

## FINDING A REASONABLE APPROACH TO THE EXTENSION OF THE PROTECTIVE SWEEP DOCTRINE IN NON-ARREST SITUATIONS

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*Under the Supreme Court's current protective sweep doctrine, it is constitutional for law enforcement officers to conduct a cursory sweep of a home incident to arrest where they have reasonable suspicion to believe the home may harbor a dangerous third party. The Supreme Court, however, has not clarified whether the protective sweep doctrine applies where there is no arrest. While at least one federal circuit court currently holds the view that protective sweeps are invalid absent an arrest, most circuits have indicated that protective sweeps may be valid even when they are not incident to an arrest. This Note argues that neither side of this circuit split has struck the right balance. By focusing too much attention on the "incident to arrest" language in Maryland v. Buie and not enough attention on the Court's express concern for officer safety, the decisions refusing to extend the protective sweep doctrine to any non-arrest situations prohibit protective sweeps in cases where they would be reasonable and, thus, constitutional. In contrast, by failing to respect the Court's repeated affirmations that exceptions to the warrant and probable cause requirements should be limited, and by brushing aside the importance of the arrest in Buie, the decisions extending the protective sweep doctrine to non-arrest situations either sanction unconstitutional searches or provide insufficient guidance to lower courts and the police, leaving Fourth Amendment privacy rights vulnerable. This Note argues that, to strike the right balance between protecting government interests and Fourth Amendment privacy rights, courts must incorporate a proper inquiry into the "need to search" into their reasonableness analysis. Specifically, they should require a compelling need for officers' initial lawful entry into a home for protective sweeps to be valid. In applying this standard, courts should draw a bright line according to the type of entry involved, extending the protective sweep doctrine to situations where officers have entered a home pursuant to exigent circumstances or a court order, but not where officers have entered a home pursuant to consent. Such an approach will maintain the limited nature of this exception to the warrant and probable cause requirements while allowing officers to protect themselves when the public interest so requires. It will also provide lower courts and officers with clear guidelines on how to apply the law. As an ancillary benefit, this approach will also minimize the risk of pretextual searches.*

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## INTRODUCTION

Three police officers receive a tip that Smith, a suspected drug dealer, plans to murder a local high school principal. The officers, lacking probable cause, want to investigate the tip. They go to Smith's home, and a woman they do not recognize answers the door. When the officers explain that they would like to speak with Smith, the woman tells them he is not there but lets them into the front room of the home. Once inside, the officers hear a faint scuffling noise coming from elsewhere in the house, and they perform a sweep of the home to make sure Smith is not hiding, waiting to ambush them. During the sweep, an officer finds a large quantity of cocaine in a bedroom. Although the police subsequently learn that the anonymous tip implicating Smith in a murder plot was unfounded, the government still charges Smith with violation of the federal narcotics laws based on the evidence seized during the sweep of his home. Smith moves to suppress the cocaine, arguing that the officers' protective sweep of the bedroom was illegal because it was not incident to an arrest. The prosecutor, however, responds that a protective sweep does not have to be incident to an arrest to be valid.

Assuming that the officers had reasonable suspicion to conduct the protective sweep and that the scope of the search was properly limited,<sup>1</sup> the success of the motion to suppress will depend on the federal circuit in which Smith is tried. More specifically, the motion's success will depend on whether the circuit views protective sweeps incident to a consent entry, rather than an arrest, to be constitutional.<sup>2</sup>

The Supreme Court established the current protective sweep doctrine in *Maryland v. Buie*,<sup>3</sup> holding it constitutional for law enforcement officers to conduct a cursory sweep of a home incident to arrest where they have reasonable suspicion to believe the home may harbor a dangerous third party.<sup>4</sup> Since *Buie*, lower courts have been left to determine the contours of this doctrine. A key issue that has arisen is whether protective sweeps are valid even where there is no arrest. The Supreme Court has not yet resolved this question, and the circuits

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<sup>1</sup> See *infra* text accompanying notes 52–58 (discussing reasonable suspicion requirement and necessarily limited nature of protective sweep).

<sup>2</sup> The exclusionary rule bars only the admission at trial of evidence seized in violation of the Fourth Amendment. See *infra* text accompanying note 31 (discussing exclusionary rule).

<sup>3</sup> 494 U.S. 325 (1990).

<sup>4</sup> *Id.* at 336–37. The discussion in this Note centers on this *Buie* holding, which is commonly referred to as the protective sweep doctrine. 3 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.4(c), at 374–75 (4th ed. 2004).

are split.<sup>5</sup> However, the great majority of circuits have indicated that, at least in certain circumstances, protective sweeps may be valid even when they are not incident to an arrest.

Although the circuits seem to be nearing a consensus that protective sweeps not incident to an arrest may be valid,<sup>6</sup> it is not entirely clear that they have come to the right conclusion on an issue that touches the very core of the Fourth Amendment: the right to be left alone in one's own home. This emerging consensus also raises other questions. Do the Supreme Court's decisions in *Buie* and its preceding cases support the application of the protective sweep doctrine where there is no arrest? Have the circuit courts provided sufficient guidance to lower courts and law enforcement officers? And, most importantly, does the circuit courts' extension of the protective sweep doctrine strike the appropriate balance between protecting government interests and Fourth Amendment privacy rights?

In this Note, I explain why these questions must be answered in the negative. Neither side of the circuit split has struck the right balance. On one hand, the decisions that categorically refuse to extend the protective sweep doctrine to non-arrest situations focus too much attention on the "incident to arrest" language in *Buie* and too little attention on the Court's express concern for officer safety. As a result, these decisions prohibit protective sweeps in situations where such searches would be reasonable and, thus, arguably constitutional. On the other hand, the decisions that do extend the protective sweep doctrine to non-arrest situations fail to respect the Court's insistence that such exceptions to the warrant and probable cause requirements should be limited and brush aside the importance of the arrest in *Buie*. Consequently, these decisions either sanction unreasonable—and, thus, arguably unconstitutional—searches or, by providing insufficient guidance to lower courts and the police, leave Fourth Amendment privacy rights vulnerable. To strike the right balance, courts must draw a new line.

Apart from court opinions, commentary on this issue has been sparse. Those commentators who have addressed the issue, however, agree that the expansion of the protective sweep doctrine to non-

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<sup>5</sup> See *infra* Part II (discussing circuit court decisions).

<sup>6</sup> Unlike the majority of circuits, the Tenth Circuit has unequivocally held that protective sweeps are not valid absent an arrest. See *infra* notes 69–74 and accompanying text. But even the Tenth Circuit has recently indicated that, while it is currently bound by its own precedent, an en banc decision might change its course. See *United States v. Torres-Castro*, 470 F.3d 992, 997 (10th Cir. 2006) (“[W]e must conclude that a protective sweep is only valid when performed incident to an arrest—at least until an en banc panel of this court determines otherwise.”).

arrest situations threatens to degrade individual privacy rights and that checks are therefore necessary.<sup>7</sup> One commentator has suggested that such checks might include a necessary showing of probable cause, an intermediate investigatory warrant requirement, or a heightened standard for consent entries.<sup>8</sup> Another scholar has argued that protective sweeps should be held invalid when officers “either ‘manufacture’ the need to take protective measures, or use the law enforcement technique to circumvent the warrant requirement.”<sup>9</sup>

I contend that a simpler and more effective guard against the lower courts’ expansion of the protective sweep doctrine may be extracted from *Buie* and the Court’s related decisions. In this Note, I argue that, for a protective sweep to be reasonable, officers must have a compelling need to enter the home in the first place. I further assert that courts can and should make this determination based on the category of police entry rather than the individual facts of the case. This categorical determination will draw a bright line that limits the extension of the protective sweep doctrine to certain types of lawful police entries. This bright-line approach, I argue, stays true to Supreme Court precedent and is easy for lower courts and law enforcement agents to follow. More importantly, this approach strikes the right balance between protecting government interests and Fourth Amendment privacy rights.

In Part I, I provide an overview of the Supreme Court’s Fourth Amendment jurisprudence. I then describe the development of the protective sweep doctrine and briefly summarize the federal circuit courts’ extension of the doctrine after *Buie*.<sup>10</sup> In Part II, I discuss how

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<sup>7</sup> See, e.g., Edward J. Loya, Jr., *Sweeping Away the Fourth Amendment*, 1 STAN. J. C.R. & C.L. 457, 463 (2005) (arguing that absent proper safeguards against abuse, protective sweep doctrine will permit officers to undercut privacy rights); Jamie Ruf, Note, *Expanding Protective Sweeps Within the Home*, 43 AM. CRIM. L. REV. 143, 161–62 (2006) (arguing that expansion of protective sweep doctrine should be addressed now to avert further erosion of privacy rights).

<sup>8</sup> See Ruf, *supra* note 7, at 157–62 (discussing these alternatives).

<sup>9</sup> Loya, *supra* note 7, at 467 (basing conclusion on synthesis of views expressed by Justice Stevens’s concurrence in *Buie*, 494 U.S. at 337, and Judge Jolly’s concurring and dissenting opinion in *United States v. Gould*, 364 F.3d 568, 593 (5th Cir. 2004)). The problem with Loya’s approach is that, in practice, it will be difficult for courts to determine accurately whether the officers are manipulating the situation in order to circumvent the warrant requirement. The circumstances of a particular situation will generally be established by the officers involved in the search and by the defendant, assuming that he does not invoke his Fifth Amendment right not to testify. In such cases, the officers, who will more likely than not be deemed the more credible witnesses, will have an incentive to present the facts in a way to avoid suppression. See *infra* note 154 (noting incentives officers have to lie to avoid suppression of evidence).

<sup>10</sup> Although state courts have dealt with the applicability of the protective sweep doctrine post-*Buie*, a discussion of state cases would potentially require an analysis of state

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circuit courts have addressed whether protective sweeps conducted in the absence of an arrest are valid, explaining why the approaches taken on both sides of the circuit split are problematic. In Part III, I discuss the importance of the arrest in *Buie* and conclude that courts should consider the need for an officer's initial entry into a home when determining whether to extend the protective sweep doctrine. Only when that need is compelling, requiring more than ordinary investigative techniques, should courts allow a protective sweep. Applying this standard to the categories of lawful police entries that courts have addressed, I conclude that the protective sweep doctrine should extend to situations where officers have entered a home pursuant to exigent circumstances or a court order, but not where officers have entered a home pursuant to consent.<sup>11</sup> This approach offers the ancillary benefit of minimizing the risk of pretextual searches.

## I

THE FOURTH AMENDMENT AND THE  
PROTECTIVE SWEEP DOCTRINE

In this Part, I first provide a brief background on the Fourth Amendment as it pertains to searches. I then describe the development of the protective sweep doctrine, and I conclude with a discussion of how the circuits have extended the protective sweep doctrine after *Buie*.

A. *The Fourth Amendment and Searches*

The Fourth Amendment is a compromise between the government's need to gather evidence and an individual's right to be free from government intrusion. The text of the Fourth Amendment provides:

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constitutions, which may grant different protections as compared to each other and to the U.S. Constitution. I have therefore limited my analysis to federal court decisions for the purposes of this Note.

<sup>11</sup> Lawful entries pursuant to exigent circumstances, court order, and consent are the three basic types of entry that have been considered by federal circuit courts, and they are the types of entry that are most likely to lead to a protective sweep. I recognize, however, that in the future the issue of whether to apply the protective sweep doctrine to other types of entry may arise. One example might be if a state statute permits officers to enter a probationer's home without a warrant or consent but does not authorize a search of the home, and officers lawfully inside a home pursuant to such a statute conduct a protective sweep. *Cf. Griffin v. Wisconsin*, 483 U.S. 868, 870–71, 880 (1987) (holding search constitutional where valid state law authorized probation officers to conduct warrantless searches of probationer's home provided that officers had "reasonable grounds" to believe contraband was present). In such instances, courts should apply the "compelling need" standard I discuss in this Note to determine whether the protective sweep doctrine should be extended.

