When Can the Police Lie? The Limits of Law Enforcement Officers' Use of Deception in Obtaining Consent to Search a Home

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I. Overview

It is clear that the home is "first among equals" of private locations—where Fourth Amendment privacy rights are at their zenith[1]—and that warrantless searches of a home are presumptively unconstitutional.[2] The law is not as clear as one might expect, however, in governing when law enforcement officers can lie to get inside a home for the purpose of gathering evidence. Often, courts rely on consent as an exception to the Fourth Amendment's protections. If a citizen validly consents to a residential search, the police can enter and search that home as extensively as that consent permits.[3] But what if officers lie about their identity as officers when seeking consent? Leaving aside when police act in an undercover capacity,[4] can a police officer, without identifying as a police officer or appearing as one, enter a home or its curtilage to gather evidence based on consent? When would consent under those circumstances be invalid under federal law? For instance, can a police officer pose as a utility worker, enter the curtilage of a home, knock on the door, seek and obtain consent to enter the home to pursue a fictitious "gas leak," and thereafter use information gathered within the home as evidence against the homeowner in a criminal case? Would the lack of disclosure of the utility worker as a police officer undermine the validity of the consent? If so, would permitting use of the false pretense significantly undercut the privacy of the home, reducing its status to something less than the "first among equals" for Fourth Amendment purposes? What if the subject of the lie

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1. *See* Florida v. Jardines, 569 U.S. 1, 6 (2013).

2. *See, e.g.*, Kentucky v. King, 563 U.S. 452, 459 (2011); Brigham City v. Stuart, 547 U.S. 398, 403 (2006); Groh v. Ramirez, 540 U.S. 551, 559 (2004).

3. *See* 18 U.S.C. § 2236(c) (noting exception to warrant requirement where occupant consents to search).

4. *See infra* Section III.A. "Undercover capacity" as used in this Article means those situations when law enforcement officers pose as criminal confederates to investigate suspected, ongoing criminal activity, such as when a police officer poses as a drug buyer and seeks to buy illegal narcotics from a defendant.

is less alarming than a gas leak? Would the lie be any less objectionable under the Constitution?

Some lower courts have concluded that such ruses, whether of a dangerous gas leak[5] or something nonthreatening,[6] vitiate consent, but the Supreme Court has not spoken to the issue. The lack of clarity on such a fundamental principle is troubling. Resolving this issue would not only further define the scope of privacy in the home, but it could also establish a useful guide when non-undercover police conceal themselves to "knock" on the electronic equivalent of a door and request consent to access private information on social media and other electronic platforms; for example, by posing as "friends" to secure waiver of privacy in a virtual environment.

This Article argues that when the police, seeking to enter a home and thereby gather evidence, conceal their identity as officers without engaging in undercover criminal activity, consent cannot itself justify their entry into the home or onto its curtilage. When the police enter the curtilage of a home with the sole purpose of conducting a search, they need a warrant or a recognized exigency;[7] an undisclosed police officer in a non-undercover role thus generally cannot enter the curtilage at all to seek such consent. In any event, the concealment of the officer's identity should invalidate any consent a disguised police officer in a non-undercover role obtains.

This reasoning is consistent with long-standing principles governing consent and with recent Supreme Court cases holding that certain police investigative tactics involving dwellings constitute searches or seizures under the Fourth Amendment.[8] Further, allowing police in non-undercover scenarios to pose as civilians to seek consent to enter a home poses serious social costs—it may undermine public confidence in the police, specifically when admitting non-officers into the home, an increasingly common occurrence. Moreover, eliminating consent as a justification for warrantless searches in non-undercover circumstances does not undermine police use of ruses in two distinguishable circumstances: first, when police enter a home with a warrant and the ruse is not designed to authorize the entry, but rather to permit the police to minimize violence or other adverse effects of the execution of the warrant;[9] and second, when police

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5. *See* United States v. Giraldo, 743 F. Supp. 152, 154 (E.D.N.Y. 1990) (concluding agent's disguise of gas company worker to enter home rendered Giraldo's consent involuntary).

6. *See, e.g.*, United States v. Wei Seng Phua, 100 F. Supp. 3d 1040, 1052 (D. Nev. 2015) (concluding agents' repairmen pretense vitiated consent to enter hotel room).

7. *See* Bovat v. Vermont, 141 S. Ct. 22, 22 (2020) (mem.) (Gorsuch, J., concurring) (discussing need for warrant, exigent circumstances, or consent to enter home or its curtilage); Collins v. Virginia, 138 S. Ct. 1663, 1675 (2018) (holding curtilage no less protected if observable from street). Police officers may not enter the curtilage without a warrant to conduct a search or obtain otherwise inaccessible information solely because the officers can observe inside the curtilage from a lawful vantage point. *See Collins*, 138 S. Ct. at 1675.

8. *See* Florida v. Jardines, 569 U.S. 1, 3, 8 (2013) (holding police use of drug-sniffing dog on homeowner's porch to investigate home constituted "search"); *see also Collins*, 138 S. Ct. at 1670 (holding physical intrusion onto curtilage to gather evidence constitutes "search")

9. *See infra* note 90 (explaining situations where police may justifiably use ruses or deception).

conceal themselves while acting in an undercover capacity, posing as a criminal confederate, and obtain consent to enter a private home to pursue otherwise illegal activity.[10]

This Article first reviews the core privacy principles that protect a home from warrantless searches, as well as the development of property rights that overlay privacy rights protecting the home and its curtilage.[11] It then discusses the principle of consent and the ways in which the police may seek consent to justify entry into the home or its curtilage.[12] This Article then examines how developments in electronic privacy may limit police intrusion into private electronic spaces.[13] This Article concludes that consent does not justify police access to homes (and, likely, certain private electronic accounts) if the officers not acting in an undercover capacity seek access without disclosing their identities as police and without seeking to engage the defendant in illegal activities as part of an investigative plan.[14]

II. PRIVACY AND PROPERTY RIGHTS AS A SAFEGUARD AGAINST POLICE INTRUSIONS

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[15] For decades, Justice Harlan's two-pronged test for determining what is private, and therefore within the scope of the Fourth Amendment—which he articulated in his concurring opinion in *Katz v. United States*[16]—has guided Fourth Amendment jurisprudence: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[17] If both prongs are met, the Fourth Amendment protects the interest.[18] Embedded in this definition is the concept of waiver—that a claim to an expectation of privacy, and society's assessment of its reasonableness, are subject to intentional or

10. *See* Pagán-González v. Moreno, 919 F.3d 582, 592 (1st Cir. 2019). A common example of an acceptable form of ruse includes when undercover police pose as drug buyers. *See id.* "[T]he deception is deemed acceptable under the Fourth Amendment because the targeted seller has freely made the choice to expose his criminal activity to others . . . [and] voluntarily assumed the risk of inviting individuals whom he knows he cannot control into his residence." *Id.*

11. *See infra* Part II. The analyses in Parts II and IV expand on the analysis in Michael D. Ricciuti, *Privacy in the Cell Phone Age: New Restrictions on Police Activity*, 52 SUFFOLK U. L. REV. 393 (2019).

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See infra* Part V.

15. U.S. CONST. amend. IV.

16. 389 U.S. 347 (1967).

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

18. *See* United States v. Jones, 565 U.S. 400, 406 (2012) (asserting subsequent Fourth Amendment cases applied Justice Harlan's test).

unintentional waiver by the rights holder.[19] Justice Harlan made this point in his concurrence, expressing that while the home is a place of privacy, those items and expressions exposed to others in "plain view" are not protected because there is no intention to keep private what has been exhibited.[20]

Under this definition, one who keeps private matters in a protected place, like a home, could still forfeit the privacy protection over that matter by removing the private matter from the protected place and exposing it to "outsiders." Even if the rights holder subjectively believes the matter is private, conducting such private business in a nonprivate place may nevertheless forfeit the Fourth Amendment's protections.[21] In either event, the expectation of privacy may become untenable, society may not recognize the privacy claim as reasonable, or both; consequently, the Fourth Amendment would not protect the interest.

In 2012, the Court expanded the scope of interests protected under the Fourth Amendment, holding that property interests are also protected under the Constitution. In *United States v. Jones*, the Court addressed whether the government, acting without a valid warrant—they had obtained one, but it expired—violated the Fourth Amendment rights of the vehicle's owner when it attached a global positioning system (GPS) device, which it monitored for almost a month, to the underside of a vehicle.[22] The Court held that it did without deciding the case on *Katz* grounds, sidestepping the question of whether the owner of the car held a legitimate expectation of privacy in the underside of his car or in the travel of the car on the public roads.[23] Justice Scalia, writing for the Court, instead resurrected an old concept, physical trespass on private property, to hold that the government intruded on Jones's property rights in the car—an interest protected under the Fourth Amendment independent from the *Katz* privacy interest.[24] Specifically, by attaching the device to the owner's car, the government physically intruded on an effect—the car—and thereby the physical trespass violated the owner's Fourth Amendment rights.[25]

The Court next applied *Jones* to expand the protection of the home in *Florida v. Jardines*.[26] In doing so, it limited a case decided two years prior, *Kentucky v. King*, which had allowed the police greater freedom to search a home. In *King*, police officers had arranged a "controlled buy" of crack cocaine outside an

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19. *See* United States v. Miller, 425 U.S. 435, 442 (1976) (holding Fourth Amendment does not protect what someone knowingly exposes to public).

