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Search, Seizure, and Immunity: Second-Order Normative Authority and Rights

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Search, Seizure, and Immunity: Second-Order Normative Authority and Rights

Stephen E. Henderson and Kelly Sorensen

A paradigmatic aspect of a paradigmatic kind of right is that the rights holder is the only one who can alienate it. When individuals waive rights, the normative source of that waiving is normally taken to be the individual herself. This moral feature—immunity—is usually in the background of discussions about rights. We bring it into the foreground here, with specific attention to a recent U.S. Supreme Court decision, Kentucky v. King (2011), concerning search and seizure rights. An entailment of the Court's decision is that, at least in some cases, a right can be removed by the intentional actions of the very party against whom the right supposedly protects the rights holder. We argue that the Court's decision is mistaken. The police officers in the case were not morally permitted, and should not be legally permitted, to intentionally create the very circumstances that result in the removal of an individual's right against forced, warrantless search and seizure.

A paradigmatic aspect of a paradigmatic kind of right is that the person holding the right is the only one who can alienate it. Rights are constraints that protect individuals, and while individuals can consent to waive many or even all rights, the normative source of that waiving is normally taken to be the individual herself.

This moral feature – immunity – is usually in the background of discussions about rights.¹ We want to bring it into the foreground here. This foregrounding is especially timely in

light of a recent U.S. Supreme Court decision, *Kentucky v. King* (2011), concerning search and seizure rights. An entailment of the Court's decision is that, at least in some cases, a right can be removed by the intentional actions of the very party against whom the right supposedly protects the rights holder. We will argue that the Court's decision is mistaken. First, the police had other effective alternatives to the way they proceeded in *King*. Second, we argue that immunity, a distinctive kind of personal normative authority, is crucial to understanding the ways in which an individual can waive or lose key rights. The police officers in the case before the Court were not morally permitted, and should not be legally permitted, to intentionally create the very circumstances that appeared to remove an individual's right against forced, warrantless search and seizure. In Fourth Amendment terms, the Court was wrong to reject the doctrine of police-created exigency. Immunity is an importantly neglected element of search and seizure, but also self-defense, entrapment, and other matters.

An embedded concern is this: law enforcement officers and others are able to create circumstances that *transform*, or in some cases seem to transform, a person into a kind of wrongdoer who was not one before. There are moral constraints against creating the circumstances that transform persons in certain ways. We will note some of these constraints as well.

Our argument is an exercise in normative jurisprudence. We will look to the U.S. Constitution and key Fourth Amendment precedents as a normative basis, but we will also analyze and defend an interpretation of the *moral* basis for search and seizure legal rights.

1. *Kentucky v. King*

Police officers set up an undercover “buy-bust” operation at an apartment complex in Lexington, Kentucky in 2005.² While an undercover informant positioned himself to make a buy, an undercover observer watched from his vehicle, and three uniformed officers were positioned nearby, ready to move in. When the informant made a crack cocaine purchase in the parking lot, the undercover observer called in his uniformed colleagues. The suspect headed into an apartment breezeway, and the observer conveyed this information and urged the uniformed officers to make an arrest before the suspect entered an apartment. The observer communicated further information – he saw the suspect enter the apartment on the right at the end of a hallway – but the uniformed officers had already left their cars and did not hear this further news.

The officers did hear a door being slammed shut, and when at the end of the hallway they smelled burnt marijuana emanating from the apartment on the left, they incorrectly surmised that this door was the one recently shut. So, according to later officer testimony, they banged on that door “as loud as [they] could” and announced, ““This is the police”” or ““Police, police, police.””³ They could immediately hear, through the door, sounds of people moving, and “[i]t sounded as [though] things were being moved inside the apartment.”⁴ Based on this aural evidence, the officers concluded that the occupants could be destroying drug-related evidence and announced that they were going to enter. An officer kicked in the door. The apartment’s front room contained three people: Hollis King, King’s girlfriend, and a guest. The guest was smoking marijuana, and a protective sweep of the apartment revealed marijuana and powder cocaine in plain view. A later search found crack cocaine and drug paraphernalia.

King challenged the admissibility of the evidence so gathered, claiming that his Fourth Amendment rights against search and seizure were violated. The Supreme Court of Kentucky agreed, but the United States Supreme Court did not.

Given the limited historical record and the Amendment's ambiguous language, there is debate about the original point and purpose of the Fourth Amendment of the U.S. Constitution.⁵ But when it comes to protection of the home, much of the debate and ambiguity disappears. Not only is the home among the Amendment's explicitly protected entities ("persons, houses, papers, and effects"), but in the view of the U.S. Supreme Court, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."⁶ Thus, "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable,"⁷ the purpose being to place a neutral and detached magistrate between the citizen in his home and the police engaged in the "competitive enterprise of ferreting out crime."⁸ While the recent Supreme Court tends to emphasize that reasonableness is the criterion of Fourth Amendment constitutionality, rather than focusing on a warrant requirement,⁹ just such a requirement continues to predominate in the context of the home: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. [Typically] . . . that threshold may not reasonably be crossed without a warrant."¹⁰

Various normative considerations support the idea that individuals have rights against search and seizure. One consideration – the consideration originally emphasized by the Supreme Court – makes property and property rights central. What one legitimately owns or controls has a moral status that puts constraints on what others may do to it, and one's home has particularly strong constraints.¹¹ On another consideration – more in line with the Supreme Court's post-

