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Police, Community Caretaking, and the Fourth Amendment

Debra Livingston†

The local police have multiple responsibilities, only one of which is the enforcement of criminal law. Police gather eyewitness accounts in the aftermath of a shooting, but they also assist lost children in locating their parents. Police identify and arrest those who have committed felonies, but they also respond to heart attack victims and help inebriates find their way home. Sometimes police check on the well-being of elderly citizens. As Professor Goldstein said some twenty years ago, "The total range of police responsibilities is extraordinarily broad . . . . Anyone attempting to construct a workable definition of the police role will typically come away with old images shattered and with a new-found appreciation for the intricacies of police work."1

In the typical Fourth Amendment case, police have intruded on privacy in service of law enforcement objectives. Fourth Amendment intrusions by local police, however, are in no way limited to contexts implicating their law enforcement role. Thus, when police enter an apartment to render aid to a woman who is having a baby, they seek neither evidence nor suspects. Such intrusions instead involve what the Supreme Court in Cady v Dombrowski termed the "community caretaking functions" of local police — functions "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."2 Of course, sometimes community caretaking and law enforcement are intertwined. When police respond to a burglary alarm late at night and arrive to find shattered glass around a broken window in an apparently violated home, officers may well go inside. They enter in order to apprehend a burglar

† Associate Professor, Columbia University School of Law. I am grateful to Miguel Estrada, John Manning, John McEnany, John Monaghan, Richard Pildes, Bill Stuntz, and especially Richard Uviller for many helpful comments. I also especially appreciate the research help of Lara Ballard and Deirdre McEvoy, as well as the substantial assistance provided by Adam Long, my editor at The University of Chicago Legal Forum.

1 Herman Goldstein, Policing a Free Society 21 (Ballinger 1977).

2 413 US 433, 441 (1973).
and to find evidence of crime. They also enter to ensure that no one is injured within.

One traditional view of the Fourth Amendment — a view that has found expression in many Supreme Court opinions and that was famously championed in recent times by Justice Stewart — holds that searches "conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable — subject only to a few specifically established and well-delineated exceptions." This "warrant theory" or "warrant preference theory" of the Amendment, though in no way mandated by Fourth Amendment text, has profoundly shaped the evolution of Fourth Amendment doctrine as it applies to police acting in a law enforcement or criminal investigative capacity. The theory first found modern expression in the years before the Fourth Amendment was applied against the states and was fashioned primarily to constrain federal law enforcement agents "acting under the excitement that attends the capture of persons accused of crime."

In later years, and particularly after the Supreme Court's decision in *Mapp v Ohio*, proponents of the warrant preference theory continued to defend it on the ground that the interposition of a neutral magistrate was the best protection against wanton intrusion by police searching for evidence or seeking suspects. The exceptions to the warrant requirement, moreover, were to be strictly limited and categorical rather than case-by-case so as "to teach the nation's police forces how to conduct future investigations without stepping on important private domains."

Many commentators have debated whether the warrant preference theory is a useful guide to the interpretation of the Fourth Amendment as it applies to traditional criminal investigations.

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It is not my purpose, here, to join directly in this already extensive exchange. Instead, my focus is on a somewhat neglected subtopic in this debate — namely, those Fourth Amendment intrusions by local police that are for purposes unrelated or only partially related to the investigation of crime. Though little hint of it is evident in Fourth Amendment scholarship, municipal police spend a good deal of time responding to calls about missing persons, sick neighbors, and premises left open at night. Police spend relatively less time than is commonly thought investigating violations of the criminal law. Courts have often assumed that the warrant preference theory's presumptive probable cause and warrant requirements apply to community caretaking intrusions by police. They have commonly held that warrantless intrusions can be justified only when they fall within variously stated "exigent circumstances," "emergency," or "rescue" exceptions to this framework. These exceptions, however, accommodate only a portion of the factual circumstances in which police have traditionally intruded on private spaces to keep the peace, to protect people and property from perceived threats, or to render assistance to those in need. More fundamentally, the warrant preference theory itself affords at best an awkward language for assessing the constitutional reasonableness of such intrusions.

There is an alternative view of the Fourth Amendment that might be helpful in the evaluation of community caretaking intrusions. The Court has recently "turn[ed] away from the specific commands of the warrant clause" and toward a test of general reasonableness, at least in contexts not involving criminal investigation. Proponents of this approach argue that reasonableness itself is the touchstone for assessing the propriety of searches and seizures. They recognize that reasonableness may require that certain Fourth Amendment intrusions be supported by probable

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8 See Jonathan Rubinstein, *City Police* 92–93, 100 (Farrar, Straus & Giroux 1973) (discussing “sick assist,” “check the well-being of the occupants,” and “open property” calls commonly received by municipal police).

9 See Samuel Walker, *The Police in America* 112 (McGraw Hill 2d ed 1992) (“Most police work involves noncriminal events. Order maintenance or peacekeeping activities comprise an estimated two-thirds of all calls to the police . . . .”). See also Goldstein, *Policing a Free Society* at 24 (cited in note 1) (noting that studies of police “have dwelled on the high percentage of police time spent on other than criminal matters”).


11 See, for example, Amar, 107 Harv L Rev at 759 (cited in note 7) (noting that Fourth Amendment requires neither warrants nor probable cause, but “that all searches and seizures be reasonable”).
cause and by advance judicial authorization. The proliferation of exceptions to the probable-cause-and-warrant formula, however, itself demonstrates that this formula cannot constitute the Fourth Amendment's core. Proponents of the reasonableness approach emphasize that determinations of constitutional reasonableness are "pragmatic [and] contingent." Reasonableness is thus generally associated with highly contextual evaluations of whether intrusions on privacy are sensible, appropriate, and constitutionally tolerable, considering all the circumstances.

Significantly, the Court's turn to reasonableness is most marked in its "special needs" cases — cases in which some need beyond the normal need for law enforcement is said to justify departure from the probable-cause-and-warrant framework, with its associated categorical exceptions. Thus, when the administrator of a public hospital searches an employee's office files to determine whether a computer has been improperly acquired, the Government's special interest in the efficient operation of its workplaces requires an assessment of constitutional reasonableness outside the strictures of the warrant preference theory.

Similarly, the interest in maintaining discipline and good order in public schools justifies school officials in conducting reasonable searches of students — even in the absence of a warrant or probable cause — in order to confiscate water pistols and cigarettes. When such "special needs" are urged in justification of a Fourth Amendment intrusion, the Supreme Court has not mandated reflexive resort to the warrant preference theory, but has instead said that "courts must undertake a context-specific inquiry" that may justify departure from the usual framework and the assessment of an intrusion's constitutionality in reasonableness terms.

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12 See, for example, California v Acevedo, 500 US 565, 583–84 (1991) (Scalia concurring in the judgment) (noting that "reasonableness" requirement of Fourth Amendment may demand adherence to probable-cause-and-warrant framework where required at common law or where changes in surrounding legal rules render it now indispensable).
13 Amar, 107 Harv L Rev at 810 (cited in note 7).
15 See O'Connor v Ortega, 480 US 709, 719–22 (1987) (plurality opinion) (discussing character of work environment and special needs present in this environment).
17 Chandler v Miller, 117 S Ct 1295, 1301 (1997). The "special needs" that justify dispensing with a rigid warrant or probable cause requirement based on a balancing analysis have proliferated in recent years. See, for example, Vernonia School District v Acton, 515 US 646 (1995) (warrant and probable cause requirements not necessary to support reasonable drug test program); National Treasury Employees Union v Von Raab, 489 US 656 (1989) (same); Skinner v Railway Labor Executives Assn, 489 US 602 (1989) (same); Griffin v Wisconsin, 483 US 868 (1987) (warrant and probable cause not necessary
The overall argument here is simple. Whatever the merits of retaining the traditional warrant preference theory as a way of conceptualizing the rules surrounding criminal investigation, community caretaking does not fit within the central assumptions of this theory. The "reasonableness theory" of the Fourth Amendment can better and more sensitively accommodate those cases in which police officers have intruded on private places principally to serve legitimate community caretaking ends. Though the Court's "special needs" cases have been subject to legitimate criticism, these cases in fact respond to the plausible intuition that some intrusions on privacy implicate a different set of social practices than traditional law enforcement and are sufficiently unlike law enforcement intrusions so as to justify a distinct Fourth Amendment approach. This same intuition, however, applies to police intrusions to protect life and property or to serve other important community caretaking purposes. By identifying the criteria of reasonableness, courts can still protect privacy. At the same time, they can secure significant communal interests.

Part I explores how warrant preference theory distorts analysis of many community caretaking activities in which police routinely engage. This Part also reveals the extent to which a reasonableness assessment is already implicit in the case law. Part II then argues for a reasonableness approach in assessing police intrusions that are predominantly in service of community caretaking goals — an approach which several courts have already employed, relying for support on the Supreme Court's decision in Cady v Dombrowski, as well as the Court's "special

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when probation officer searches home of probationer pursuant to regulation satisfying Fourth Amendment's "reasonableness" requirement); New York v Burger, 482 US 691 (1987) (warrant and probable cause not necessary when police conduct administrative inspections of closely regulated business where a substantial government interest informs regulatory scheme, warrantless inspections are necessary to further scheme, and inspection program provides constitutionally adequate substitute for warrant requirement); Ortega, 480 US at 708 (plurality opinion) (warrant and probable cause not necessary elements of Fourth Amendment reasonableness when government as employer conducts work-related searches of employees' desks and offices); T.L.O., 469 US at 325 (warrant and probable cause requirements not necessary for searches of students by school officials, which should instead be assessed for reasonableness under all the circumstances).

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18 See Stephen J. Schulhofer, On the Fourth Amendment Rights of the Law-Abiding Public, 1989 S Ct Rev 87, 88–89 (discussing criticism but concluding that departure from the probable-cause-and-warrant framework is appropriate where "special needs" searches respond to important health and safety concerns or to the "internal governance imperatives" of self-contained public institutions like workplaces and schools).

needs" jurisprudence. Part II argues that adopting such an approach does not eviscerate Fourth Amendment protections, but in fact can lead to a more open assessment of the criteria of reasonableness in this context and even to more democratic deliberation about the appropriate role of police in a community. Part II concludes with an observation on all this for the subject of The University of Chicago Legal Forum Symposium — "Solutions for Overproceduralism in the Criminal Trial."

I. COMMUNITY CARETAKING AND THE WARRANT PREFERENCE THEORY

A. The Fourth Amendment and Community Caretaking


Both modern Fourth Amendment law and the modern warrant preference theory were formulated principally in cases involving criminal investigation. As Professor Landynski has noted, the Supreme Court began to interpret the Fourth Amendment in a reasonably consistent manner only during Prohibition, when aggressive federal enforcement created an "explosion" in the Court's Fourth Amendment jurisprudence. In the years before the Fourth Amendment was applied against the states in 1949, the Court repeatedly though not invariably endorsed the warrant procedure precisely to constrain federal law enforcement agents acting under the "excitement" and "zeal" induced by the pursuit of criminals. After Mapp v Ohio rendered the Fourth Amendment "practically, as well as nominally" binding on state and local police in 1961, the Warren Court, too, embraced the

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20 See note 17.
22 See, for example, Trupiano v United States, 334 US 699, 705 (1948) (noting that warrants should be required whenever possible because "[i]n their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed"), overruled in part by United States v Rabinowitz, 339 US 56 (1950), overruled in part by Chimel v California, 395 US 752 (1969); United States v Lefkowitz, 285 US 452, 464 (1932) (noting that "[s]ecurity against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."). But see Harris v United States, 331 US 149, 150 (1947) (broadly construing authority to search incident to arrest and noting that "only unreasonable searches and seizures come within the constitutional interdict"), overruled in part by Chimel, 395 US 752.
23 Donald Dripps, Akhil Amar on Criminal Procedure and Constitutional Law: "Here
warrant procedure as a necessary corrective to the ardor of criminal investigators. The Court noted that it was not enough that police conducting a search "reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." In an oft-quoted formulation of the modern warrant preference theory, the Court concluded that searches conducted outside the judicial process — without prior approval by a judge or magistrate premised on a deliberate, impartial assessment of probable cause — "are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."

To a large degree animated by assumptions about the nature of criminal investigation, then, proponents of the modern warrant preference theory solved the "syntactical mystery" of the Fourth Amendment's independent clauses by decreeing that "the announced right to be secure against unreasonable intrusions, followed immediately by a description of the means of obtaining a warrant, implies that the method described (search by warrant) is ordinarily the reasonable one." The theory's "per se" rule that searches and seizures should be conducted pursuant to warrants issued on probable cause, however, does not require that police always obtain such warrants. "[I]ndeed, it does not require them most of the time." The rule, then, "is 'per se' only in the sense that the police must secure a warrant unless they can demonstrate that the case fits within one of a number of specific exceptions that the Court has fashioned." These exceptions, however, must be categorical, rather than case-by-case, so that police are not left to make ad hoc assessments of reasonableness on their

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I Go Down That Wrong Road Again", 74 NC L Rev 1559, 1603 (1996) (discussing Mapp's effect on local police operations).
25 Id at 357.
26 Uviller, 25 Crim L Bull at 33 (cited in note 6) (discussing warrant preference theory). The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

US Const, Amend IV.
28 Id.
own. Their purpose, too, is thus prescriptive: to encourage police to go to a magistrate before intruding on private places in pursuit of crime, but also precisely to define in advance those circumstances in which police "may proceed without the magistrate's blessing." 29

The modern warrant preference theory, then, was pressed into service "in an effort to respond to seemingly intractable problems of police overreaching" in the enforcement of criminal laws. 30 As Professor Taylor persuasively argued over a generation ago, the theory introduced into twentieth century law an idea "largely unique to this century" — namely, that warrants constitute an important device for preventing police misconduct. 31 But the theory's taxonomic aspiration — its bold demand for advance judicial articulation of the circumstances in which police may proceed outside the probable-cause-and-warrant framework — became an equally important tool for fulfillment of the theory's mission of police constraint. Proponents of the warrant preference theory sought "unabashed control of future activities of law enforcement officers that might encroach upon constitutionally guarded security." 32 To these proponents, however, this control could be achieved only "if the police [were] acting under a set of rules which, in most instances, [made] it possible to reach a correct determination beforehand as to whether an invasion of privacy [was] justified in the interest of law enforcement." 33 The theory thus cast courts (and particularly the Supreme Court) in an essentially rulemaking posture — a posture that has produced the now familiar litany of exceptions to the probable-cause-and-warrant formula for police intrusions in service of criminal law enforcement.

