn, 219 F.3d at 330).
114. 306 F.3d 231, 241 (5th Cir. 2002).
115. *Id.* at 234.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Wilson*, 306 F.3d at 241.
121. *Id.* at 241.
122. *Id.*
123. *Id.*; United States v. Debuse, 289 F.3d 1072, 1074–75 (8th Cir. 2002).
124. *Debuse*, 289 F.3d at 1074–75; United States v. Gwinn, 219 F.3d 326, 333 (4th Cir. 2000).
125. *See Wilson*, 306 F.3d at 241; United States v. Butler, 980 F.2d 619, 622 (10th Cir. 1992); United States v. Di Stefano, 555 F.2d 1094, 1101 (2d Cir. 1977).

5. *The First Circuit*

Finally, the First Circuit Court of Appeals found that when police "arrest a partially clothed [arrestee] in his [or her] home, the need to dress him [or her] may constitute an exigency . . . ."[126] In *Nascimento*, the police lawfully entered an apartment pursuant to an arrest warrant; however, they did not have a search warrant.[127] Once the officers were inside, they encountered Nascimento in the front of his apartment wearing only underwear.[128] Due to Nascimento's lack of clothing, the officers escorted him to his bedroom to dress.[129] There the officers did a sweep of the closet for weapons, which was eight to ten feet from Nascimento.[130] Inside the closet, the officers found a gun frame, which they seized as evidence.[131] The First Circuit found that the officers acted appropriately when they decided to escort Nascimento to his bedroom in order to dress.[132] The court reasoned that "both human dignity and the New England climate counseled . . . in favor of a more complete wardrobe."[133] Additionally, the facts supported that Nascimento was clad in only his underwear and the officers' did not use as a pretext to carry out an otherwise unconstitutional search.[134] Accordingly, the officers used their "common sense and practical considerations" to guide a judgment about the situation.[135] Ultimately the court found the search and seizure reasonable, as officers have been afforded latitude when dealing with exigent circumstances.[136]

B. The Circuits Against: Sixth and Ninth Circuits, along with a District Court within the Seventh Circuit

To date, the Sixth and Ninth Circuit Courts of Appeals have explicitly found there is no exigent circumstance that allows an officer to re-enter the home of an arrestee who is partially clothed; therefore, the Circuits found those warrantless searches to be unconstitutional.[137] Additionally, the Seventh

126. United States v. Nascimento, 491 F.3d 25, 50 (1st Cir. 2007).
127. *Id.* at 49.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Nascimento*, 491 F.3d at 50.
133. *Id.*
134. *Id.*
135. *Id.* (quoting United States v. Cook, 277 F.3d 82, 86 (1st Cir. 2002)).
136. *Id.* at 51.
137. United States v. Kinney, 638 F.2d 941, 945 (6th Cir. 1981); United States v. Whitten, 706 F.2d 1000, 1016 (9th Cir. 1983).

Circuit has not decided on this issue, but a district court within the circuit has held that it finds no exigency exists in the same circumstances.[138]

The Sixth Circuit held in *United States v. Kinney* that it was not necessary for officers to enter the apartment of the arrestee due to him not being fully clothed.[139] In this case, a Federal Bureau of Investigation (FBI) agent pulled Timothy Kinney out of his apartment and arrested him.[140] At the time, Kinney was clothed but his shirt was unbuttoned.[141] The agent took Kinney back into the apartment, as a crowd was gathering and Kinney's torso was exposed in the front.[142] Upon entry to the apartment, the agent did a sweep and found a gun.[143] The government argued that Kinney being exposed and a crowd forming was enough to establish an exigent circumstance.[144] However, the court held that since Kinney did not request additional clothing or consent to an entry of his home, there was no justification for the officer's warrantless entry.[145]

Further, the Ninth Circuit found in *United States v. Whitten*, that there was no exigency when officers entered an arrestee's hotel room to allow him to dress.[146] Officers knocked on John Gaiefsky's hotel room door, and once Gaiefsky answered, the officers immediately handcuffed him and placed him in a chair inside the room.[147] The officers searched the room and found a gun.[148] Meanwhile, Gaiefsky was wearing only underwear so he asked to get dressed.[149] The court ruled that because the officers entered the hotel room prior to Gaiefsky asking for clothes, the search and discovery of the evidence was unconstitutional.[150] The court found that "absent such a 'specific request or consent,' the officers' entry was unlawful."[151]