1967 focus on expectations of privacy – the idea of the home is central. The home is where one performs basic and intimate actions: sleeping, eating, and relating with one’s nearest others. Take whatever is claimed to be the core of rights in general – autonomy, interests, capabilities, vulnerabilities, etc. – and, on this view, that core will explain what makes the home special, in a way similar to what makes an individual’s body and bodily boundaries special. A third consideration makes the idea of power, and in particular asymmetries of power, central. The power of the state, overwhelmingly greater than the power of the individual, must be checked if the individual is to have appropriate standing, and search and seizure rights are one important way to check that power.¹²

Thus, in most circumstances, in order to enter and search a home, law enforcement officers first need to obtain a warrant by demonstrating probable cause to a judicial authority. Courts have made decisions about the scope of these rights. For instance, while some might informally consider an automobile to be an “extension” of one’s home, no warrant is necessary for searches of automobiles and motorcycles.¹³ No warrant is necessary for searches of pastures, woods, and open water, even if posted with “no trespassing” signs and protected by the law of criminal trespass, but the perimeter of a person’s home is protected.¹⁴ And no warrant is necessary if the person consents to a search, thereby waiving his search and seizure rights.¹⁵ Boundary cases sometimes arise; for instance, in *Carney v. California* (1985), the U.S. Supreme Court permitted a warrantless search of a motor home because, like a car or motorcycle, it was “readily mobile.”¹⁶

Beyond scope limits, there are also important exceptions to search and seizure rights, established in legal precedent over the course of the last several decades: law enforcement officers do not need a warrant to enter a home in the case of “exigent circumstances.” Thus,

officers may make a warrantless entry to fight a fire, to engage in “hot pursuit” of a fleeing suspect, to render necessary medical assistance or physical protection, or to prevent imminent destruction of evidence.¹⁷ Given the strong justifications for a home warrant requirement, these exceptional circumstances “have been jealously and carefully drawn,”¹⁸ and are “few in number and carefully delineated.”¹⁹

Unfortunately, the Court has left unclear what quantum of suspicion is required with respect to these triggering events, but it appears to be a sliding scale.²⁰ Thus, in the case of emergency aid, it is sufficient if officers had an “objectively reasonable basis for believing” a person in need of immediate aid,²¹ whatever precisely that might mean. But for the exigency most relevant in *King*, namely imminent destruction of evidence, it appears officers must have not only probable cause of criminality, but also probable cause to believe evidence will imminently be destroyed absent warrantless entry.²² And an exigent circumstance only permits the intrusion necessary to eliminate the exigency. Thus, officers who enter a home in hot pursuit should be limited in what they may search for,²³ just as those who enter a home to fight a fire²⁴ or to provide emergency aid²⁵ are limited in what they may do without obtaining a judicial warrant.

Suppose police approach a home having probable cause to believe that the occupants are using drugs. Suppose also the police see, through a window of the home and from the vantage of a public way, the occupants hurriedly destroying drugs and drug paraphernalia. Legal precedent permits the police to enter without a warrant. Police have the same permission to enter if instead they only hear sounds, instead of seeing behavior, compatible with evidence destruction, though it is far from clear what sounds are consistent with destruction as opposed to innocent

behaviors.²⁶ The argument for these exceptions is that law enforcement is at an unacceptable disadvantage if search and seizure rights can insulate evidence destruction.²⁷

The *King* case extends this notion of “exigent circumstances” in a new way. In the circumstances of *King*, the police seem to have *created*, by boldly announcing their presence, circumstances that resulted in their forming a reasonable belief that evidence was being destroyed. At first, when the police smelled marijuana at the door (the door on the left, not the door the original suspect entered), there were no signs, visual or aural, that evidence was being destroyed, and so there were no “exigent circumstances” in the settled understanding of that term. Thus, the police did not have permission to enter without a warrant. (Olfactory evidence – the smell of burnt marijuana – arguably is evidence only of *past* possession, and of too minor a crime to itself constitute “exigent circumstances”²⁸; in any event, the state of Kentucky did not argue this ground.) Exigent circumstances only came into existence after the police loudly announced their presence. And, in an important sense, exigent circumstances only came into existence *on account of* the police loudly announcing their presence.

2. Arguments

We will argue that the police officers in the *King* case were not morally permitted, and should not be legally permitted, to create the very circumstances that appeared to remove an individual’s right against forced, warrantless search and seizure. When police forcibly entered King’s apartment without a warrant, they violated his Fourth Amendment rights. More generally, we will argue that on the best understanding of both search and seizure law and morality, rights that protect an individual cannot be removed by the specific party against whom the individual is protected.

(1) The first and simplest argument is that the police have other acceptable alternatives in cases like *King*. Obtaining a warrant can now be quick and efficient, because of electronic communication and, in many places, readily available judges. The officer need merely articulate his relevant training and experience, and describe what he has just witnessed. A telephonic or e-mail warrant can be obtained in a matter of minutes,²⁹ and everywhere a warrant should be available within a couple of hours, during which time officers can remain on location and continue surveillance. Justice Ruth Bader Ginsburg, the sole dissenting Justice in *Kentucky v. King*, makes this argument in her dissenting opinion, noting that police had “ample time to obtain a warrant.”³⁰ The exceptions carved out in the “exigent circumstances” precedents apply only in cases of genuine emergencies: cases when life or evidence is at stake.³¹ There was no emergency in the *King* case, and little danger that any evidence would be destroyed – at least, not until the police loudly announced their presence. Ginsburg continues, “The urgency must exist, I would rule, when the police come on the scene, not subsequent to their arrival, prompted by their own conduct.”³² So there is no pressing need in cases like *King* that justifies an erosion of search and seizure rights – especially an erosion of the unusual sort the Court allowed.