To be clear, the warrant preference theory has generated many workable search and seizure rules designed to ensure that law enforcement agents do not wantonly intrude on privacy in the pursuit of evidence or suspects. The warrant process may not operate as the bulwark against overzealous police investigation

30 Steiker, 107 Harv L Rev at 856 (cited in note 7).
that some believed it might prove to be, but it has served to "inhibit the 'impulsive' search."\(^{34}\) When police operate without warrant, moreover, many of the categorical rules do map out "the otherwise strange terrain," allowing police to "converse more confidently about the nature of a proposed incursion."\(^{35}\) Courts acting within the assumptions of the warrant preference theory have thus at least partially secured the central objective of its proponents — to constrain police in advance from intrusions that might be deemed in retrospect to violate the Fourth Amendment.

It is worth pausing to consider, however, some demerits of this approach to Fourth Amendment adjudication. First, the warrant preference theory is essentially about form, rather than substance. The theory focuses our attention on the warrant requirement and the categorical exceptions to the probable-cause-and-warrant formula on the assumption that requiring police to operate pursuant to a warrant or within the confines of these exceptions will ensure that they behave reasonably across the run of cases. As Professors Wasserstrom and Seidman have pointed out, however, this approach may have diverted attention from the substantive command of the Fourth Amendment that searches and seizures actually be reasonable.\(^{36}\) The search-incident-to-arrest exception permitting the search of the passenger compartment of an automobile upon arrest of its occupant, for instance, in effect authorizes police intrusions that might be held unconstitutional if judged solely on their facts — since the passenger compartment is often beyond the arrestee's control and the exception is premised on the need to prevent arrestees from gaining possession of weapons or destructible evidence.\(^{37}\) Categorical exceptions of this type stem "from the theory that these seemingly unreasonable police actions are part of a broader class of police behavior that merits categorical approval."\(^{38}\) Such exceptions, however, paradoxically expand the police officer's authority to search in the attempt clearly to delineate it — prompting some observers to question whether these exceptions

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\(^{35}\) Uviller, 25 Crim L Bull at 44 (cited in note 6).


might amount "to a disregard of Fourth Amendment values." 39

This is not to say that the warrant preference theory has wholly blinded courts to the need on occasion to transcend its focus on the probable-cause-and-warrant formula, with its many categorical exceptions. Thus, in its recent "knock and announce" cases, the Supreme Court has made clear that even when police intrude on privacy pursuant to a warrant issued on probable cause, Fourth Amendment reasonableness still requires that absent special circumstances, police seek peaceable entry before forcing their way into a home. 40 In Winston v Lee, 41 the Court determined that on the facts of the case before it, searching for a bullet based on both probable cause and advance judicial authorization would nevertheless be unreasonable when the bullet was lodged in a suspect's body and could only be retrieved through surgery requiring general anesthesia. 42 It remains true, however, that "the Court's preoccupation with warrants and probable cause — ordaining these with one hand while chiseling out exception after exception with the other" — has resulted in less attention to the question "what, exactly, makes for a substantively unreasonable search or seizure." 43

Next, the theory's strong premise that police cannot be trusted to afford appropriate weight to privacy concerns may operate as a self-fulfilling prophecy: police may fail to exercise restraint precisely because they have been told that it is not their function to determine what constitutes a reasonable intrusion on privacy. 44 Others have commented more generally that the effort to constrain workplace discretion through ex ante supervision and the promulgation of rigid rules can have the unintended consequence of socializing those subject to such a regime to think that their role is characterized by unreflective rule implementation rather than the exercise of judgment. 45 Granted, the manner in which Fourth Amendment constraints are articulated consti-

39 Id at 231, 242.
40 See Wilson v Arkansas, 514 US 927, 929 (1995) (holding that "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment"). See also Richards v Wisconsin, 117 S Ct 1416, 1421 (1997) (rejecting blanket exception to knock-and-announce requirement for execution of search warrants in felony drug investigations).
42 See id at 767.
43 Amar, 107 Harv L Rev at 801 (cited in note 7).
44 See Wasserstrom and Seidman, 77 Georgetown L J at 35 (cited in note 36).
tutes only one element in the police officer’s work environment. But if a similar socializing effect can even partly account for the way police think about Fourth Amendment intrusions, it would constitute a significant and deleterious consequence of the warrant preference approach. Given the oft-expressed concerns that magistrates act as “rubber stamps” in the review of warrant applications, police administrators need to take responsibility for ensuring that such applications are based on evidence sufficient to justify coercive interference with people in the community.\(^46\) Since the overwhelming majority of police intrusions on privacy occur without warrant, moreover, inculcating respect for Fourth Amendment values within police departments must be a necessary part of the project of ensuring that police behave reasonably.

Finally, given the unforeseeable variety of cases and the inability to anticipate important factual nuance, the Warren Court’s boast that it could fashion “an established and immutable” catalogue of search and seizure rules was always at least partly vainglorious.\(^47\) “[E]ven seemingly ‘bright-line’ rules usually become blurred as the police and the adversarial process test their outer limits.”\(^48\) In the post-*Mapp* world, moreover, there was also something omitted within the warrant preference theory — a missing piece that derives from the fact that municipal police have multiple responsibilities in society, only one of which is the enforcement of criminal laws. Proponents of the modern warrant preference theory have been preoccupied with constraining law enforcement agents who intrude on Fourth Amendment interests in the pursuit of evidence or criminal suspects. It is thus not surprising that police intrusions in service of “community caretaking” responsibilities have received less attention — even though these intrusions profoundly implicate both the individual’s interest in privacy and community expectations about the social services that police provide.

2. Community Caretaking.

Communities have always looked to local police to perform social services unrelated or at best partially related to enforcing

\(^{46}\) See Wasserstrom and Seidman, 77 Georgetown L J at 34 (cited in note 36) (noting that “rubber stamp” quality of magistrate review of warrant applications “is an open scandal”).

\(^{47}\) Uviller, 25 Crim L Bull at 43 (cited in note 6). See also *Katz*, 389 US at 357 (noting that searches conducted without prior judicial approval are per se unreasonable “subject only to a few specifically established and well-delineated exceptions”).

"Community caretaking" denotes a wide range of everyday police activities undertaken to aid those in danger of physical harm, to preserve property, or "to create and maintain a feeling of security in the community." It includes things like the mediation of noise disputes, the response to complaints about stray and injured animals, and the provision of assistance to the ill or injured. Police must frequently "care for those who cannot care for themselves: the destitute, the inebriated, the addicted . . . and the very young." They are often charged with taking lost property into their possession; they not infrequently see to the removal of abandoned property. In those places where social disorganization is at its highest, police are even called upon "to serve as surrogate parent or other relative, and to fill in for social workers, housing inspectors, attorneys, physicians, and psychiatrists." Community caretaking, then, is an essential part of the functioning of local police. It in fact occupies such a high proportion of police time that one can even question "the value of viewing the police primarily as a part of the criminal justice system."

All this is obscured, however, in Fourth Amendment law. It is not uncommon for police to intrude into the homes of elderly
people in response to calls from anxious relatives unable to locate them. Police in many places routinely enter commercial premises found inexplicably open at night to secure the premises and to notify the owners that their property has been left vulnerable to invasion. These community caretaking intrusions, however, rarely uncover evidence of crime. Because Fourth Amendment claims are usually litigated in suppression hearings as part of criminal trials, the Supreme Court has had few opportunities to consider cases in which police have intruded on privacy for such purposes. State courts have entertained community caretaking cases more frequently. Their relative obscurity in the Fourth Amendment canon, however, is evident even upon considering their placement in Professor LaFave’s exhaustive treatise — where they are scattered in various sections under the rubric of intrusions for “other purposes.”

Community caretaking intrusions are unlike searches and seizures for the purpose of locating evidence or suspects in several important ways. First, the absence of a law enforcement motive often mitigates the harms associated with intrusions on privacy for the purpose of criminal investigation. Thus, when police enter the home of an elderly woman to ensure that she is not injured within, their “search” does not “damage reputation or manifest official suspicion.” Nor is it as intrusive as the normal

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56 See Rubinstein, City Police at 91 (cited in note 8) (noting that “[p]eople often call the police to complain that they have not seen a friend for a while”). See, for example, State v Gocken, 857 P2d 1074, 1081 (Wash App 1993) (describing warrantless “health and safety” intrusion by police into the condominium of a missing elderly woman at request of her friend); Guyot, Policing as Though People Matter at 270–71 (cited in note 49) (describing police entry into home on request of friend to check on the well-being of an elderly woman and subsequent discovery of missing woman’s dead body in bedroom).

57 See Rubinstein, City Police at 100 (cited in note 8) (noting that “open property” calls are commonly received by municipal police). See, for example, Banks v State, 493 SE2d 923, 926 (Ga App 1997) (discussing police intrusions into closed business premises found unlocked during a normal security sweep); Alaska v Myers, 601 P2d 239, 243–44 (Alaska 1979) (same).

58 See, for example, Wayne R. LaFave, 3 Search and Seizure: A Treatise on the Fourth Amendment § 5.5(d) at 200–02 (West 3d ed 1996) (discussing searches of containers for “purposes other than obtaining evidence”); § 6.6 at 389–410 (discussing intrusions into premises for “other purposes”); § 7.4 at 533–73 (discussing searches of vehicles for purposes other than seizure of evidence).

59 See Schulhofer, 1989 S Ct Rev at 116 (cited in note 18) (suggesting in discussion of regulatory inspections that absence of a law enforcement purpose might mitigate intrusion on privacy because of factors like the absence of official suspicion, but noting that regulatory and law enforcement goals can only rarely be disentangled). See also Sherry F. Colb, Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence, 96 Colum L Rev 1456, 1487 (1996) (noting that “targeting harm” of being “singled out from others through an exercise of official discretion that is not based on an adequate evidentiary foundation” is a distinct Fourth Amendment injury).
search for evidence on such premises — a search which criminal investigators will pursue throughout the home until the evidence is found or determined not to be present. Similarly, the potential for overzealousness is often reduced when police serve community caretaking, as opposed to law enforcement ends. Motivated by the desire to make felony arrests, police may be tempted to search a warehouse based on mere suspicion that evidence will be found within. This temptation is less likely to be present, however, when police answer complaints about noxious odors or barking dogs. Admittedly, these observations apply to only a portion of community caretaking activity — because community caretaking and law enforcement objectives can be entangled, a point to which we shall return. It remains true, however, that police pursuing community caretaking ends are frequently not engaged in what Justice Jackson so famously termed "the often competitive enterprise of ferreting out crime." They are thus not imbued with the adversarial spirit that so prompted elaboration of the warrant preference theory.

Next, the probable-cause-and-warrant framework is often plainly inappposite to consideration of the reasonableness of community caretaking intrusions. The textual command of the Warrant Clause that no warrants shall issue "but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized" lends itself to a construction posing the "commonsense, practical question" whether police or other state actors have sufficient reason to believe that specified people or things to be seized are to be found in a given location. This need not limit the application of the Warrant Clause solely to criminal investigation. As the Court has repeatedly

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60 See Samuel Walker, The Police in America at 61–63 (cited in note 9) (noting that officers in traditional departments often value felony arrests, since these arrests validate a "crime fighter" image).
61 See Goldstein, Policing a Free Society at 25 (cited in note 1) (noting that police spend "large number of hours" on matters related to stray and injured animals).
64 Thus, as Professor Schulhofer has observed, the "central preoccupation" of the Framers was not the excessive zeal of Crown officers seeking evidence to prosecute crime, but the writ of assistance — that blanket warrant authorizing royal customs officials to undertake searches that "were not in aid of criminal prosecution or 'law enforcement' in the traditional sense," but that generally had as their objective the seizure and forfeiture of untaxed goods. Schulhofer, 1989 S Ct Rev at 115 (cited in note 18). The Warrant Clause's textual command is not facially inappposite to searches in aid of forfeiture, however, since they do seek the seizure of specified goods.
said, however, warrants issue only on probable cause. And probable cause traditionally means a "fair probability" that contraband, evidence, or suspects "will be found in a particular place."

In many community caretaking contexts, however, the relevant question is not whether police have an adequate basis to believe they will find particular persons or things in a particular place. Instead, the question is whether they have sufficient reason to act. Thus, when police enter commercial premises inexplicably left open at night in order to secure the property, they are not looking for specific persons or things. They are performing an historically-anchored "watchman's" role. Lacking probable cause to search, however, or the ability to satisfy the particular description requirement of the Warrant Clause, police could not obtain a traditional judicial warrant to support their entry even if they sought one in advance. Similarly, when they respond to screams emanating from an apartment in the middle of the night, police have no idea whether they will find inside the victim of an ongoing assault, the results of an accident or nightmare, or something else entirely. No warrant could specify "the persons or things to be seized."