The United States District Court for the Eastern District of Wisconsin, a district that is within the Seventh Circuit, held that "the clothing and accessories exception [does not] validate the warrantless entry" into a home.[152] In

138. United States v. McMillian, No. 11-CR-193, 2012 U.S. Dist. LEXIS 10841, at *19 (E.D. Wis. Jan. 27, 2012).
139. *Kinney*, 638 F.2d at 945.
140. *Id.* at 943.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 945.
145. *Kinney*, 638 F.2d at 945.
146. *See* United States v. Whitten, 706 F.2d 1000, 1016 (9th Cir. 1983), *overruled on other ground by* United States v. Perez, 116 F.3d 840 (9th Cir. 1983).
147. *Id.* at 1015.
148. *Id.*
149. *Id.*
150. *Id.* at 1016.
151. *Id.* (quoting United States v. Anthon, 648 F.2d 669, 675 (10th Cir. 1981).
152. United States v. McMillian, No. 11-CR-193, 2012 U.S. Dist. LEXIS 10841, at *19 (E.D. Wis. Jan. 27, 2012).

United States v. McMillian, an officer arrested Tyrone McMillian.[153] After seeing that McMillian had no shoes on, the officer went inside to retrieve some.[154] With the assistance of someone else in the house, the officer went into the bedroom, and in the process of retrieving the shoes, observed two gun cases.[155] The court held that this evidence was not admissible as the officer's entry into the bedroom, without a warrant, to retrieve shoes was unconstitutional.[156] This court declined to recognize that gathering clothing for an arrestee is an exigent circumstance nor that officers have a duty to find clothing for an arrestee.[157] However, the court did state that the record did not support the use of the "clothing and accessory" exception in this instance.[158] This leaves room for its potential use in the future, as the "Seventh Circuit has not addressed either variant of the clothing exception."[159]

IV. Proposed Resolution to the Circuit Split

The Supreme Court should resolve the issue among the circuits by finding that there is an exigent circumstance when an officer needs to obtain adequate clothing for an arrestee. Furthermore, this should not be convoluted with the already established consent exception.[160] This resolution is proposed to work in situations where law enforcement officials have neither consent nor a warrant to enter the home of the arrestee. The Court should do this by laying out an approach that law enforcement officials are able to use and understand, guiding them to know when they are constitutionally allowed to enter the home without a warrant to get an arrestee clothing.

A. The Supreme Court Should Adopt the Totality of the Circumstances as used by the Second and Fourth Circuits

The Supreme Court of the United States should find that when a reasonable officer would believe that there is a need for additional clothing based on the totality of the circumstances then he or she should, under his or her duty to the arrestee, enter the home without a warrant to gather clothes for an arrestee, regardless of the arrestee's consent. The Supreme Court should rule that there is an exigency present when officers need to enter a home without

153. *Id.* at *4.
154. *Id.* at *5.
155. *Id.*
156. *Id.* at *20.
157. *Id.* at *19.
158. *McMillian*, 2012 U.S. Dist. LEXIS 10841 at *19.
159. *Id.* at *18.
160. *See* Fernandez v. California, 571 U.S. 292, 294 (2014) (explaining that if occupants of a home consent to a search and an officer need not obtain a warrant to perform it).

a warrant to obtain clothing for an arrestee, based on the rationales of the Second and Fourth Circuits.[161] The proposed test, in which a reasonable officer uses the totality of the circumstances and his or her duty to an arrestee, falls into already established Fourth Amendment law.[162]

1. The Duty of Care Standard

The Second Circuit, in *Di Stefano,* found that law enforcement officers owe arrestees a duty of care in either allowing the arrestee to dress or gathering clothes for the arrestee to wear.[163] However, other circuits have stated that an arrestee asking for clothes is the same as if the arrestee consented to the warrantless entry, which falls under a different exception entirely.[164] Additionally, the Fourth Circuit in *Gwinn*, relying on the totality of the circumstances test, listed factors that were present at the time of the arrest leading to the exigency which should be used as part of the standard.[165] First, that there is an objective need to protect an arrestee against the substantial risk of injury in the absence of clothing.[166] Second, that the entry not be pretextual.[167] Third, that the intrusion be minor and last only a short amount of time.[168] Fourth, the intrusion be limited only to the retrieval of adequate clothing.[169] Fifth, that the purpose of re-entry not be to promote a government interest, but to ensure the safety of an arrestee while he or she is in the custody of a government actor.[170]