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.<sup>12</sup>

Although the Court has held that “the Fourth Amendment protects people, not places,”<sup>13</sup> it has consistently recognized the heightened expectations of privacy in the home, and has therefore granted the home greater Fourth Amendment protection.<sup>14</sup> As the Court has noted repeatedly, “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”<sup>15</sup>

In deciding whether the government has conducted a search<sup>16</sup> that violates an individual’s Fourth Amendment rights, courts must determine whether the search was reasonable.<sup>17</sup> The Court has held that a search is presumptively unreasonable in the absence of a warrant based on probable cause.<sup>18</sup> A number of interests support this

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<sup>12</sup> U.S. CONST. amend. IV.

<sup>13</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>14</sup> 1 *LAFAVE*, *supra* note 4, § 2.3, at 554–55; *see also* *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (explaining that there is acknowledged minimum expectation of privacy in home, with deep common law roots, that requires Fourth Amendment protection against government intrusion). Prior to *Katz*, the Court had recognized the home to be a specially protected area under the Fourth Amendment. *See Silverman v. United States*, 365 U.S. 505, 511–12 (1961) (explaining that individual’s right to have his home be free from government intrusion is at core of Fourth Amendment’s protections); *Lewis v. United States*, 385 U.S. 206, 211 (1966) (“Without question, the home is accorded the full range of Fourth Amendment protections.”).

<sup>15</sup> *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313 (1972). Furthermore, the Court has indicated that the interests in houses that are protected by the Fourth Amendment are distinct from the owners’ personal privacy interests. *See Alderman v. United States*, 394 U.S. 165, 176–80 (1969) (describing Fourth Amendment protection of homes and arguing that *Katz* did not mean to take away such protection).

<sup>16</sup> “[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.” *Kyllo*, 533 U.S. at 33 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

<sup>17</sup> *Illinois v. McArthur*, 531 U.S. 326, 330 (2001); *United States v. Knights*, 534 U.S. 112, 118–19 (2001); *Maryland v. Buie*, 494 U.S. 325, 331 (1990); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974) (explaining that Fourth Amendment prohibits only unreasonable searches).

<sup>18</sup> *See Johnson v. United States*, 333 U.S. 10, 14–15 (1948) (“Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.”). In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court set forth the current “totality-of-the-circumstances” approach for establishing probable cause, under which the issuing magistrate must “make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Id.* at 238.

default rule, including the desirability of placing an unbiased fact finder between a suspect and law enforcement officers,<sup>19</sup> preventing post hoc submissions on probable cause,<sup>20</sup> and limiting officers' discretion by defining the acceptable scope of searches beforehand.<sup>21</sup> As the Court has explained, "[t]he warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest."<sup>22</sup>

The Fourth Amendment does not prohibit all warrantless searches, however. The Court has enumerated several circumstances,

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Some commentators and jurists have called into question the presumptive unreasonableness of warrantless searches. See, e.g., *California v. Acevedo*, 500 U.S. 565, 583–84 (1991) (Scalia, J., concurring) (“[T]he supposed ‘general rule’ that a warrant is always required does not appear to have any basis in the common law . . . .”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) [hereinafter Amar, *Fourth Amendment First Principles*] (“We need to read the Amendment’s words and take them seriously: they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable.”). Professor Amar has remarked elsewhere that, “in place of the misguided notions that every search or seizure always requires a warrant, and always requires probable cause . . . [r]easonableness . . . emerged as the central Fourth Amendment mandate and touchstone.” Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097, 1098 (1998) [hereinafter Amar, *Terry and Fourth Amendment First Principles*]. A full discussion of the relationship between the reasonableness and warrant clauses is beyond the scope of this Note, but suffice it to say the issue has been extensively debated. See, e.g., Amar, *Fourth Amendment First Principles*, *supra*, at 757–58, 761–85, 800–11 (analyzing history of Fourth Amendment’s clauses and arguing they should be read disjunctively); Carol S. Streiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 820–46, 852–56 (1994) (challenging Professor Amar’s arguments).

<sup>19</sup> See, e.g., *Johnson*, 333 U.S. at 13–14 (noting that Fourth Amendment requires neutral magistrates, rather than “officer[s] engaged in the often competitive enterprise of ferreting out crime,” to make reasonableness determinations).

<sup>20</sup> See *Katz*, 389 U.S. at 358 (explaining that omission of advance authorization “bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment” (quoting *Beck v. Ohio*, 379 U.S. 89, 96 (1964))); Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293, 311–12 (1996) (noting that contemporaneous record of basis for probable cause and scope of search removes need for courts to make factual determinations based on “conflicting and after-the-fact versions of what occurred or what was intended”).

<sup>21</sup> See *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (discussing role of warrant in limiting officers’ discretion in conducting search). The Fourth Amendment requires warrants to describe with reasonable particularity “the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. This requirement prevents officers from using warrants as blank checks for overly broad searches. See, e.g., *Chadwick*, 433 U.S. at 9 (“Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization ‘particularly describing the place to be searched and the persons or things to be seized.’” (quoting U.S. CONST. amend. IV)).

<sup>22</sup> *Camara v. Mun. Court*, 387 U.S. 523, 539 (1967).

including those where officers might be in danger, where the presumption of unreasonableness for warrantless searches may be overcome.<sup>23</sup> Even in such cases, a warrantless search must meet the Fourth Amendment's "reasonableness" requirement,<sup>24</sup> a determination that involves "balancing the need to search against the invasion which the search entails."<sup>25</sup> In some cases, the Court has held that a reasonable warrantless search still requires a finding of probable cause;<sup>26</sup> in others, it only requires a finding of reasonable suspicion,<sup>27</sup> which is a less demanding standard.<sup>28</sup> As noted above, however, the home is sacrosanct in Fourth Amendment jurisprudence, so much so that the Court has noted that, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."<sup>29</sup>

Once a court has determined that a search is unreasonable, there is still the question of what the remedy should be. The Fourth Amendment does not specify a remedy in the event of its violation.<sup>30</sup> Yet, the rights protected by the Fourth Amendment would have little significance without some means of enforcement. Thus, to deter

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<sup>23</sup> *E.g.*, *New York v. Burger*, 482 U.S. 691, 703 (1987) (allowing "special needs" exception for warrantless search of junkyard); *Schneekloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (allowing exception in cases of voluntary consent); *Chimel v. California*, 395 U.S. 752, 755–59 (1969) (allowing warrantless searches incident to valid arrest); *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967) (allowing exigent circumstances exception for "hot pursuit"); *Carroll v. United States*, 267 U.S. 132, 149 (1925) (allowing exception for searches of automobiles).

<sup>24</sup> *See* *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (noting that reasonableness is "touchstone of the Fourth Amendment"); *Maryland v. Buie*, 494 U.S. 325, 331 (1990) (noting that Fourth Amendment only prohibits unreasonable searches) (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989)).

<sup>25</sup> *Camara*, 387 U.S. at 537; *see also Knights*, 534 U.S. at 118–19.

<sup>26</sup> *See, e.g., Carroll*, 267 U.S. at 149 (holding that warrantless search and seizure of vehicle is valid if based on probable cause).

<sup>27</sup> *See, e.g., Buie*, 494 U.S. at 337 (permitting protective sweep of home "when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene"); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (concluding that officer must have authority to conduct reasonable searches for weapons "where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime").

<sup>28</sup> The Court has described this standard as "a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant'" the officer's belief. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (quoting *Terry*, 392 U.S. at 21).

<sup>29</sup> *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

<sup>30</sup> *But see Amar*, *Fourth Amendment First Principles*, *supra* note 18, at 785–87 (arguing that Framers wanted civil damages to be remedy for Fourth Amendment violations), *questioned in Streiker*, *supra* note 18, at 847–52 (countering Amar with constitutional dynamism argument supporting courts' application of exclusionary rule for illegally obtained evidence).

Fourth Amendment violations, the Court has established the exclusionary rule, which prohibits the admission at trial of evidence seized in an unreasonable search.<sup>31</sup>

*B. The Development of the Protective Sweep Doctrine*

Beginning with *Terry v. Ohio*,<sup>32</sup> the Court began looking at the constitutionality of warrantless searches conducted to protect the safety of officers and others in the nearby vicinity. In *Terry*, the Court faced the question of whether an officer may constitutionally seize a person and conduct a limited search of the person for weapons even when the officer lacks probable cause for an arrest.<sup>33</sup> The Court established that such “stop-and-frisks” are not—and could not practically be—subject to the Fourth Amendment’s warrant requirement, but rather must be analyzed under “the Fourth Amendment’s general proscription against unreasonable searches and seizures.”<sup>34</sup> The Court therefore balanced the degree of the need to seize and search against the extent of the invasion the seizure and search entailed.<sup>35</sup>

In balancing the interests at stake, the Court stressed, on the one hand, the need for police officers to be able to protect themselves,<sup>36</sup> and, on the other hand, the limited intrusiveness of the search involved.<sup>37</sup> The Court found that an officer need not have probable cause to arrest for such a search to be reasonable.<sup>38</sup> Rather, the Court held that where a searching officer has reasonable suspicion to believe that the individual may be involved in criminal activity and may be armed and presently dangerous, a limited frisk of the person’s outer

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<sup>31</sup> See *Weeks v. United States*, 232 U.S. 383, 391–93, 398 (1914) (establishing exclusionary rule in federal courts); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending application of exclusionary rule to state courts). It should be noted that the exclusionary rule is a judicially created remedy, not a constitutional requirement. See *United States v. Leon*, 468 U.S. 897, 905–06, 926 (1984) (analyzing origin of exclusionary rule before holding that exclusion is inappropriate where officers rely in good faith on warrant later found to be invalid). For a comprehensive discussion of the rather complicated history of the exclusionary rule and its effects, see generally Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 665–78, 736–57 (1970), and Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

<sup>32</sup> 392 U.S. 1 (1968).

<sup>33</sup> *Id.* at 15.

<sup>34</sup> *Id.* at 20.

<sup>35</sup> *Id.* at 20–22; see also *supra* text accompanying notes 24–25 (discussing reasonableness analysis).

<sup>36</sup> *Id.* at 23–24. The Court pointed specifically to the high number of recent police officer deaths and assaults in the line of duty and to criminals’ easy access to firearms. *Id.* at 23–24 & n.21.

<sup>37</sup> *Id.* at 24–27. The Court noted that a frisk is something “less than a ‘full’ search” that must be confined to that which is necessary to detect hidden weapons. *Id.* at 26.