The authority of police to enter an apartment in response to screams, of course, has been viewed as self-evident, as "inherent in the very nature of [the] duties [of] peace officers." It is obvi-

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65 Vernonia School District v Acton, 515 US 646, 653 (1995) (noting that warrants cannot be issued "without the showing of probable cause required by the Warrant Clause"); Griffin v Wisconsin, 483 US 858, 877 (1987) (noting that constitutionally mandated judicial warrants may only issue upon probable cause). Griffin recognized that administrative search warrants arguably present an exception to the rule requiring warrants to issue only on probable cause, but noted that such warrants are not necessarily issued by courts and that they present special circumstances in which probable cause is formally defined to denote reasonableness, rather than a quantum of evidence for the belief justifying a search. Id at 877-78 & n 4.

66 Gates, 462 US at 238. See also United States v Sokolow, 490 US 1, 7 (1989) (same); National Treasury Employees Union v Von Raab, 489 US 656, 667 (1989) (noting that probable cause concept is related to criminal investigation); O'Connor v Ortega, 480 US 709, 723 (plurality opinion) (noting that concept of probable cause is rooted "in the criminal investigatory context"); South Dakota v Opperman, 428 US 364, 371 n 5 (1976) (noting, in upholding inventory searches premised on standard procedures, that "[t]he standard of probable cause is peculiarly related to criminal investigations, not routine, non-criminal procedures").

67 Vernonia, 515 US at 653 (noting that warrants cannot be issued "without the showing of probable cause required by the Warrant Clause"); Griffin, 483 US at 877 (noting that constitutionally mandated judicial warrants may only issue upon probable cause).

68 See note 26, quoting Fourth Amendment.

69 United States v Barone, 330 F2d 543, 545 (2d Cir 1964). See also Wayne v United States, 318 F2d 205, 211 (DC Cir 1963) (noting that no warrant is required "to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a
ous that police "must search at once through the pockets of a pedestrian lying unconscious on the street [and] must rush into a house in response to a cry for help." Courts operating within the assumptions of the warrant preference theory have validated many community caretaking intrusions of this type on the ground that they fall within variously formulated "exigent circumstances," "emergency," and "rescue" exceptions to the probable-cause-and-warrant formula. The very obviousness of these exceptions as applied to police intrusions in response to screams, fires, and cries for help, however, has concealed the extent to which these community caretaking "exigencies" rest uncomfortably within the assumptions of the warrant preference theory.

In the context of criminal investigation, exigencies are defined by a law enforcement mission (supported by probable cause) that will be frustrated in the time needed to obtain a judicial warrant. Thus, police enter a home in hot pursuit of a fleeing suspect. Was evidence threatened with removal or destruction in the period in which a warrant might have been obtained? Time (or the lack thereof) delineates exigency in these traditional law enforcement cases. To quote a standard textbook, exigent circumstances involve situations "in which an officer had probable cause to search, but had no time . . . to seek a warrant. The exigent circumstances exception merely excuses the officer from having to obtain a magistrate's determination that probable cause exists; it does not permit a search in the absence of probable cause." Defined in this way, the exigent circumstances exception satisfies the warrant preference theory's mandate that any exceptions to the probable-case-and-warrant framework be well-delineated and categorical, so that police know the limits on their authority in advance.

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70 H. Richard Uviller, Virtual Justice 82 (Yale 1996).
71 See, for example, Barone, 330 F2d at 543–44 (upholding warrantless entry into apartment to investigate the source of loud screams).
72 See Warden v Hayden, 387 US 294, 298–99 (1967) (discussing "hot pursuit").
73 See Johnson 333 US at 15 (discussing threat of destruction of evidence).
75 This is not to say, however, that even in the law enforcement context, the exigency exception is perfectly clear-cut. Thus, in Welsh v Wisconsin, the Court introduced an implicit reasonableness component to this exception by holding that even when police have probable cause to search for evanescent evidence in a home, "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense." 466 US 740, 753 (1984). Welsh does not depart from the "time is of the essence" approach to exigency, however, since the seriousness of an offense works only "as
For community caretaking intrusions, however, the exigency concept is considerably less straightforward. Thus, when police intrude on privacy to respond to screams in the night, the exigent circumstances exception is not limited by the probable-cause-but-no-time formula. Police lack probable cause to search for or seize anything in particular when they answer cries from behind an apartment door. Their intrusion in response to such cries is nevertheless proper. Exigency here, then, means something like “a compelling demand for immediate action.”

But the relevance of time as a limiting principle in the exigency equation seems less apparent in these community caretaking intrusions — since police could not have obtained a traditional judicial warrant to authorize their entry in any event. Moreover, this definition of exigency sounds very much like the importation into the exigency concept of a case-by-case assessment whether an intrusion was appropriate in the circumstances.

Courts have sometimes seemed to recognize that the exigency exception is a species apart from many other categorical exceptions when applied to police actions that “are not primarily law enforcement activities.” They have opined that “it is not possible to articulate a succinct yet exhaustive list of circumstances that qualify as ‘exigent.’” They have observed that exigency seems to be “more of a residual group of factual situations that do not fit into other established exceptions.” In fact, the exigency exception as employed in these community caretaking cases is neither “specifically established” nor “well-delineated.” As Professor Uviller has suggested, exigency in this arena is in fact an “imp” — an imp that “bedevils much of Fourth Amendment jurisprudence.” The existence of such an exception thus points out that in the community caretaking context, proponents of the warrant preference theory have not yet fulfilled their aspiration that police authority to intrude on privacy be carefully defined in advance.

a one way street” — prohibiting some intrusions when the offense is truly minor, but not authorizing intrusions even when the crime under investigation is very serious unless the probable-cause-but-no-time formula is satisfied. See Wasserstrom, 27 Am Crim L Rev at 138 (cited in note 10).

76 Uviller, Virtual Justice at 82 (cited in note 70).
77 Id at 83.
78 United States v Rohrig, 98 F3d 1506, 1515 (6th Cir 1996).
79 Murdock v Stout, 54 F3d 1437, 1440 (9th Cir 1995).
81 Uviller, Virtual Justice at 82 (cited in note 70).
Of course, the warrant preference theory is simply a theoretical construct that lends meaning to the Fourth Amendment's general terms and that thus helps in the resolution of cases. One would be hard pressed to conform all of Fourth Amendment law to any idealized theory of the Amendment's interpretation. The question, then, is not whether the exigency concept as applied to community caretaking intrusions adheres to the pristine aspirations of the warrant preference theory, but whether it provides an adequate conceptual framework for considering such intrusions. The case for assessing community caretaking intrusions in terms of their post hoc reasonableness emerges in part from consideration of the ways in which the exigency concept has hindered courts in their efforts to resolve cases in which police have intruded on privacy to perform important community caretaking tasks. It is to that subject, then, that we turn.

B. Exigency and Community Caretaking

1. Missing Persons.

Police routinely receive calls from friends, neighbors, relatives, and employers expressing concern about people who have not been heard from over a period of time. These people are often elderly and the callers are often fearful that the missing person may be ill or even dead. Police must respond to such calls, but absent unusual circumstances, they in no way conceive of them as implicating law enforcement objectives. Patrol officers typically visit the person's residence (often after some delay) and they knock on the door. All is well if the person answers. But what if there is no response?

This was the problem in State v Bridewell. There, a friend received UPS packages for her neighbor, Bridewell, who lived in an isolated, rural area. The friend became concerned when, after three or four days, Bridewell had not returned her telephone call about the packages. She knew that Bridewell lived alone and worked as a logger on his premises; he had experienced some health problems in the past. The friend drove to his house in

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82 See Rubinstein, City Police at 91 (cited in note 8).
83 See note 56.
84 See Rubinstein, City Police at 91 (cited in note 8).
85 759 P2d 1054 (Or 1988).
86 Id at 1056. The neighbor also informed police that Bridewell had told her his life had been threatened — a point not further elucidated in the Oregon Supreme Court's opinion. Id.
the evening and found Bridewell's dogs chained to the front porch, the front door open, and Bridewell's two pickup trucks gone. When she entered the house, she observed it in a state of disarray; after spying an empty pistol holster on the couch, she drove to the sheriff's office and related her observations to police. The following morning, deputies responded to the scene. They found the chained dogs and open door the neighbor had described; after calling for Bridewell, the police walked through the premises in search of him. They discovered him in his shop alive and well, but also in the company of 354 marijuana plants.

How should this case be treated within an “exigent circumstances” or “emergency” framework? The officers in Bridewell lacked probable cause to believe they would find anything in particular in Bridewell’s home. Certainly when they arrived the next morning to find the premises just as Bridewell’s neighbor had described, however, there was reason to be alarmed for Bridewell’s safety — a standard of justification approaching that deemed acceptable by many courts in the context of an emergency entry. But following their department’s custom of inquiring into missing person reports during daylight hours, the officers waited twelve hours to go to the scene. Clearly, they did not treat the matter as requiring an emergency response. Could there then be exigent circumstances supporting their warrantless entry? To the state appeals court, this was a “community caretaking” search, and so tested against a general standard of “reasonableness” that, in this case, justified the officers in entering the home to locate Bridewell. According to the Oregon Supreme Court, however, there were no exigent circumstances. There was also no true emergency. Moreover, the court declined even to consider the argument that the officers’ intrusion was reasonable for Fourth Amendment purposes in the absence of legislative

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87 Id.
88 See id at 1056-57.
89 The Oregon Supreme Court recognized an “emergency aid” exception to the probable-cause-and-warrant formula distinct from the “emergency/exigent circumstances” exception and suggested that a “reasonable belief or suspicion” that an emergency existed might apply to the former exception. The court, however, determined that the “emergency aid” exception requires a “true emergency” and that none was presented on the facts. 759 P2d at 1058.
90 Id.
91 State v Bridewell, 742 P2d 648, 650 n 1 (Or App 1987) (citing testimony of an officer that he elected to visit Bridewell’s home in the morning because “[i]t didn’t seem like that big of an emergency”).
92 Id at 652.
93 752 P2d at 1058.
authorization for police to perform community caretaking tasks.  

"Missing persons" cases, then, are illustrative of a range of police activity in which Fourth Amendment rules fashioned to constrain criminal investigation run up against the reality that "police work includes social service and order maintenance as well as or rather than law enforcement." Such cases can sometimes be assimilated to an emergency model. Police delay in responding to a missing person report has prompted some courts, however, to refuse to invoke the exigency exception on the theory that there was adequate time to obtain a judicial warrant. And some of these cases can present a real twist. Thus, the Oregon Supreme Court held in Bridewell that the passage of time had dissipated any possible exigency, since police could have gone to a magistrate. At the same time, the court concluded that police lacked probable cause to obtain a warrant in any event.

Commonwealth v Bates illustrates the same problem even more starkly. In Bates, a woman disappeared from a restaurant during dinner and was reported missing by her dinner companion. Police dispatched to her apartment some three hours later knocked on the unlocked door. They opened it when they heard a television set's volume change, but could still rouse no one to respond. The reviewing court noted that it was "no doubt... appropriate to look into the apartment" in search of the missing woman. The court nevertheless ruled that the intrusion violated the Fourth Amendment on the theory that the officers

94 Id at 1059. The court implied that if police perform community caretaking functions pursuant to "statutory or other authority from a politically accountable body," evidence found as a result might be admissible in a criminal trial. The Oregon legislature thereafter passed a statute purporting to authorize police to perform such functions and to enter or remain upon premises "if it reasonably appears to be necessary" to prevent serious harm to persons or property, to render aid to injured or ill persons, or to locate missing persons. See Oregon Revised Statutes § 133.033 (1996).


96 See, for example, State v Jones, 947 P2d 1030, 1038 (Kan App 1997) (where parents had not heard from their son in three days, he had inexplicably missed a dinner appointment and was known to have recently made an acquaintance of whom he was afraid, emergency doctrine justified police entry into son's home).

97 See, for example, Commonwealth v Bates, 548 NE2d 889, 892 (Mass App 1990).

98 See 759 P2d at 1057–58.

99 548 NE2d 889.

100 Id at 891.

101 Id (emphasis added). A criminal case arose when the officers in Bates opened the door to find an intoxicated man lying on a couch on top of a handgun and ammunition. Bates, who was eventually identified as the missing woman's dinner companion, was charged with unlawful firearms possession. Id at 890–91.
should have obtained a warrant during the three hours after police first received the report that the woman was missing.\textsuperscript{102} The police in Bates, however, did not know whether the missing woman had been kidnapped, had gone to the movies, or even whether she lived alone. It is beyond argument that they lacked probable cause to believe that anything in particular would be found in the apartment, nor could they specify any person or thing to be seized.

The failure to obtain a warrant should not be the basis for condemning an otherwise appropriate intrusion when a warrant could not have been obtained in any event. Bridewell and Bates thus evidence real confusion in application of the exigency concept. But the confusion stems not just from a failure to understand that the exigent circumstances exception is not limited by the probable-cause-but-no-time formula when applied to community caretaking intrusions. These cases reflect a more fundamental uncertainty about what norms should govern police intrusions in service of community caretaking, as opposed to law enforcement ends. Thus, what is an “emergency” legitimating an otherwise invalid intrusion? The propriety of entering a burning building “is too plain to require explanation.”\textsuperscript{103} But what about intruding into a home to locate a missing person? Or responding to dogs left barking in apartments for days on end?\textsuperscript{104} The Supreme Court has never attempted to formulate categorical rules defining for police when they may intrude on privacy in pursuit of community caretaking objectives. It is not surprising, then, that courts operating within the assumptions of the warrant preference theory sometimes lose their bearings in community caretaking cases.