Courts have found that law enforcement agents owe arrestees a duty of care in other situations as well, such as when the arrestee is in need of medical attention.[171] The Ninth Circuit, in deciding a torts case arising out of California, found that there is a special relationship between a law enforcement officer and an arrestee,[172] reasoning that, "a typical setting for the recognition of a special relationship [arises when an arrestee] is particularly vulnerable and dependent upon the [officer] who, correspondingly, has some control over the [arrestee's] welfare."[173] The Ninth Circuit, in making this decision, relied on a ruling from the Supreme Court of California which established that there

161. *See* discussion *supra* Sections III.A.1 and III.A.3.
162. *See* discussion *supra* Section IV.A.1–3.
163. United States v. Di Stefano, 555 F.2d 1094, 1101 (2d Cir. 1977).
164. *See* United States v. Debuse, 289 F. 3d 1072, 1074 (8th Cir. 2002).
165. United States v. Gwinn, 219 F.3d 326, 333–34 (4th Cir. 2000).
166. *Id.*
167. *Id.* at 334.
168. *Id.*
169. *Id.*
170. *Id.*
171. *See* Winger v. City of Garden Grove, 806 F. App'x 544, 546 (9th Cir. 2020) (applying California law).
172. *Id.*
173. *Id.*

a jailer owes a duty of care owed to a prisoner[174] and paralleled the duty as one that law enforcement officials wield as well.[175] Ultimately, the Ninth Circuit found that a law enforcement officer has a duty of care to an arrestee that extends to seeking medical attention where there is a "risk of harm."[176]

Additionally, the Supreme Court of Oklahoma has found that law enforcement agents owe some type of care to not use excessive force against an arrestee.[177] The court held that although a police officer does not owe an arrestee ordinary negligence-based care, there is still a duty to "use only such force in making an arrest as a reasonably prudent police officer would use in light of the objective circumstances confronting the officer at the time of the arrest."[178] Like the standard proposed in this Note, the officer's duty is very specific and based upon the totality of the circumstances.[179] The court also gave factors to help law enforcement officials determine how objective the decision to use force is and when they have a duty to refrain from excessive use of force.[180]

2. The Reasonableness Standard

The reasonableness factor that comes into play when determining what a law enforcement agent should objectively do is present throughout Fourth Amendment case law.[181] Two areas in particular that use a "reasonable officer" test are (1) establishing probable cause[182] and (2) the use of a drug dog at a traffic stop.[183] Specifically, in *United States v. Whren*, the Supreme Court of the United States held that the subjective intent of the arresting officer is not grounds to invalidate probable cause.[184] The Court stated that the test for probable cause is one that is objective and based upon reasonableness.[185] Moreover, the Court ruled in *Illinois v. Caballes* that although officers are able to use drug dogs during the course of a traffic stop, the stop cannot be

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174. Giraldo v. Dep't of Corr. & Rehab., 166 Cal. Rptr. 3d 371, 385 (Ct. App. 2008).

175. *Winger*, 806 F. App'x 544 at 546.

176. *Id.*

177. *See* Morales v. City of Okla. City ex rel Okla. City Police Dep't, 2010 OK 9, ¶ 23, 230 P.3d 869, 879.

178. *Id.* at ¶ 26, 230 P.3d at 880.

179. *Id.*

180. *Id.* ¶ 27, 230 P.3d at 880.

181. *E.g.* Whren v. United States, 517 U.S. 806, 813–14, 817 (1996); Illinois v. Caballes, 543 U.S. 405, 408–09 (2005).

182. *See* Carroll v. United States, 267 U.S. 132, 161–62 (1925) (explaining that probable cause exists when "the facts and circumstances within [law enforcement's] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that" a crime was being committed).

183. *Caballes,* 543 U.S. at 407–08.

184. *Whren*, 517 U.S. at 813.