One might object that this argument cuts too deep: if search warrants are so easy to obtain, the objection says, then search and seizure rights have already been eroded such that the Court’s decision in *King* subtracts nothing additional of significance. The objection makes an important point; there is, of course, a downside to making a search warrant easier to obtain in that it reduces the resource restraint on searches, and therefore could result in a problematically high number of searches if the substantive criminal laws are overbroad. William Stuntz has explained the beneficial effects of the warrant requirement:

Warrants raise the costs of searching. To get them, police must draft affidavits and wait around courthouses. Partly for this reason, warrants also raise the substantive standard applied to the search. If an officer knows he must spend several hours on the warrant, he is likely not to ask for it unless he is pretty sure he will find the evidence. Also, magistrates may apply a higher standard when judging warrant applications before the search than when deciding suppression motions after the incriminating evidence has been found. This explains why searches pursuant to warrants tend to be successful—according to the leading study, police find at least some of what they’re looking for in more than eighty percent of warrant-based searches, and find most of what they’re looking for in over seventy percent of such searches.³³

Whatever one thinks the optimal process in that sense, judicial oversight of home searches and the warrant process are still vitally important. Whether it requires a few minutes of police officer time or a couple of hours, it interposes a neutral magistrate between the citizen in her home and the police. Justice Ginsburg is correct that in *King* the police had sufficient time to secure a warrant, and that process, even if brief, leaves in place an important procedural check on police power.

Eight Justices of the Supreme Court reiterated this principle in the decision of *Missouri v. McNeely* (2013), which concerned the necessary process before a police officer can direct a doctor or nurse to conduct a blood draw to determine the blood alcohol content of a recent driver.³⁴ The question before the Court was whether the natural and inevitable metabolization of alcohol in the bloodstream presents a *per se* exigency of imminent destruction of evidence, such that a warrant is never required. Only a single Justice, Justice Thomas, accepted this government

argument, with the other eight Justices dividing into several camps based on what subset of instances would justify a warrantless draw.³⁵ Justice Sotomayor, writing for the Court, recognized the relevance of modern technologies to the warrant application process³⁶ and concluded that “where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.”³⁷ The Court’s insistence on a case-by-case, totality of the circumstances determination, only excusing a warrant when obtaining one is impracticable, is exactly what should govern cases like *King*.

(2) A second argument reaches beyond these straightforward practical matters to broader issues about the nature of rights themselves. It is here that *King* reveals itself as a case not merely of legal but of philosophical importance as well – a case where, as we’ll show, a crucial but under-discussed kind of personal normative authority is at stake.

We’ll employ standard philosophical terminology and concepts about the nature of a right. To have a right, in the most standard moral and legal sense, is to have a claim against someone else to be treated in a certain way. Ethical theorists distinguish between a *positive* claim (the rights holder has a claim that another person do something) and a *negative* claim (the rights holder has a claim that another person *not* do something). The claim may be *absolute* (the rights holder has a claim no matter how much good would be achieved by violating it) or *non-absolute* (the rights holder has a claim that can be outweighed or permissibly infringed if some sufficiently significant good is at stake). Another set of terms concern rights *about other* rights – the important second-order authority the rights holder has over her other rights. These terms reflect that some rights take as their object other rights. So the rights holder has the right to *waive* or *transfer* a claim in the case of some rights, but not, some argue, in the case of other

inalienable rights. And the rights holder may *forfeit* some rights through certain behavior; some understand self-defense in this way – an attacker forfeits his right to life when he intentionally poses a lethal threat to another.³⁸

Rights against search and seizure are negative claims – that is, claims individuals have against law enforcement behavior. They are also uncontroversially non-absolute. The best understanding of certain “exigent circumstances” precedents reflects this: when, say, a house is on fire and someone is in imminent danger, police may enter the home without a warrant, because protecting individuals is a good above the threshold where search and seizure claims hold. Rights against search and seizure are also uncontroversially waivable – an individual may consent to police searching her home without a warrant.

What about the specific “exigent circumstances” precedents that concern evidence destruction – say, a case when police observe through a window of a home the occupants destroying evidence? One explanation of these precedents notes the non-absolute nature of search and seizure rights: just as in the case of a house fire, the good of protecting property, or at least particularly evidence property, is a sufficiently significant good to be above the threshold where the right obtains. But it may be better to explain these cases in terms of forfeiture: when the police have reasonable belief that evidence is being destroyed by some individual, the individual *forfeits* his claims against warrantless law enforcement entry. We’ll return below to both of these interpretations of the nature of the “exigent circumstances” exception.

We need a term for another common though under-discussed feature of rights. A rights holder is said to have *immunity* when she, and only she, controls whether the right – her claim against someone else to be treated in a certain way – remains in standard conditions. “Standard conditions” are these: she has not waived or transferred the right; the right is either absolute, or

the right is non-absolute but there is no good at stake above the threshold where the right obtains; and she has not forfeited the right. Immunity about rights is a specific kind of second-order *normative authority* – a normative authority by the rights holder that prohibits others from removing first-order rights.³⁹ Consider the ethics of promising. Suppose Smith makes an explicit promise to Jones to bring a book to Jones and loan it to him at lunch, and suppose that Jones accepts the promise. Now Jones, but only Jones, has immunity about the promise. Jones has not waived the right (he has not released Smith from the promise), the right is non-absolute but there is no good at stake above the right's threshold (Smith, say, does not come across an injured person in urgent medical need on his way to lunch), and Jones has done nothing to forfeit the right. Smith, the promisor, now lacks immunity over the promise – he cannot make Jones's claim on his promised performance go away. Only Jones has that normative authority. Or consider a case of harm. Travers has the right that Hansen not punch him in the face. Travers, and only Travers, has immunity about that right. He can waive the right, if, say, he and Hansen both consent to a boxing match. But Hansen cannot make Travers's right go away. Even in non-standard conditions, it is not Smith or Hansen who make the rights go away. Either Jones and Travers do (by consent or by forfeiture), or circumstances do (e.g., the circumstance of Smith coming across an injured person in urgent medical need).