They are also diverted from consideration of important aspects of the community caretaking problem. Thus, the Bridewell court might well have considered how community residents would have viewed the behavior of the local police in that case if they had failed to enter Bridewell’s home, not “pursu[ing] the possible necessity for rescue on the facts then known,” and Bridewell had in fact faced a life-threatening situation within.\textsuperscript{105} Both tort and criminal law, after all, have commonly afforded privileges to pri-

\textsuperscript{102} Id at 892.


\textsuperscript{104} See, for example, People v Thornton, 676 NE2d 1024, 1028–29 (Ill App 1997) (applying emergency doctrine to rescue of dog).

\textsuperscript{105} Wayne R. LaFave, Police Motives and Searches ‘For a Benevolent Purpose’, 1994 WL 530213, *3 (O.J. Commentary) (advocating this inquiry in “benevolent search” cases).
vate actors to enter on the property of another so long as it reason-
ably appears necessary to prevent serious harm to that person
or to a third person (or to the property of either), unless the pri-
vate actor knows or has reason to know "that the one for whose
benefit he enters is unwilling that he shall take such action."106

The Fourth Amendment might conceivably constrain police in
situation where tort and criminal law would afford a privilege to
friends and neighbors. But when courts mistakenly assimilate
community caretaking to a probable-cause-but-no-time formula,
they fail even to consider what Fourth Amendment norms should
govern police intrusions for the purpose of protecting human life.

2. Burglary Calls and Premises Left Open at Night.

The confusion evident in at least some missing person cases
can also be found in cases where police have intruded on privacy
principally to protect property. Here, too, the probable-cause-but-
no-time formula is often inapposite to the evaluation of such in-
trusions. Thus, when police enter an apartment to turn off water
that is leaking from one apartment into another, they could not
have obtained a traditional judicial warrant to authorize this in-
trusion even if they had sought one in advance. Courts assessing
such intrusions after the fact, then, must in effect inquire
whether it was appropriate under the circumstances for police to
have acted as they did.107 Some intrusions of this type, however,
involve situations in which police have acted to protect property
against criminal harms. Courts have wavered about the appro-
priate norms that should govern such intrusions, sometimes as-
similating them to the probable-cause-but-no-time formula in a
way that discounts communal interests in the social services pro-
vided by police.

Consider United States v Erickson.108 In this case, Tacoma
police were dispatched to investigate a suspected burglary at a
suburban home. On arrival, an officer spoke to two neighbors.
They told him they had seen two men dragging a large plastic

106 American Law Institute, 1 Restatement Torts 2d § 197 (ALI 1965). See also Bride-
well, 759 P2d 1054, 1060 n 5 (noting that Oregon criminal trespass laws privilege entry to
prevent serious harm to another).

107 Compare United States v Boyd, 407 F Supp 693, 694 (S D NY 1976) (warrantless
entry supported by exigent circumstances where leaking water "presented a dangerous
condition which, if allowed to continue might well have caused the collapse of ceilings and
walls, endangering the lives of the inhabitants of the apartments") with State v Dube,
655 A2d 338, 339–40 (Me 1995) (upholding warrantless entry to assist in addressing apart-
ment leak without discussion of whether collapse was imminent).

108 991 F2d 529 (9th Cir 1993).
bag, which appeared to be full of heavy items, across the back-
yard of a nearby residence. The neighbors reported that the men
had left the bag to retrieve a car, which they then used to carry
the bag away.\textsuperscript{109} The officer walked into the backyard of the resi-
dence. He saw no signs of entry, but did observe an open base-
ment window covered by a black plastic sheet. Because the sheet
covered a space large enough for an intruder to have gained ac-
cess to the home, the officer pulled the plastic from the window
and looked inside.\textsuperscript{110} When he observed numerous marijuana
plants, he immediately contacted a supervisor to prepare an ap-
lication for a search warrant. Police eventually seized from the
home marijuana plants, cultivation equipment, and documentary
evidence. They also determined that the home had, in fact, been
burglarized.\textsuperscript{111}

Courts might well differ in their assessment whether, on
these facts, an emergency was presented — or, for that matter,
whether it was reasonable for police to have looked into the
basement to ascertain whether the home was secure. The Fourth
Amendment question in \textit{Erickson}, then, is not clear-cut. To the
Ninth Circuit, however, this was a simple case. The court admit-
ted that “[i]nvestigating reports of burglaries undoubtedly quali-
ifies as one of [the diverse] community caretaking functions” of
local police.\textsuperscript{112} The court concluded, however, that to intrude on
private places in response to a burglary call, police must be able
to point to exigent circumstances — meaning no time to obtain a
warrant and probable cause to believe the burglary is in progress
at the moment police arrive.\textsuperscript{113} The court came to this conclusion
on the theory that the exigent circumstances exception itself
“adequately accommodates” the competing interests.\textsuperscript{114}

The factors omitted from this equation, however, are worth
comment. The exigent circumstances exception, thus construed,
does not include in its analysis that the officer in \textit{Erickson} had
reason to fear for the safety of the home’s occupants and the secu-
ritry of their property — even if he had less than probable cause to
believe that burglars were within. The probable-cause-and-no-
time formula similarly affords no weight to the fact that the offi-
cer, \textit{acting on behalf of the property owner}, only minimally in-

\begin{footnotes}
\item[109] Id at 532.
\item[110] Id.
\item[111] Id.
\item[112] 991 F2d at 531.
\item[113] Id at 533.
\item[114] Id.
\end{footnotes}
truded into the home. The Ninth Circuit's approach simply assimilates police in their guise as community caretakers to police in their role as law enforcement agents.

This approach, moreover, creates problems for community caretaking activities in which police commonly engage. Thus, police patrolling at night in many places routinely check “closed-for-business” commercial premises to make sure they are secure. What happens when police find a business open and they enter in order to lock the premises and to ensure that no intruders are within? To courts in Georgia, Illinois, Alaska, and California, officers patrolling commercial areas may enter open premises for this limited purpose without warrant and on something less than probable cause to believe evidence of a crime or its perpetrator will be found inside.\(^1\) The Tenth Circuit, however, has concluded that there is no general community caretaking “exception” to the presumptive warrant and probable cause requirements and that a commercial establishment found unsecured does not present an exigency of sufficient proportion to justify warrantless entry.\(^2\) The decision in *United States v Bute*\(^3\) prompted a vigorous dissent to the effect that the majority was ignoring traditional police practices broadly embraced by local communities: “[C]hecking out commercial premises inexplicably left not just unlocked but wide open in the middle of the night is not an activity that society tolerates; it is one society demands.”\(^4\)

Some might argue that neither the purpose of an intrusion on privacy nor its public acceptability should play any role in determining the proper approach to the resolution of Fourth Amendment issues because “rights protect individual interests by excluding appeals to the common good . . . as a justification” for

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1. See, for example, *Banks v State*, 492 SE2d 923, 925 (Ga App 1997) (officers who find an apparently closed business unlocked during a normal security sweep “may conduct a limited intrusion on the business premises for the sole purpose of securing the area and ensuring no intruders are present” when they have no reason to believe owner would object and they possess articulable suspicion that unauthorized persons may be present); *Illinois v Gardner*, 459 NE2d 676, 681 (Ill App 1984) (warrantless entry of unlocked automotive repair shop at night reasonable where officer was following departmental policy and entered only to ascertain whether unauthorized persons had gained entry and to notify owner that building was not secure); *Alaska v Myers*, 601 P2d 239, 243–44 (Alaska 1979) (routine business security checks undertaken on behalf of property owners and in the absence of reason to believe they would object “are procedures to which the traditional concept of probable cause is inapposite” and require neither the issuance of a judicial or administrative warrant); *California v Parra*, 30 Cal App 3d 729, 732–34 (1973) (entry into florist shop found inexplicably open reasonable in light of need to provide for its security).


3. 43 F3d 531 (10th Cir 1994).

4. Id at 542.
their limitation. Community residents, after all, might well support suspicionless sweeps of the apartments in a crime-ridden housing project for the purpose of rooting out narcotics trafficking — a social service they might deem at least as important as locating missing persons, responding to calls from neighbors who suspect that a home has been burglarized, and protecting commercial premises found open at night. The Fourth Amendment, however, is precisely about restraining such majoritarian preferences in order to provide security to individuals in “their persons, houses, papers, and effects.” The probable-cause-and-warrant formula with its associated categorical exceptions, moreover, is an essential component of this checking function.

This argument, however, strays far from the field of actual constitutional practice. As Professor Sunstein has observed more generally, since “no right is absolute” in American law, the exploration of rights is essentially an exploration into the conditions and reasons that justify their limitation. And in the Fourth Amendment context, the Court has frequently examined both the reasons supporting a privacy intrusion and prevailing social norms in determining the appropriate standards with which to assess it. Thus, in *Camara v Municipal Court*, the Supreme Court found it “obviously necessary [ ] to focus upon the governmental interest” at stake in municipal health and safety inspections in assessing their constitutionality. The Court observed that the “long history of judicial and public acceptance” of such inspections was a factor in concluding that they are constitutionally reasonable even in the absence of traditional probable cause or any individual suspicion related to the premises to be inspected. The Court in effect approved such inspections based

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120 See note 26, quoting Fourth Amendment text.


123 Id at 534.

124 Id at 537. The Court concluded that “probable cause” exists to support issuance of a warrant in the municipal code context provided that “reasonable legislative or administrative standards for conducting an area inspection are satisfied . . . .” Id at 538. The
on their general reasonableness while reaffirming that the public interest in ferreting out crime "would hardly justify a sweeping search" of dwellings in the absence of probable cause to believe that evidence might be found in a particular place.  

Like the health and safety inspections in Camara, many community caretaking intrusions evoke a plausible intuition that when the state acts on behalf of the object of search to protect life or property, its intrusion on privacy is fundamentally different from an intrusion for the purpose of seizing evidence or suspects invaded. Community caretaking intrusions, moreover, like health and safety inspections in Camara, also have a longstanding history and serve compelling social ends. This does not mean the Fourth Amendment is inapplicable to community caretaking intrusions. But it does suggest that the ordinary rules of Fourth Amendment adjudication associated with criminal law enforcement may be inadequate for assessing such intrusions — particularly if these rules prevent local police from performing broadly supported public functions that have historically distinguished them from the federal agents engaged more singularly in the adversarial business of enforcing the criminal law.

3. Victims.

While community caretaking is unlike the enforcement of criminal laws, it is important to note, here, that community caretaking cannot be disentangled from law enforcement in many cases. Most commonly, these cases involve situations in which police intrude on private places to assist potential victims, but in circumstances where they may also find suspects or evidence of crime. In this context, intrusions may well damage the reputations of people whose privacy interests are invaded. Police may also be "acting under the excitement that attends the capture of persons accused of crime." When community caretaking interests predominate over law enforcement interests in such cases, however, the ordinary "law enforcement" rules are still inadequate for assessing the propriety of police intrusions.

Consider in this regard Mitchell v Arkansas. In Mitchell, Court thus partially transformed the practices associated with such code enforcement by imposing on them a warrant requirement. In effect, however, these warrants issue as an aspect of Fourth Amendment reasonableness, rather than because the state has made a showing of probable cause in its traditional sense.

125 Id at 535.
127 742 SW2d 895 (Ark 1988).
police received an anonymous tip from a distraught woman who said she wished to report “something [she was] not supposed to know.” In a tape-recorded conversation, the woman told police, “You need to go to 3408 Wilma, Short Wilma, and there is a man dead there.” The woman said she had overheard that the victim had been shot the night before, and that his body had been left alone on a couch. She added, “Everybody has left it. That is all I am saying but I feel sorry for a man being dead in that house all night.” The woman refused to provide further information: “I overheard it. That’s all I’ll tell you right now.” Officers promptly dispatched to the scene at about 11:00 a.m. found no such address on Short Wilma, but a house bearing that number on nearby Wilma Street.

An officer knocked. Receiving no response, he spoke to a neighbor who had heard no shots and seen nothing unusual. Officers then tried the door and, finding it unlocked, turned the knob and pushed the door inward a few inches until it was caught by a chain. They saw a couch and what appeared to be a body wrapped in a blanket on the floor. Mitchell was arrested exiting from a back window; he told the officers that the person in the living room may have been shot and was possibly still alive. Police then entered the home to find the dead victim. The Arkansas Supreme Court suppressed all the evidence resulting from this series of events, ruling that when the officers opened the door, they lacked probable cause and that, moreover, there was no exigency — since all the information provided by the tipster suggested that if a victim existed, he was already dead.

Mitchell is a provocative case that requires further elaboration. First, there aren’t many cases like Mitchell. Most courts addressing the question whether an immediate search for purported homicide victims is justified by exigent circumstances have said, with the Mitchell dissent, that such victims — who might still be alive — are entitled to the benefit of the doubt.