185. *Id.* at 813–14.

prolonged more than the amount of time that it would take a reasonable officer to complete the stop.[186] Using a reasonable officer standard in deciding whether there is an exigency when an arrestee is partially clothed allows officers to take the information that is known to them and decide if another law enforcement official would reasonably think that the arrestee needs more clothing.[187]

3. *The Totality of the Circumstances Standard*

Furthermore, other exigent circumstances that have been adopted by the Supreme Court of the United States use a totality of the circumstances approach to determine if it is reasonable to perform a search without a warrant.[188] In *Missouri v. McNeely*, the Court found that a per se rule granting officers the ability to obtain warrantless blood tests as an exigent circumstance was not valid.[189] Instead, rule was one based upon the totality of the circumstances.[190] That said, the dissipation of alcohol is constant and testing could be prolonged by obtaining a warrant, which is why the court ruled that the totality of the circumstances should be accounted for.[191] Concurring in part and dissenting in part, Chief Justice Roberts found that law enforcement should also look to see if there is time to obtain a warrant when weighing the totality of the circumstance.[192] Additionally, the ability to use modern technology to obtain a warrant should be taken into consideration.[193] Some examples of when the totality of circumstances weigh in favor of an exigency are: (1) if there is glass on the ground when the arrestee has no shoes on;[194] (2) if the arrestee has no more than a bathrobe on when arrested;[195] (3) if the weather

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186. *Caballes*, 543 U.S. at 419–20.

187. *See generally* Richard P. Shafer, Annotation, *When does a police officer's use of force during arrest become so excessive as to constitute violation of constitutional rights, imposing liability under Federal Civil Rights Act of 1871 (42 U.S.C.A. § 1983)*, 60 A.L.R. Fed. 204 (showing multiple instances in which police officers must use the reasonable officer standard and take into account all circumstances).

188. *See* Missouri v. McNeely, 569 U.S. 141, 157 (2013).

189. *Id.* at 156.

190. *Id.* at 157.

191. *Id.* at 153.

192. *Id.* at 172. (Roberts, C.J., concurring in part and dissenting in part).

193. *Id.* at 172–73. (Roberts, C.J., concurring in part and dissenting in part).

194. United States v. Butler, 980 F.2d 619, 621 (10th Cir. 1992) (holding that there was an exigent circumstance based on the potential harm that could be caused by the arrestee having no shoes on while there was glass on the ground).

195. United States v. Di Stefano, 555 F.2d 1094, 1097, 1100 (2d Cir. 1977) (holding that since Di Stefano was dressed in only a bathrobe that the officers had a duty to either request to have her get additional clothing or gather it for her—the officers were justified in following Di Stefano inside while she got the clothes).

is objectively cold enough to render the need of more clothing;[196] and (4) if the arrestee has no shoes on and has to walk on public thoroughfares.[197]

4. *The Standards Tied Together—A Duty of Care Under the Totality of the Circumstances as Viewed by a Reasonable Officer.*

Ultimately, when an officer arrests a person who is underclothed, he or she has a duty to obtain clothing for the arrestee regardless of whether consent was given or if there is a warrant to enter the home.[198] When a reasonable officer would believe that there is a need for additional clothing, the officer should then, under his or her duty to the arrestee, enter the home regardless of whether a warrant has been issued to gather clothing.[199] Based upon the cases explained in Section III.A, some factors that the officers may use in aiding their decision to enter an arrestee's home to obtain clothing are: (1) the climate and weather condition at the time of arrest;[200] (2) the potential for injury to the exposed body parts;[201] (3) the terrain that the arrestee must cross in order to get where the officer leads him or her;[202] and (4) if the absence of clothes could potentially cause personal injury to the arrestee during the course of the officers' charge.[203] These factors will guide law enforcement officials to determine when there is a circumstance that weighs in favor of an exigency arising.

Some scholars have suggested that the use of a test that is subjective such as the totality of the circumstances does not provide law enforcement officials with enough guidance.[204] Instead, these scholars believe that the totality of the circumstances is a "pointless tautology that identifies nothing . . . ."[205] While this may seem true on the forefront of a totality of the circumstances standard, in all actuality this type of test allows law enforcement officials to evaluate

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196. United States v. Nascimento, 491 F.3d 25, 50 (1st Cir. 2007) (holding that "[w]hen police encounter and arrest a partially clothed individual in his home, the need to dress him may constitute an exigency justifying the officers in entering another room in order to obtain needed clothing." Here, the "New England climate" amounted to an exigency rendering the officer's warrantless entry justified.).