20. *See Katz*, 389 U.S. 347, 361 (Harlan, J., concurring) (differentiating privacy of home generally from items in "plain view").

21. *See Jones*, 565 U.S. at 406 (providing no reasonable privacy right when conducting activity in nonprivate place); *see also Katz*, 389 U.S. at 352 (discussing privacy right of words spoken in closed telephone booth).

22. *See Jones*, 565 U.S. at 402-03 (detailing factual background of GPS attachment).

23. *See id.* at 406-07 (determining attachment and monitoring of device violated Fourth Amendment).

24. *See* United States v. Jones, 565 U.S. 400, 409 (2012) (highlighting Jones's property rights in car). Justice Scalia posited that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.*

25. *See id.* at 404 (asserting government violated Fourth Amendment "effects" clause).

26. *See* 569 U.S. 1, 10-11 (2013) (extending *Jones* rationale to protection of home and curtilage).

apartment complex.[27] After the buy occurred, the seller entered the breezeway of the apartment complex, but the police failed to observe which of two apartments the suspect had entered.[28] Smelling marijuana smoke emanating from one of the apartments, however, the officers approached that door, "banged on [it] . . . 'as loud as [they] could,'" and loudly announced themselves.[29] After knocking, the officers heard sounds consistent with evidence destruction, announced their imminent entry, and kicked in the door, finding incriminating drug evidence inside, but not the alleged crack dealer they were after.[30]

Upholding the police action, Justice Alito's decision for the Court held the exigent circumstances justified the entry and rejected the argument that warrantless entry to prevent evidence destruction was an unconstitutional "police-created exigency."[31] The Court held that the exigent circumstances rule justifies a warrantless search when the police act reasonably and do not create the exigency with conduct that itself violates the Fourth Amendment.[32] In reaching this result, the Court rejected analyses that examined the officers' intent or alleged bad faith and instead focused exclusively on the objective facts to justify police action.[33] The Court also rejected the reasoning applied by lower courts that police in circumstances like in *King* need probable cause before knocking on the door of a home;[34] instead, the Court reasoned that requiring a warrant or consent interfered with legitimate law enforcement strategies.[35] Thus, "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."[36] In its reasoning, the Court noted the importance

27. *See* 563 U.S. 452, 455 (2011) (describing undercover operation).

28. *See id.* at 456.

29. *See id.*

30. *See id.* at 456-57 (noting police found target of investigation in another apartment).

31. *See King*, 563 U.S. at 461-62. The various circuit courts had developed a "police-created exigency" exception to the exigent circumstances rationale, which prohibited the police from relying on an exigency they created to justify a search. *See id.* at 461.

32. *See id.* at 462 (explaining exigent circumstances exception requirements).

33. *See* Kentucky v. King, 563 U.S. 452, 464 (2011) (explaining evenhanded law enforcement best achieved through objective standard).

34. *See id.* at 466 (rejecting probable cause approach of lower courts); *see also* Bovat v. Vermont, 141 S. Ct. 22, 22 (2020) (mem.) (Gorsuch, J., concurring) (recognizing "knock and talk . . . increasingly popular law enforcement tool" regardless of warrant or exigency).

35. *See King*, 563 U.S. at 466-67 (listing reasons probable cause approach unjustifiably interferes with legitimate law enforcement strategies). The Court enumerated several appropriate circumstances in which an officer need not seek a warrant: when a brief conversation with the occupants could obviate the need for a warrant; when the occupant's consent may be preferred as simpler, faster, less embarrassing, and more convenient; when the officer may desire more information to buttress an otherwise weak warrant basis; when law enforcement wishes to execute one search with a broader basis than was then available; or when the police wish to keep the investigation confidential. *See id.* "Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution." *Id.* at 467.

36. *Id.* at 469.

of a citizen's knowledge that it is the police knocking at the door, even though the Court fell short of constitutionally requiring such disclosure.[37]

As noted above, the Court expanded on the property rationale of *Jones* in *Jardines*, expanding the protection afforded to a home.[38] In that case, the Court addressed whether the police conducted a search when they came onto the porch of a home with a drug-sniffing dog for the purpose of detecting the odor of narcotics emanating from the home.[39] The dog "alerted" to the front door, and the police used that fact to obtain a warrant to search the home.[40] Officers found marijuana plants in the home.[41] Jardines moved to suppress that evidence, arguing the use of the drug-sniffing dog on his front porch constituted an unreasonable search.[42] The Court agreed and concluded, following *Jones*, that Jardines's property rights had been violated because police entered the curtilage of a home for the sole *purpose* of conducting a search.[43] The Court reasoned that the Fourth Amendment established a "simple baseline"—the government simply may not physically intrude on a constitutionally protected area to obtain information.[44] Entry on the porch with the dog was a search subject to constitutional protections because the officers were gathering information in the private curtilage of the house and entered that area without explicit or implicit consent.[45] Because the police first invaded a protected *property* interest to permit the dog to conduct the sniff, it was irrelevant that the dog's ability to detect only contraband invaded no protected *privacy* interest.[46] Because "the officers learned what they learned only by physically intruding on Jardines' property to gather evidence . . . a search occurred," and any *Katz* analysis of the expectation of privacy was unnecessary.[47]

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37. *See id.* at 468. The Court noted that officers are "encouraged" to identify themselves so citizens could therefore make informed decisions whether to answer the door. *See id.*

38. *See supra* text accompanying note 1 (discussing constitutional significance of home declared in *Jardines*).

39. *See* Florida v. Jardines, 569 U.S. 1, 3-4 (2013) (presenting circumstances and execution of police conduct).

40. *See id.* at 4 (describing police procedure leading to Jardines's claim).

41. *See id.*

42. *Id.* at 4-5.

43. *See Jardines*, 569 U.S. at 11 (noting *Katz* reasonableness test added to traditional property-based understanding of Fourth Amendment).

44. *See id.* at 5 (citing United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)). In *Knotts*, the Court held that the police's placement of a beeper inside a chloroform container they expected Knotts to purchase was not a search. *Knotts*, 460 U.S. at 282. The Court analogized the police's monitoring of Knotts to a person traveling in an automobile on public thoroughfares, concluding Knotts had no reasonable expectation of privacy in his movements. *Id.* at 281.

45. *See* Florida v. Jardines, 569 U.S. 1, 5-6 (2013) (declaring holding).

46. *See id.* at 11 (finding privacy question unnecessary when constitutional property rights violated).

47. *See id.* In her concurrence, Justice Kagan, joined by Justices Ginsburg and Sotomayor, argued that both the property and privacy rationales supported the majority's decision, suggesting that a drug-sniffing dog is a "super-sensitive instrument" that invaded the privacy of the home when it trespassed on the curtilage. *See id.* at 12-13 (Kagan, J., concurring) (analogizing drug-sniffing dog to high-powered binoculars gazing into home).

Because the officers' investigation took place in a "constitutionally protected area," the question then became whether the officers had a generally accepted social license for their actions.[48] According to the Court, customary habits may imply a license.[49] While a knocker on a front door may create an implicit license to attempt entry, the implication is that visitors—including the police—will knock promptly, wait briefly, and then leave absent further invitation.[50] The Court rejected the license argument, finding determinative that the police officers' sole purpose in entering the property was to conduct a search, as shown by the objective evidence, including use of a trained police dog, actions which extended beyond any customary invitation implied by "hanging a knocker."[51]

Jardines still permitted police officers to come to the door to conduct an investigation by asking questions of anyone who answers, because anyone is invited to come to the door, knock, and seek a conversation with the occupant.[52] The *Jardines* Court distinguished *King* by noting that *King* simply prohibited police entry onto the curtilage of a home for the sole purpose of conducting a *search*:

> What *King* establishes is that it is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that*. The mere "purpose of discovering information" in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment. But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.[53]

When the police are lawfully on the premises, such as to knock on the door to ask questions as police officers, they can seek consent or make plain-view observations for use in criminal investigations.[54]

In a subsequent case, *Collins v. Virginia*, the Court clarified that police generally cannot enter the curtilage of the home for the purpose of conducting a search of a vehicle located within the curtilage without a warrant, even if another rationale—such as the presence of a motorcycle and the application of the

48. *See Jardines*, 569 U.S. at 7 (expressing need to determine presence or absence of license).