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128 Id at 896.
129 Id.
130 Id.
131 742 SW2d at 896.
132 Id at 897.
133 Id.
134 Id.
135 742 SW2d at 898–900.
136 Id at 900. See, for example, State v Kraimer, 298 NW2d 568, 578 (Wis 1980) (though defendant claimed to have shot and killed his wife four days earlier, “immediate investigation was necessary in order to render aid to Mrs. Kraimer, if alive”). But see
Moreover, many courts have adopted emergency or rescue doctrines to make clear that when police are responding to a dire situation, they may act on something other than probable cause that they will find suspects or evidence of crime. Thus, in New York, warrantless intrusion in “emergency” cases is permissible when police have reasonable grounds to believe there is an immediate need to protect life or property; when their search is not “primarily motivated” by the intent to arrest or seize evidence; and when there is some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.\footnote{Condon v Colorado, 489 P2d 1297, 1300 (Colo 1971) (en banc) (odor of a decomposing body did not justify emergency entry into home since “there would be no hope of revival at any rate”).}

Analyzing Mitchell solely as a case involving the investigation of crime, however, the Arkansas Supreme Court was not flat out wrong in suggesting that an anonymous and uncorroborated tip — sending officers to an address that did not exist — was not enough to establish probable cause to believe that a murderer or the evidence of his crime would be found inside. But this conclusion merely points out the inappropriateness of applying law enforcement norms to situations in which police may act in part to enforce the criminal law, but where community caretaking concerns predominate.

The emergency and rescue doctrines fashioned by many courts already soften the edges of the exigency analysis — implicitly recognizing that some police intrusions involve more than the normal interest in law enforcement and that in these circumstances, the severity of certain harms to be prevented justifies a

\footnote{People v Mitchell, 347 NE2d 607, 609 (NY App 1976). In Mitchell, a chambermaid disappeared shortly after reporting for work and police, after checking all vacant rooms and the public areas of the hotel in search of her, conducted a room-by-room search of the floor on which the maid had last been seen. The New York Court of Appeals upheld this search — which resulted in the location of her murdered body — holding that where police have reasonable grounds to believe there is an emergency at hand which requires immediate action to protect life or property, they need only have “some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.” Id. Several states have adopted the New York test, see LaFave, 3 Search and Seizure: A Treatise on the Fourth Amendment § 6.6 (a) at 393 n 17 (cited in note 58) (noting cases), while other jurisdictions have recognized the propriety of emergency entry but have required that such entry be supported by probable cause to believe that an emergency exists. See, for example, Earle v United States, 612 A2d 1258, 1263 (D DC 1992) (warrantless entry in response to emergency requires, inter alia, “probable cause ... to believe that an immediate entry is necessary to assist someone in danger of bodily harm”). Still other jurisdictions have adopted “reasonableness” tests, holding that a police officer’s “objectively reasonable belief that a person might be in need of immediate aid or assistance will justify a warrantless entry.” State v Blades, 626 A2d 273, 280 (Conn 1993).}
reduction in the evidentiary standard by which one evaluates the propriety of an intrusion. These doctrines, however, vary from state to state and sometimes impose peculiar requirements—like the requirement in Bridewell that police prove correct in their assessment that an emergency exists before an intrusion can be upheld as consistent with the Fourth Amendment. In addition, these doctrines still limit inquiry into the appropriateness of an emergency intrusion by generally excluding consideration of the nature of the intrusion itself. They thus continue to obscure the central issue in Mitchell, as seen by the dissent: namely, whether a minimal police intrusion—"opening the door as far as the chain latch would permit, with no actual entry"—was unreasonable when prompted by legitimate concern that a victim of gunshot might lie injured within.

All this suggests that a less rule-bound, more flexible approach to assessment of the appropriateness of community caretaking intrusions would be preferable. This claim, of course, has frequently been proffered even in the context of traditional law enforcement. Thus, Professor Alschuler has argued that the seriousness of the harm that a search might prevent and the intrusiveness of the police invasion necessary to avoid this harm should be part of the probable cause equation. Professors Wasserstrom and Seidman have suggested that a fully rational solution to the search and seizure problem would allow consideration of degrees of probability...the extent of the privacy invasion, the expected utility of the search, and the seriousness of the crime under investigation. The standard response to such arguments by proponents of the warrant preference theory has been that a graduated, circumstantial approach to Fourth Amendment adjudication would deprive courts of the ability to constrain police "in their ex ante decisions about when and whether to search and seize." Whatever the salience of this observation in the law

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138 See 759 P2d 1054, 1058 (Or 1988).
139 742 SW2d at 900.
140 See Alschuler, 45 U Pitt L Rev at 243–56 (cited in note 38).
141 Wasserstrom and Seidman argue that the Court has rejected this approach to Fourth Amendment adjudication across the run of traditional law enforcement cases because its case-by-case character would impose undue burdens on the Court, would fail to provide guidance to police, and is unduly subject to manipulation. They also argue that the Court lacks the theoretical tools to offer persuasive accounts of how the relevant factors should be assessed— a point which is disguised in the formalism of the warrant preference approach. Id at 50. For a general endorsement of the reasonableness approach notwithstanding these reservations, see Amar, 107 Harv L Rev at 762–85 (cited in note 7).
142 Steiker, 107 Harv L Rev at 854 (cited in note 7).
enforcement context, however, it has substantially diminished application to community caretaking for reasons that are developed below.

II. COMMUNITY CARETAKING AND REASONABLENESS

A. The Fourth Amendment and Community Caretaking Reassessed

1. The Reasonableness Approach.

Community caretaking does not fit within the central assumptions of the warrant preference theory. There is, however, an alternative approach to Fourth Amendment adjudication that holds more promise for sensitive assessment of the competing interests at stake when police have intruded on privacy in service of important community caretaking ends. Though the warrant preference theory and the rules emanating from it remain important in the resolution of Fourth Amendment cases, "the conceptualization of the Fourth Amendment universe as revolving around the Warrant Clause [has given] way to a view that '[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable.'"143 Cases in the "reasonableness" tradition abandon the effort at complete ex ante specification of circumstances justifying departure from the probable-cause-and-warrant formula. Instead of "forcing fact patterns into fixed preconceived categories," courts employing the reasonableness approach assess "all of the competing interests to determine what is reasonable under the circumstances."144 Reasonableness cases thus coexist uneasily with the warrant preference theory's assumption that departures from the probable-cause-and-warrant formula should be pursuant to categorical rules defined in advance. The Supreme Court, however, has increasingly experimented with the more "flexible, circumstantial, adjudicative" approach associated with a test of general reasonableness.145

Nowhere is this more apparent than in the Court's "special needs" cases — cases presenting special needs, beyond the normal need for law enforcement, that are said to justify departure

144 Wasserstrom and Seidman, 77 Georgetown L J at 44–45 (cited in note 36).
from the presumptive probable-cause-and-warrant framework in favor of a de novo assessment of how the Fourth Amendment should be understood to apply in a particular context. The forebear of these cases was the Warren Court's decision in Camara holding that in the housing inspection context, routine "area" inspections are "reasonable" under the Fourth Amendment even in the absence of probable cause in its traditional sense. 146 The Court since Camara has found occasion to hold in several different contexts that special needs justify distinct Fourth Amendment approaches. Thus, when school officials search students, government employers search the offices of public employees, and probation officers search the homes of their probationers, the Supreme Court has emphasized the centrality of the reasonableness requirement in Fourth Amendment adjudication and has held that neither a warrant nor probable cause is always required. 147 In the presence of special needs like the need to maintain security and order in public schools (a need apart from the normal interest in crime detection), courts are enjoined to "undertake a context-specific inquiry" to assess whether these needs render the warrant and probable cause requirements impracticable and whether intrusions on privacy are reasonable under the circumstances. 148

New Jersey v T.L.O. perhaps most clearly illustrates the reasonableness approach. 149 There, a teacher discovered a high school student apparently smoking in a school bathroom. The teacher brought the student to the assistant vice principal who looked through the student's purse after the student denied that she had been smoking in violation of school rules. 150 In considering how the Fourth Amendment was to apply to this search, the Court did not presume that the warrant and probable cause re-

146 See text accompanying notes 121-23.
148 Chandler v Miller, 117 S Ct 1295, 1301 (1997). See also Griffin, 483 US at 873.
149 469 US at 325. The "special needs" cases do differ among themselves. Thus, in Griffin, the Court did not undertake review of the particular search of the probationer's home, but of the reasonableness of Wisconsin's regulations authorizing such searches. 463 US at 872-73. These regulations, however, contained provisions that amounted to a generalized requirement of reasonableness. Id at 875-80. Compare with William J. Stuntz, Implicit Bargains, Government Power, and the Fourth Amendment, 44 Stan L Rev 553, 554 & n 7 (1992) (noting that "special needs" cases apply a generalized reasonableness test to the resolution of Fourth Amendment disputes but suggesting that this test amounts to rational-basis review).
150 See T.L.O., 469 US at 328.
quirements were applicable, but undertook a context-specific assessment of the reasonableness of both requirements in the school environment. Neither requirement was deemed suitable to "maintenance of the swift and informal disciplinary procedures needed in the school." Generally, the Court said, a school official should have reasonable grounds to believe a search will turn up evidence of a rule infraction before intruding on the privacy interests of a student. The search undertaken to find such evidence should be reasonably related to the search's objectives "and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." In sum, the Court determined that "the legality of a search of a student should depend simply on [its] reasonableness, under all the circumstances." Applying this principle, the Court upheld the search of the student's purse.

Cases like T.L.O. are attractive because they transcend the warrant preference theory's focus on compliance with formal rules to lend substantive content to Fourth Amendment concerns. This is not, however, to overstate the difference between the reasonableness approach and the warrant preference approach in many cases. Thus, the Supreme Court in Illinois v Gates may have effectively transformed probable cause itself into an implicit test of general reasonableness by defining probable cause to mean a "fair probability" — a standard that might "easily be interpreted to mean 'sufficient probability to justify the search or seizure under all the circumstances.'" Many of the warrant preference theory's categorical exceptions to the prob-

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151 Id at 340–41.
152 Id at 340. Justice Blackmun, concurring in the judgment, articulated a threshold inquiry to support departure from the probable-cause-and-warrant framework that provides that such departure is justified only "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." 469 US at 351. This approach has become the Court's official threshold test in invoking the "special needs" approach. The impracticability analysis in practice, however, often merges with the Court's assessment of the reasonableness of an intrusion. For a close analysis of this aspect of the cases, see Schulhofer, 1989 S Ct Rev at 101, 104 (cited in note 18).
154 Id at 342.
155 Id at 341.
156 Id at 347–48.
157 See Wasserstrom and Seidman, 77 Georgetown L J at 46–47 (cited in note 36).
able-cause-and-warrant formula, moreover, were founded on rea-
sonableness.\textsuperscript{160} And these exceptions are sometimes formulated
so as to explicitly permit individualized consideration of the ap-
propriateness of an intrusion on the facts of a given case.\textsuperscript{161}

Cases like \textit{T.L.O.}, however, do opt for a wholly contextual-
ized, case-by-case approach to the reasonableness assessment
that is markedly unlike the approach the Court has often taken
in the law enforcement context.\textsuperscript{162} Granted, the Supreme Court
has sometimes asserted even when considering traditional law
enforcement intrusions that reasonableness is “[t]he touchstone
of the Fourth Amendment.”\textsuperscript{163} The Court has sometimes empha-
sized even here the “fact-specific nature of the reasonableness
inquiry” and the associated need to “eschew [ ] bright-line
rules.”\textsuperscript{164} At the same time, the Court has repeatedly declined to
reexamine the rigidity of various Fourth Amendment rules asso-
ciated with traditional criminal investigation on even quite symp-
 pathetic facts.

In \textit{Arizona v Hicks},\textsuperscript{165} for example, a police officer was law-
fully in an apartment from which a shot had been fired.\textsuperscript{166} The
officer picked up stereo equipment to read obscured serial num-
bers because he suspected the equipment had been stolen. The
officer had ample reason for this suspicion — given that the ex-
 pensive equipment looked out of place in the otherwise squalid
apartment and that the premises were found to contain a stock-
ing-cap mask and several weapons, including a sawed-off rifle.\textsuperscript{167}
The Court, moreover, assumed that the officer was permitted to
look at the equipment and to seize it if this examination produced
probable cause to believe it represented the fruits of a crime.\textsuperscript{168}
The Court nevertheless held that the officer violated the Fourth

\textsuperscript{160} See Uviller, 25 Crim L Bull at 34 (cited in note 6).
\textsuperscript{161} See, for example, \textit{Welsh v Wisconsin}, 466 US 740, 753 (1984) (noting that “the
gravity of the underlying offense” is an important factor in determining whether an exi-
gency supports entry into the home for the purpose of searching for evanescent evidence).
\textsuperscript{162} For another case in the \textit{T.L.O.} tradition, see, for example, \textit{Ortega}, 480 US at 725–26
(plurality opinion) (public employer intrusions for noninvestigatory work-related purposes,
as well as for investigations of work-related misconduct, “should be judged by the stan-
dard of reasonableness under all the circumstances”).
\textsuperscript{163} \textit{Florida v Jimeno}, 500 US 248, 250 (1991). See also \textit{Ohio v Robinette}, 117 S Ct 417,
421 (1996) (noting that touchstone of Fourth Amendment is reasonableness to be “meas-
ured in objective terms by examining the totality of the circumstances”).
\textsuperscript{164} \textit{Robinette}, 117 S Ct at 421.
\textsuperscript{165} 480 US 321 (1987).
\textsuperscript{166} Id at 326–29.
\textsuperscript{167} Id at 323.
\textsuperscript{168} Id at 325–26.
Amendment when he picked up the equipment to read the serial numbers in the absence of probable cause — thus refusing to "calibrate the level of justification for a search to the level of intrusion resulting from it." Professor Seidman has aptly observed that it is difficult to understand "why [the] truly de minimis invasion [in *Hicks*] is impermissible" unless the Court's holding reflects an implicit conclusion that "when the police are engaged in core criminal investigation, it is important to maintain the integrity" of the formal rules associated with the warrant preference approach.\(^{170}\)

The tension between cases like *Hicks* and cases like *T.L.O.* has quite predictably resulted in charges that the Court lacks any theoretical grounds for determining whether the warrant preference or reasonableness approach will be invoked.\(^{171}\) It is not my purpose, here, to provide a comprehensive theory that might rationalize the Court's cases. The line between at least some "warrant preference" and "reasonableness" cases, however, seems arbitrary only on the assumption that Fourth Amendment adjudication is about protecting the abstracted privacy interests of individuals — privacy interests evaluated wholly apart from any consideration of the governmental purpose supporting an intrusion or the character of this intrusion, including its context and social meaning. Thus, when a school teacher reaches into the backpack of a student to find the water pistol that has disrupted a science class, he has intruded on privacy in precisely the same way as the police officer who searches the backpack of an individual stopped on the street. At stake is the abstract interest in the privacy of a backpack — an interest to which the Court affords diminished protection in the school context on the thin conclusion that the need for swift discipline in the schools, balanced against the pri-


\(^{170}\) Seidman, 7 J Contemp Legal Issues at 155 (cited in note 27). See also Steiker, 94 Mich L Rev at 2500 (noting that *Hicks* demonstrates that Court has not yet "converted the warrant requirement and its expanding exceptions into the less rigid, more free-wheeling balancing act" evident in the special needs arena). For another case in the *Hicks* tradition, see *Minnesota v Dickerson*, 508 US 366, 377–79 (1993) (holding that while a police officer performing a frisk may touch the entire body of a suspect in search of a weapon, on feeling an object that is not a weapon, the officer may not manipulate this object even slightly to confirm a suspicion that it is contraband).