197. United States v. Wilson, 306 F.3d 231, 241 (5th Cir. 2002) (holding that the hazards of public sidewalks and streets pose a threat of harm when an arrestee is not properly clothed).

198. *See Di Stefano*, 555 F.2d at 1101 (citing United States v. Titus, 445 F.2d 577 (2d Cir. 1971); United States v. Gwinn, 219 F.3d 326, 333 (4th Cir. 2000).

199. Missouri v. McNeely, 569 U.S. 141, 172–73 (2013) (Roberts, C.J., concurring in part and dissenting in part).

200. *Nascimento*, 491 F.3d at 50.

201. *Gwinn*, 219 F.3d at 333.

202. *Wilson*, 306 F.3d at 241.

203. *Id.*

204. Bruce A. Antkowiak, *Saving Probable Cause*, 40 SUFFOLK U. L. REV. 569, 584–85 (2007).

205. *Id.*

each individual case[206] to determine whether the situation is emergent enough to arise to the level of exigent. The Supreme Court of the United States is reluctant to establish per se rules when it comes to Fourth Amendment law because the nature of situations vary vastly.[207] Scholars against this type of standard also argue that there is no way to identify what circumstances will be relevant to the equation.[208] They ask if things such as "the maiden name of the arresting officer's mother" should be considered in the evaluation.[209] However, it seems self-evident that such trivial substances are left out of the overall assessment. Further, if law enforcement officials struggle to decipher what circumstances amount to the level of consideration, they should look to prior cases to get an idea of what is relevant.

Others may feel that allowing officers to get clothing for an arrestee as an exigency will lead to an abuse of power.[210] While law enforcement should be able to obtain clothing for an arrestee who needs it, this rule should not be seen as a "blank check for intrusion upon the privacy of the sloppily dressed."[211] Law enforcement should be cautioned against using this exception "as a cover for entries made for other purposes."[212] Police should conduct a limited entry into an area for the purpose of obtaining clothes that should in no way be pretextual.[213] Additionally, the government should bear the burden of proof, showing that the arrestee had a substantial need for clothing.[214]

B. Public Policy Standpoint

While the Supreme Court of the United States stated that there are only "a few specifically established and well-delineated exceptions" to the warrant requirement, this appears to be somewhat of an understatement.[215] The Court first made this statement in *Katz*, and has had a tendency to repeat it in cases

206. Marissa Reich, *Supreme Court Review:* United States v. Drayton*: The Need For Bright-Line Warnings During Consensual Bus Searches:* United States v. Drayton, 536 U.S. 194 (2002), 93 J. CRIM. L. & CRIMINOLOGY 1057, 1064 (2003) (quoting Florida v. Royer, 460 U.S. 491, 506–07 (1983) "[t]here will be endless variations in the facts and circumstances. It is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question [of] whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.").

207. *Id.*

208. Antkowiak, *supra* note 204, at 585.

209. *Id.*

210. *See* Thomas K. Clancy, *What Does The Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 367 (1998) (stating that some rights are given to prevent government abuse of power).

211. United States v. Butler, 980 F.2d 619, 621 (10th Cir. 1992).

212. United States v. Gwinn, 219 F.3d 326, 334–35 (4th Cir. 2000).

213. *Butler*, 980 F.2d at 621.

214. *Gwinn*, 219 F.3d at 335.

215. *See* cases cited *infra* note 218 and accompanying text.

where exceptions to the warrant requirement come up.[216] However, in many of these cases, the Supreme Court is establishing new exceptions to the warrant requirement.[217] There are at least nineteen exceptions to the warrant requirement that the Court has formally adopted, if not more.[218] The Supreme Court's statement that the exceptions to the warrant requirement are few, and must be well-delineated, seems to be less factual as the Court continues narrowing the scope of the Fourth Amendment protections.[219] Additionally, these cases prove that the rationale is contradictory.[220] Despite the fact that the Supreme Court signifies the importance of obtaining a warrant and refers to the exceptions as few, statistics show that the largest portion of searches that occur in the law enforcement field are warrantless.[221] Scholars have pointed out that there seems to be "an invisible hand is expanding the scope of conduct

216. Katz v. United States, 389 U.S. 347, 357 (1967).

217. Arizona v. Gant, 556 U.S. 332, 338 (2009) (establishing warrantless search incident to arrest); California v. Acevedo, 500 U.S. 565, 580 (1991) (establishing warrantless search of a vehicle); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (establishing that no warrant is required to seize items in plain view).