49. McKee v. Gratz, 260 U.S. 127, 136 (1922).

50. *See Jardines*, 569 U.S. at 8 (analogizing to Girl Scouts and trick-or-treaters).

51. *See* Florida v. Jardines, 569 U.S. 1, 9-10 (2013) (explaining reasoning for rejecting license argument). "An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. . . . The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." *Id.*

52. *See id.* at 8, 9 n.4.

53. *Id.* at 9 n.4. Justice Alito, who authored the majority opinion in *King*, dissented in *Jardines*, arguing that the Court's "objective purpose to search" reasoning offered no meaningful way to distinguish a permissible "knock and talk" from an impermissible search when both occur for the *purpose* of gathering information. *Id.* at 21-22 (Alito, J., dissenting) (citations omitted).

54. *See* California v. Ciraolo, 476 U.S. 207, 213 (1986).

automobile exception—might authorize the search.[55] "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."[56] In light of the heightened protection of the home, an intrusion on the curtilage for the purpose of gathering evidence is presumptively unreasonable without a warrant or valid warrant exception.[57] Thus, for the *Collins* Court, the automobile exception to the Fourth Amendment did not give the police license to intrude into the curtilage to investigate a motorcycle parked there and covered by a tarp; to hold otherwise would both unduly expand the automobile exception and intrude upon Fourth Amendment protections afforded to the home.[58]

III. LIMITS ON POLICE DECEPTION

To fully understand the scope of police license to lie, it is helpful to categorize the scenarios in which the police may approach a citizen's home without a warrant to seek various forms of consent. There are at least four such situations: (1) to seek consent to engage in criminal activity while in an undercover capacity; (2) to seek consent without misrepresenting the officer's identity; (3) to seek consent without misrepresenting the officer's identity but while misrepresenting the officer's purpose; and (4) to seek consent while misrepresenting the officer's identity but without intent to engage in illegal activity.

A. Police Come to the Door in an Undercover Capacity to Seek Consent to Engage in Criminal Activity

The law has long permitted a criminal confederate to reveal to the government private communications conducted with a defendant without violating the Fourth Amendment.[59] Additionally, an undercover agent can pose as a citizen engaged in criminal activity and pursue otherwise illegal activity in a defendant's home.

55. *See* Collins v. Virginia, 138 S. Ct. 1663, 1671 (2018) (declining to extend automobile exception to permit entry onto curtilage of home). Entry into the curtilage is not justified even if contraband within the curtilage is in plain view; the Court stated "[t]he ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible." *Id.* at 1675.

56. *See id.* at 1670 (quoting *Ciraolo*, 476 U.S. at 212-13).

57. *See id.*

58. *See Collins*, 138 S. Ct. at 1671 (reasoning driveway part of home's curtilage). The Court noted that it had previously declined to expand the scope of other exceptions to the warrant requirement to permit warrantless entry into the home and observed that its prior reasoning in those cases applied with equal force to the automobile exception. *See id.* at 1671-72 (noting expanding scope of automobile exception would undervalue Fourth Amendment protection of home). For example, for police to seize contraband under the plain-view doctrine, they still required "a lawful right of access to the object itself" and could not rely on plain-view principles to access the home. *See id.* at 1672.

59. *See* Hoffa v. United States, 385 U.S. 293, 302 (1966) (holding Fourth Amendment not implicated when witness invited to hotel room). A cooperating witness, Partin, was allowed into Hoffa's hotel room and later revealed the substance of conversations occurring therein to the government. *See id.* (explaining Partin did not

In *Lewis v. United States*,[60] the Court concluded that the government did not violate the Fourth Amendment when a federal narcotics agent misrepresented his identity and his willingness to purchase narcotics and gained entry into Lewis's home where the unlawful narcotics transaction occurred.[61] The Court recognized that it had "long . . . acknowledged . . . in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents."[62] Even though the ruse enabled the undercover agent to access Lewis's home, the Court found no privacy violation because Lewis invited the undercover agent to his home specifically to sell narcotics.[63] The Court reasoned that Lewis had converted the home into a commercial location to which he invited outsiders for unlawful business purposes, and the dwelling was therefore entitled to no greater protection than if that business occurred in any other space.[64] As is the case with a private person, a government agent may similarly accept an occupant's invitation to access their property and conduct business.[65] As the First Circuit observed in a recent case, *Pagán-González v. Moreno*, the Fourth Amendment permits a law enforcement officer to pose as a drug buyer to gain entry to a home or hotel room because the seller chose to expose his criminal activity, thereby voluntarily assuming the risk of inviting into his residence those whom he cannot control.[66]

Perhaps an argument can be made in the wake of *Jardines* that the police need some level of cause—reasonable suspicion or probable cause—to approach the door undercover to engage in criminal activity, but it would be a hard argument to make based on the Supreme Court cases reviewed here. *King* rejected a probable cause requirement in a non-undercover setting,[67] and *Jardines* specifically focused on the warrant requirement because police entered the curtilage solely to conduct a search,[68] which is not the sole or even primary purpose of an undercover effort to engage in criminal activity with the occupant.

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eavesdrop on conversation). The Court held this method did not violate the Fourth Amendment because Partin was invited inside and the conversations occurred while his presence was known to the speakers. *See id.* (noting Hoffa did not rely on security of hotel); *see also* United States v. White, 401 U.S. 745, 746-47, 749 (1971) (holding Fourth Amendment not violated when cooperating witness allowed government to monitor his conversations). Rather, Hoffa "was relying upon his misplaced confidence that Partin would not reveal his wrongdoing." *Hoffa*, 385 U.S. at 302.

60. 385 U.S. 206 (1966).

61. *See id.* at 210. Police do not need a warrant to send a secret agent to a defendant's home to purchase narcotics. *See White*, 401 U.S. at 749.

62. *See Lewis*, 385 U.S. at 208-09.

63. *Id.* at 210.

64. *See id.* at 211 (noting lessened expectation of privacy for unlawful activities).

65. *See id.*

66. *See* Pagán-González v. Moreno, 919 F.3d 582, 592 (1st Cir. 2019).

67. *See* Kentucky v. King, 563 U.S. 452, 466-67 (2011) (noting probable cause not always required).

68. *See* Florida v. Jardines, 569 U.S. 1, 11 (2013) (recognizing search when purpose to find evidence).

B. Police Come to the Door to Seek Consent Without Misrepresenting the Officer's Identity

Valid consent can justify police intrusions into a home that would otherwise violate the Fourth Amendment. To be valid, such consent must be voluntary[69] and someone with actual or apparent authority over the home must give the consent.[70] Courts examine the totality of the circumstances to determine whether consent was valid;[71] factors include knowledge of the right to refuse consent[72] and the presence or absence of coercive police tactics.[73] "[T]he presence or absence of a single controlling criterion" is not determinative.[74]

Under these principles, police may freely come to the door of a home when acting as police and disclosed as such, so long as they do not otherwise violate the Fourth Amendment. *King* highlighted this conclusion: Warrantless entry is permissible to prevent the destruction of evidence so long as the police "did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment."[75]

The Court in *King* did not conclude that police had to disclose themselves as police officers, but instead noted that officers are encouraged to identify themselves.[76] The police in that case, however, were identifiable—the opinion notes they were uniformed.[77] *King* thus stands for the proposition that the police can come to the door, *identified or identifiable as such*, and ask for consent to search. Of course, they must play by society's rules under *Jardines*—for instance, they must stay on the walkway used by others and knock as others might do.[78]

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69. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (holding warrantless search of car lawful when based on owner's consent).

70. *See* United States v. Matlock, 415 U.S. 164, 170 (1974) (upholding warrantless search based on third party's common authority over Matlock's property); *see also* Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (ruling police may validly rely upon third person's apparent authority to consent where reliance reasonable).

71. *See Schneckloth*, 412 U.S. at 227 (following courts of California in holding voluntary consent question of fact).

72. *See id.* (consenting party aware of right to refuse); *see also* United States v. Mendenhall, 446 U.S. 544, 558-59 (1980).

73. *See Mendenhall*, 446 U.S. at 557 (noting consent involuntary if resulting from express or implied duress or coercion).

74. *See Schneckloth*, 412 U.S. at 226.

75. *See* Kentucky v. King, 563 U.S. 452, 462 (2011).

76. *See id.* at 468.

77. *See id.* at 456 (emphasizing officers involved wore uniforms).