<sup>38</sup> *Id.* at 27.

clothing to discover weapons that could be used against the officer or others is reasonable under the Fourth Amendment.<sup>39</sup> The Court, however, took care not to retreat from its previous holdings “that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,”<sup>40</sup> and that “in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances.”<sup>41</sup>

In the Term after *Terry*, the Court considered the constitutionality of a warrantless search of a home incident to a full custodial arrest. In *Chimel v. California*,<sup>42</sup> officers arrested Chimel inside his home and then conducted an extensive search, without a search warrant, of Chimel’s attic, garage, and workshop. The police also ordered Chimel’s wife to open drawers in some rooms and move the contents around so they could see all that the drawers contained.<sup>43</sup> Relying on *Terry*, the Court emphasized that whenever practical, police must first obtain a warrant to search a home, and that the scope of the search must be limited by the circumstances that justified its initiation.<sup>44</sup> The Court concluded, however, that a police officer may search the person he has just arrested and “the area ‘within [the arrestee’s] immediate control’”<sup>45</sup> for either weapons the arrestee might try to use against the officer or evidence the arrestee might attempt to hide or destroy.<sup>46</sup> Yet, the Court also held that it was unreasonable for an officer to search beyond the room in which the arrest occurred.<sup>47</sup>

Despite *Chimel*’s prohibition of a full-fledged search of an arrestee’s house, *Terry* had effectively opened the door to the application of a “reasonableness” standard to justify other limited warrantless searches.<sup>48</sup> Subsequently, in *Michigan v. Long*,<sup>49</sup> the Court extended the scope of the search power under *Terry* beyond the suspect’s person. In *Long*, the Court held that the search of an automo-

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<sup>39</sup> *Id.* at 24, 27, 30–31.

<sup>40</sup> *Id.* at 20 (citing *Katz v. United States*, 389 U.S. 347 (1967); *Beck v. Ohio*, 379 U.S. 89, 96 (1964); *Chapman v. United States*, 365 U.S. 610 (1961)).

<sup>41</sup> *Id.* (citing *Warden v. Hayden*, 387 U.S. 294 (1967); *Preston v. United States*, 376 U.S. 364, 367–68 (1964)).

<sup>42</sup> 395 U.S. 752 (1969).

<sup>43</sup> *Id.* at 753–54, 763.

<sup>44</sup> *Id.* at 762 (citing *Terry*, 392 U.S. at 19, 20).

<sup>45</sup> *Id.* at 763. The Court described this area as “the area from within which [the suspect] might gain possession of a weapon or destructible evidence.” *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133, 1134 (1998) (“*Terry* unwittingly cracked the door for a decline in the role of traditional probable cause.”).

<sup>49</sup> 463 U.S. 1032 (1983).

bile passenger compartment, confined to places where a weapon may be placed, is constitutional provided that an officer has reasonable suspicion to believe that the person stopped is dangerous and might immediately access weapons.<sup>50</sup> The Court noted that roadside encounters between suspects and the police are particularly hazardous; thus, where the officer has reason to believe a suspect is dangerous, a protective search is justified in order to protect the police officer and others.<sup>51</sup>

In *Maryland v. Buie*,<sup>52</sup> the Court turned again to the legality of warrantless searches of the home. The Court considered the requisite level of justification for police to conduct a protective sweep, which it defined as “a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others.”<sup>53</sup> The Court acknowledged that a search of the home is usually unreasonable absent a warrant based on probable cause, but added that the public interest might rise to such a level that even a search of a home without a warrant or probable cause could be reasonable.<sup>54</sup> Relying on *Terry* and *Long*, the Court held that a police officer’s warrantless protective sweep of a house does not violate the Fourth Amendment “when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”<sup>55</sup>

As in *Terry* and *Long*, the *Buie* Court justified its use of the lesser reasonable suspicion standard by balancing the government’s needs against the search’s intrusiveness. The Court looked first at the potential risk to the police and noted that the danger might be even greater in the context of a home arrest than in the context of a *Terry* on-the-street frisk or a *Long* roadside encounter. The Court reasoned that a protective sweep “occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of

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<sup>50</sup> *Id.* at 1049.

<sup>51</sup> *Id.*

<sup>52</sup> 494 U.S. 325 (1990).

<sup>53</sup> *Id.* at 327. After *Buie*, this “incident to arrest” language became crucial as circuit courts attempted to determine the validity of protective sweeps not incident to arrest. See *infra* Part II (discussing decisions dealing with this issue).

<sup>54</sup> *Id.* at 331.

<sup>55</sup> *Id.* at 337. The Court also held that, incident to an arrest, “officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” *Id.* at 334.

being on his adversary's 'turf.'"<sup>56</sup> The Court then balanced the interest in protecting officers against the limited nature of the intrusion. The Court defined a protective sweep as a search confined to "a cursory inspection of those spaces where a person may be found."<sup>57</sup> A protective sweep should last no longer than necessary to eliminate the suspicion of danger—certainly no longer than the time required to complete the arrest and leave the premises.<sup>58</sup> The Court concluded that during such a search, officers may seize any item in plain view so long as they have reason to believe it is evidence of a crime.<sup>59</sup>

The Court also made a point of distinguishing *Buie* from *Chimel*, based on the intrusiveness of the searches and the nature of the dangers justifying the intrusions.<sup>60</sup> First, the Court pointed out that while *Chimel* involved a "full-blown search of the entire house for evidence of the crime for which the arrest was made," the protective sweep in *Buie* was a more limited intrusion.<sup>61</sup> Second, the Court noted that while the justification for the search in *Chimel* was the potential danger of the arrested suspect, the danger in *Buie* was posed by third parties in other parts of the house. Thus, unlike the automatic search of the home proposed in *Chimel*, a *Buie* search may only be conducted when police have reasonable suspicion to believe that a dangerous third party is somewhere in the house.<sup>62</sup>

In the wake of *Buie*, lower courts have been left to interpret how far the protective sweep doctrine extends. Even though the arrest in *Buie* took place inside a home, the majority of circuits have now extended the protective sweep doctrine to allow for searches of a home after an arrest is made directly outside the home.<sup>63</sup> In

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<sup>56</sup> *Id.* at 333.

<sup>57</sup> *Id.* at 335.

<sup>58</sup> *Id.* at 335–36.

<sup>59</sup> *Id.* at 330; *see also* *United States v. Taylor*, 248 F.3d 506, 512 (6th Cir. 2001) ("The plain view exception to the warrant requirement applies when (1) the officer did not violate the Fourth Amendment in arriving at the place where the evidence could be plainly viewed, (2) the item is in plain view, and (3) the incriminating character of the evidence is immediately apparent.").

<sup>60</sup> *Buie*, 494 U.S. at 336.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* For instance, a *Buie* protective sweep would be unjustified where there is no sign of anyone other than the arrested suspect in the home. *See United States v. Colbert*, 76 F.3d 773, 777–78 (6th Cir. 1996) (noting that allowing protective sweeps when police do not know if third party is in home would encourage officers to stay ignorant as to presence of others in home).

<sup>63</sup> *E.g.*, *United States v. Lawlor*, 406 F.3d 37, 41 (1st Cir. 2005); *United States v. Cavely*, 318 F.3d 987, 994–96 (10th Cir. 2003); *United States v. Wilson*, 306 F.3d 231, 238–39 (5th Cir. 2002); *Colbert*, 76 F.3d at 776–77; *United States v. Henry*, 48 F.3d 1282, 1283, 1285 (D.C. Cir. 1995); *United States v. Kimmons*, 965 F.2d 1001, 1004, 1009 (11th Cir. 1992), *vacated*, 508 U.S. 902 (1993); *United States v. Oguns*, 921 F.2d 442, 446 (2d Cir. 1990).

explaining such an extension, courts have noted that the risky circumstances justifying the *Buie* decision—specifically, the great potential danger to police officers—can also accompany an arrest made directly outside a home.<sup>64</sup> In *United States v. Lawlor*, the First Circuit further noted that whether the suspect was actually arrested before or just after the search does not affect the search's validity, provided that there was probable cause to arrest prior to the search.<sup>65</sup> As I will discuss below, other courts have extended the protective sweep doctrine even further to situations where there was no probable cause to arrest prior to the search.<sup>66</sup> Finally, the Tenth Circuit has held *Buie* to allow for protective detentions in addition to protective searches, explaining that the ability to conduct protective sweeps for dangerous persons would not sufficiently allow officers to protect themselves if there were no corresponding right to detain potentially dangerous persons.<sup>67</sup>

## II

### THE PROTECTIVE SWEEP DOCTRINE IN NON-ARREST SITUATIONS

Although *Buie* dealt with a protective sweep incident to an arrest, a majority of circuits have held protective sweeps valid even where they are not conducted in conjunction with an arrest. A minority of circuits disagree, however. In this Part, I explain why neither side of the split has struck the right balance for the protection of both government interests and Fourth Amendment privacy rights. I first discuss the minority approach, which holds that protective sweeps of homes absent an arrest are per se invalid, and I explain how this approach prohibits some constitutional searches. I then discuss the majority approach, which extends *Buie* to non-arrest situations, and note the common rationales the courts have used to support this position. I explain how, in failing to adequately consider Supreme Court prece-

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<sup>64</sup> E.g., *Lawlor*, 406 F.3d at 41; *Colbert*, 76 F.3d at 776–77. In light of this underlying rationale, such a protective sweep is still valid only “if sufficient facts exist that would warrant a reasonably prudent officer to fear that the area in question could harbor an individual posing a threat to those at the scene.” *Lawlor*, 406 F.3d at 41.

<sup>65</sup> *Lawlor*, 406 F.3d at 41 n.4; see also *United States v. Torres-Castro*, 470 F.3d 992, 998 (10th Cir. 2006) (noting that protective sweeps that precede arrest may still be incident to arrest if arrest immediately follows search).

<sup>66</sup> See *infra* Part II.B (describing extension of doctrine to non-arrest cases).

<sup>67</sup> See *United States v. Maddox*, 388 F.3d 1356, 1362, 1363, 1367–68 (10th Cir. 2004) (applying *Buie* and upholding protective detention of defendant in driveway of home where fugitive was being arrested). The Ninth Circuit has also relied on *Buie* to support a detention incident to a protective sweep. See *United States v. Garcia*, 997 F.2d 1273, 1282 (9th Cir. 1993) (finding it reasonable for officers to handcuff defendant prior to his arrest and incident to protective sweep).

dent and differentiate between the various types of lawful police entries, some decisions have sanctioned unreasonable searches while others, in providing too little guidance to lower courts and police officers, have left privacy rights vulnerable.

*A. Holding Protective Sweeps To Be Per Se Invalid  
in Non-Arrest Situations*

*1. Circuit Court Decisions*

Only the Tenth and, perhaps, the Ninth Circuits currently hold the view that protective sweeps of homes are justified only if they are conducted incident to an arrest.<sup>68</sup> In the most recent circuit court decision to deal with the issue, *United States v. Torres-Castro*,<sup>69</sup> the Tenth Circuit acknowledged that most circuits have applied the protective sweep doctrine in non-arrest situations but, explaining it was bound by its own precedent, nevertheless concluded that only protective sweeps incident to arrest are valid.<sup>70</sup> The police had gone to Torres-Castro's home to talk to him after receiving a complaint from his girlfriend that he had assaulted and threatened to kill her.<sup>71</sup> After Torres-Castro let the officers into his home, the officers noticed a number of individuals in back rooms and proceeded to conduct a protective sweep.<sup>72</sup> The court held that the protective sweep doctrine did not apply in non-arrest situations<sup>73</sup> but still admitted the evidence

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<sup>68</sup> Until 2004, the Fifth Circuit also held that protective sweeps were only valid when incident to an arrest. See *United States v. Wilson*, 36 F.3d 1298, 1306 (5th Cir. 1994) (holding that search of hotel room not incident to arrest did not fall under protective sweep doctrine). However, in *United States v. Gould*, 364 F.3d 578, 580–81 (5th Cir. 2004), an en banc panel of the Fifth Circuit concluded that a blanket prohibition on protective sweeps not incident to arrest was inappropriate and overruled *Wilson*. The Tenth Circuit has also pointed to *United States v. Waldner*, 425 F.3d 514 (8th Cir. 2005), for the proposition that the Eighth Circuit agrees that a protective sweep must be incident to arrest. *Torres-Castro*, 470 F.3d at 997. The holding in *Waldner*, however, was not based on the fact that the officers were not in the home for an arrest. Rather, it was premised on the officers' lack of reasonable suspicion that the area searched might have harbored a dangerous individual. See *Waldner*, 425 F.3d at 517 (“[T]here is no evidence that the officers had any articulable facts that an unknown individual might be in the office . . . ready to launch an attack. . . . Under these circumstances, we hold that the protective sweep exceeded its permissible scope under the Fourth Amendment.”).