218. *See generally* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967) (establishing warrantless entry of officers in hot pursuit); Brigham City v. Stuart, 547 U.S. 398 (2006) (establishing warrantless entry when an occupant is injured or threatened with imminent injury); Kentucky v. King, 563 U.S. 452 (2011) (establishing warrantless entry when destruction of evidence is imminent); Birchfield v. North Dakota, 579 U.S. 438 (2016) (establishing warrantless breath test for blood alcohol content); *Coolidge*, 403 U.S. 443; *Acevedo*, 500 U.S. 565; *Gant*, 556 U.S. 332; South Dakota v. Opperman, 428 U.S. 364 (1976) (establishing warrantless search to inventory items); Maryland v. Buie, 494 U.S. 325 (1990) (establishing warrantless protective sweeps); Fernandez v. California, 571 U.S. 292 (2014) (establishing consent of the current occupant allows a warrantless search); New York v. Burger, 482 U.S. 691 (1987) (establishing warrantless administrative searches); United States v. Flores-Montano, 541 U.S. 149 (2004) (establishing warrantless border crossing searches); Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (establishing warrantless seizure at a checkpoint); New Jersey v. T.L.O., 469 U.S. 325 (1985) (establishing warrantless search of students in school); City of Ontario v. Quon, 560 U.S. 746 (2010) (establishing the warrantless search of government employees for a reason besides ordinary crime control); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (establishing warrantless drug testing in schools); Florence v. Bd. of Chosen Freeholders, 566 U.S. 318 (2012) (establishing warrantless strip searches of arrestees going into the general population at facility); Maryland v. King, 569 U.S. 435 (2013) (establishing a warrantless DNA test of arrestees); Samson v. California, 547 U.S. 843 (2006) (establishing a warrantless search of those persons on probation or parolees).

219. *Gant*, 556 U.S. at 338; *Acevedo*, 500 U.S. at 580.

220. *See* cases cited *supra* note 218 and accompanying text.

221. *Exceptions to the Warrant Requirement: Overview*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-4/exceptions-to-the-warrant-requirement-overview (last visited Sept. 05, 2023); *Exceptions to the Fourth Amendment Warrant Requirement*, FINDLAW, https://constitution.findlaw.com/amendment4/annotation06.html (July 21, 2022) (citing A.L.I., A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE xix (Tent. Draft No. 3 1970)).

regulated under the Fourth Amendment."[222] Ultimately, the Supreme Court should not take issue with finding another exception to the warrant requirement, as it has already expanded the exceptions exponentially.[223]

Scholars see the dilution of Fourth Amendment rights, specifically allowing more exceptions to the warrant requirement, as a small piece of an overall decline of criminal procedure rights.[224] Further, allowing warrantless entry into the home presents serious threats to these rights.[225] They warn that too narrow a view of the Fourth Amendment will lead to its "slow and steady erosion."[226] That said, during the late 1980's to early 2000's there was a trend of cutting back on the protections of the Fourth Amendment.[227] Even today, the Supreme Court has been presented with opportunity after opportunity to put a stop to the erosion of Fourth Amendment protections, yet it passed on said opportunities.[228] The Court still finds that there are a multitude of exceptions to the Fourth Amendment; therefore, finding that there is an exigency when an officer needs to get clothing for an arrestee aligns with current Fourth Amendment law trends.[229]

In the eighteenth century, anyone who was arrested "could expect that not only his surface clothing, but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well."[230] Today, this rule extends beyond the arrestee's physical person into areas surrounding the place of arrest.[231] Nonetheless, the Court does not have an issue with expanding the Fourth Amendment exceptions.[232] Despite the language of many opinions seeming to find that the exceptions are few, the Court has not

222. Elizabeth Canter, Note, *A Fourth Amendment Metamorphosis: How Fourth Amendment Remedies and Regulations Facilitated the Expansion of the Threshold Inquiry*, 95 VA. L. REV. 155, 191 (2009).

223. *See* cases cited *supra* note 218 and accompanying text.