78. Query what would happen if they come to the door selling tickets to the police department's charity ball and have a drug-sniffing dog to demonstrate the uses made of the charitable donations. If the dog alerted then, would it violate *Jardines*? Would good faith matter? It should not; as *King* noted, good faith is a subjective concept with little relevance in the Fourth Amendment context: "'Our cases have repeatedly rejected' a subjective approach, asking only whether 'the circumstances, viewed *objectively*, justify the action.'" *Id.* at 464 (quoting Brigham City v. Stuart, 547 U.S. 398, 404 (2006)). "Indeed, we have never held, outside limited contexts such as an 'inventory search or administrative inspection . . . , that an officer's motive invalidates objectively

C. Police Come to the Door to Seek Consent Without Misrepresenting the Officer's Identity but Misrepresenting the Officer's Purpose

Critical in analyzing scenarios in which undisclosed police officers seek consent to enter a home based on misrepresentation is to recognize that where disclosed police lie to homeowners, lower courts have sometimes, although not always, found that the consent obtained is invalid.[79] This result follows, in part, from a policy-based concern that such deception may erode society's trust in law enforcement. The First Circuit has recently noted that a court's allowance of such falsehoods would undermine trust in government officials generally.[80] Quoting the Fifth Circuit, the First Circuit reiterated that "private individuals have 'the right to expect that the government, when acting in its own name, will behave honorably.'"[81] Indeed, the First Circuit recognized that the Supreme Court has held an officer's false claim of possessing a valid warrant constitutes coercion and misrepresentation and undermines the validity of any related consent.[82]

Despite these issues, and under the totality of the circumstances, such misrepresentations by the police do not always vitiate consent. The First Circuit noted that the Fourth Amendment does not categorically proscribe deception when obtaining consent: "[t]he question instead is whether the deception in context rendered the consent involuntary."[83] The court noted an Eleventh Circuit decision, *United States v. Spivey*, which held that "fraud, deceit or trickery in obtaining access to incriminating evidence *can* make an otherwise lawful search

justifiable behavior under the Fourth Amendment.'" *Id.* (alteration in original) (quoting Whren v. United States, 517 U.S. 806, 812 (1996)).

79. *See, e.g.*, United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990) (per curiam) (holding misinformation about purpose of entry vitiates consent); United States v. Tweel, 550 F.2d 297, 300 (5th Cir. 1977) (noting consent obtained through deception violates Fourth Amendment); United States v. Parson, 599 F. Supp. 2d 592, 608 (W.D. Pa. 2009) (using tactics which confuse defendant negate consent).

80. *See* Pagán-González v. Moreno, 919 F.3d 582, 592-93 (1st Cir. 2019) (noting individuals may rely on agent's representations); *see also* United States v. Ramirez*,* 976 F.3d 946, 953 (9th Cir. 2020) (discussing categories of law enforcement deception). "Deception is unlawful when the government makes its identity as law enforcement known to the target of the ruse and exploits the target's trust and cooperation to conduct searches or seizures beyond that which is authorized by the warrant or other legal authority, such as probable cause." *Ramirez*, 976 F.3d at 953.

81. *See Pagán-González*, 919 F.3d at 593 (quoting SEC v. ESM Gov't Sec., Inc., 645 F.2d 310, 316 (5th Cir. Unit B May 1981)).

82. *See id.* at 594. The First Circuit stated that "the Supreme Court has soundly rejected the consent to search obtained by officers who falsely claim they have a warrant." *Id.*; *see* Bumper v. North Carolina, 391 U.S. 543, 550 (1968). That situation, the Court explained, is "instinct with coercion" because the officer "announces in effect that the occupant has no right to resist the search." *Bumper*, 391 U.S. at 550. The First Circuit concluded, "[i]t is thus well established, in our own law and elsewhere, that 'deception invalidates consent when police claim authority they lack.'" *Pagán-González*, 919 F.3d at 594-95 (quoting United States v. Spivey, 861 F.3d 1207, 1213 (11th Cir. 2017)).

83. *See Pagán-González* at 593-94.

unreasonable," while deception by officers relying on their status as government agents "does not always invalidate consent."[84]

Such misrepresentations by disclosed police officers must be distinguished from undercover officers seeking to enter a defendant's home to engage in otherwise illegal activity.[85] As discussed above, in undercover cases, the defendant does not know he or she is permitting a government agent to enter the premises. In *Spivey*, by contrast, Spivey *knew* of the officer's identity but relied on a misrepresentation as to the officer's purpose.[86] As the Tenth Circuit noted in a similar case, the question is whether the officer's deception as to their purpose rendered the consent involuntary.[87] Police misrepresentation of their purpose for seeking entry into a home strips an individual of the opportunity to determine whether to relinquish their privacy; in the Tenth Circuit's view, that consent should not be treated as valid.[88] Indeed, where the misrepresentation suggests that the citizen is in danger, the Tenth Circuit found that the consent may be considered coerced.[89]

D. Police Come to the Door to Seek Consent While Misrepresenting the Officer's Identity but Without Intent to Engage in Illegal Activity

If misrepresentations by disclosed police officers may vitiate consent, then one would think the law would take an even harder line when officers conceal their identities as police in the first place, but the law is not that clear. That said, a close analysis of the law, particularly after *Jardines*, indicates such consent would be invalid on several grounds.

An undercover and undisclosed police officer may seek entry to a home in two scenarios: where the police have a warrant and where they do not. This

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84. *See Spivey*, 861 F.3d at 1214. In *Spivey*, Austin and Spivey had reported a burglary, and the police obtained consent to enter the home on the pretense of following up on that report. *See id.* at 1210. In reality, the police had already apprehended the burglar, who disclosed evidence of fraud at Austin and Spivey's residence—the real reason for the officer's entrance into the home. *See id.* at 1210-11. Despite the misrepresentation, the *Spivey* court upheld the consent as voluntary, emphasizing that Austin "made a strategic choice to report the burglary and to admit the officers into her home." *Id.* at 1211. The Ninth Circuit took the opposite position in *Ramirez*, holding that "[a] ruse that reveals the officers' identity as law enforcement but misrepresents the purpose of their investigation so that the officers can evade limitations on their authority raises serious Fourth Amendment concerns." *See Ramirez*, 976 F.3d at 955. *Ramirez* expanded on a prior decision in which the Ninth Circuit determined that federal agents unconstitutionally used a ruse to execute an arrest, entering Phillips's office building by having uniformed police officers to knock on the building door, and falsely asking another occupant for "permission to enter to investigate a report of a burglary in the building." *See* United States v. Phillips, 497 F.2d 1131, 1133-35 (9th Cir. 1974) (reasoning agents require probable cause to use ruse or other means for entry). After the uniformed officers obtained "consent" to enter, the agents followed them inside and arrested Phillips. *See id.* at 1133.

85. *See supra* Section III.A.

86. *See Spivey*, 861 F.3d at 1215.

87. *See* United States v. Harrison, 639 F.3d 1273, 1278 (10th Cir. 2011).

88. *See id.* at 1280 (quoting 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.10(c) (3d ed. 2007)).

89. *See id.* at 1279-80 (analogizing false threat of danger to officer inducing consent by pointing gun at suspect).

Section focuses on the latter.[90] When the police do not have a warrant, and where an undisclosed officer seeks consent to justify entry into a home, *Jardines* clarified that the police officer's entry onto the curtilage to conduct an investigation implicates the Fourth Amendment.[91] *Jardines* made this point when it rejected the State's argument that the front walk and door knocker implied an invitation to the police to bring a drug-sniffing dog into the curtilage to search the home for narcotics.[92] When police officers come to the door without a warrant, conceal their identity as police officers, and gain entry purportedly by consent intending to gather evidence—not to engage in illegal activity in an undercover capacity—they implicate the precise concern at issue in *Jardines*.

While the Supreme Court has not addressed the scope of consent in these circumstances, lower courts did prior to *Jardines*. For instance, in *United States v. Giraldo*, a case from the Eastern District of New York, the police gained access to a house when an officer posed as a gas company employee searching for a fictitious gas leak, only revealing herself as a police officer and obtaining consent