\(^{171}\) See, for example, Steiker, 94 Mich L Rev at 2498 (noting "haziness" of special needs concept and resulting confusion about scope of cases that might be assimilated to a reasonableness approach); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 Minn L Rev 383, 397–404 (1988) (noting that the "Court has failed to meet . . . challenge of defining a rational relationship between the warrant and reasonableness clauses").
Vacancy interest of the child, justifies a more permissive approach.

As Professor Schulhofer has observed, however, the water pistol search is not like the search by a suspicious police officer: it "seem[s] to have a fundamentally different character" that demands as much as it permits a Fourth Amendment analysis outside the confines of the probable-cause-and-warrant framework.\textsuperscript{172} To Professor Schulhofer, intrusions on privacy by school teachers are unlike intrusions by police investigating crime because the former does not involve the adversarial effort of the state to control private activity for public purposes — an arena for which the presumptive probable-cause-and-warrant framework strikes the balance "between the individual interest in the security of privacy activity and the public interest in effective social control."\textsuperscript{173} The school search, instead, is about the governance of a public enterprise in which "the investigating authority and the person searched are participants in a shared mission," whether by choice or legitimately imposed duty.\textsuperscript{174} In this arena, "internal governance should not have to await, as does external social control, the accumulation of evidence rising to the level of probable cause. Internal governance searches should be subject only to the more fluid dictates of ad hoc reasonableness."\textsuperscript{175}

Professor Schulhofer's work is primarily concerned with providing an analytic framework to explicate the Court's regulatory search jurisprudence and to aid in the judicial review of urinalysis drug-testing programs.\textsuperscript{176} He considers neither community caretaking intrusions nor the multi-faceted character of the local police role. Professor Schulhofer's proposed framework, moreover — limiting the reasonableness approach characteristic of the special needs cases to circumstances presenting pressing health and safety concerns or the internal governance imperatives of a self-contained public activity — would not permit this approach to be employed in a wide variety of circumstances in which police intrude on privacy in service of community caretaking ends.\textsuperscript{177} Nevertheless, Professor Schulhofer's nuanced assessment of the

\textsuperscript{172} Schulhofer, 1989 S Ct Rev at 115 (cited in note 18).
\textsuperscript{173} Id at 118.
\textsuperscript{174} Id at 117–18.
\textsuperscript{175} Id at 118.
\textsuperscript{176} Schulhofer, 1989 S Ct Rev at 87–90 (cited in note 18).
\textsuperscript{177} Id at 89 (proposing limits to administrative search category). Professor Schulhofer does observe that the attempt to articulate an "all-inclusive list" of circumstances justifying departure from the probable-cause-and-warrant framework would be foolhardy. Id at 110.
Court’s special needs cases does suggest that Fourth Amendment standards can and should differ based in part on the purposes supporting the state’s intrusion on privacy and the social context in which this intrusion occurs.\textsuperscript{178} It thus suggests an approach to Fourth Amendment adjudication that might prove helpful in evaluating community caretaking cases. This approach, incidentally, may also shed light on the Supreme Court’s decision in \textit{Cady v Dombrowski} — a decision in which the Court abandoned the confines of the warrant preference theory to uphold as reasonable a police intrusion in service of community caretaking ends.\textsuperscript{179}

2. \textit{Reasonableness and Community Caretaking.}

So what does this approach entail? Fourth Amendment adjudication might helpfully be viewed as being less about protecting abstract privacy interests against state intrusion — privacy interests considered apart from the purposes supporting an intrusion and the social context in which it occurs — and more about developing the appropriate linguistic and rhetorical tools for defining the limits on governmental authority to intrude on privacy in different spheres. This approach to Fourth Amendment adjudication connects with the observation that constitutional rights adjudication is frequently about marking out “the kinds of reasons that government can act on when it seeks to . . . intervene in [different] sphere[s] of activity.”\textsuperscript{180} This differentiation in the approach to rights adjudication occurs in part because the equivalent state action in material terms can have a different social meaning — a meaning that can undermine or support “the culture to which the Constitution aspired” — because of the context in which it occurs and the purposes for which it is undertaken.\textsuperscript{181} Rights adjudication, then, as Professor Pildes has observed, often “channel[s] the kinds of reasons and justifications government can act on in different domains; rights enable courts to attend to . . . the social meaning those actions convey.”\textsuperscript{182}

This approach to the Fourth Amendment has the potential of

\textsuperscript{178} Id at 112 (noting that pressing health or safety concerns support departure “from traditional Fourth Amendment requirements”); 118 (noting that probable-cause-and-warrant framework is inappropriate for striking balance “between the privacy interests and internal management imperatives of parties who . . . share interdependent roles within an enterprise organized to pursue a governmental mission”).

\textsuperscript{179} 413 US 433 (1973).

\textsuperscript{180} Pildes, 27 J Legal Stud at 839 (cited in note 119).

\textsuperscript{181} Id at 838.

\textsuperscript{182} Id at 869.
bringing the emerging literature on social norms to bear on Fourth Amendment theory in ways that cannot be fully developed here.\textsuperscript{183} Suffice it to say, however, that this approach suggests how the Camara Court could conclude both that it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior" and that health inspectors can obtain a warrant for the purpose of performing routine home inspections without any showing of probable cause in its traditional sense.\textsuperscript{184} Camara rejected the Court's earlier position in Frank v Maryland\textsuperscript{185} that health and safety inspections touch at most on the periphery of Fourth Amendment interests because these inspections are not undertaken for the purpose of criminal investigation.\textsuperscript{186} At the same time, however, the Court recognized that such inspections have a long history of public acceptance and are necessary to achieving acceptable results in preventing dangerous conditions.\textsuperscript{187} These inspections, moreover, do involve a different sort of intrusion on the citizen's privacy than traditional law enforcement invasions.\textsuperscript{188} But this difference cannot be a function simply of a difference in the abstract privacy interest involved — since at least some law enforcement intrusions might be materially no more invasive than a health inspector's survey of the home. The difference lies in the fact that purpose and context shape both the character and social meaning of an intrusion and thus are relevant in determining the appropriate Fourth Amendment approach. And in Camara, "reasonableness [was] [...] the ultimate [Fourth Amendment] standard.\textsuperscript{189}

Part of the judicial task, then, is giving constitutional content to the privacy norms important in different spheres of interaction between the state and its citizens — norms that can then assist in defining the kinds of reasons for which the state can intrude on privacy in different domains.\textsuperscript{190} This approach to Fourth Amendment adjudication has analogues in other areas of consti-
tutional rights adjudication.\textsuperscript{191} It also has obvious relevance to community caretaking. The exercise of community caretaking responsibilities often involves circumstances that render the probable-cause-and-warrant framework inapposite in ways similar to those recognized in the Court's "special needs" cases.\textsuperscript{192} In many community caretaking cases, moreover, police are not poised in conflict with citizens by virtue of the police officer's mandate to prosecute crime, but are acting on behalf of the objects of search to promote health and safety, to preserve property, or to safeguard life — in effect, to perform a core set of police responsibilities the legitimacy of which has gone unquestioned in local communities.\textsuperscript{193} These intrusions, then, have a different character and a different social meaning than law enforcement intrusions — thus justifying a reasonableness approach.\textsuperscript{194}

Consider in this connection \textit{Cady v Dombrowski}\textsuperscript{195} — the progenitor of the "inventory" exception, which is itself a departure from the presumptive requirements of a warrant and probable cause premised in part on the need to safeguard property that has come into possession of police.\textsuperscript{196} In this case, Dombrowski, a Chicago police officer, crashed at night into a bridge abutment in West Bend, Wisconsin, while driving drunk.\textsuperscript{197} A passing motorist drove Dombrowski to a nearby tavern where Dombrowski called the West Bend police. After returning with him to the scene, West Bend officers arranged for Dombrowski's car to be towed to a garage seven miles from the police station, where it was left unguarded outside. Dombrowski was formally arrested

\textsuperscript{191} See, for example, Robert C. Post, \textit{Between Governance and Management: The History and Theory of the Public Forum}, 34 UCLA L Rev 1713, 1767–93 (1987) (arguing that First Amendment rules differ based on whether the state is exercising authority to govern the general public or to administer its own institutions).

\textsuperscript{192} See, for example, \textit{Griffin v Wisconsin}, 483 US 868, 876 (1987) (noting that warrant requirement is inappropriate where it would "interfere to an appreciable degree with the probation system"); \textit{O'Connor v Ortega}, 480 US 709, 723 (1987) (noting that concept of probable cause is inapposite to setting where "the purpose of a search is to retrieve a file for work-related reasons").

\textsuperscript{193} Compare \textit{Griffin}, 483 US at 876–79 (noting that where relationship between state actor and object of search is "not, or at least not entirely, adversarial," warrant and probable cause requirements have diminished application).

\textsuperscript{194} See Pildes, 27 Jour Leg Stud at 861 (cited in note 119) (noting that state actions undertaken for different reasons "are not the same — ethically, expressively, and sometimes legally," because their social meaning is shaped in part by purpose).

\textsuperscript{195} 413 US 433 (1973).

\textsuperscript{196} See \textit{Colorado v Bertine}, 479 US 367, 371–72 (1987) (noting that inventory searches represent a "well-defined exception" to the warrant and probable cause requirements and observing that such searches "serve to protect an owner's property while it is in the custody of the police").

\textsuperscript{197} See 413 US at 435–36.
for drunken driving and then taken to a hospital, where he unexpectedly lapsed into a coma that required his hospitalization overnight.\textsuperscript{193} The West Bend police, believing that Chicago police officers were at all times required to carry their service revolvers, had at the scene unsuccessfully looked for Dombrowski’s revolver in the passenger compartment of his rental car. In early morning hours — after Dombrowski had lapsed into the coma — one of the West Bend officers went to the garage and opened the trunk of Dombrowski’s car for the purpose of locating the revolver.\textsuperscript{199} The West Bend officer later testified that retrieving weapons from disabled vehicles was “standard procedure in [his] department.”\textsuperscript{200} Opening the trunk, the officer stumbled upon evidence of a murder.\textsuperscript{201}

Presented to the Court only a few years after the Warren Court’s rhetorical embrace of the warrant preference theory in \textit{Katz v United States},\textsuperscript{202} the police conduct in \textit{Cady} fell within no existing exception to the presumptive warrant requirement — including the exigent circumstances exception, since police had ample opportunity to see a magistrate.\textsuperscript{203} The Court nevertheless upheld the search, noting that “[t]he ultimate standard set forth in the Fourth Amendment is reasonableness.”\textsuperscript{204} The Court observed that because of differences between the responsibilities of federal law enforcement officers and local police, “application of Fourth Amendment standards, originally intended to restrict only the Federal Government . . . presents some difficulty when searches of automobiles are involved.”\textsuperscript{205} Local police, unlike federal law enforcement agents, have substantial contact with cars that have become disabled. Much of this contact is “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”\textsuperscript{206} In \textit{Cady}, the Court said, West Bend police were required to take custody of

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\textsuperscript{193} Id at 436.
\textsuperscript{199} Id at 436–37.
\textsuperscript{200} Id at 437. Parenthetically, the “standard procedure” identified by the officer was never specifically stated nor was any police regulation embodying this procedure ever identified. See Wayne R. LaFave, \textit{Controlling Discretion by Administrative Regulation: The Use, Misuse, And Nonuse of Police Rules and Policies in Fourth Amendment Adjudication}, 89 Mich L Rev 442, 452 n 60 (1990).
\textsuperscript{201} Id at 439.
\textsuperscript{202} 389 US 347, 357 (1967).
\textsuperscript{203} See \textit{Cady}, 413 US at 451.
\textsuperscript{204} Id at 439.
\textsuperscript{205} Id at 440.
\textsuperscript{206} Id at 441.
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Dombrowski's disabled vehicle because it constituted a nuisance and Dombrowski, being incapacitated, could not care for it himself. Police, moreover, had reason to worry that a revolver was inside the automobile and that this revolver posed a hazard, since the car had been left on an unguarded lot. The Court concluded in a fact-bound opinion that it was reasonable in these circumstances for the West Bend officer to have searched the trunk in the exercise of his "community caretaking" responsibilities — "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands."