224. *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 261–62 (2011).

225. *See* Gregory T. Helding, Comment, *Stop Hammering Fourth Amendment Rights: Reshaping The Community Caretaking Exception With The Physical Intrusion Standard,* 97 MARQ. L. REV. 123, 159 (2013).

226. *Id.*

227. *See* Primus*, supra* note 224, at 261–62; *U.S. Supreme Court Opinions by Chief Justice and Year*, JUSTIA U.S. SUPREME COURT https://supreme.justia.com/cases/federal/us/ (last visited Sept. 05, 2023) (showing the Rehnquist court was from 1986–2005).

228. *See* cases cited *supra* note 218 and accompanying text.

229. *See* cases cited *supra* note 218 and accompanying text.

230. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602-1791 420 (2009).

231. Maryland v. Buie, 494 U.S. 325, 334 (1990) (stating that officers were allowed to perform a protective sweep without a warrant "to ensure their safety after, and while making, the arrest" and "[t]hat interest is sufficient to outweigh the intrusion such procedures may entail.").

232. *See* cases cited *supra* note 218 and accompanying text.

administered much restraint in carving out more exceptions.[233] For example, in *Lange v. California*, the Supreme Court declined to extend the hot pursuit exigent circumstance to fleeing misdemeanants.[234] The majority reasoned that since common law authorities favored a categorical rule for the hot pursuit of a fleeing felon, misdemeanants are altogether left out of the exception.[235] Chief Justice Roberts found the argument made by the majority to be negatively implied and wrong, as there are many historical sources stating the rule applied to "all sorts of offenses the Court seems to deem 'minor.'"[236]

The Supreme Court of the United States has expanded the protections of the Fourth Amendment from the original meaning, as it is not frozen in time.[237] However, as the authority of the government grows and the scope increases, courts have invented one exception after another.[238] Courts have constantly poked holes in the protections once provided by the Fourth Amendment until "it has started to resemble Swiss cheese."[239] It does not seem as though the Suprme Court of the United States will stop finding exceptions to the warrant requirement, as case law indicates that the number and scope of the exceptions have been growing.[240] However, the Supreme Court has shown restraint from making categorical, per se rules in regard to exceptions to the warrant requirement.[241] In lieu of that, the rule this Note proposes would not be categorical for every arrestee who is underclothed. The test proposed is one that considers more than just the arrestee being partially dressed in the eyes of the arresting officer: there should be a determination made based upon factors and objective reasons.

V. CONCLUSION

Ultimately, the Supreme Court of the United States should find that an exigent circumstance arises in some cases when a person is arrested while partially dressed. Considering this, the Court should set out a standard, taking into account the totality of the circumstances, the reasonable officer test, and

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233. *See* Arizona v. Gant, 556 U.S. 332, 338 (2009); California v. Acevedo, 500 U.S. 565, 580 (1991); Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971) (showing that the language of the opinion might state that the exceptions are arrow, but at the same time the court allows the exception to stand).

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

235. *Id.*

236. Lange v. California, 141 S. Ct. at 2037 (Roberts, C.J., concurring).

237. *Id.* at 2037.

238. *See IJ's Project on the 4th Amendment Protecting Our Right to be Secured in Our Persons and Property*, INST. FOR JUST., https://ij.org/issues/ijs-project-on-the-4th-amendment/ (last visited Sept. 05, 2023).

239. *Id.*

240. *Exceptions to the Fourth Amendment Warrant Requirement*, *supra* note 221.

241. *E.g.,* Missouri v. McNeely, 569 U.S. 141, 156 (2013).

the officer's duty of care to an arrestee. This test would allow officers to have a better understanding of when a situation is emergent enough to be an exigent circumstance and when the officer's actions in making a warrantless entry are constitutional. Without adopting a per se rule, as the Court is reluctant to do, the test proposed would provide an acceptable amount of guidance to an arresting officer to ensure that his or her actions in performing a warrantless entry into a home would be justified.

Courtney Murray[*]

* J.D. Candidate, University of Arkansas at Little Rock, William H. Bowen School of Law, 2024; B.A. in Political Science, University of North Texas, 2021. I want to give a special thank you to my family, my friends, and Taz for their support and encouragement. Also, thank you to the members of the Law Review for the hours put into editing and publishing this note.