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90. In the former situation, in which the officer has a search or an arrest warrant and seeks to effect a peaceful entry, a judge has already found probable cause, either for an arrest or search, and the police officer is simply trying to gain entry to do what the judge authorized. Leaving aside any knock and announce issue, this situation likely will not pose a Fourth Amendment issue because the warrant authorizes the entry. *See, e.g.*, United States v. Ramirez, 976 F.3d 946, 953 (9th Cir. 2020) (holding no violation when officers conceal identities to persuade subject of warrant to open door). The Ninth Circuit relied upon Supreme Court precedent, ruling there was no Fourth Amendment violation where law enforcement entered property covertly and installed electronic bugging devices in accord with a valid search warrant. *See* Dalia v. United States, 441 U.S. 238, 248 (1979) (holding no reason notice required for electronic surveillances requiring covert entry). The Supreme Court reasoned that the search warrant authorized the electronic surveillance and the covert entry safely and most successfully carried out the authorized surveillance. *See Ramirez*, 976 F.3d at 953-54. The police can employ deception when executing an arrest or search warrant in a suspect's home where knock and announce is obviated. *See* United States v. Vargas, 621 F.2d 54, 56-57 (2d Cir. 1980). According to the Court, a judge's issuance of a search warrant justifies the agents' use of a ruse to enter an apartment. *See id.* at 56. The large amount of pure cocaine and presence of innocent children further justified this method of entry to avoid violence. *See id.* "Even absent a warrant, stratagem or deception utilized to obtain evidence is generally permissible." *Id.* at 56-57 (citing Lewis v. United States, 385 U.S. 206, 208-09 (1966)). The Court noted the agents announced their identity and purpose before entering. *See id.* at 57; *see also Ramirez*, 976 F.3d at 953 (holding use of deception lawful to hide police identity and facilitate lawful searches). The knock and announce requirement poses no substantial issue. The warrant provides the police with the authority to enter the home absent consent, and if there is reasonable suspicion to believe that seeking consent by knocking and announcing would be futile, "'circumstances presen[t] a threat of physical violence,' or if there is 'reason to believe that evidence would likely be destroyed,'" it can be bypassed. *See* Hudson v. Michigan, 547 U.S. 586, 589-90 (2006) (quoting Wilson v. Arkansas, 514 U.S. 927, 936 (1995)). Even were knock and announce necessary, the failure to comply with that requirement would not result in suppression. *See id.* at 599. This is true even if, unlike a case discussed below, the police falsely claim they are gas company employees investigating a gas leak. A government agent armed with an arrest warrant did not violate the Fourth Amendment nor the knock and announce rule when he "proclaim[ed] himself to be a utility worker investigating a gas leak" because doing so was not a "break[ing]" prohibited by 18 U.S.C. § 3109 and did not violate the Fourth Amendment. *See* United States v. Alejandro, 368 F.3d 130, 133 (2d Cir.), *supplemented by* 100 F. App'x 846 (2d Cir. 2004).

91. *See supra* notes 46-51 and accompanying text (explaining *Jardines* proscribed trespass to property for purpose of conducting search).

92. *See* Florida v. Jardines, 569 U.S. 1, 9 (2013) (stating door knocker not customary invitation to introduce police dogs into area around home).

to search the apartment after gaining entry by the ruse.[93] Distinguishing *Lewis*, the court found that the gas leak claim vitiated the voluntariness of the consent by leading Giraldo to believe there was a life-threatening emergency.[94]

> Even if the courts permit some forms of deception to gain entry to a private dwelling, there are sound public policy reasons for distinguishing the type of deception engaged in here. We take judicial notice of the suspicion with which the police, fire departments and public utilities are regarded in many poor urban communities. In order to ensure cooperation in truly life-threatening situations, it is vital to maintain the public trust in emergency services. When the police or the gas company come to the door warning of a real gas leak or other life-threatening emergency, it is in everyone's interest that they be believed. Sanctioning the type of deception engaged in here would send a message to all those with reason to fear "the system" (whether they be law abiding or law breaking) that emergency warnings cannot be trusted.[95]

The *Giraldo* opinion noted that "[s]ome courts have extended *Lewis* to cases where an undercover agent gains entry to a dwelling pursuant to some *lawful* behavior," citing *United States v. Scherer*[96] and *United States v. Wright*[97] as examples.[98] In *Scherer*, a Bureau of Alcohol, Tobacco and Firearms agent allegedly posed as an informer's cousin, came onto Scherer's property with the informer to build duck blinds, and made incriminatory observations.[99] The Seventh Circuit rejected Scherer's Fourth Amendment claim on consent grounds without considering that the agent was already acting in an undercover capacity in conjunction with an informant as part of a larger investigation.[100]

In *Wright*, the police gained entry to a motel room by concealing that they were police, instead pretending to be citizens with car trouble.[101] The Eighth Circuit rejected Wright's privacy claim and concluded that opening the motel room door to the police validly allowed plain-view observations from the

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93. *See* United States v. Giraldo, 743 F. Supp. 152, 153 (E.D.N.Y. 1990) (showing how officer deception led to resident granting consent for search).

94. *See id.* at 154 (differentiating police deception in *Lewis* from police deception in *Giraldo*). The alternative "choice" to refuse entry and risk blowing oneself up was no choice at all. *See id.*

95. *Id.*; *see* United States v. Harrison, 639 F.3d 1273, 1281 (10th Cir. 2011) (holding police coerced consent to search with false threat of "drugs and bombs" in apartment). The court noted that "[w]e have repeatedly held that deception and trickery are among the factors that can render consent involuntary," and that "[w]e should be especially cautious when this deception creates the impression that the defendant will be in physical danger if he or she refuses to consent to the search." *See Harrison*, 639 F.3d at 1278-79. The court found the ruse suggested Harrison had no choice but to consent and upheld suppression. *See id.* at 1280.

96. 673 F.2d 176 (7th Cir. 1982).

97. 641 F.2d 602 (8th Cir. 1981) (holding deception lawful when agent feigned car trouble and wanted to borrow tools).

98. *See Giraldo*, 743 F. Supp. at 154 (citing cases applying *Lewis* to circumstances of lawful deception).

99. *See Scherer*, 673 F.2d at 181.

100. *See id.* at 182 (noting Scherer expressly consented and agents did not exceed scope of invitation).

101. *See Wright*, 641 F.2d at 603 (describing officer's disguise of citizen seeking help).

doorway.[102] The court affirmed its prior ruling that there is no meaningful distinction between an officer's lawful or unlawful purpose when obtaining consent.[103] While the officers used a ruse, the court found the deception minimal and stated that the officer's conduct was entirely consistent with any visitor to the door.[104]

The reasoning in these cases is flawed because consent can only be obtained by police officers disclosed as such unless police conceal their identity to engage in undercover criminal activity.[105] *Giraldo* emphasized the inherent danger of coercion and public policy concerns in falsely claiming that a gas leak occurred, but consent should not turn on the nature of the lie offered by the police. Rather, the question is whether an undisclosed officer, not engaging in criminal activity undercover, can ever obtain valid consent to search through deception under facts like those in *Giraldo*. The officer simply cannot.

Even though *Schneckloth v. Bustamonte* held that no one factor is determinative of consent, one element that logically must be present for consent to be lawful is that it be requested of a citizen by police officers *acting or appearing as police officers*. This element must be present because Fourth Amendment protections only apply against the government.[106] Thus, police seeking to enter a home without a warrant or a valid warrant exception need consent; as the Supreme Court acknowledged in *Schneckloth*, consent searches comprise law enforcement agencies' standard investigatory techniques: "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."[107] Accordingly, consent in a non-undercover circumstance can only logically apply when the police have identified themselves as police. Particularly where entry into the home is at issue, the sanctity of which "is at the core of the Fourth Amendment's protection against unreasonable governmental intrusions,"[108] proper application of the narrow exception for warrantless consent

102. *See id.* at 605 (validating police's plain-view observations from doorway). "What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967).

103. *See* United States v. Wright, 641 F.2d 602, 604-05 (8th Cir. 1981) (affirming officers' lawful or unlawful purpose not dispositive); *see also* United States v. Raines, 536 F.2d 796, 799 (8th Cir. 1976) (rejecting Raines's distinction between lawful and unlawful).

104. *See Wright*, 641 F.2d at 605 (stating officers acted like normal visitors despite using disguises).

105. *See, e.g.*, United States v. Wooden, 945 F.3d 498, 500 (6th Cir. 2019), *cert. granted in part*, 141 S. Ct. 1370 (2021) (mem.) (describing facts of case). An investigator, who was not uniformed, knocked on Wooden's door hoping to find a fugitive inside; Wooden allowed the officer in after the officer asked to speak to a resident of the house. *See id.* Thereafter, the officer observed criminal behavior. *See id.* The Sixth Circuit upheld the district court's denial of Wooden's suppression motion on plain error review, noting that the investigator's deception was proper. *See id.* at 504. The court also rejected a trespass claim based on *Jardines* and *Jones* because "an officer's undercover status does not amount to deception under ordinary trespass principles." *See id.* at 503-04.

106. *See* United States v. Jacobsen, 466 U.S. 109, 113-14 (1984) (stating Fourth Amendment "proscrib[es] only governmental action").

107. Schneckloth v. Bustamonte, 412 U.S. 218, 231-32 (1973).

108. Pagán-González v. Moreno, 919 F.3d 582, 590 (1st Cir. 2019).

searches of a home needs this identification requirement. After all, "the Supreme Court has described consent as a 'jealously and carefully drawn exception' to the warrant requirement."[109] Thus, to carry its burden to prove valid and voluntary consent, the government must prove voluntariness based on the totality of the circumstances, similar to the test for the voluntariness of a confession.[110] That review includes "any evidence that law enforcement officers' fraud, deceit, trickery or misrepresentation prompted defendant's acquiescence to the search."[111]

Pagán-González equated the urgent action claim in *Giraldo* with consent based on a false claim that the police already had a warrant.[112] Both instances, the First Circuit held, were coercive.[113] In addition, the First Circuit reasoned that, as a public policy concern, a false urgency claim would not only weaken confidence in the police, but also undercut the public's cooperation with emergency responders reacting to a real emergency.[114] But the urgency argument serves only to distinguish extreme violations of Fourth Amendment rights from more pedestrian violations. Whether undercover police officers falsely claim an emergency, as in *Giraldo*, or some less dire ruse, there can be no valid consent in circumstances like these if the citizen does not know the person requesting consent is a police officer.