<sup>69</sup> 470 F.3d 992, 996–97 (10th Cir. 2006).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 995.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 997. The court also noted that a search preceding an arrest might “still be incident to that arrest.” *Id.* The court did not resolve the question with regard to the search at issue, however, because it found the evidence to be admissible on other grounds. *Id.* at 999.

found during the sweep—a gun and ammunition—under the inevitable discovery doctrine.<sup>74</sup>

In *United States v. Reid*,<sup>75</sup> the Ninth Circuit also indicated that a protective sweep would not be justified in the absence of an arrest. However, it is unclear from the opinion whether the court's holding rested on only the lack of an arrest or on a combination of the lack of arrest and a lack of reasonable suspicion that the searched apartment harbored a dangerous third party.<sup>76</sup> The Ninth Circuit's stance on this issue is further confused by the fact that several years earlier it had upheld a protective sweep in a non-arrest situation.<sup>77</sup>

The primary rationale the courts have put forth for not extending the protective sweep doctrine to non-arrest situations has been the plain language of *Buie*. The Ninth and Tenth Circuits have both pointed to the definition of “protective sweep” used in *Buie*, underscoring the “incident to an arrest” language the Court employed in its definition and throughout the decision.<sup>78</sup> Additionally, in a decision extending the protective sweep doctrine to a non-arrest situation, a Fifth Circuit judge dissented on the grounds that the Supreme Court had not expanded the original *Buie* definition of a protective sweep.<sup>79</sup>

## 2. *Why These Decisions Are Problematic*

In creating a *per se* rule invalidating all protective sweeps not conducted incident to an arrest, these courts have failed to consider adequately the fact that officers might need to enter a home for a

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<sup>74</sup> See *id.* (noting that, because protective sweep was not “but for” cause of seizure and police would inevitably have discovered evidence, court did not need to determine whether protective sweep was “incident to Mr. Torres-Castro's arrest”). Under the inevitable discovery doctrine, evidence found through a Fourth Amendment violation will not be excluded if it “would inevitably have been discovered lawfully.” 6 LAFAYETTE, *supra* note 4, § 11.4(a). Courts have applied this doctrine to admit both primary and secondary evidence that would otherwise be excluded. *Id.*

<sup>75</sup> 226 F.3d 1020 (9th Cir. 2000).

<sup>76</sup> See *id.* at 1027 (noting both deficiencies before concluding that there was no valid protective sweep).

<sup>77</sup> See *infra* notes 98–101 and accompanying text (discussing *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993)).

<sup>78</sup> See *United States v. Davis*, 290 F.3d 1239, 1243 n.4 (10th Cir. 2002) (“[T]he government's argument may be briskly disposed with the definition of ‘protective sweep.’ As it appears in the first sentence of *Buie*, “[a] ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others.” (quoting *Maryland v. Buie*, 494 U.S. 325, 327 (1990))); *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000) (quoting same protective sweep definition). For a discussion of *Buie*'s definition of a protective sweep, see *supra* text accompanying notes 52–55.

<sup>79</sup> *United States v. Gould*, 364 F.3d 578, 602–03 & n.4 (5th Cir. 2004) (DeMoss, J., dissenting).

variety of reasons besides performing an arrest.<sup>80</sup> As several circuits have noted, many of these situations present similar—or even greater—potential risks to officer safety.<sup>81</sup> In reaching its holding allowing stop-and-frisk searches based on reasonable suspicion, the *Terry* Court was particularly concerned with the risks facing law enforcement officers in the line of duty, noting the number of officer deaths and assaults in the years leading up to the case.<sup>82</sup> The *Buie* Court reiterated this concern.<sup>83</sup> Unfortunately, the risks facing officers have not decreased.<sup>84</sup>

Since the protection of officers seems to be equally—if not more—critical today as when the Court decided *Terry*, Supreme Court precedent does not mandate a blanket rule invalidating all protective sweeps conducted in the absence of an arrest. Such a rule would be at odds with the concern for officer safety the Court expressed in the cases leading up to and including *Buie*, since it would foreclose protective sweeps in non-arrest cases where an officer's safety is legitimately at risk. Such a rule would run afoul of the pragmatic notion of Fourth Amendment reasonableness<sup>85</sup> and, as a result,

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<sup>80</sup> See *infra* Part II.B.1 (discussing lawful entries pursuant to exigent circumstances, search warrants, and protective orders).

<sup>81</sup> See *infra* notes 102–08 and accompanying text (discussing rationales in cases extending *Buie* to non-arrest situations).

<sup>82</sup> See *supra* note 36 and accompanying text.

<sup>83</sup> See *supra* text accompanying note 56.

<sup>84</sup> In the past ten years, the annual number of officers feloniously killed nationally has ranged from a low of 42 to a high of 70, for a total of 575 officer deaths. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 2005, at tbl.1 (2006), <http://www.fbi.gov/ucr/killed/2005/aboutleoka.htm>. These numbers do not include officer deaths resulting from the events of September 11, 2001. *Id.* at n.1. These recent statistics are consistent with those that troubled the *Terry* Court. See *Terry v. Ohio*, 392 U.S. 1, 24 n.21 (1968) (noting that 57 officers had been killed in line of duty in 1966). The number of assaults against officers in 1966, however, is only half the number of such assaults in 2005. Compare *id.* (noting that there were 23,851 such assaults in 1966) with FED. BUREAU OF INVESTIGATION, *supra*, at tbl.68 (noting that there were 57,546 such assaults in 2005, 27.4% of which resulted in officer injuries). It should be noted, however, that neither the current numbers nor the ones considered in *Terry* are limited only to those circumstances in which officers were assaulted or killed while carrying out their duties in homes. See FED. BUREAU OF INVESTIGATION, *supra*, at tbls.20, 67 (describing circumstances in which officers were feloniously killed or assaulted, respectively).

<sup>85</sup> See *United States v. Miller*, 430 F.3d 93, 100 (2d Cir. 2005) (“The restriction of the protective sweep doctrine only to circumstances involving arrests would jeopardize the safety of officers in contravention of the pragmatic concept of reasonableness embodied in the Fourth Amendment.”).

would prohibit a number of searches that are arguably constitutional.<sup>86</sup>

It is true that the “incident to arrest” language figured prominently in *Buie*’s protective sweep definition, but this text does not necessarily preclude the constitutionality of all protective sweeps conducted absent an arrest. As the Fifth Circuit has noted, the Supreme Court has “describe[d] as ‘dubious logic’ the argument ‘that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it.’”<sup>87</sup> An attendant arrest certainly helps justify a finding that a protective sweep is reasonable, but other circumstances may provide equal justification.

Of course, some might argue that officers can still conduct a protective sweep if they are truly concerned for their safety, but that any evidence discovered during such a search should be suppressed. But this is not the right outcome either. Where a protective sweep not incident to arrest is reasonable, officers should not have to decide between jeopardizing their lives by not conducting a sweep and jeopardizing a prosecution by discovering evidence that will subsequently be inadmissible at trial. As the Court noted in *Terry*, it is inappropriate to invoke the exclusionary rule to suppress the fruits of legitimate investigative techniques simply because similar police conduct involves an unconstitutional intrusion.<sup>88</sup> Furthermore, in many protective sweep cases, suppression will not serve the deterrent effect for which the exclusionary rule was established, because the officers’ primary interest when conducting the sweep will not be in prosecuting a crime, but rather in protecting themselves and those around them.<sup>89</sup>

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<sup>86</sup> See *infra* Part III.B (arguing that protective sweeps are reasonable where officers have initially entered premises pursuant to exigent circumstances or court order and other *Buie* requirements are met).

<sup>87</sup> *United States v. Gould*, 364 F.3d 578, 581 (5th Cir. 2004) (quoting *United States v. Knights*, 534 U.S. 112, 117 (2001)); see also *infra* text accompanying note 102 (describing arguments against textually limiting *Buie* to its “incident to arrest” language).

<sup>88</sup> *Terry*, 392 U.S. at 13. Professor Amar goes even further—too far, in fact—in asserting that “[w]rongdoers are simply not morally entitled to be restored to the status quo ante which is itself the product of their own wrongdoing,” and, on that basis, arguing that when the government finds evidence in an illegal search, such evidence should not be excluded at trial. Amar, *Terry and Fourth Amendment First Principles*, *supra* note 18, at 1127–28. Following such reasoning to its logical end would leave society with too little deterrence against illegal searches.

<sup>89</sup> See *Terry*, 392 U.S. at 14 (noting that suppression might be ineffective deterrent where police are not primarily motivated by successful prosecution).

*B. Extending the Protective Sweep Doctrine  
to Non-Arrest Situations*

*1. Circuit Court Decisions*

The majority of circuits have extended the *Buie* protective sweep doctrine to situations where officers have lawfully entered a home for reasons other than an arrest. These lawful entries fall into three general categories:<sup>90</sup> entries to execute a court order,<sup>91</sup> entries justified by exigent circumstances,<sup>92</sup> and consent entries.<sup>93</sup> In extending the protective sweep doctrine to these situations, some courts have provided greater explanation than others for why the absence of an arrest is not dispositive.

Several of the circuit courts have apparently been unconcerned by the arrest versus non-arrest distinction. For example, in *United States v. Daoust*,<sup>94</sup> decided just a few months after *Buie*, there was no dispute that the *Buie* standard should apply where police had entered a home incident to a search warrant.<sup>95</sup> The police had a search warrant for a gun located in a particular room in a remote log cabin, but a protective sweep of other rooms yielded additional guns, the admission of which the defendant challenged.<sup>96</sup> In upholding the validity of the protective sweep incident to a search warrant, the only issue for the First Circuit was whether the police had the requisite reasonable suspicion to conduct the protective sweep. Pointing to the officers' knowledge that the defendant had a violent history, owned a gun, and

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<sup>90</sup> Although the decisions currently fall into these three categories, courts have not formally differentiated between them in their analyses. As I will explain, *see infra* Part II.B.2, this lack of delineation is one of the main problems with the courts' current approach to extending the protective sweep doctrine in non-arrest situations.

<sup>91</sup> For example, officers might enter a home pursuant to a search warrant or protective order.

<sup>92</sup> Under the exigent circumstances doctrine, it is lawful for police to enter premises without a warrant where "there is a 'compelling need for official action and no time to secure a warrant,'" such as when police are in "hot pursuit" of a suspect, have probable cause to believe evidence might be imminently destroyed, have probable cause to believe immediate action is necessary to prevent the suspect from escaping, or have probable cause to believe the police or community will be in danger if they do not take immediate action. Jacqueline Bryks, Comment, *Exigent Circumstances and Warrantless Home Entries: United States v. MacDonald*, 57 BROOK. L. REV. 307, 322-23 (1991) (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)).

<sup>93</sup> Under the consent doctrine, neither a search warrant nor probable cause is required when an individual voluntarily permits the police to search an area. *See* 4 LAFAYE, *supra* note 4, § 8.1, at 5 ("If consent is given, evidence may thereby be uncovered in a situation where there was no other lawful basis for making the search."). For a discussion of what constitutes valid consent, *see Schneekloth v. Bustamonte*, 412 U.S. 218, 222-49 (1973).