The Court never generalized Cady outside its application to automobiles nor explored its implications for a range of police activity not primarily associated with the investigation of crime. The Court's decision in Cady, however, provides support for using a reasonableness approach in assessing community caretaking intrusions. The officer in Cady identified a clear community caretaking purpose for his intrusion — a purpose that was important apart from any interest in law enforcement. His intrusion, moreover, had a different social meaning than a traditional law enforcement invasion. Since Dombrowski was entitled to carry a weapon, the West Bend officer in no way suspected that in retrieving this weapon, he would thereby uncover evidence of crime. Thus, the intrusion did not mark Dombrowski as a target of suspicion. Nor did it implicate a central assumption animating the warrant preference theory — that because of the "distinctive risk of overreaching" in the pursuit of crime, the ardor of law enforcement agents must be constrained by a magistrate outside circumstances carefully defined in advance. These factors did not mean the Fourth Amendment was inapplicable to the search of Dombrowski's trunk. They simply supported the Court's decision to abandon presumptive adherence to the probable-cause-and-warrant formula and to assess the reasonableness of the offi-

207 413 US at 442-443.
208 Id at 443.
209 Id at 441, 443.
210 Several lower federal courts, moreover, have limited Cady's application to contexts involving the search of automobiles. See United States v Bute, 43 F3d 531, 535 (10th Cir 1994) (Cady applicable "only in cases involving automobile searches"); United States v Erickson, 991 F2d 529, 532 (9th Cir 1993) (same); United States v Pichany, 687 F2d 204, 208-09 (7th Cir 1982) (same). But see United States v Rohrig, 98 F3d 1506, 1521 (6th Cir 1996) (invoking Cady to inform exigent circumstances analysis in context of entry into home); LaFave, 3 Search and Seizure: A Treatise on the Fourth Amendment § 6.6, at 390 n 3 (cited in note 58) (community caretaking concept informs many decisions regarding the warrantless search of premises).
211 Schulhofer, 1989 S Ct Rev at 120 (cited in note 18).
cer's behavior outside the confines of the warrant preference theory's categorical scheme.

Finding doctrinal support for a reasonableness approach in the Court's "special needs" cases and in its decision in *Cady v Dombrowski*, several courts have implicitly or explicitly adopted this approach in community caretaking cases. It is the thesis, here, that a reasonableness approach is justified in those cases where traditional community caretaking concerns predominate over any law enforcement end that might also be served by an intrusion. The Court, however, has not yet "endorsed a test of general reasonableness for searches or seizures by police officers seeking to enforce the criminal law . . ." It is necessary, then, to give some content to the sphere of community caretaking so as to differentiate it from law enforcement. Some attention must also be paid to the meaning of Fourth Amendment reasonableness in the community caretaking sphere.

B. Reasonableness and the Community Caretaking Sphere

1. Defining Community Caretaking.

If Fourth Amendment adjudication is partly about recognizing distinct spheres of interaction between the state and its citizens and then developing appropriate language for assessing the privacy norms important within these separate spheres, part of the judicial task involves identifying the sphere in which a case belongs — a task that can be "freighted with as much complexity as any other method of constitutional decisionmaking." In the special needs context, the Court has settled on a threshold inquiry that asks whether special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable, thereby justifying a reasonableness approach. This formulation is considerably less than clear-cut. Neither "special needs" nor "the normal need for law enforce-

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212 See, for example, *Rohrig*, 98 F3d at 1524–25 (assessing warrantless entry into home to abate ongoing nuisance in "reasonableness" terms); *United States v Miller*, 589 F2d 1117, 1125 (1st Cir 1978) (holding community caretaking function and possibly exigent circumstances justified intrusion on boat left at mooring of another to check on boat's ownership and safety of mariners); *Bies v State*, 251 NW2d 461, 468 (Wis 1977) (holding early morning intrusion into doorway of garage in response to noise complaint to be reasonable exercise of "community caretaker" function).


214 See Pildes, 27 J Legal Stud at 848 (cited in note 119).

ment" have been defined. The "special needs" inquiry, to many, "turns out to be no more than a label" to indicate when reasonableness will be the Fourth Amendment test.216

In the community caretaking context, however, the task of identifying community caretaking needs that exist separate and apart from any interest in law enforcement is not as complicated as in other practices. There is a core set of community caretaking activities that have a longstanding tradition and that have achieved relatively unquestioned acceptance in local communities. Thus, the responsibility of police officers to search for missing persons, to mediate disputes, and to aid the ill or injured has never been the subject of serious debate; nor has their responsibility of police to provide services in an emergency. There is substantial consensus that these duties are part of the police role. And performing these duties obviously serves important ends distinct from any interest in law enforcement.

This is not to say, however, that the simple articulation of a community caretaking interest can be the basis for differentiating community caretaking from law enforcement if community caretaking is to constitute a separate sphere. The search of a suspected drug dealer's home, after all, can be said to promote health and safety concerns — since both police and the communities they serve undoubtedly have an interest in removing noxious substances from the stream of commerce. If the mere articulation of these concerns is adequate to invoke the reasonableness approach, however, the warrant preference theory is sub silentio drained of any role in marking out the appropriate justifications for state intrusions on privacy in the context of routine criminal investigation. Little remains of the Supreme Court's admonition that in traditional law enforcement, the Fourth Amendment generally requires compliance with "the procedures described by the Warrant Clause."217

Nor should the community caretaking sphere be limited, however, to circumstances where no law enforcement interest is present at all. Law enforcement and community caretaking goals are often entangled. Thus, when police enter commercial premises found open at night, they are acting on behalf of the property owner to secure his property, but may also pursue inchoate suspicions that a burglar lurks within. Police who respond to noise complaints in early morning hours may serve community care-

216 Stuntz, 44 Stan L Rev at 554 (cited in note 149).
taking purposes by appropriately intruding on private spaces to abate an ongoing nuisance, but they serve law enforcement purposes when they issue a summons for unreasonable noise.216 In Mitchell, police opened an unlocked door to peer inside the living room of the defendant when they were no doubt concerned for the safety of a possible victim.219 The officers were also aware, however, that they might find a suspect or evidence of crime.

When police cite community caretaking to justify an intrusion on private domains, then, a court should ask whether in all the circumstances, objectively viewed, a legitimate community caretaking purpose clearly predominated over any law enforcement purpose that was also present. The community caretaking purpose must constitute an independent and substantial justification for the intrusion. The circumstances should in fact make clear that the police would have been wholly justified in pursuing the community caretaking end even in the absence of a law enforcement objective.

The court should next consider whether this community caretaking purpose renders the probable-cause-and-warrant framework impracticable. In the Court's special needs cases, impracticability often signifies inappropriateness — as in O'Connor v Ortega, where both the warrant and probable cause requirements were deemed unsuitable for the workplace and for work-related searches conducted by state actors in their role as employers.220 In the community caretaking context, the traditional probable-cause-and-warrant framework will frequently be simply inapposite to evaluation of the appropriateness of an intrusion — since officers are not searching for particular persons or things to be seized.221 At any rate, once this threshold test is satisfied, a court

216 See United States v Rohrig, 98 F3d 1506 (6th Cir 1996) (upholding entry into home for purpose of abating loud noise caused by blasting stereo).
219 See text accompanying notes 127-36.
220 480 US 709, 721-725 (1987). See also Griffin, 483 US at 876-79 (noting that where relationship between government actor and object of search is "not, or at least not entirely, adversarial," warrant and probable cause requirements have diminished application); New Jersey v T.L.O., 469 US 325, 340 (1984) (noting that warrant requirement is unsuited to school environment and to relationship between school officials and students).
221 Courts might conceivably impose a nontraditional warrant requirement on community caretaking intrusions that cannot be assimilated to the traditional probable-cause-and-warrant framework and that also involve no immediate need to act. Thus, in Brielwell, the Oregon Supreme Court suggested that the legislature might provide for the issuance of administrative warrants to authorize limited searches of the homes of missing persons. 759 P2d 1054, 1060 (Or 1988). In cases like Camara, administrative warrants issue on compliance with "reasonable legislative or administrative standards" for conducting routine inspections. 387 US 523, 538 (1967). Though the warrants formally issue upon probable cause, this standard denotes reasonableness in the administrative search
should perform a reasonableness assessment when intrusions fall outside established categorical exceptions to the probable-cause-and-warrant formula.

The inquiry proposed here is necessarily contextual and will produce legitimate differences of opinion at the margins. It does, however, serve two purposes. First, it preserves the categorical rules associated with the warrant preference theory in the majority of cases while at the same time permitting courts to employ the more nuanced reasonableness approach not only in the absence of law enforcement purposes, but also when community caretaking purposes are clearly more important. Cases like *Mitchell* suggest the wisdom of this approach, since even in the presence of criminal investigative ardor and substantial law enforcement interests, community caretaking imperatives are sometimes substantially more important than any interest in traditional criminal investigation, and in ways that transform both the character and social meaning of a privacy intrusion.

This is not to suggest that the police conduct in *Mitchell* — pushing open a door to see whether a gunshot victim lay within — was self-evidently reasonable. The officers did act on an anonymous and uncorroborated tip and the community caretaking imperative was less apparent by virtue of the fact that the tipster insisted that the victim was dead. The emergency and rescue doctrines of many states, however, already introduce into the warrant preference framework a case-by-case evaluation whether the pressing need to preserve life or property justified a warrantless intrusion in the absence of probable cause. In those cases where legitimate community caretaking concerns predominate over any law enforcement objective, a post hoc reasonableness inquiry simply permits courts to consider whether an intrusion was appropriate, taking into account not only the information in the hands of police and the seriousness of the harm to be averted, but also the nature of the intrusion necessary to handle the perceived threat to community caretaking concerns.

Second, the proposed inquiry allows courts to guard against
pretextual reliance on community caretaking interests by police who are in fact acting to enforce the criminal law. The emergency and rescue doctrines of several states seek to guard against pretext by providing that warrantless police intrusions in response to an emergency are only permissible when the officer is not “primarily motivated” by the intent to arrest or seize evidence. The personal motivations of police, however, should not be used as a basis for differentiating the community caretaking sphere. The officers in Mitchell, for instance, were undoubtedly motivated both by the need to rescue and the desire to apprehend a murderer. The happenstance of which motivation predominated in the minds of the officers thus seems an inappropriate basis for determining the reasonableness of their actions. Moreover, framing the pretext inquiry in subjective terms is a gratuitous invitation to police perjury. Fourth Amendment rules should not unnecessarily create temptations of this kind since police perjury has ramifications extending far beyond the individual case and, in fact, threatens the ever ongoing project of promoting police accountability.

Some might argue that courts should guard against pretext by excluding evidence acquired in the performance of community caretaking functions and thus dispelling any motive to use community caretaking authority in service of law enforcement ends. The Court in the Fourth Amendment context, however, has never held that evidentiary exclusion is proper in the absence of a constitutional violation. In order to exclude evidence ac-

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223 See, for example, People v Mitchell, 347 NE2d 607, 609 (NY App 1976) (warrantless entry in “emergency” cases permissible, inter alia, where police are not “primarily motivated” by intent to arrest and seize evidence).
224 See text accompanying notes 127–36.
225 See Jerome H. Skolnick and James J. Fyfe, Above the Law: Police and the Excessive Use of Force 121 (MacMillan 1993) (noting that police officers who violate rules in one context because they believe it necessary to do their jobs are in danger of devaluing rules generally, and finding shortcuts around all of them).
226 Compare Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn L Rev 349, 437 (1974) (arguing that “upon a proper regulatory view of the fourth amendment and its implementing exclusionary rule, there is no necessary relationship between the violation of an individual’s fourth amendment rights and exclusion of evidence”).
227 See, for example, Terry v Ohio, 392 US 1, 13 (1968) (noting that exclusionary rule in Fourth Amendment context “cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections”). The Court did indicate in Skinner that the routine use in criminal prosecutions of evidence obtained in a urinalysis testing program might “give rise to an inference of pretext” that would draw into question the validity of the program. 489 US at 621 n 5. The Court was not endorsing the prophylactic use of evidentiary exclusion, however, but was merely asserting that frequent criminal prosecutions, “together with slender or half-hearted
quired as a result of community caretaking, then, a court must hold the underlying conduct unconstitutional — and thus potentially subject the police department and its officers to civil suit. The appropriate exercise of community caretaking authority, however, is vital to the community and cannot be prohibited in the effort to guard against its improper use. Moreover, even if the Court were to reassess its view that prophylactic exclusion is inappropriate, exclusion of evidence in the absence of a constitutional violation would be particularly perverse in the community caretaking sphere. Given the broad social acceptability of reasonable privacy intrusions for the purpose of performing traditional community caretaking tasks, such exclusion would grant a substantial windfall to criminal defendants who have not suffered a constitutional violation or, indeed, even a privacy intrusion that community residents would recognize as harmful.

The proposed inquiry, then, guards against pretext by asking courts to consider the circumstances of the individual case and to determine whether legitimate community caretaking purposes, objectively viewed, truly predominated over any law enforcement interests that were also present. Incidental community caretaking concerns will thus not be sufficient to invoke the reasonableness approach in the presence of strong law enforcement motives. The judgment required is contextual, but no more difficult than others that the Court has required in the Fourth Amendment context.