Requiring disclosure of police identity, as suggested here, is consistent with the Supreme Court's description of consent as a "'jealously and carefully drawn' exception" to the warrant requirement[115] and with the same close scrutiny on claims of consent as are applied when assessing the voluntariness of a confession.[116] Further, as in *Jardines*, and as discussed below in *Carpenter v. United*

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109. *Id.* at 591 (quoting Georgia v. Randolph, 547 U.S. 103, 109 (2006)).

110. *See Schneckloth*, 412 U.S. at 221-22, 226-27.

111. *See Pagán-González*, 919 F.3d at 591 (quoting United States v. Vanvliet, 542 F.3d 259, 264 (1st Cir. 2008)).

112. *See id.* at 594-95.

113. *See id.* at 596 (noting courts consistently hold coercion implicit when officers falsely present urgency). In the language of the Eleventh Circuit, "when an officer lies about the existence of exigent circumstances, he also suggests that the occupant has no right to resist and may face immediate danger if he tries." *See* United States v. Spivey, 861 F.3d 1207, 1213 (11th Cir. 2017); *see also* United States v. Harrison, 639 F.3d 1273, 1280 (10th Cir. 2011) (holding consent invalid where officers falsely claimed Harrison's apartment contained bomb); United States v. Montes-Reyes, 547 F. Supp. 2d 281, 291 (S.D.N.Y. 2008) (finding no consent where officers used false premise of missing girl to fabricate "grave emergency"); United States v. Hardin, 539 F.3d 404, 424-25 (6th Cir. 2008) (invalidating consent where apartment manager, aiding police, entered apartment to investigate nonexistent water leak); Krause v. Commonwealth, 206 S.W.3d 922, 926 (Ky. 2006) (finding coercion where officers obtained consent based on false report of rape at location); People v. Jefferson, 350 N.Y.S.2d 3, 4 (App. Div. 1973) (per curiam) (reversing convictions because gas leak ruse used to gain consent violated Jefferson's constitutional rights); *cf.* People v. Zamora, 940 P.2d 939, 943 (Colo. App. 1996) (reasoning consent valid where voluntary, despite "officers . . . partially misrepresent[ing] their purpose" for search).

114. *See* Pagán-González v. Moreno, 919 F.3d 582, 595-96 (1st Cir. 2019) (discussing public policy concerns motivating some courts to find implied coercion).

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

116. *Pagán-González*, 919 F.3d at 591 (first citing Schneckloth v. Bustamante, 412 U.S. 218, 226-27 (1973)); and then citing United States v. Coombs, 857 F.3d 439, 449 (1st Cir. 2017)).

States,[117] it matters that the person asking for a waiver of rights is a member of law enforcement. Requiring such disclosure is consistent with the principles undergirding the knock and announce requirement under the Fourth Amendment. Knock and announce is a long-standing procedure that requires police to identify themselves before entering a home; with roots in English common law, the "knock and announce principle was woven quickly into the fabric of early American law" and "is an element of the reasonableness inquiry under the Fourth Amendment."[118]

Thus, the logic governing consent, coupled with the Fourth Amendment's strong protection of the home and the reasoning of *Jardines*, establishes that consent to enter a home given to an undisclosed police officer—an officer who does not intend to engage in criminal activity—should not be valid. Where the police come onto the curtilage with the sole purpose of gathering evidence in the home—that is, conducting a search—as was the case in *Giraldo*, they plainly need a warrant (or a warrant exception) under *Jardines*. Consequently, an undisclosed police officer cannot come onto the curtilage to seek consent to enter the home without disclosing the officer's identity where the objective facts show that the officer intends to conduct a search while on the property. This is different from the "knock and talk" scenario, where police officers, recognizable or identified as such, objectively seek to converse with the occupants. And, just as in *Collins*, which observed that a plain-view seizure is unjustifiable when effectuated by an unlawful trespass, an undisclosed police officer unlawfully on private property should not be in the position to obtain lawful consent. In any event, any consent the police do obtain should be invalid because the citizen would not know that it is the police seeking consent.

From a social policy perspective, allowing police to lie about their identity and purpose for entering the home is problematic, particularly after the COVID-19 pandemic. Many people now work from home and have the necessities of life delivered there, including groceries, consumer goods, and even cars.[119] If the police are allowed to deceive citizens to gain access to homes, citizens may become fearful of opening their door to accept a delivery or, as *Giraldo* highlights, to address an emergency. Leaving aside the violation of privacy and

117. 138 S. Ct. 2206 (2018).

118. Wilson v. Arkansas, 514 U.S. 927, 933-34 (1995) (grounding Fourth Amendment analysis in history of common law knock and announce).

119. *See* Robert Ferris, *Here's Why Many People Are Shopping for Cars Online*, CNBC (Oct. 20, 2021, 10:00 AM), https://www.cnbc.com/2021/10/20/heres-why-many-people-are-shopping-for-cars-online.html [https://perma.cc/Q5HU-7BWK] (reporting increases in online automobile sales and at-home car deliveries); Khristopher J. Brooks, *Working from Home Is Here to Stay, Latest Job Listings Show*, CBS NEWS (Mar. 16, 2021, 3:01 PM), https://www.cbsnews.com/news/indeed-remote-work-telecommuting-work-from-home-employer/ [https://perma.cc/WDC4-Z9L3] (reporting increase of work from home jobs); Nathaniel Popper, *Americans Keep Clicking to Buy, Minting New Online Shopping Winners*, N.Y. TIMES (May 13, 2020), https://www.nytimes.com/interactive/2020/05/13/technology/online-shopping-buying-sales-coronavirus.html [https://perma.cc/C59M-Z2AP] (listing demand for at-home delivery services across sectors).

property rights, this tactic, were it normalized, would exact enormous social costs—erosion of trust in the police and interference with the daily lives of citizens.

IV. APPLICATION OF THE LIMITATIONS ON CONSENT IN AN ELECTRONIC ENVIRONMENT

The home is special under the Fourth Amendment and is subject to a higher level of privacy than other private spaces.[120] Nevertheless, the limitations on consent to enter a home as proposed in this Article are helpful in analyzing whether and when the police can enter private electronic space. While the home is, of course, more jealously protected than, say, a Facebook page, the concepts discussed above governing the privacy of the home are useful guides when dealing with electronic privacy.

Some background on electronic privacy is helpful. In the 1970s, the Supreme Court decided two cases that addressed whether a person could successfully keep private matters from the view of the government if a third party possessed that supposedly private information. In those cases, the government successfully argued what is now known as the third-party doctrine—the fact that third parties held putatively private information could undermine an expectation of privacy and make a search warrant unnecessary.

United States v. Miller, decided in 1976, involved a suppression motion directed at a government subpoena for bank records such as microfilmed copies of checks and deposit slips.[121] Miller argued the government improperly seized the records.[122] Though a district court denied Miller's motion to suppress, the Fifth Circuit reversed on appeal.[123] It assumed Miller had standing, reasoned that the seizure amounted to "compulsory production of a man's private papers to establish a criminal charge against him," and held that the government had used inadequate "legal process."[124] In essence, the Fifth Circuit reasoned the depositor had not lost his privacy protections simply because he maintained his private papers with the bank and concluded that the government had failed to follow necessary statutory requirements before invading that privacy.[125]

The Supreme Court reversed and found the government did not intrude a protected Fourth Amendment interest.[126] First, the Court found that the records were

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120. *See* U.S. CONST. amend. IV (protecting "right of the people to be secure in their . . . houses . . . , against unreasonable searches"); Florida v. Jardines, 569 U.S. 1, 6 (2013) (observing "when it comes to the Fourth Amendment, the home is first among equals").

121. *See* United States v. Miller, 425 U.S. 435, 436 (1976) (detailing bank's maintenance of records requested under subpoena and Miller's challenge to their constitutionality).

122. *See id.* at 438-39 (claiming subpoenas defective).

123. *See* United States v. Miller, 500 F.2d 751, 756 (5th Cir. 1974), *rev'd*, 425 U.S. 435 (1976) (reversing district court's denial of motion to suppress bank records).

124. *Id.* at 757 (quoting Boyd v. United States, 116 U.S. 616, 622 (1886)).

125. *See id.* at 758 (articulating why such "broad disclosure" violates *Boyd* principles).