<sup>94</sup> 916 F.2d 757 (1st Cir. 1990).

<sup>95</sup> *Id.* at 759 (noting that this was "a proper conclusion given that the search was for an instrument of violence unlawfully possessed by the home's occupant").

<sup>96</sup> *Id.* at 758.

lived in an isolated cabin, the court answered this question in the affirmative.<sup>97</sup>

Similarly, in *United States v. Garcia*,<sup>98</sup> the Ninth Circuit ignored the lack of an arrest warrant in upholding a protective sweep conducted pursuant to a consent entry. Two months after an informant had reported that narcotics were being sold from an apartment, two officers posing as prospective renters approached the apartment and, through a screen door, began asking Garcia and another occupant questions about the neighborhood. One of the officers asked Garcia if he could throw away his soda can, and, when Garcia opened the door, the officers held it open, informing Garcia they were police and wanted to talk to him. Garcia let them in, and other officers who had been waiting nearby joined them. The police then conducted a protective sweep of the apartment and discovered various quantities of cocaine and firearms, which Garcia later moved to suppress.<sup>99</sup> After finding that the officers' initial entry was pursuant to lawful consent,<sup>100</sup> the Ninth Circuit—without even mentioning that Garcia was not under arrest during the search—held that the officers had conducted a valid protective sweep of the apartment.<sup>101</sup>

Other courts have given more thought to whether the protective sweep doctrine should apply absent an arrest, and common themes have emerged in their rationales. First, in justifying the extension of the protective sweep doctrine to non-arrest situations, courts have not ignored *Buie*'s "incident to arrest" language. Rather, they have sought to diminish its importance by noting that the *Buie* Court only had occasion to consider a protective sweep incident to arrest and by arguing that nothing in the decision claims that a search would have

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<sup>97</sup> *Id.* at 759.

<sup>98</sup> 997 F.2d 1273 (9th Cir. 1993).

<sup>99</sup> *Id.* at 1276–77.

<sup>100</sup> *Id.* at 1281.

<sup>101</sup> *Id.* at 1282. As noted above, a subsequent decision invalidating a protective sweep not incident to arrest calls into question the Ninth Circuit's current stance on protective sweeps not conducted incident to arrest. *See supra* notes 75–76 and accompanying text (discussing *United States v. Reid*, 226 F.3d 1020 (9th Cir. 2000)).

Other circuits have acknowledged the fact that *Buie* involved an arrest but, without explanation, have still applied *Buie* to cases not involving an arrest. *E.g.*, *United States v. Taylor*, 248 F.3d 506, 513 (6th Cir. 2001) (rejecting argument that protective sweeps are only valid when incident to arrest and simply stating "that the principle enunciated in *Buie* . . . applies with equal force to an officer left behind to secure the premises while a warrant to search those premises is obtained"); *United States v. Patrick*, 959 F.2d 991, 996 (D.C. Cir. 1992) (noting that *Buie* involved search incident to arrest, but nevertheless applying *Buie* and holding protective sweep valid where officers had information that inhabitant was involved in drug trafficking).

been invalid had the officers been in the home for some other lawful reason and faced the same danger.<sup>102</sup>

Second, instead of lingering on the language of *Buie*, courts applying the protective sweep doctrine to non-arrest situations have focused on the *Buie* Court's underlying rationales: the need for officers to be able to protect themselves and the two factors that make an in-home arrest particularly risky, namely, the adversarial nature of the arrest and the risk of ambush.<sup>103</sup> Acknowledging that the first risk factor, an arrest, is missing in non-arrest cases, courts extending the protective sweep doctrine beyond arrest cases rely entirely on the fact that the second factor, the heightened risk of ambush, is equally present. For instance, in *United States v. Gould*, the Fifth Circuit, in holding that an arrest is not required for an in-home protective sweep to be valid, noted that, although an arrest might be a relevant factor in establishing the requisite level of danger, certain non-arrest circumstances "can give rise to equally reasonable suspicion of an equally serious risk of danger of officers being ambushed by a hidden person as would be the case were there an arrest."<sup>104</sup>

Similarly, in *Leaf v. Shelnett*,<sup>105</sup> the Seventh Circuit emphasized that the protective sweep doctrine is justified not only by the arrest's adversarial nature but also by an officer's susceptibility to ambush while in unfamiliar territory. The court stated that "[t]he underlying rationale for the protective sweep doctrine is the principle that police officers should be able to ensure their safety when they lawfully enter a private dwelling."<sup>106</sup> Thus, after holding that the defendant officers' initial entry into an apartment was justified by exigent circumstances,<sup>107</sup> the court concluded that "it was not necessary for the officers to have made an arrest in order for their search of the apartment to be justified."<sup>108</sup>

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<sup>102</sup> *E.g.*, *United States v. Gould*, 364 F.3d 578, 581 (5th Cir. 2004); *see also Taylor*, 248 F.3d at 513–14 (arguing that danger to officer is same in arrest and non-arrest situations).

<sup>103</sup> *See supra* note 56 and accompanying text (quoting *Buie* for Court's reliance on these two factors).

<sup>104</sup> *Gould*, 364 F.3d at 584.

<sup>105</sup> 400 F.3d 1070 (7th Cir. 2005).

<sup>106</sup> *Id.* at 1087.

<sup>107</sup> *Id.* at 1081–82.

<sup>108</sup> *Id.* at 1087–88. In another case extending the protective sweep doctrine to a non-arrest situation, the Second Circuit claimed that the *Buie* Court's primary concern was not why the police were in the home in the first place, but "why the officers might fear for their safety and what they could do to protect themselves." *United States v. Miller*, 430 F.3d 93, 98–99 (2d Cir. 2005). The court concluded that *Buie*'s logic applies equally to situations where the police are lawfully in a home for reasons other than carrying out an arrest warrant, so long as the officers might be faced with a similar or greater risk of danger compared to that which they would face if they were executing an arrest warrant. *Id.* at 99.

Finally, in the process of holding the protective sweep doctrine to apply absent an arrest, courts have not differentiated between the various types of initial lawful entries where a protective sweep might be reasonable. As noted above, some courts have given little thought to extending the protective sweep doctrine to non-arrest situations and, consequently, have provided no guidance regarding which types of non-arrest situations, apart from the particular cases at issue, the doctrine should apply to.<sup>109</sup> Even courts that have given the extension of the protective sweep doctrine more consideration have not clarified whether there are certain non-arrest situations where protective sweeps will always or never be valid. For example, in *United States v. Miller*,<sup>110</sup> the Second Circuit held “that an officer in a home under lawful process, such as an order permitting or directing the officer to enter for the purpose of protecting a third party, may conduct a protective sweep” as long as “the officer has reasonable suspicion that the . . . area harbors a threat to the safety of those on the scene.”<sup>111</sup> However, the court also held more generally that the *Buie* protective sweep doctrine may apply in “circumstances other than during the in-home execution of an arrest warrant.”<sup>112</sup>

Likewise, in *Gould*, the Fifth Circuit held that an in-home protective sweep is valid where officers are legally present in a home pursuant to a “legitimate law enforcement purpose” and the other *Buie* requirements are met.<sup>113</sup> Police officers went to Gould’s trailer to

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<sup>109</sup> See *supra* notes 94–101 and accompanying text.

<sup>110</sup> In *Miller*, an officer carrying out a protective order issued to Miller’s former roommate had followed Miller, who the police had reason to believe was dangerous, into his bedroom. *Miller*, 430 F.3d at 96. The officer discovered a firearm lying in plain view, and Miller was charged as a felon in possession. *Id.* Miller appealed to the Second Circuit after he unsuccessfully moved to suppress the admission of the firearm into evidence. *Id.* at 96–97. Applying *Buie*, the Second Circuit found the protective sweep valid. *Id.* at 100–02.

<sup>111</sup> *Id.* at 95. In a footnote, the court recognized the concern that, in the context of consent entries, “the application of *Buie* . . . might provide officers an opportunity to circumvent the warrant requirement, as they could request entry with the ulterior purpose of conducting a protective sweep.” *Id.* at 100 n.3 (citing *United States v. Gandia*, 424 F.3d 255, 262–63 (2d Cir. 2005)). The court indicated, however, that this same concern did not apply where the police had initially entered a home pursuant to a protective order. See *id.* (finding nothing in record to suggest that officers had entered Miller’s home for any reason other than to carry out protective order that judge had issued earlier that day). Nevertheless, the court did not specifically limit its holding to situations involving a protective order.

<sup>112</sup> *Id.* at 100.

<sup>113</sup> *United States v. Gould*, 364 F.3d 578, 587 (5th Cir. 2004) (noting that there must be reasonable suspicion to believe searched area harbors someone “posing a danger to those on the scene,” that sweep must be limited to “ cursory inspection of those spaces where a person may be found,” and that sweep may neither last longer than necessary “to dispel the reasonable suspicion of danger” nor “longer than the police are justified in remaining on the premises”).

speak with him after receiving a tip that Gould, who was known to be violent, was planning to kill two judges. After another resident let them into the trailer, the officers proceeded to search the master bedroom, where they discovered three guns in plain view. The prosecution appealed after Gould successfully moved to suppress the guns on the basis of an unlawful search.<sup>114</sup> The court found that while the trailer's other resident could lawfully consent to the officers' initial entry, he had no authority to consent to their search of Gould's bedroom.<sup>115</sup> The court thus turned to the question of whether the protective sweep doctrine justified the officers' subsequent search of the bedroom and, applying the *Buie* reasonable suspicion standard, concluded that it did.<sup>116</sup> Apart from holding the consent entry in Gould's case to be valid, however, the court gave no other indication as to what might be considered a "legitimate law enforcement purpose."

In another case, *United States v. Martins*,<sup>117</sup> the First Circuit held that "police who have lawfully entered a residence possess the same right to conduct a protective sweep whether an arrest warrant, a search warrant, or the existence of exigent circumstances prompts their entry."<sup>118</sup> The court held the police's initial entry into an apartment to be valid under the emergency assistance doctrine because exposure to "toxic" marijuana smoke and the ongoing crime of marijuana use endangered the welfare of a child in the apartment.<sup>119</sup> Then, applying the *Buie* requirements, the court found reasonable suspicion to justify a protective sweep.<sup>120</sup> The court did not clarify whether there are certain circumstances—such as when officers have entered pursuant to consent—when the protective sweep doctrine does not extend to a lawful entry.

## 2. *Why These Decisions Are Problematic*

By failing to account fully for the presence of an arrest in *Buie*, decisions that extend the protective sweep doctrine to non-arrest situations do not adequately protect Fourth Amendment privacy rights. As the Supreme Court has itself stated, *Terry* was meant to be a limited exception to the probable cause and warrant requirements, the

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<sup>114</sup> *Id.* at 580.

<sup>115</sup> *Id.* at 589.

<sup>116</sup> *Id.* at 589–93.

<sup>117</sup> 413 F.3d 139 (1st Cir. 2005).

<sup>118</sup> *Id.* at 150.

<sup>119</sup> *Id.* at 148–49.