King has immunity – again, a second-order normative authority – over whether police may enter his house without a warrant. Jones's promisee right protects Jones against Smith's non-performance, and Travers's right against harm protects Travers against Hansen's hitting him. Similarly, King's right against search and seizure protects King against law enforcement officers entering his home without a warrant. The party against whom the rights holder is protected cannot – *normatively* cannot – make the right go away.

There are strong reasons for believing in rights-holder immunity with respect to search and seizure rights. The first reason is consistency and symmetry with rights-holder immunity in the case of other rights – rights like promisee rights to promise fulfillment and rights against harm. Absent some special factor or factors, immunity should function similarly and consistently across various sorts of rights.⁴⁰ A second reason is metaethical and metalegal. On any leading account of the nature of rights – the interest theory, the will theory, etc. – immunity is important.⁴¹ A third reason returns us to Justice Ginsburg’s practical point: there is an uncontroversial need for law enforcement to be able to search and seize, but this need can be met in the *King* case and other cases through less morally worrisome and legally worrisome means.

As it turns out, King was guilty of possessing marijuana and crack cocaine. This fact can obscure the police’s violation of his rights when they entered his apartment. To see this, suppose the police are at the wrong door, but don’t know this, and lack a warrant; they decide to knock loudly while shouting, “Police! Police! Police!” Hearing hurried scuffling inside, and, deciding the noise is compatible with evidence destruction, they kick in the door. Inside are two frightened children and their mother, who, startled, simply knocked over a lamp.⁴² The police violate her search and seizure rights, just as they violated King’s. King happens to be guilty of drug possession, and under other circumstances – say, if the police saw him in possession of drugs in a public park – that criminal act means that he forfeits certain rights: police can arrest him and take the drugs. But guilt of some crime does not automatically remove search and seizure rights.

Of course the *King* case is still more complicated than the discussion so far has revealed. It might be objected that the police did not usurp King’s normative authority over his search and seizure rights, since they only created the *circumstances* in which King himself acted in such a

way that those rights went away. In the view of this objection, the police merely altered the circumstances in which King *himself* exercised his normative authority, and so the police did not act wrongfully. This is an important objection. There are two forms the objection could take: either (A) the police created circumstances in which some significant good was at stake such that matters went above the rights' protective threshold and the police could permissibly infringe it; or (B) the police created circumstances in which King acted such that he forfeited his rights. Let's look at each form of the objection in turn.

(A) No one argues that search and seizure rights are absolute; so there is some threshold above which they may be permissibly infringed. This is why the "exigent circumstances" exception includes, for instance, permission for warrantless entry to save someone's life. In order for the first form of the objection to make sense, we would need to imagine that the police have the power to alter circumstances in such a way that some threshold-surpassing good is at stake that was not at stake before. And we can imagine police with that power: they can create incentives for evidence to be destroyed that was not at risk of being destroyed before. But that points out the problem with this version of the objection: the best means of preserving and obtaining evidence that is not currently at risk of destruction is for police to get a warrant and/or knock on the door normally. If instead police act as they did in the *King* case, any potential evidence is at *more* risk of being destroyed through panic and alarm – police would need to wait for sounds of ostensible destruction to enter, and in some cases those sounds will indeed be part of evidence destruction.⁴³ The point here is of both practical and theoretical importance: in order for matters to rise above the threshold at which search and seizure rights may be infringed, police would be incentivizing the destruction of the very evidence they aim to collect. This version of the objection fails straightforwardly.

(B) Consider now the other version of the objection. Suppose we concede for a moment that, in the circumstances the police created, King did *forfeit* his search and seizure rights. That is, suppose King's actions constituted an exercise of his normative authority: the right went away, but it was King's actions that were the moral proximate cause of the right going away. Still, this concession does not necessarily entail that the police acted permissibly in creating the circumstances; and it does not entail that any evidence they seize should be admissible in court. Consider another case. Suppose Sandler dislikes his neighbor and wants to beat him up, but prefers to be seen as acting in self-defense. So Sandler concocts a plan: he repeatedly and persistently, over weeks, personally insults, taunts, and provokes the neighbor until the neighbor throws a punch at Sandler, whereupon Sandler downs him with a strong haymaker. Sandler has altered the circumstances in such a way that, some might say, Sandler's neighbor exercised his normative authority and forfeits his right against being punched. But this does not mean that Sandler has acted permissibly. Sandler has provoked the neighbor into some sort of use of his agency, but his actions neither justify Sandler's initial provocation nor, some might argue, permit Sandler without complication to down him with a strong haymaker. Sandler's neighbor may be to some degree morally responsible for throwing a punch, but that doesn't alter the moral status of what Sandler did in provoking him. Instances of rights holders forfeiting their rights need not make the actions of others preceding that forfeiture justified and permissible. King's rights forfeit would not necessarily entail that the police did not violate his Fourth Amendment rights in triggering that forfeit.