By demanding both that a community caretaking interest exist and that it predominate over any law enforcement interest, considering all the circumstances, the inquiry can provide substantial protection against pretext — provided that courts are willing to look skeptically at asserted community caretaking purposes and to remain “vigilant in guarding against . . . a false reliance [on such purposes] when the real purpose [is] to seek out evidence of crime.”

regulatory . . . goals,” might indicate that a drug testing program did not involve “special needs, beyond the normal need for law enforcement,” but was merely a pretextual use of the administrative search category for law enforcement purposes. Schulhofer, 1989 S Ct Rev at 138 (cited in note 18). See also New York v Burger, 482 US 691, 716–17 (1987) (upholding admissibility in criminal prosecution of evidence seized by police during regulatory search).

228 See, for example, Murray v United States, 487 US 533, 542–44 (1988) (in case where agents initially discovered evidence in an illegal search of a warehouse and thereafter acquired it with a warrant, remanding for determination whether the agents' decision to seek the warrant was prompted by what they had seen during the initial entry).

229 LaFave, 5 Search and Seizure: A Treatise on the Fourth Amendment § 6.6(b) at 406 (cited in note 58) (discussing intrusions for the purpose of protecting property).

Courts must conduct the reasonableness inquiry "with a commitment to careful de novo review" if they are to serve the judicial checking function "that lies at the core of the Fourth Amendment." Some commentators have suggested that this task is nearly impossible — that post hoc reasonableness review necessarily degenerates into a balancing test that undervalues the individual's interest in privacy. "Because the very notion of reasonableness embodies the idea of 'balancing' competing interests," one scholar has said, "the tendency, so long as the government can put forward some legitimate reason for its actions, is to find that some intrusion is allowed . . . ." Proponents of the warrant preference theory thus conclude that Fourth Amendment rights "should receive the more certain protection resulting from categorical rules rather than the less certain protection resulting from ad hoc balancing."

It is not possible to deduce in the abstract, however, whether Fourth Amendment interests are more or less protected from the single factor whether the legal directives emanating from the Fourth Amendment are expressed in categorical rules or in "reasonableness" terms. Thus, a categorical rule always permitting warrantless searches of automobiles based on probable cause to believe they contain evidence of crime may afford less judicial oversight to the decision to search than a scheme in which each such warrantless search is assessed for its reasonableness in the individual case. In the Fourth Amendment context, as elsewhere, "[r]ules cannot be favored or disfavored in the abstract; everything depends on whether, in context, rules are superior to the alternatives." In the community caretaking arena, moreover, the paucity of litigated cases itself advises against a categorical approach. Given that courts see community caretaking only infrequently, it is not likely they could formulate categorical exceptions to the probable-cause-and-warrant formula that would express real sensitivity to the competing concerns.

A full assessment of the components of reasonableness in the community caretaking context is a subject for another time.

231 Sundby, 94 Colum L Rev at 1769–70 (cited in note 143).
Some of the criteria for assessing reasonableness, however, can be identified here. In the community caretaking context, the judicial task is to give content to those privacy norms that structure the relationship between police and community residents when police are not acting principally to enforce the law, but to perform community caretaking responsibilities. As the Court suggested in Camara, existing social practices are obviously relevant to this task. This is not to say that courts are bound by such practices. In Camara itself, the Warren Court partly transformed the practices associated with municipal code enforcement by imposing on them a warrant requirement. When police who have intruded on privacy are performing traditional community caretaking functions in a manner that has been broadly accepted in local communities, however, this fact is relevant to the assessment of reasonableness.

Courts have a variety of sources to draw on in informing themselves about the traditional community caretaking functions of local police. These functions may be broadly outlined in the municipal police charter. They may be the subject of guidelines within the police department. In addition, community caretaking functions are discussed in some detail in the American Bar Association's formulation of standards for the urban police.

Legislatures can also play a role in articulating the community caretaking practices deemed acceptable in local communities. In Bridewell, for instance, the Oregon Supreme Court's frank discussion of community caretaking helped prompt democratic deliberation about the appropriate scope of police authority in this important sphere. The court declined to reach the question whether the officers' initial intrusion into Bridewell's home might be upheld under the Fourth Amendment as a reasonable exercise of traditional community caretaking duties. The court interpreted Oregon law to require that politically accountable actors provide statutory authorization for police to perform community caretaking tasks. No such authorization then existed. The Oregon legislature thereafter passed a law authorizing police to perform "community caretaking functions" — functions that the Oregon law defines to include searching for missing persons,

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236 Id at 538. See also note 124.
237 See ABA Standards for Criminal Justice at 1.31–32 (cited in note 50).
238 759 P2d 1054, 1059 (Or 1988).
239 Id.
rendering aid to the injured or ill, and preventing serious harm to people or property. Notably, the statute opts for a "reasonableness" approach rather than the probable-cause-and-exigent circumstances approach associated with the warrant preference theory. The Oregon law provides that police may enter or remain upon the premises of another when reasonably necessary to perform community caretaking tasks.240

Once it is determined that legitimate community caretaking purposes may justify a privacy intrusion, numerous other factors can be relevant to the reasonableness assessment in the individual case. These factors include the probability that an intrusion will secure the articulated purposes and the availability of other means of achieving these purpose without intruding on private domains.241 The nature of the privacy interest invaded is obviously of concern. So is the invasiveness of the intrusion.

A court assessing these factors can look for guidance to the reasonableness inquiry endorsed in T.L.O.242 There, the Court said that Fourth Amendment reasonableness requires a two-fold inquiry into whether an intrusion on privacy is justified at its inception and thereafter "reasonably related in scope to the circumstances which justified the interference in the first place."243 This inquiry focuses attention first on whether a particular intrusion, given all the circumstances, is appropriate and constitutionally tolerable. Even if this intrusion is initially justified, however, reasonableness still requires that it thereafter be carried out in a manner consistent with the factors supporting its initial legitimacy. In Bridewell, for example, the police may have served appropriate community caretaking purposes in walking through Bridewell’s premises to search for him.244 The Oregon officers, however, clearly exceeded the scope of their authority when they continued without warrant to search for marijuana after ascertaining that Bridewell was alive and well — rendering appropriate exclusion of the evidence found in Bridewell’s home.245

The Sixth Circuit’s recent decision in United States v Rohrig exemplifies the reasonableness approach.246 There, Canton, Ohio

240 See note 94.
243 Id, quoting Terry v Ohio, 392 US 1, 20 (1968).
244 See text accompanying notes 86–90.
245 See Bridewell, 759 P2d at 1057.
246 98 F3d 1506 (6th Cir 1996).
police responded in early morning hours to a complaint about loud music emanating from a home.\textsuperscript{247} Police first heard the music from a block away; as they drove up, they observed several pajama-clad neighbors emerge from their houses to complain. The officers banged on the front door of the residence from which the music was blaring and tapped on the first floor windows to no avail. When police were unable to rouse anyone in the house after repeatedly banging on doors and shouting to announce their presence, two officers opened an unlocked screen door and went inside, continuing to call loudly for an occupant.\textsuperscript{248} They eventually found the offending stereo and turned down the volume. In the same room, they found Rohrig asleep on the floor. A criminal case arose, however, because the officers in their canvass of the home also stumbled upon “wall-to-wall” marijuana plants in a basement equipped with fans and running water.\textsuperscript{249}

The \textit{Rohrig} court first recognized that the case before it presented none of the traditional exigent circumstances justifying a warrantless entry: namely, hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent a suspect’s escape, or danger to the police or others.\textsuperscript{250} The court nevertheless upheld the intrusion as fitting within the exigent circumstances exception — though, in fact, its analysis was cast in “reasonableness” terms. The court observed that the officers who entered Rohrig’s home were not acting principally to enforce the law — meaning, their main purpose was not to cite Rohrig for making too much noise. They were instead acting for the important purpose of abating a nuisance and restoring the neighbors’ “peaceful enjoyment of their homes and neighborhood.”\textsuperscript{251} The Sixth Circuit noted the Supreme Court’s willingness to employ a reasonableness approach when faced with special interests beyond the normal interest in law enforcement, and to assess the practicality of the warrant and probable cause requirements in a particular context.\textsuperscript{252} The court determined that neither of these requirements is implicated to the same degree when police officers act not to enforce the criminal law, but to perform their diverse community caretaking functions. “Because the Canton officers were not engaged in the ‘often competitive enterprise of ferreting out crime,”

\begin{footnotes}
\footnotetext[247]{Id at 1509.}
\footnotetext[248]{Id.}
\footnotetext[249]{Id.}
\footnotetext[250]{Id.}
\footnotetext[251]{98 F3d at 1518–19.}
\footnotetext[252]{Id.}
\footnotetext[251]{Id at 1517–18.}
\end{footnotes}
the court said, "there is less cause for concern that they might have rashly made an improper decision."

However one views the result in Rohrig, the Sixth Circuit's approach was hardly dismissive of the competing interests at stake in the evaluation of the intrusion into Rohrig's home. The court noted that it did not "lightly abrogate the constitutional presumption that police officers must secure a warrant before entering a private residence." The court observed, however, that Rohrig's claim that no warrant could have issued to permit entry in this case itself suggested that "the warrant mechanism is unsuited to the type of situation presented." The effort to obtain a warrant would have "subject[ed] the community to a continuing and noxious disturbance for an extended period of time." Moreover, Rohrig himself had compromised the privacy of his home by "projecting loud noises into the neighborhood in the wee hours of the morning" and then failing to answer officers' repeated calls. The court's decision was carefully limited to the facts before it: "We wish to emphasize the fact-specific nature of this holding. By this decision, we do not mean to fashion a broad 'nuisance abatement' exception to the general rule that warrantless entries into private homes are presumptively unreasonable." The court concluded simply that in all the circumstances presented, it was "unable to identify any unreasonable conduct on the part of the Canton police."

The police in Rohrig faced neither an emergency nor an exigency, as these terms have traditionally been understood. They did, however, face one of the most common community caretaking tasks of local police — resolving a noise dispute. The Rohrig-court recognized the warrant preference theory provided an inadequate conceptual framework for assessing constitutional reasonableness in this community caretaking case. The reasonableness of the Canton officers' behavior stemmed in part from the time of day and the presence of the pajama-clad neighbors unable

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263 Id at 1523 (citation omitted), quoting Johnson v United States, 333 US 10, 14 (1948).
254 98 F3d at 1524–25.
255 Id at 1523 n 9.
256 Id at 1522.
257 Id at 1521–22.
258 98 F3d at 1525 n 11.
259 Id at 1524.
to sleep. It derived partly from the officers' repeated efforts to rouse someone in the home by banging on doors and windows before attempting entry. Reasonableness in the community caretaking sphere, then, does not depend on compliance with ex ante rules. Rather, it hinges on the "peculiar facts and circumstances" of each case.\(^{261}\)

This is not to say, however, that the reasonableness assessment is essentially ad hoc. As Professor Alschuler has observed, "[a] long course of adjudication under the fourth amendment [has] given expression to a set of values"\(^{262}\) — values that can inform the exercise of judgment by both police performing community caretaking functions and courts reviewing the propriety of their actions after the fact. Reasonableness in the community caretaking sphere should be assessed in light of ongoing social practices, police departmental guidelines, and statutes. Ultimately, it is rooted in social values and societal norms regarding the limits of police initiative in performing community caretaking tasks.\(^{263}\) The Court in \textit{Cady} noted that in applying the general standard of reasonableness, "little [can be said to] refine the language of the Amendment itself in order to evolve some detailed formula for judging cases."\(^{264}\) Case-by-case adjudication, however, can lend concrete meaning to Fourth Amendment values just as surely as the formula expressed in any categorical rule. By giving substantive content to Fourth Amendment reasonableness in the community caretaking sphere, moreover, courts can over time fill in the missing piece omitted in the warrant preference framework — that piece deriving from the fact that local police serve community caretaking functions in society separate and apart from their law enforcement role.

**CONCLUSION**

The subject of The \textit{University of Chicago Legal Forum} Symposium is "Solutions for Overproceduralism in the Criminal Trial." Fourth Amendment law, of course, is but one piece of the criminal trial and the proposal offered here will affect only those exceptional community caretaking intrusions that find their way to court. Nonetheless, there may be a small lesson here. The Warren Court in \textit{Katz v United States} enthusiastically expressed

\(^{261}\) Uviller, 25 Crim L Bull at 47 (cited in note 6).
\(^{262}\) Alschuler, 45 U Pitt L Rev at 256 (cited in note 38).
\(^{263}\) Id.
\(^{264}\) 413 US 443, 448 (1973).
its commitment to full ex ante specification of the circumstances in which law enforcement officers might intrude on private domains.\textsuperscript{265} This commitment produced a body of Fourth Amendment law that has offered no small guidance to police in their role as law enforcement agents. It is chastening to consider, however, that courts may have misperceived the local police even as they sought to shape police behavior through Fourth Amendment adjudication in the criminal trial. Formulating Fourth Amendment standards almost exclusively in criminal cases, courts not surprisingly devised logical rules that treat police as if they do nothing else but enforce the criminal law. But this has never been the case.

In conclusion, then, the lesson to take from the community caretaking tale — a lesson which may have broader implications for criminal trial reform — may be that old lesson about life's tendency to confound the attempt fully to specify appropriate outcomes in advance. The norms appropriate to constraining police acting for law enforcement purposes end up being simply ill-suited to cases in which police serve important community caretaking ends. In the community caretaking context, then, courts should abandon the ex ante articulation of categorical rules in favor of a case-by-case approach. In this way, they can lend visibility to the role of police as community caretakers. They can also lend coherence to those Fourth Amendment cases where police have intruded on privacy in service of community caretaking ends.

\textsuperscript{265} 389 US 347, 357 (1967).