<sup>120</sup> *Id.* at 150–51 (citing factors such as high-crime area, nearby shootings moments earlier, officers' knowledge of gang members' tendency to congregate together, and defendant's attempt to misinform officers as all supporting finding of reasonable suspicion to believe that others were in apartment).

narrow scope of which the “Court ‘has been careful to maintain.’”<sup>121</sup> Left unchecked, the expansion of the protective sweep doctrine could lead to a drastic erosion of the individual rights that the probable cause and warrant requirements are meant to safeguard.<sup>122</sup> Yet, overall, the courts have been liberal in their extension of the protective sweep doctrine, applying it indiscriminately to a variety of non-arrest situations. They have done so without explanation,<sup>123</sup> without accounting for the significance of *Buie*’s “incident to arrest” language,<sup>124</sup> and without any attempt to distinguish between the different types of potential police entries.<sup>125</sup>

Of course, if the exception was meant to be so limited, one might ask why the Court extended the protective sweep doctrine in the first place. After all, the home is where Fourth Amendment rights are most sacred.<sup>126</sup> For the *Buie* Court, one of the key factors justifying such an exception for an in-home search was the incidence of an arrest. In addition to noting that a protective sweep is, as defined by the *Buie* Court, incident to arrest,<sup>127</sup> the *Buie* Court relied, in part, on the adversarial nature of an arrest to uphold the search.<sup>128</sup> Yet, in extending the protective sweep doctrine to non-arrest situations, some circuit courts have ignored the arrest versus non-arrest distinction completely.<sup>129</sup> Alternatively, other courts have played down the

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<sup>121</sup> *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979) (quoting *Dunaway v. New York*, 442 U.S. 200, 210 (1979)); see also *Florida v. Royer*, 460 U.S. 491, 498 (1983) (noting that “*Terry* created a limited exception” to general rule requiring probable cause).

<sup>122</sup> The following observations of a deputy district attorney and a former deputy district attorney illustrate this danger in the similar context of the search incident to arrest doctrine:

[T]he Court runs the risk of losing sight of the original warrant mandate and the narrowness of its exceptions. Such a problem has particularly plagued the search incident to arrest exception, for it has suffered the “progressive distortion” of starting as a “hint” which became a “suggestion,” and then “loosely turned into dictum and finally [was] elevated to a decision.” Such a “precarious foundation” has allowed unchecked expansion of the search incident to arrest exception. This, in turn, has resulted in making “the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest.”

George Dery & Michael J. Hernandez, *Turning a Government Search into a Permanent Power: Thornton v. United States and the “Progressive Distortion” of Search Incident to Arrest*, 14 WM. & MARY BILL RTS. J. 677, 710 (2005) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 80 (Frankfurter, J., dissenting)).

<sup>123</sup> See *supra* notes 94–101 and accompanying text.

<sup>124</sup> See *supra* notes 103–09 and accompanying text.

<sup>125</sup> See *supra* notes 109–20 and accompanying text.

<sup>126</sup> See *supra* notes 13–15.

<sup>127</sup> See *supra* note 53 and accompanying text.

<sup>128</sup> See *supra* text accompanying note 56.

<sup>129</sup> See *supra* notes 94–101 and accompanying text.

importance of the arrest language in *Buie*<sup>130</sup> and have focused instead on the similar risk of ambush present in non-arrest situations<sup>131</sup> or on the lawfulness of the initial police entry.<sup>132</sup>

None of these approaches, however, gives appropriate consideration to the limited nature of the probable cause and warrant exceptions or to the importance of the arrest in *Buie*.<sup>133</sup> Consequently, some courts have extended the protective sweep doctrine to situations where such searches are unreasonable and, thus, arguably unconstitutional.<sup>134</sup> Equally troubling is the fact that other courts have applied the protective sweep doctrine to situations where such searches are reasonable,<sup>135</sup> but have provided too little guidance to lower courts and law enforcement officers regarding which lawful entries are covered by the protective sweep doctrine. This in turn makes it difficult for officers to apply the protective sweep doctrine in the line of duty and hinders trial courts' attempts to apply the doctrine consistently and fairly,<sup>136</sup> leaving privacy rights vulnerable.<sup>137</sup>

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<sup>130</sup> See *supra* note 102 and accompanying text.

<sup>131</sup> See *supra* notes 103–08 and accompanying text.

<sup>132</sup> See *supra* notes 110–20. It is at least plausible—if not highly likely—that courts have taken such an approach to avoid the suppression of reliable evidence. See George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 147–49, 176–82 (1993) (noting incentives for judges to “warp Fourth Amendment doctrine” and proposing alternative system for pre-trial motions to suppress in which juries would decide on violation and judges would decide whether to suppress).

<sup>133</sup> See *infra* Part III.A (discussing importance of arrest in *Buie*).

<sup>134</sup> For example, as I explain in Part III.B, *infra*, protective sweeps conducted incident to consent entries should always be deemed unreasonable.

<sup>135</sup> As I explain in Part III.B, *infra*, the protective sweep doctrine should apply where officers enter a home pursuant to exigent circumstances or court order.

<sup>136</sup> See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1472–73 (1985) (noting need for simple criminal procedure rules and concern that confusing nature of Fourth Amendment law “fails to inform the police how to behave and to inform the lower courts of the basis for the exclusionary decision,” resulting in loss of evidence and violations of civil rights); cf. Nina Morrison, Note, *Curing “Constitutional Amnesia”: Criminal Procedure Under State Constitutions*, 73 N.Y.U. L. REV. 880, 904–07 (1998) (discussing state courts' preference for legal standards that courts and police can easily apply).

<sup>137</sup> As noted above, the deterrent effect of the exclusionary rule may be diminished in the case of protective sweeps. In such cases, officers are in a potentially dangerous situation and, by definition, their search is primarily motivated by a desire to protect their safety or the safety of others, not by the desire to guarantee a successful prosecution. See *supra* note 89 and accompanying text. Thus, a bright-line rule that applies after officers have already entered a dangerous situation might still leave individuals' privacy rights vulnerable. In contrast, a bright-line rule that applies before officers enter a dangerous in-home situation, and that takes into consideration the need for the initial entry, will ensure that officers know before they enter dangerous in-home situations whether subsequent protective sweeps will be invalid. See *infra* Part III.B (arguing that courts should require officers to have compelling need to enter home in first place, and that courts should apply

## III

WHEN COURTS SHOULD EXTEND THE PROTECTIVE SWEEP  
DOCTRINE ABSENT AN ARREST

The need for officers to be able to protect themselves while carrying out their duties requires extension of the protective sweep doctrine to at least some situations where there is no arrest. On the other hand, allowing protective sweeps in all situations where police are lawfully in a home would result in courts sanctioning unreasonable searches and would ultimately degrade Fourth Amendment privacy rights. Thus, a meaningful standard must be found for determining when protective sweeps not incident to arrest are reasonable. In this Part, I assert that such a standard may be gleaned from the Court's decisions in *Buie* and *Terry*. When applied to the three categories of lawful police entries the courts have faced, this standard should lead courts to extend the protective sweep doctrine when officers have entered a home pursuant to exigent circumstances or a court order, but not when they have entered pursuant to consent. I conclude this section by arguing that such an approach has the added benefit of reducing the risk of pretextual protective sweeps.

A. *The Significance of the Arrest in Buie*

It is a mistake for courts to disregard the importance of the arrest in *Buie*.<sup>138</sup> As one jurist has commented, “the element that the officers must be executing an arrest warrant in a home in order to conduct a protective sweep cannot be so easily disposed of and [replaced].”<sup>139</sup> In *Buie*, the Court could not have been unaware of the significant step it was taking in extending what was supposed to be a limited exception to the probable cause and warrant requirements for an in-home search. Indeed, the Court stated that, under its balancing test to determine reasonableness, such searches would usually be unconstitutional without probable cause and a warrant.<sup>140</sup> In *Buie*, there was something on the government interest side of the scale that tipped the balance in favor of allowing a limited warrantless search of a home based only on reasonable suspicion. The Court did not explicitly state that the arrest was a determinative factor in its reasonableness analysis because it did not have to—a search incident to arrest was the only situation the Court was confronting. Nevertheless,

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standard to categories of entries and not to specific facts of cases). Consequently, such a rule would help maintain the deterrent force of the exclusionary rule.

<sup>138</sup> See *supra* text accompanying note 102 (discussing how courts have downplayed arrest in *Buie*).

<sup>139</sup> United States v. Gould, 364 F.3d 578, 603 (5th Cir. 2004) (DeMoss, J., dissenting).

<sup>140</sup> Maryland v. Buie, 494 U.S. 325, 331 (1990).

although the Court did not identify the arrest as the essential element to its holding, the Court's logic indicates that the presence of the arrest in *Buie* played a persuasive role in its decision to allow a protective sweep.

In qualifying the definition of a protective sweep with "incident to arrest" language,<sup>141</sup> and repeating that qualifying language throughout its decision, the Court implied that the arrest was significant in some way. In fact, the Court stressed that the adversarial nature of the arrest, in part, increased the risk to officers.<sup>142</sup> However, a closer look at *Buie* and the Court's earlier decision in *Terry* indicates that the primary significance of the arrest was not the danger innate to arrests but rather the officers' need to be in the home in the first place.

In *Terry*, the Court initially described the government side of the reasonableness balancing test as being the "need to search"<sup>143</sup> and then, shortly thereafter, restated it as the "need for law enforcement officers to protect themselves and other prospective victims of violence."<sup>144</sup> I do not challenge the notion that the government interest in *Buie* and *Terry* was the need for officers to conduct searches to protect themselves and others in the area. One does not even reach the need to conduct a protective search, however, if the officers do not need to be in a home in the first place. In a case like *Terry*, an officer patrolling the public domain seeks to halt crimes that are already occurring or to prevent those which are about to occur. In such a scenario, particularly where a suspect may present an imminent threat to those in the immediate area, an officer has little choice but to attempt to stop the crime.<sup>145</sup> One could hardly expect officers to avoid public areas altogether or turn their backs on a crime they see occurring in a public area. In contrast, officers can generally avoid putting themselves in a dangerous suspect's home. In most cases, the government's "need to search" does not outweigh the intrusion on

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<sup>141</sup> See *supra* notes 52–54 and accompanying text (discussing "incident to arrest" language in *Buie*).

<sup>142</sup> See *supra* text accompanying note 56 (noting *Buie*'s discussion of dangers of in-home arrest).

<sup>143</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536–37 (1967)).

<sup>144</sup> *Id.* at 24.

<sup>145</sup> Furthermore, when individuals are in public, they might be more comfortable in objecting to what they view as an improper search by officers because other people may observe the officers' conduct. See *United States v. Drayton*, 536 U.S. 194, 198, 204 (2002) (noting that bus passenger may feel more confident in not cooperating with officers conducting search when other passengers are at hand to witness officers' conduct).

Fourth Amendment privacy interests.<sup>146</sup> Yet, there are certain situations where officers do have a compelling need to be in a home. In *Buie*, that compelling need was the execution of an arrest warrant. As the Court noted, it was the arrest that “put[ ] the officer[s] at the disadvantage of being on [their] adversary’s ‘turf.’”<sup>147</sup> Implicit in that statement is the idea that the officers’ presence in the home was required and the resulting danger was an unfortunate by-product of that required action.

### B. Requiring a Compelling Need

It is well established that reasonableness is the touchstone of a constitutional Fourth Amendment search,<sup>148</sup> and that a determination of reasonableness entails “balancing the need to search against the invasion which the search entails.”<sup>149</sup> Unfortunately, in ignoring the rationales for the Court’s decisions in *Terry* and *Buie*, circuit courts extending the protective sweep doctrine to non-arrest situations have failed to weigh appropriately the interests at stake. I submit that courts must engage in a more meaningful assessment of the need to search when determining in which limited situations warrantless, suspicion-based protective sweeps will be reasonable.<sup>150</sup> Courts should not only factor the officers’ need for self-protection against possible ambushes but should also consider the need for the officers’ initial entry into the home.