But we should reconsider the concession: it is not clear that King in fact did morally forfeit his search and seizure rights. We said earlier that the party against whom the rights holder is protected cannot – *normatively* cannot – make the right go away; the party against whom the

rights holder is protected can, at most, cause certain behavior. This rights-holder behavior may *appear* to indicate rights forfeiture, but when the behavior is caused in certain ways, it does not. Sandler might be able to provoke his neighbor into throwing the first punch, but given Sandler's particular engineering of these circumstances, it is not clear that the neighbor's punch counts as a moral forfeit of much, if anything, on the neighbor's part. Again, the neighbor may be to some degree morally responsible for throwing a punch, but that does not mean he also throws away his rights. One can accrue new moral responsibilities without losing rights. So just as under the concession in the previous paragraph, Sandler's neighbor's throwing a punch may not permit Sandler to punch him back. Given what Sandler knows about his neighbor, through persistent provocation Sandler can exercise a high degree of *control about what happens*; but that doesn't mean Sandler can control *the norms* about what happens. What makes immunity and its normative authority important also makes it resistant to the external manipulation of circumstances.

This is not to say that *no* alteration of circumstances by other parties can permissibly trigger a rights holder's use of his normative authority such that he indeed forfeits a right. Forget the repeated and persistent personal insults and provocation; suppose instead that Sandler simply places a sign on his own lawn supporting a political candidate that the neighbor dislikes, and the neighbor throws a punch at Sandler because of this. Sandler does nothing impermissible in placing a political sign on his own lawn, and nothing about Sandler's actions seems to take from the neighbor full responsibility and accountability for his attack. This case seems importantly different from the earlier neighbor case and *King*. We need a way to distinguish such cases. The most plausible distinction, we believe, will inform cases like *King's*, the two neighbor cases, and

also distinguish among traditional instances of permissible versus wrongful entrapment. Let's turn for a moment to entrapment.

Police not uncommonly pose undercover as prostitutes or drug purchasers and sellers. In doing so, they create circumstances in which other individuals reveal themselves to be willing to purchase sex or drugs. This is permissible, the most defensible view about entrapment holds, as long as the circumstances the police create are not unusual. An undercover policeman selling drugs in a neighborhood where the selling of drugs is common does not wrongfully entrap those who respond to the sting – they exhibit no disposition that would tend to go unexpressed in the absence of the sting. By contrast, an undercover policeman selling drugs in a neighborhood where the selling of drugs is very uncommon – or who advertises drugs at an absurdly low price – does wrongfully entrap those who respond. There is a sense in which the respondents in the latter situation are wrongfully transformed into drug purchasers – the unusual circumstances help make them into something they were very unlikely to have otherwise been. Key here is the creation of non-standard, unusual, triggering circumstances.⁴⁴

Among the attractions of this distinction between permissible and wrongful entrapment is the fact that it requires no reference to the motives or intentions of the person who creates the circumstances. The test depends on external and objectively determinable circumstances, not on subjective internal mental states. One need not see inside someone's head; one only needs to determine whether third parties created unusual circumstances. A second attraction is the concession the distinction makes to human nature: somewhere in all or nearly all of us there may lurk a drug purchaser; but while it is not wrong to sting those who are drug purchasers in many similar counterfactual circumstances, it is wrong to sting those who would only purchase drugs in unusual and dissimilar counterfactual circumstances.

The distinction nicely informs the *King* case. The setting for the case begins with a sting, and the legitimacy of that sting depends upon whether drug selling and buying is common in the Lexington, Kentucky neighborhood in which it took place. But because King played no part in that drug sale, whether the sting was legitimate is actually irrelevant to his case. What was *not* common was the police shouting and knocking loudly on the doors of homes. The police created non-standard triggering circumstances when they pounded on King's door. Drawing a line between non-standard, unusual (and so wrongfully created) conditions and standard conditions is challenging, and it is reasonable to presume some zone of indeterminacy about borderline cases. But wherever the line or zone is, we disagree with the Supreme Court majority's view that it is not possible to place the *King* case on the unacceptable side of that line.

In an opinion written by Justice Samuel A. Alito, Jr., eight Justices dismiss the notion that the legal rule could depend upon the officers' "tone of voice in announcing their presence and the forcefulness of their knocks."⁴⁵ In part, the Court's opinion is informed by what strikes us as an extremely naive view of how glad persons in a home will be to hear that the strangers on their doorstep are claiming to be cops – a view that, at any rate, is urged without any empirical support.⁴⁶ We do agree that police should be permitted to knock on a door as any other private citizen might do. A contrary rule would seem to require wasteful if not fruitless inquiry into officer subjective intent, as there are many reasons an officer might choose to seek consent rather than a warrant, including uncertainty as to probable cause and tactical concerns of limiting or eliminating future leads.⁴⁷ Thus, when New Jersey investigators knocked on a door in order to make a controlled buy that would corroborate a confidential tip, the fact that the would-be seller opened the door smoking a marijuana cigarette, but threw the cigarette inside the apartment and tried to slam the door upon recognizing them as police, created a legitimate exigency permitting

a forced warrantless entry.⁴⁸ But we disagree that any consideration of volume is too “nebulous and impractical.”⁴⁹ In our experience, no reasonable visitor to a home pounds on the door as loudly as possible and thrice shouts his name.⁵⁰

In the more recent case of *Florida v. Jardines* (2013), a divided Supreme Court alleged fealty to *King* but was in fact solicitous to a view much like our own. The question was whether an officer could, without Fourth Amendment restraint, walk a drug-detecting dog to the front door of a single-family detached residence.⁵¹ Justice Antonin Scalia wrote a majority opinion for five Justices that began by examining the authority to approach a front door: “We have . . . recognized that ‘the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.’ This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.”⁵² The Court brushed off any concern with the clarity of that customary implied license, noting that “it is generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters.”⁵³ In a footnote responding to the dissent, the Court accepted as criteria of a permissible approach what is “typical for a visitor,” what would not “cause alarm to a resident,” what is “expected of ordinary visitors,” and what “would be expected from a reasonably respectful citizen.”⁵⁴ Pounding and yelling as loudly as possible, absent a fire or other emergency, would seem to violate every criterion. Thus, just as “the background social norms that invite a visitor to the front door do not invite him there to conduct a search,”⁵⁵ and thus do not permit bringing a drug detecting dog, they do not permit an officer to pound at the door and yell.