126. *Miller*, 425 U.S. at 440.

the bank's business records and not the depositor's private papers.[127] Second, even granting that the Bank Secrecy Act provided some measure of privacy protection over the records at issue, the Court rejected Miller's argument that he had a reasonable expectation of privacy over his supposedly private papers while they were in the bank's hands.[128] Relying on *Katz* for the proposition that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection,"[129] the Court found no reasonable expectation of privacy over negotiable instruments used in commercial transactions, financial statements, or deposit slips that "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."[130] Thus, depositors risk conveying information to the government by revealing information to third parties,[131] and the Fourth Amendment does not prohibit obtaining such information even if the depositor reveals it assuming the third party will only use it for a limited purpose and will not betray that confidence.[132] Because those third parties had access to that check, the government did not require a search warrant to obtain the records but could instead rely on a subpoena to obtain them from the bank.

Also bear in mind the concept of "assumption of the risk." By using a third-party bank, a citizen assumes the risk that the bank might disclose the citizen's supposedly private papers. Considering today's digital life, the breadth of that idea and the privacy waiver it entails should be concerning. Substitute the identity of the information holder—the bank in *Miller*—for a third party in the digital world such as Google, Facebook, or Snapchat. The parallel is not complete—after all, *Miller* dealt with negotiable instruments purposely shared with others—but much the same can be said of Facebook posts and the like.[133]

Shortly after it decided *Miller*, the Court dealt with the trickier situation of telephones in *Smith v. Maryland*.[134] In *Smith*, the government had installed a pen register on Smith's phone without a warrant.[135] The Court addressed whether a

127. *See* United States v. Miller, 425 U.S. 435, 440 (1976) (explaining records do not fall within protected zone of privacy).

128. *See id.* at 441-42 (reasoning Bank Secrecy Act does not invade Fourth Amendment on its face).

129. *Id.* at 442 (alteration in original) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

130. *Id.*

131. *See Miller*, 425 U.S. at 443.

132. *See id.* at 443.

133. *See* Carpenter v. United States, 138 S. Ct. 2206, 2262 (2018) (Gorsuch, J., dissenting) (asking "[w]hat's left of . . . Fourth Amendment?" in digital age).

134. 442 U.S. 735, 736 (1979).

135. *See id.* at 737 (outlining background and government's collaboration with phone company to install pen register on Smith's phone). A pen register is a device that records the numbers dialed on a telephone but does not intercept the communications themselves; before text messaging data existed, the dialed telephone number and the later communications after connecting to that telephone number remained separate. *See id.* at 736 n.1 (describing pen register mechanism); Michael D. Ricciuti, *Privacy in the Cell Phone Age: New Restrictions on Police Activity*, 52 SUFFOLK U. L. REV. 393, 399-400 (2019) (explaining pen register's utility before mobile phones and era of cellular data).

telephone user had a legitimate expectation of privacy regarding the numbers dialed and concluded he did not.[136] Relying on Justice Harlan's concurrence in *Katz*, the Court held that the pen register did not invade a legitimate expectation of privacy.[137] As to Smith's subjective expectation of privacy under the first prong of Harlan's *Katz* analysis, the Court doubted Smith expected privacy in dialed numbers when those numbers were conveyed to and recorded by the telephone company, an entity that could use pen registers itself to identify unwanted callers.[138] Thus, it was "too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret."[139] This conclusion was valid even if the calls were made from inside a user's home, the area subject to the highest Fourth Amendment protection.[140] While Smith's conduct, including calling from home, may have been calculated to preserve the privacy of the contents of the telephone communication, it did not protect the privacy of the number dialed because, by necessity, that information had to be conveyed to the phone company.[141]

In any event, on the second prong of Harlan's *Katz* analysis, the Court found that society would not recognize any such subjective expectation of privacy in the dialed telephone numbers as reasonable because a telephone user voluntarily turns over the called number data to the phone company, a third party just like the bank in *Miller*.[142] Moreover, the telephone user, like the bank patron in *Miller*, assumed the risk of that third party disclosing information to the government.[143] Smith argued the telephone company did not record or bill for the local calls at issue and, as a result, he enjoyed a legitimate expectation of privacy in such locally dialed telephone numbers.[144] The Court rejected that claim, reasoning there is no constitutional difference whether the phone company makes a quasi-permanent record of a dialed number because the caller voluntarily conveyed the numbers to the company and assumed the risk they would be recorded.[145] The Court saw no reason for the analysis to turn on how the company

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136. *See Smith*, 442 U.S. at 742 (explaining why phone customers forfeit privacy interest in phone data when they dial numbers).

137. *See id.* at 742-43 (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)) (doubting "people in general entertain any actual expectation of privacy in . . . numbers they dial").

138. *See id.* (elaborating on why telephone users' privacy expectations do not extend to dialed numbers).

139. *Id.* at 743.

140. *See* Smith v. Maryland, 442 U.S. 735, 743 (1979) (stating use of home phone makes "no conceivable difference").

141. *See id.* (highlighting Fourth Amendment does not protect personal information conveyed voluntarily to third party).

142. *See id.* at 743-44 (setting limit on privacy expectation when information conveyed voluntarily to third party); United States v. Miller, 425 U.S. 435, 442 (1976) (holding records do not fall within protected zone of privacy).

143. *See Smith*, 442 U.S. at 744-45 (explaining why phone customers assume risk, making privacy expectation unreasonable); *Miller*, 425 U.S. at 443 (reasoning bank depositor risks exposing information shared with third party).

144. *See Smith*, 442 U.S. at 745 (describing Smith's argument).

145. *See id.*

bills its customers.[146] In language that resonates in our time, the Court refused to "make a crazy quilt of the Fourth Amendment . . . where . . . the pattern of protection would be dictated by billing practices of a private corporation."[147] Ultimately, the government could access the dialed numbers without a search warrant because there was no expectation of privacy governing data held by a third party. The user, after all, had assumed the risk of disclosure.

The Supreme Court's June 2018 decision in *Carpenter* weakened the third-party doctrine, however, and perhaps froze it in its current position.[148] At issue was whether the government could obtain, without a warrant, cell-site location information (CSLI)—information generated by cell phone companies that effectively tracked the movement of a cell phone whenever it was on.[149] CSLI is, essentially, increasingly precise personal GPS data.[150] When on, cell phones communicate with the nearest cell tower.[151] Cell companies keep time-stamped data on which cell tower is nearest to the phone.[152] Like the phone company in *Smith*, cell phone service providers maintain this data largely for business purposes.[153] By tracking the cell towers communicating with the cell phone, the government can recreate virtually all of the movements of the cell phone, and hence its user.[154]

In *Carpenter*, the government requested CSLI data with a court order pursuant to the Stored Communications Act,[155] which established a bar lower than probable cause to obtain such information from a third-party provider.[156] Chief Justice Roberts noted the broad purposes of the Fourth Amendment—to secure "'the privacies of life' against 'arbitrary power'" and "to place obstacles in the way of a too permeating police surveillance."[157] Faced with such a novel and modern

146. Smith v. Maryland, 442 U.S. 735, 745 (1979).

147. *Id.*

148. *See* Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (declining to extend *Smith* and *Miller* to certain records in cellular carrier's possession).

149. *See id.* at 2211-12 (defining CSLI and stating issues before Court).

150. *See id.* (explaining how cell companies gather CSLI data and why data falls outside police's constitutional reach).

151. *See id.* at 2211.

152. *Carpenter*, 138 S. Ct. at 2212 (recognizing "[w]ireless carriers collect and store CSLI for their own business purposes").

153. *See id.* (describing purpose of CSLI and commercial collection thereof). Service providers may have an interest in retaining such data to identify weak service areas, manage charges, and even sell aggregated data to third parties. *See id.*

154. *See* Carpenter v. United States, 138 S. Ct. 2206, 2211-12 (2018) (explaining CSLI and "vast" amount of CSLI modern cell phone companies generate).

155. *See* Stored Communications Act § 2703(d), 18 U.S.C. § 2703(d) (articulating standard lower than probable cause).

156. *See Carpenter*, 138 S. Ct. at 2226 (Kennedy, J., dissenting) (explaining prosecutorial basis for seeking CSLI). The government needed to demonstrate "specific and articulable facts showing . . . reasonable grounds to believe" that the records sought were "relevant and material to an ongoing criminal investigation." Stored Communications Act § 2703(d).