For protective sweeps to be valid, officers should be required to have a compelling need to be in the home in the first place,<sup>151</sup> and not

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<sup>146</sup> See *Illinois v. McArthur*, 531 U.S. 326, 336 (2001) (“Temporarily keeping a person from entering his home, a consequence whenever police stop a person on the street, is considerably less intrusive than police entry into the home itself in order to make a warrantless arrest or conduct a search.”); *United States v. Gould*, 364 F.3d 578, 595 (5th Cir. 2004) (Smith, J., dissenting) (“A search that does nothing more than allow the officers safely to remain in a place where they have no reason or right to be will, of necessity, be unreasonable in all but the rarest of circumstances.”).

<sup>147</sup> *Maryland v. Buie*, 494 U.S. 325, 333 (1990).

<sup>148</sup> See discussion *supra* notes 17, 24 and accompanying text.

<sup>149</sup> *Camara v. Mun. Court*, 387 U.S. 523, 536–37 (1967).

<sup>150</sup> I discuss only the government interest side of the equation because that is the moving variable in this context. If the protective sweep doctrine applies, the scope of the search must always comply with the requirements set forth in *Buie*—namely, the search must be limited to spaces where possible ambushers could be hiding. See *supra* text accompanying notes 57–58.

<sup>151</sup> See *Gould*, 364 F.3d at 603 (DeMoss, J., dissenting) (explaining that, to justify protective sweep, officer would need to have compelling, and not just legitimate, reason to be in home in first place, and citing execution of arrest warrant as example).

just a legitimate or lawful purpose as some courts have held.<sup>152</sup> If it is unnecessary for an officer to place himself in a risky in-home situation to begin with—or if he can at least wait until he has a neutral magistrate's imprimatur before doing so—the government's interest should never outweigh the intrusion on individual privacy rights. Courts should, therefore, always find such searches unreasonable.

In applying this standard to determine whether the protective sweep doctrine should be extended to non-arrest situations, courts should focus on the particular type of lawful entry at issue, rather than the specific facts of a case. There are two considerable disadvantages to adopting a case-by-case approach in this context. First, such an approach makes it difficult for lower courts and law enforcement officers to follow the law consistently.<sup>153</sup> Second, by failing to delineate ex ante the general situations where protective sweeps will or will not be valid, courts create incentives for police officers to push the boundaries in the hope of obtaining incriminating evidence that will not be suppressed.<sup>154</sup> Thus, a bright-line rule, clearly focused on the category of entry at issue, is the preferred course.<sup>155</sup>

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<sup>152</sup> See *supra* notes 113–20 and accompanying text (discussing *Gould* and *United States v. Martins*, 413 F.3d 139 (1st Cir. 2005), two cases in which courts based their decisions on presence or absence of “legitimate or lawful purposes”).

<sup>153</sup> See, e.g., L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 713, 732 (1998) (noting that results of study involving over four hundred officers in Ventura County, California, indicated that clear majority of officers were unhappy with complexity of current search-and-seizure law).

<sup>154</sup> After all, if officers had not been pushing the Fourth Amendment's boundaries, the cases raising protective sweep issues in each circuit would not have arisen in the first place. The lower courts' case-by-case analysis has validated these officers' efforts, as demonstrated by the majority of courts holding these searches valid. Furthermore, officers know the low chances of evidence being suppressed weigh against defendants making such motions. Cf. Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and “Lost Cases”: The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1064 (1991) (concluding, in multijurisdictional study, “that motions to suppress were successful in only 0.9% of the primary warrants” and that findings were consistent with those in other studies). Fact-based inquiries are also problematic because they give police officers the incentive to lie in order to avoid the suppression of evidence. See Perrin et al., *supra* note 153, at 717, 725–27 (noting “incentive for officers to reshape history in a way that fits within the rules” and citing study results supporting such manipulation of facts by officers, particularly those with more years on force and higher rank).

<sup>155</sup> See Amsterdam, *supra* note 17, at 393–94 (arguing that “sliding scale approach could only produce more slide than scale”). As Professor Amsterdam has noted, “If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable.” *Id.* at 394. One scholar has proposed holding protective sweeps absent an arrest invalid either where an officer, once inside a home, creates the need for protective measures or when the sweep serves as a pretext for gathering evidence. See Loya, *supra* note 7, at 467–70 (discussing examples of officer

As noted above, initial lawful entries into the home can be divided into three basic categories: entries to execute a court order, entries justified by exigent circumstances, and consent entries. When courts evaluate these categories using the correct standard—i.e., by requiring a compelling need for the initial lawful entry into the home—they should extend the protective sweep doctrine to situations where officers have entered a home pursuant to a court order or exigent circumstances, but not to cases involving consent entries.

When officers enter a home pursuant to a court order, a neutral magistrate has sanctioned their presence for a purpose, such as the execution of a search warrant or, as in *Buie*, an arrest warrant, which goes beyond ordinary investigative tactics. Alternatively, a magistrate has specifically required police to enter a home, for instance, to carry out a protective order. In either case, there is a compelling need for the officers' presence. Thus, the protective sweep doctrine should extend to these scenarios—for example, to cases where officers executing a search warrant that is limited to one room of a cabin sweep another room as well,<sup>156</sup> or where officers executing a protective order in an apartment follow a resident into a bedroom.<sup>157</sup>

In the case of exigent circumstances, the very justification for the initial lawful entry is that there is a compelling need, like the prevention of imminent destruction of evidence or harm to the community. This compelling need requires the officers' immediate response, such that obtaining a warrant would be impractical.<sup>158</sup> For instance, when officers find a child apparently alone in an apartment, surrounded by the smell of marijuana smoke following a gang shooting,<sup>159</sup> they must enter the premises immediately to ensure the child's safety. Similarly, when it is late at night and officers suspect that a robbery is in progress,<sup>160</sup> they must enter the home at once to prevent the robbery and protect any residents. Thus, the protective sweep doctrine should also extend to situations where officers enter a home pursuant to exigent circumstances.

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rushing into closed room and dangerous suspect sitting in same room as officers). While such an approach is promising in theory, in practice it would be vulnerable to the pitfalls I have just noted. A better approach is to draw a clear line before the initial entry.

<sup>156</sup> See *supra* notes 94–97 and accompanying text (discussing *United States v. Daoust*, 916 F.2d 757 (1st Cir. 1990)).

<sup>157</sup> See *supra* notes 110–11 (discussing *United States v. Miller*, 430 F.3d 93 (2d Cir. 2005)).

<sup>158</sup> See *supra* note 92 (describing exigent circumstances doctrine).

<sup>159</sup> See *supra* notes 117–20 and accompanying text (discussing *United States v. Martins*, 413 F.3d 139 (1st Cir. 2005)).

<sup>160</sup> See *supra* notes 105–08 (discussing *Leaf v. Shelnett*, 400 F.3d 1070 (7th Cir. 2005), in which officers entered apartment upon suspicion of robbery in progress).

In contrast, when officers gain initial entry into a home pursuant to consent, they have no need, apart from ordinary investigative tactics, to be in the home.<sup>161</sup> The officers could avoid being there altogether or wait until they have secured a warrant before entering. For instance, if officers suspect someone of a crime but do not yet have probable cause for a search warrant, they can first employ alternative investigative techniques to gather more evidence instead of going to the suspect's home to talk with him. Then, once they have enough evidence to establish probable cause, the officers can secure a warrant.<sup>162</sup> Alternatively, the officers can go to the suspect's home but ask to speak with him outside or back at the station. If the suspect is not there or if he refuses to leave his home, the officers can wait for him outside, try to speak with him again later, or find another way to secure evidence.<sup>163</sup> It would be unreasonable, therefore, for officers to conduct a sweep of a home when they have made the choice to enter the home in the first place, without a compelling need and knowing the risk such circumstances present. Thus, courts should not apply the protective sweep doctrine to situations where officers have entered a home pursuant to consent.

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<sup>161</sup> See *United States v. Gandia*, 424 F.3d 255, 262–63 (2d Cir. 2005) (arguing that, in contrast to situation where officer enters home to execute arrest warrant or pursuant to exigent circumstances, officers taking statement after consent entrance had no need to enter home in first place); *United States v. Gould*, 364 F.3d 578, 601 (5th Cir. 2004) (DeMoss, J., dissenting) (arguing that, in consent entry situations, officers are under “no obligation or duty to enter the home in the first place”). While one might argue that it is necessary for officers to enter homes to follow up on investigative leads, such a need does not justify a subsequent in-home search.

<sup>162</sup> In fact, in at least one case in which a court applied *Buie* to a protective sweep subsequent to a consent entry, the police likely already had enough evidence to secure a search warrant beforehand. See *United States v. Patrick*, 959 F.2d 991, 994 (D.C. Cir. 1992) (noting that lessee of apartment had complained about defendant taking over bedroom in apartment and storing drugs and weapons therein). Similarly, in *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993), once the officers saw a bag of cocaine through an apartment's screen door, they could have concluded their conversation about rental prices in the neighborhood without tipping Garcia off to the fact that they were police officers. The officers could have then used what they had seen, combined with the previous tip that the premises were used to store narcotics, to obtain a warrant to search the apartment for the cocaine.

<sup>163</sup> In cases where officers need to speak with a suspect but do not have probable cause for a search warrant, one scholar has proposed that the officers could have the option of securing a new type of intermediate “investigatory warrant,” which, with prior judicial authorization, would permit police entering a home pursuant to consent to conduct protective sweeps. Ruf, *supra* note 7, at 159–60. Such a warrant would ensure that a neutral magistrate has determined the validity of officers' concerns for their safety prior to the protective sweep, which could prevent false post hoc submissions. See *id.* at 160 (noting that such ex ante justification would be useful in “blatant cases” like *Gould*). Such a warrant should only be issued where officers can show both an urgent need to speak with the suspect and that other investigatory techniques would not work equally well.

Of course, there remains the chance that such a bright-line, categorical rule will still permit some searches that are unreasonable and prevent some searches that are reasonable. For instance, a court might hold a protective sweep to be valid after erroneously finding exigent circumstances to justify the initial entry or reasonable suspicion to justify the protective sweep. Conversely, a court might invalidate a protective sweep conducted where police officers went to the home of a non-suspect to ask questions about someone else, were given consent to enter the home, and, only once they were inside, realized the person they were dealing with was more involved in the crime than they initially thought and that he or other people in his home were potentially very dangerous. Though this bright-line rule might be imperfect, it is still superior to the circuit courts' current approaches. Not only will it provide better guidance for police officers and courts and deter overzealous policing, but, perhaps most importantly, it will result in more accurate reasonableness determinations.

One might also argue that a bright-line rule holding invalid all protective sweeps conducted pursuant to a consent entry presents officers with a Hobson's choice between sacrificing consent entries altogether and, if entry is pursuant to consent, refraining from taking minimally intrusive measures to protect themselves even when they have reasonable suspicion to fear an ambush.<sup>164</sup> Thus, the argument goes, officers will be discouraged from pursuing valuable leads. In practice, however, such a rule will merely force officers to assess the risk of a particular in-home situation prior to gaining entry. In the majority of cases, officers will have a good sense of that risk based on the crime they believe the suspect has committed. For example, where police suspect someone of being involved in a militia, the sale of illegal weapons, and multiple murders,<sup>165</sup> or where they believe a suspect is violent and planning one or more murders,<sup>166</sup> officers will have a good idea that entering that suspect's home is a risky proposition. Thus, they will be on notice that if they want to speak with a suspect, they should either attempt to do so outside the home,<sup>167</sup> take

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<sup>164</sup> See *Gould*, 364 F.3d at 590 (making this argument and refusing to adopt bright-line rule).