We noted that respondents in the unusual circumstances characteristic of wrongful entrapment are often *transformed* into something they would otherwise probably never be. A

man buying unusually cheap drugs from an undercover policeman in a neighborhood where drugs are never sold becomes, only in such rare circumstances, a drug purchaser. Similarly, there may be relatively few counterfactual circumstances in which King becomes an evidence destroyer in the absence of the police's triggering actions. But the concern here is actually broader than these two cases suggest. We should worry even more about cases where the rights holder is thoroughly innocent. Recall the case above of the woman who simply knocks over a lamp when the police announce themselves and bang loudly at the door: she is not thereby transformed into a criminal and wrongdoer. Here, the unusual circumstances of the police banging loudly at the door transform the woman into nothing more than a scuffler or accidental lamp-breaker – a scuffler or lamp-breaker whose noise is merely compatible with the sound of evidence destruction, such that the police can now reasonably believe that evidence destruction is in progress. This woman is wronged by the creation of unusual triggering circumstances that merely make her reasonably *seem* to be an evidence destroyer, and wronged again where the police act on that reasonable seeming and proceed to enter. Put another way, rights-holder immunity can be violated not only through third party unusual-circumstance-triggered *actual* transformation, but also through third party unusual-circumstance-triggered *reasonably presumed* transformation.

There is another element of the *King* case worth noting. Search and seizure rights protect rights holders against a very specific and very powerful group: police officers. The very point and purpose of search and seizure rights is bound up with the nature and scope of police power; only the police can lawfully forcibly enter your home, search your home, and forcibly remove you from your home. It would be distinctively morally problematic if the very group the rights holder is protected against had the normative power, through the creation of rare and unusual

circumstances, to trigger the rights holder's forfeit of this protection. Immunity in the case of promise rights is similar. It would be distinctively morally problematic if Smith, the promisor and the very person on which the promisee Jones has special claims, had the normative power to somehow trigger Jones's forfeit of his claims on Smith to fulfill the promise. Some rights protect against no specific duty-bearer, but rather against all others, and so the violation of those rights may be, if only structurally, less egregious than the violation of search and seizure and promise rights. And when a right protects against a specific party that is independently especially powerful and persuasive – e.g., police officers – it is perhaps the most egregious case.

3. Conclusion

We have argued that what the police did in the *King* case was morally impermissible and should be declared legally impermissible. First, police had ample time to efficiently secure a warrant. Second, King had immunity – second-order normative authority regarding his first-order search and seizure rights. An objector may say that police merely created the circumstances in which King exercised his own normative authority. But this cannot have been an instance where endangered evidence put police above a threshold where they could permissibly infringe King's search and seizure rights, because here the evidence would have at best only become endangered through the police's own actions. Even if one concedes that King forfeited his rights, one need not concede the police acted permissibly in creating the circumstances. And in fact one should not concede that King forfeited his rights: third parties, and most distinctively the third parties against whom a right specifically protects, cannot normatively, by creating unusual circumstances, make the rights holder waive his first-order rights.

With these arguments in hand, we are now in a position to see that the police actually wronged King twice: one, by wrongfully entering and thereby violating his first-order rights against warrantless search and seizure; and two, by doing so through an attempted manipulation of his second-order immunity. Although the U.S. Supreme Court recognized that it would be relevant if the officers *threatened* to violate the Fourth Amendment prior to entry,⁵⁶ the majority not only took a very narrow view of what would constitute such threatening, but failed to recognize and appreciate the manipulation of King's immunity. Pounding on the door and shouting was not reasonable police conduct, and thus should not be permissible.

So the Court decided *Kentucky v. King* incorrectly. King's search and seizure rights were violated at both the first- and second-order levels. The Court's decision improperly expands the resources of third parties to tinker with the moral and legal boundaries that protect individuals against those specific third parties. As a legal matter, the burden should be on anyone trying to justify entry *without* a warrant, and we have instead demonstrated both practical and ethical reasons why entry in cases like *King* should be permitted only *with* a warrant or upon consent reasonably obtained. The Court was wrong to reject the entire concept of a police-created exigency.

Of course, our claims have a broader significance beyond the *King* case. The immunity aspect of rights is importantly under-discussed in ethical and legal theorizing about rights – theorizing which usually restricts its attention to first-order claim rights and privilege rights and, occasionally, second-order power rights (that is, rights to create and alter other rights). Discussed still less often are immunity rights that are under pressure from third-party circumstance creation. The normative concept of immunity is important for many crucial areas of moral concern, such as self-defense and promises. As in *King*, there are instances of promises and self-defense where

a rights holder is wronged twice: once with regard to a first-order claim right, and again with regard to second-order immunity.

We do not argue that our claims exhaust the worries one should have about challenges to immunity and its associated normative authority. But what is at stake in the *King* case is nothing less than a crucial incursion into important and defensible moral boundaries.