157. *Carpenter*, 138 S. Ct. at 2214 (majority opinion) (first quoting Boyd v. United States, 116 U.S. 616, 630 (1886); and then quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

question, the Court looked to the reasoning of two prior cases. First, the Court invoked *Kyllo v. United States*,[158] in which the government violated Kyllo's Fourth Amendment rights by pointing a thermal imaging device at a home without a search warrant, thereby prohibiting the government from capitalizing on the then-new technology.[159] Second, Chief Justice Roberts analogized to *Riley v. California*,[160] in which the Court held that the police may not conduct warrantless searches of digital information on a cell phone seized from an arrestee absent probable cause and exigency.[161] The Court imposed further limits on the traditional Fourth Amendment search-incident-to-arrest exception in light of technology's ability to provide users with the "immense storage capacity" of modern cell phones.[162] *Carpenter* required the Court to reexamine established law and reconcile two lines of cases: First, the third-party doctrine cases of *Miller* and *Smith* because third parties create and hold CSLI like dialed telephone numbers; second, the line of cases "address[ing] a person's expectation of privacy in his physical location and movements," the right Justice Sotomayor highlighted in *Jones*.[163]

The *Carpenter* Court opined that historical CSLI presented even greater privacy concerns than the GPS vehicle monitoring in *Jones* because cell phones travel on one's person as almost a "feature of human anatomy."[164] Cell phone tracking is therefore more akin to an ankle monitor than a bank record.[165] The Court was also concerned with the retrospective aspect of the data, which would allow police to track an individual to places and in ways previously unknown.[166]

> With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against

158. 533 U.S. 27 (2001).

159. *See Carpenter*, 138 S. Ct. at 2214 (explaining Court's application of Fourth Amendment principles to new technology); *Kyllo*, 533 U.S. at 40 (prohibiting thermal imaging of home's interior regardless of whether exposure included "intimate details").

160. 573 U.S. 373 (2014).

161. *See id.* at 403 (reasoning modern personal effects not "any less worthy of . . . protection for which . . . Founders fought"); *see also* Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018) (explaining reasoning from *Riley*).

162. *See Riley*, 573 U.S. at 393 (distinguishing search of cell phone from searching of pockets before cell phones widely carried); *Carpenter*, 138 S. Ct. at 2214 (noting inaptness of cell phones to search-incident-to-arrest exception).

163. *Carpenter*, 138 S. Ct. at 2215-16 (discussing previous cases concerning privacy in location, movements, and information conveyed to third parties).

164. *Id.* at 2218 (quoting *Riley*, 573 U.S. at 385).

165. *See id.* (stressing "near perfect surveillance" of CSLI tracking).

166. *See id.*

> everyone. Unlike with the GPS device in *Jones,* police need not even know in advance whether they want to follow a particular individual, or when.[167]

Chief Justice Roberts and the Supreme Court rejected a simple application of *Smith* and *Miller* to CSLI.[168] Roberts reasoned it was not clear whether the logic of *Smith* and *Miller* extended to the qualitatively different category of cell-site location records, which did not simply record dialed numbers, but comprehensively recorded a person's movements.[169] Because of this comprehensiveness, the Court declined to mechanically extend the third-party doctrine simply because a third party holds cell phone location records.[170] Instead, the Court held that an individual has a legitimate expectation of privacy in CSLI's record of his physical movements, and Carpenter's location information was therefore the product of a search.[171] Indeed, Roberts—referring to the concurring opinions of Justices Alito and Sotomayor from *Jones*—emphasized that the majority of the Court already recognized a reasonable expectation of privacy in one's physical movements, at least for long periods of time.[172]

The Chief Justice further rejected the government's proposed straightforward application of the third-party doctrine from *Miller* and *Smith* because it ignored the "seismic shifts in digital technology" that made tracking Carpenter's and others' location possible "not for a short period but for years and years."[173] He noted "a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today."[174] The government requested a significant extension of the third-party doctrine to a "distinct category of information," not a straightforward application.[175] Unlike in *Smith* and *Miller*, the cell phone user did not voluntarily expose CSLI information. The cell companies instead automatically captured the CSLI information.[176] Consequently, the user does not voluntarily assume the risk of handing over "a comprehensive dossier

167. Carpenter v. United States, 138 S. Ct. 2206, 2218 (2018).

168. *See id.* at 2217 (distinguishing privacy interests in bank records and phone records from one's physical location via CSLI).

169. *Id.*

170. *See id.* (declining to extend third-party doctrine via *Smith* and *Miller* to CSLI tracking data).

171. *Carpenter*, 138 S. Ct. at 2217.

172. *See id.*; *see also* United States v. Jones, 565 U.S. 400, 418, 430 (2012) (Alito, J., concurring) (stating long-term GPS monitoring in investigations of most offenses impinges on expectations of privacy); *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring) (agreeing with Justice Alito's statement on privacy expectation).

173. Carpenter v. United States, 138 S. Ct. 2206, 2219 (2018).

174. *Id.*

175. *Id.*

176. *See id.* at 2223 (noting CSLI generates automatically without affirmative act). The majority reasoned "[i]n light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." *Id.*

of his physical movements," as was the case in *Smith* and *Miller*.[177] Despite the criticism of the third-party doctrine, Roberts added that the *Carpenter* decision was narrow and did not "disturb the application of *Smith* and *Miller*."[178]

Importantly, a third party possessed Carpenter's cell phone data, but that fact did not result in the government's ability to obtain it without a warrant—it was the fact that it was the government asking that made the difference. This suggests that, when the government is the party seeking access, the Court will put up a barrier to access where one did not exist against other third parties.

In light of these cases, how would the consent analysis apply when police seek access to accounts used by citizens on platforms like Facebook? While it is true that a Facebook account is not the highly protected home, use of such accounts still raise privacy and property rights. Indeed, capturing communications made using such platforms is more akin to wiretaps—which require warrants—than to the telephone bills at issue in *Smith*, which did not.

Katz's expectation of privacy analysis is problematic in the digital world, especially with *Smith* and *Miller* still good law. In his dissent in *Carpenter*, Justice Gorsuch makes that very point.[179] But even if an expectation of privacy in one's digital life survives a *Katz* analysis and the third-party doctrine, it is vulnerable on its merits. Cases will likely turn, at least in part, on any steps a user takes to protect his or her communications. Presumably, communications open to all—that are, in essence, "public"—require no consent at all for the police to access them; nevertheless, if the user limits distribution of communications to people who ask for access, the issues discussed in Section III.D as to the home become relevant to a digital search. Analogizing to the home situation, police can certainly identify themselves as such and request access. But if they conceal themselves, and pose as a "friend," an argument can be made that any consent they obtain is invalid.[180] If the police are acting in an undercover capacity to engage in otherwise criminal conduct, the reasoning of *Hoffa v. United States* and similar cases control and permit access.[181] If that is not the case, then police who conceal their identity and gain access to private communications have not done so with valid consent, following the analysis described above. Granted, a Facebook user cannot claim the privacy protection afforded homes and curtilage, but the user can argue that consent can only be requested and given by a citizen when the citizen knows it is the police doing the asking.

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177. *Carpenter*, 138 S. Ct. at 2220.

178. *Id.*

179. *See* Carpenter v. United States, 138 S. Ct. 2206, 2262 (2018) (Gorsuch, J., dissenting) (arguing theoretical reasoning behind third-party doctrine unbelievable).

180. *See supra* Section III.D (addressing when police conceal official identity for purpose of gathering information).

181. *See supra* Section III.A (discussing how police officer undercover capacity permits engagement in criminal conduct).

V. Conclusion

When the police conceal themselves in something other than a traditional undercover role, consent cannot justify their search of a home when they come onto the curtilage to the door in disguise and with an investigatory purpose. In those circumstances, where the police aim to search, the police cannot enter the curtilage to seek consent without disclosing themselves, and in any event, consent should only be valid when the person giving consent has knowledge of the police officer's status. There are two well-known exceptions to this rule. First, if the police have a warrant and conceal themselves to ensure a safe entry or avoid destruction of evidence and the like, then the consent itself does not violate a Fourth Amendment right and is valid. Second, undercover officers can still seek to engage in otherwise criminal activity and obtain consent as a would-be criminal confederate. These exceptions reflect a clear and recognizable public judgment that those engaged in crime should not be insulated from legitimate police efforts to combat such crime. Such logic bears little relevance when the police use deception to enter private property and seek consent to enter and search a home, not to engage in undercover criminal conduct. As this Article argues, the Fourth Amendment should not be interpreted to further allow police to enter a private home to search based on a lie that they are something other than police.

The limitation on police action suggested in this Article is relatively modest. Under the principles discussed above, there is no doubt that the police who are identifiable as such or identify themselves as police officers can knock on a citizen's door and ask to enter and search. But allowing the police to approach while disguised, and concealing their investigatory purpose, denies the citizen critical information as to whether the door should be opened at all—that it is the police doing the asking. Allowing the police to pose as others would leave the police free to invade the sanctity of the home at will and do so posing in roles ranging from the mundane—a delivery driver seeking a signature, in response to which some may open the door—to the alarming—a utility worker seeking to address a dangerous gas leak, in response to which most would. Such deception would sacrifice core privacy rights while undermining the public's trust in the police or in any visitor. That deception should not be the law.

While a closer call for obvious reasons, the same general result should apply in the electronic realm. If the police seek access to private communications, unrelated to active undercover criminal activities, and do not disclose their official identities, consent should be invalid. As society moves more and more of its private communications online, extending this restriction to the electronic world follows the logic of *Carpenter* and preserves privacy against unwarranted deception.