<sup>165</sup> See *infra* note 168 (discussing facts of *United States v. Taylor*, 248 F.3d 506 (6th Cir. 2001), which extended *Buie* to search conducted after consent entry and pending issuance of search warrant).

<sup>166</sup> See *supra* text accompanying notes 113–14 (discussing facts of *Gould*).

<sup>167</sup> If, in speaking with a suspect outside his home, information emerges—from either the suspect or someone else—that gives the officers probable cause to secure a search warrant for the premises, the officers may reasonably detain the suspect outside the home until they are able to secure the warrant. See *Illinois v. McArthur*, 531 U.S. 326, 337 (2001)

additional officers along with them, or first engage in other investigative techniques to establish probable cause for a warrant. If officers underestimate the risk, enter a suspect's home, and only subsequently realize the danger of the situation, they can always retreat.<sup>168</sup> The point is that officers have options other than protective sweeps available to them that do not require abridging privacy rights. Moreover, even if such alternatives do not bear quite the same fruit, such a sacrifice is worth it, given the interest in preserving the integrity of the Fourth Amendment.

### C. Reducing the Risk of Pretextual Searches

One of the Fourth Amendment's chief purposes is to bar arbitrary, not just unjustified, searches.<sup>169</sup> Even so, when a search is based on probable cause, the Court has adopted an objective approach to analyzing whether a Fourth Amendment violation has occurred. "[A]s long as the circumstances, viewed objectively, justify [a search]," the search will not be held invalid just because the provided justification was mere pretext.<sup>170</sup> Although the Court has not decided whether a successful pretext challenge might be made in cases

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(holding that where officers have probable cause for search warrant of home and reasonably believe resident would destroy evidence if left free, officers may restrain resident outside home provided that restraint is limited and reasonably tailored).

<sup>168</sup> Alternatively, if officers have entered a home pursuant to consent and have already seen something that establishes probable cause for a search warrant, they may conduct a protective sweep pending the issuance of the warrant, and any evidence discovered in plain view will be admissible under the inevitable discovery doctrine. See discussion *supra* note 74. In fact, the Sixth Circuit in *Taylor* acknowledged this option. 248 F.3d at 513–14 (holding *Buie* applicable to protective sweep conducted while officer was securing search warrant). The officers had suspected Taylor of committing criminal acts but lacked probable cause to obtain a search warrant. *Id.* at 510 (noting that report indicated Taylor's involvement in drug dealing, sale of illegal weapons, Michigan militia, and "one or more murders"). They went to Taylor's home to talk to him, and his brother let them into the apartment. Once inside, the officers saw a marijuana stem, which gave them probable cause to obtain a search warrant for the rest of the apartment. While one officer left to obtain a warrant, the others conducted a protective sweep to secure the apartment pending the issuance of the warrant. During the sweep, they found a large quantity of marijuana in a closet. *Id.* at 512–13. The court noted that even if a protective sweep were not valid in this situation, the inevitable discovery doctrine would have resulted in the evidence's admissibility. See *id.* at 514 (noting that if, instead of conducting protective sweep, police had waited for return of officer with warrant, ensuing search inevitably would have resulted in discovery of evidence at issue).

<sup>169</sup> Amsterdam, *supra* note 17, at 417.

<sup>170</sup> *Scott v. United States*, 436 U.S. 128, 138 (1978); see also *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). Such an approach is not altogether unwarranted because, as Professor Amsterdam has remarked, "A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably." Amsterdam, *supra* note 17, at 436–37.

involving searches that are subject to the reasonable suspicion standard, such as protective sweeps,<sup>171</sup> it would likely reject such challenges because reasonable suspicion is rooted in objective, articulable facts.<sup>172</sup> Nevertheless, it is still worth highlighting the fact that a “compelling need” standard will result in the significant ancillary benefit of minimizing the risk of pretextual searches.

In the context of police investigations, there is always a risk that officers will conduct pretextual protective searches to gather evidence they would otherwise be unable to secure.<sup>173</sup> For example, officers might testify in support of a protective sweep that they were concerned for their safety, when they were really looking for evidence in the absence of probable cause. By extending the protective sweep doctrine to situations where officers have entered a home pursuant to consent, many courts have increased this risk. Giving officers the opportunity to conduct a valid sweep of a home once they have entered with a suspect’s or a third party’s consent, regardless of the officers’ subjective intent, effectively creates an end run around the usual search warrant requirements. Requiring officers to have a compelling need for their initial lawful entry into a home would make the protective sweep doctrine inapplicable in all consent entry cases, and thus would eliminate this considerable and unnecessary loophole.

When an officer’s initial entry into a home is pursuant to exigent circumstances or a court order, the risk of officers abusing the protective sweep doctrine to engage in pretextual protective sweeps is relatively low.<sup>174</sup> To establish exigent circumstances, officers must

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<sup>171</sup> See 1 LAFAYETTE, *supra* note 4, § 1.4(f), at 143–44, 153–54 (noting that *Whren* Court articulated exceptions in which pretext inquiry might figure into balancing of government’s need against intrusiveness of search).

<sup>172</sup> See *id.* §1.4(f), at 152 (arguing that Court would likely reason that “the existence of reasonable suspicion likewise ‘ensure[s] that police discretion is sufficiently constrained’” (quoting *Whren v. United States*, 517 U.S. 806, 817–18 (1996))). In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court struck down narcotics checkpoints of which the primary purpose was general crime control. *Id.* at 44–46. In doing so, the Court noted that *Whren* expressly distinguished cases involving searches justified in the absence of probable cause, reinforcing the principle that “programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion.” *Id.*

<sup>173</sup> See Patricia Leary & Stephanie Rae Williams, *Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment’s Outer Frontier: A Subjective Test for Pretextual Seizures*, 69 TEMP. L. REV. 1007, 1007 (1996) (arguing that federal courts’ reading of Fourth Amendment, later endorsed by Supreme Court in *Whren*, eliminated checks on pretextual searches); David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 107–09, 110 (1998) (arguing that Court’s decision in *Whren* actually encourages officers to engage in pretextual searches).

<sup>174</sup> See *United States v. Gandia*, 424 F.3d 255, 263 (2d Cir. 2005) (“[P]retext may be less likely when police enter a home with a search warrant, upon probable cause combined

generally show probable cause to believe that imminent action is necessary, and these factors are not easy to manufacture.<sup>175</sup> Furthermore, exigent circumstances arise in the spur of the moment, under extreme conditions, where officers have little time to think about how they might take advantage of the protective sweep doctrine to engage in fishing expeditions.<sup>176</sup>

In the case of court orders, a neutral magistrate has decided that officers should enter a home. Specifically, in the case of a search warrant, a magistrate has determined there is probable cause.<sup>177</sup> And in the case of a protective order, officers have not sought to enter a home. Rather, the court has called upon the officers to ensure a civilian's safety.<sup>178</sup> In such circumstances, officers are not likely to use a protective sweep as an end run around the probable cause and warrant requirements.<sup>179</sup>

In contrast, there is a heightened risk of abuse in the context of a consent entry. Officers looking for proof to tie a suspect to a crime but lacking probable cause for a search warrant can simply go to a suspect's home, gain entry through consent and, once inside, conduct a protective sweep in the hopes of spotting incriminating evidence in plain view.<sup>180</sup> Officers may then manipulate the facts in court to avoid revealing the real purpose of their search, leaving courts none the

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with exigent circumstances, or pursuant to the 'danger exception' to the normal requirement that officers knock and announce themselves." (citations omitted)).

<sup>175</sup> *But see* 3 LAFAYE, *supra* note 4, § 6.6(a), at 469 (noting that, due to general hesitancy to second-guess officers who enter premises to save human lives, courts must be aware that officers might falsely claim imminent action was necessary in order to disguise their true purpose of collecting evidence).

<sup>176</sup> *See Gandia*, 424 F.3d at 263 ("[T]he presence of emergent conditions in effect assures that the officers have a non-pretextual reason for entering the premises.").

<sup>177</sup> *See id.* (noting that "a warrant would, in any event, have been obtained through judicial process," which includes judicial finding of probable cause).

<sup>178</sup> *See United States v. Miller*, 430 F.3d 93, 100 n.3 (2d Cir. 2005) (noting diminished concern for pretext where officers enter home pursuant to protective order).

<sup>179</sup> Of course, the potential for police abuse can never be entirely eliminated. One might argue that there could be times when officers have probable cause to search one area of the premises but not others, and they might use the protective sweep doctrine to get around their lack of probable cause and search warrant for those other areas. However, the advance authorization by a neutral magistrate and the necessary showing of reasonable suspicion to justify a protective sweep should help guard against such abuse.

<sup>180</sup> *See Gandia*, 424 F.3d at 262 ("[T]here is a concern that generously construing *Buie* will enable and encourage officers to obtain . . . consent as a pretext for conducting a warrantless search of the home."); *United States v. Gould*, 364 F.3d 578, 589 (5th Cir. 2004) (noting circumstances in which protective sweeps pursuant to consent entries might pose particular concerns); *supra* note 111 (discussing this concern in *Miller*, 430 F.3d at 100 n.3). In his *Gould* dissent, Judge DeMoss worried that police "knock and talk" tactics might turn into "'knock, enter, maybe talk, and search' police investigatory tactic[s] . . . resulting in an end-run around the protections afforded by the Fourth Amendment." 364 F.3d at 601 (DeMoss, J., dissenting).

wiser. This risk is exacerbated by the fact that courts have found the *Buie* reasonable suspicion standard to be satisfied where an occupant of the searched home is suspected of being involved in “inherently dangerous” crimes, such as alien smuggling<sup>181</sup> or drug trafficking.<sup>182</sup> If courts require officers to have a compelling need to enter a home, however, consent entries will be excluded from the protective sweep doctrine, and the overall risk of pretextual protective sweeps of homes will be diminished.

### CONCLUSION

Circuit courts determining whether to extend the *Buie* protective sweep doctrine to non-arrest situations have struck the wrong balance between protecting government interests and Fourth Amendment privacy rights. To remedy this imbalance, courts must incorporate into their reasonableness analysis a proper inquiry into the “need to search,” requiring a compelling need for officers’ lawful entry into a home in order for protective sweeps to be valid. Applying this standard, courts will find the protective sweep doctrine applicable where officers enter a home to save a child, stop a robbery, or execute a search warrant, but not when they engage in “knock and talk” investigative techniques. Such an approach will maintain the limited nature of this exception to the warrant and probable cause requirements while allowing officers to protect themselves when the public interest so requires. It will also provide lower courts and officers with clear guidelines to apply the law. Most importantly, this approach will ensure that Fourth Amendment privacy rights—and the sanctity of the home—do not become a thing of the past.

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<sup>181</sup> In *United States v. Mendez*, 431 F.3d 420 (5th Cir. 2005), the court, applying the requirements articulated in *Gould*, found a protective sweep to be valid where officers had received information that undocumented aliens were being harbored in a home, then obtained consent to enter the home from its owner and, upon seeing additional people watching television, proceeded to conduct a sweep of the home. *Id.* at 424–25, 428–29. In holding the protective sweep valid, the court rejected the defendant’s complaint that the officers lacked reasonable suspicion to believe there might be people in the home who presented a danger to those on the scene, and found that the inherently dangerous nature of alien smuggling supported the officers’ reasonable suspicion. *Id.* at 428.

<sup>182</sup> See *United States v. Patrick*, 959 F.2d 991, 996 (D.C. Cir. 1992) (holding that officers who “were lawfully on the premises . . . were authorized to conduct a protective sweep based on their reasonable belief that one of [the home’s] inhabitants was trafficking in narcotics”).