¹ The concept of immunity is mentioned frequently, but without much development, in standard treatments of rights. See, for instance, Carl Wellman, *Real Rights* (New York: Oxford University Press, 1995); Tom Campbell, *Rights: A Critical Introduction* (New York: Routledge, 2006); William A. Edmundson, *An Introduction to Rights*, 2nd ed. (New York: Cambridge University Press, 2012). There is remarkably little secondary literature specifically about immunity rights.

² *Kentucky v. King*, 131 S. Ct. 1849, 1854 (2011).

³ *Ibid.*

⁴ *Ibid.*

⁵ See Joshua Dressler and Alan C. Michaels, *Understanding Criminal Procedure*, 5th ed. (Newark, NJ: Lexis-Nexis, 2010), 52-53, 157-64.

⁶ *United States v. United States District Court*, 407 U.S. 297, 313 (1972). “The Fourth Amendment indicates with some precision the places and things encompassed by its protections: persons, houses, papers, and effects. . . . But when it comes to the Fourth Amendment, the home is first among equals.” *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quotation marks and citation omitted).

⁷ *Payton v. New York*, 445 U.S. 573, 586 (1980).

⁸ *Ibid.*, 586 n. 24 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1947)). “The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. 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. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a

grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.”

⁹ See *United States v. Knights*, 534 U.S. 112, 118-19 (2001). “The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.’”

¹⁰ *Payton v. New York*, 445 U.S. 573, 590 (1980). See also *Kirk v. Louisiana*, 536 U.S. 635 (2002) (reaffirming the principles and holding of *Payton*); and *Kyllo v. United States*, 533 U.S. 27 (2001) (reaffirming the warrant requirement as applied to sense enhancing technology directed at the home).

¹¹ See *Boyd v. United States*, 116 U.S. 616, 627 (1886) (“The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass.”) (quoting *Entick v. Carrington*, 19 Howell St. Tr. 1029, 1066 (1765) (Eng.)). Thus, “It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property.” *Ibid.*, 630.

¹² All three of these normative supports are compatible with the position about immunity that we defend below.

¹³ *California v. Acevedo*, 500 U.S. 565 (1991).

¹⁴ *United States v. Dunn*, 480 U.S. 294 (1987).

¹⁵ *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973). Either of two co-tenants can typically consent to a search of a home, since both are taken as common authorities over it. See *United States v. Matlock*, 415 U.S. 164 (1974) (accepting common authority); and *Georgia v. Randolph*, 547 U.S. 103 (2006) (limiting common authority when there is a present, objecting co-tenant).

¹⁶ 471 U.S. 386 (1985).

¹⁷ *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

¹⁸ *Jones v. United States*, 357 U.S. 493, 499 (1958).

¹⁹ *United States v. United States District Court*, 407 U.S. 297, 318 (1972).

²⁰ “Warrants are generally required to search a person’s home . . . unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.” *Brigham City*, 547 U.S. at 403 (internal quotation marks omitted) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978)).

²¹ *Ibid.*, 406.

²² See *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (characterizing a lower court’s decision requiring probable cause as “essentially the correct standard”).

²³ See *Warden v. Hayden*, 495 U.S. 91 (1990) (permitting warrantless entry and search for persons and weapons).

²⁴ See *Michigan v. Clifford*, 464 U.S. 287 (1984) (permitting warrantless entry to fight fire and determine its cause, but not to search for evidence of arson).

²⁵ See *Mincey v. Arizona*, 437 U.S. 385 (1978) (permitting warrantless entry to search for possible victims but not further warrantless search).

²⁶ See *King v. Commonwealth*, 386 S.W. 3d 119 (Ky. 2012) (finding insufficient evidence of imminent destruction). “In fact, the sounds as described at the suppression hearing were indistinguishable from ordinary household sounds, and were consistent with the natural and reasonable result of a knock on the door. . . . Exigent circumstances do not deal with mere possibilities, and the Commonwealth must show something more than a possibility that evidence is being destroyed to defeat the presumption of an unreasonable search and seizure” (122-23). See also *United States v. Ramirez*, 676 F.3d 755, 762 (8th Cir. 2012) (holding, over a dissent, that closing a door upon police does not give rise to the exigency of imminent destruction of evidence).

²⁷ The argument about unacceptable disadvantage can be understood as either straightforwardly consequentialist (i.e., other rights and social goals are best attained by giving law enforcement an edge here), or as claiming that some sort of deontological rights threshold has been transcended (search and seizure rights constrain law enforcement, but not absolutely – there is some point at which other considerations outweigh these rights).

²⁸ See *United States v. Carter*, 360 F.3d 1235, 1241-42 (10th Cir. 2004). But see *Posey v. Kentucky*, 185 S.W. 3d 170, 173-75 (Ky. 2006) (disagreeing and finding possession of marijuana to be a sufficiently important crime).

²⁹ See *Missouri v. McNeely*, 133 S. Ct. 1552, 1572-73 (2013) (Roberts, C.J., concurring in part) (explaining that at least thirty states provide for electronic warrant applications and describing systems in two states that can obtain a warrant within five or fifteen minutes).

³⁰ *Kentucky v. King*, 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting).

³¹ *Ibid.*

³² *Ibid.*

³³ William J. Stuntz, “O. J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment,” *Harvard Law Review* 114 (2001): 842, 848.

³⁴ 133 S. Ct. 1552 (2013).

³⁵ See *ibid.*, 1561 (Sotomayor, J., writing for a Court majority consisting of Scalia, Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.); *ibid.*, 1568 (Kennedy, J., concurring in part in order to make clear that some categorical rules might still be appropriate in this context); *ibid.*, 1569 (Roberts, C.J., writing a partial dissent for Roberts, C.J., and Breyer and Alito, JJ., who would require a warrant only if one can be obtained before the hospital blood draw will take place in the natural course of events); *ibid.*, 1574 (Thomas, J., dissenting and arguing a warrantless blood draw supported by probable cause never violates the Fourth Amendment).

³⁶ *Ibid.*, 1561-62.

³⁷ *Ibid.*, 1561.

³⁸ We follow the classic taxonomy of rights and elements of rights, including the term “immunity” (a central concern of this paper), found in W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning* (New

Haven: Yale University Press, 1919). See also Shelly Kagan, *Normative Ethics* (Boulder, CO: Westview Press, 1998), 170-76, and Leif Wenar, "Rights," *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall 2011 ed., <http://plato.stanford.edu/archives/fall2011/entries/rights> (accessed April 26, 2013).

We have framed our position and arguments in this paper in the standard terminology of the rights tradition in ethical and legal theorizing. But many of the key concepts, including the special kind of normative authority that Hohfeld called "immunity," can also be articulated in other terms – for instance, Shelly Kagan's terminology of "constraints," "options," and first- and second-order versions of constraints and options.

³⁹ Again, the concept of "immunity" here is the standard concept from the Hohfeld rights tradition in ethics. The concept has no necessary connection with other legal uses of the term "immunity" – e.g., diplomatic immunity, prosecutorial immunity, judicial immunity, qualified immunity, etc.

⁴⁰ For example, in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Supreme Court held that consent for purposes of the Fourth Amendment must be voluntary, but need not be knowing, in part on account of the unstructured and ever-shifting environment found at the scene of a crime or along a highway. It is easily debatable whether the Constitution should not at least require a suspect be informed of the right to refuse consent, as that would not seem factually difficult or problematic, but we concede there can be special factors that affect immunity.

⁴¹ Take the interest theory, for instance. Rights protect interests according to this view, and for the key interests protected by rights about promises, harm, and search and seizure, agent immunity is crucial. The interests of rights holders are best protected if there is a robust zone where other agents lack second-order normative authority over the rights holder's first-order rights. Other people should be constrained not just against harming and searching and seizing, but also constrained against tinkering with the authority over whether the former constraints obtain. Whatever justifies second-order normative authority, it should not be able to be manipulated or tricked away from the agent.

⁴² Thus, on remand the Kentucky Supreme Court deemed inadequate the government's proffer of imminent destruction. *King v. Commonwealth*, 386 S.W. 3d 119 (Ky. 2012).

⁴³ The specifics in legal precedent are as follows. Police armed *with* a warrant must nonetheless knock and announce prior to entry, unless they have reasonable suspicion that doing so will endanger themselves or others, or result in destruction of evidence. *Richards v. Wisconsin*, 520 U.S. 385 (1997). The purposes of the knock and announce requirement are to (1) prevent needless destruction of property (e.g., occupants may open the door instead of the police needing to break it down), (2) prevent needless invasion of privacy (e.g., allow a naked person to throw on a robe), and (3) prevent the needless risk of harm (e.g., mistaken self-defense). *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). But police need wait only a matter of seconds before entering when the evidence inside could easily be destroyed – which is the case in *King* where the evidence is drugs (but not, say, if the evidence were a stolen piano). They do not need to wait for sounds of destruction like they do for a warrantless entry justified by exigent circumstances. *United States v. Banks*, 540 U.S. 31 (2003).

⁴⁴ See Joel Feinberg, "Instigating the Unpredisposed: Bad Luck in Law and Life," in *Modality, Morality, and Belief*, ed., Walter Sinnott-Armstrong, Diana Raffman, and Nicholas Asher (New York: Cambridge University Press, 1995), 152-73; Joel Feinberg, "Causing Voluntary Actions," reprinted in Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970), 152-86; and Walter Sinnott-Armstrong, "Entrapment in the Net?" *Ethics and Information Technology* 1 (1999): 95-104. See also Kelly Sorensen, "Counterfactual Situations and Moral Worth," *Journal of Moral Philosophy* (forthcoming); and *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994) (recognizing that entrapment's predisposition has a "positional" as well as dispositional aspect).

⁴⁵ *Kentucky v. King*, 131 S. Ct. 1849, 1861 (2011).

⁴⁶ *Ibid.*

⁴⁷ See *ibid.*, 1860.

⁴⁸ See *New Jersey v. Walker*, 62 A.3d 897, 900 (NJ 2013). Police may not, however, presume a defendant will destroy readily destructible evidence. Instead, there must be conduct evidencing an intent to destroy evidence, such as the furtive movements in *Walker*. See *Turrubiate v. Texas*, No. PD-0388-12 (Tex. Crim. App. Apr. 10, 2013) (rejecting a state claim of exigency absent such conduct).

⁴⁹ *King*, 131 S. Ct. at 1861.

⁵⁰ If there is a neighborhood in which this behavior is empirically normal, then we are open to considering that the *King* case might come out the other way, although ample consideration should be given to the unique character of the police and therefore the likely effect of their pounding and yelling. Only the police might lawfully break down the door and forcibly remove you in handcuffs. See *infra* p. ___. Nor would that particular result call into question the greater implications of our argument.

⁵¹ *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013).

⁵² *Ibid.*, 1415 (citation omitted).

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 1415 n. 2 (quotation marks omitted).

⁵⁵ *Ibid.*, 1416.

⁵⁶ See *King*, 131 S. Ct. at 1854.