NOTES

The Emergency Aid Doctrine and 911 Hang-ups: The Modern General Warrant

I. INTRODUCTION

The phone rings. A 911 dispatcher starts to answer, but the line goes dead. The dispatcher calls back. No one answers. Was it a misdial or a cry for help cut short? Because callers often expect help to arrive when intentionally calling 911, the police respond to the address from

which the call likely originated.[1] Police approach the house and knock on the door. Again, no one answers. There may be an emergency inside, so the police enter the house without a warrant and without consent. If they find a heart attack victim lying on the floor, they might save a life. If they find sleeping parents and a tech-savvy toddler, they might educate and leave. But if they find evidence of a crime—say, cocaine or illegal firearms—they might make an arrest based on evidence found during their warrantless entry and search of the home.

Americans call 911 nearly 240 million times a year. Nearly eighty million are hang-ups or inadvertent calls, conveying no information. Police officers responding to such calls face a confounding dilemma: society expects them to promptly prevent harm and render aid, but the Fourth Amendment guarantees protection from unreasonable searches. In an attempt to balance these interests, courts rely on the emergency aid doctrine. Historically, the doctrine permitted the police to respond, without a warrant, to situations where there was an imminent risk to people and property.[2] Recent expansions of the emergency aid doctrine, however, may tacitly allow the government to enter a home based merely on receiving a 911 hang-up—a type of call conveying no information, initiated by an unknown party, and placed for unknown reasons. Thus, the question arises whether these expansions extend the emergency aid doctrine too far.

The emergency aid doctrine requires the police to have an objectively reasonable basis to believe an emergency threatens imminent harm to people and property.[3] Yet, the Supreme Court has not clearly defined what constitutes imminent harm, leading to the widespread policy of conducting warrantless searches following 911 hang-ups.[4] Some courts uphold these searches based on a generalized presumption that 911 hang-ups are de facto emergencies involving imminent harm, even though officers have no articulable facts to believe an emergency exists.[5] Such a presumption shifts the burden of

1. The police often respond to the caller's most likely location, typically the residence associated with the phone number or a GPS or triangulated location of the caller's cell phone. *See infra* Part III.

2. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 403 (2006) ("[W]arrants are generally required . . . unless the 'exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." (quoting Mincey v. Arizona, 437 U.S. 385, 393–94 (1978))).

3. *E.g.*, Michigan v. Fisher, 558 U.S. 45, 47 (2009) (per curiam) (quoting *Brigham*, 547 U.S. at 406); *see also* Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (noting that an exception to the warrant requirement applies when "[a] warrantless search is objectively reasonable" (quoting *Mincey*, 437 U.S. at 394)).

4. *See infra* Part II.

5. *See infra* Part III.

proof from the government to the homeowner. Instead of requiring the government to demonstrate why a warrantless search was reasonable or necessary based on apparent imminent harm, a court's de facto presumption forces individuals to justify why the police should *not* invade their homes after receiving a mere 911 hang-up.[6]

This Note seeks to aid practitioners by highlighting common errors that occur when analyzing 911 hang-up emergency aid responses. It therefore considers what evidentiary weight should be attributable to 911 hang-ups when analyzing the reasonableness of a warrantless search in emergency aid situations. Part II explains why the Supreme Court's Fourth Amendment jurisprudence applies to searches incident to 911 hang-ups, and it examines the Court's most recent articulations of the emergency aid doctrine. These articulations are then contrasted with several lower-court interpretations of the emergency aid doctrine in the context of 911 hang-ups. Given disparate outcomes, Part III examines what information 911 hang-ups actually convey, how police use that information, and how they respond to hang-up situations where information is limited. The stark reality is that 911 hang-ups convey little or no information, yet the emergency aid doctrine requires the police to have an objectively reasonable basis to believe that an emergency exists before entering a home without a warrant. Courts struggle with determining what quantum of evidence is sufficient to meet this standard. To that end, Part III concludes by exploring common judicial interpretations of what amounts to an objectively reasonable basis in the context of 911 hang-ups.

Ultimately, this Note attempts to clarify the Supreme Court's analysis of emergency aid situations. Such clarification is essential to maintaining the balance between police power and individual liberty. Thus, Part IV suggests interpreting 911 hang-ups as mere efforts to communicate rather than as de facto cries for help. By focusing on the quality and quantity of the information conveyed in 911 calls rather than presuming an emergency exists, the burden to justify warrantless entries remains with the government by requiring it to prove there was an extant and apparent emergency. This Part further argues that 911 hang-ups are tantamount to anonymous tips, in that the police need to

---

6. *See, e.g.*, *Fisher*, 558 U.S. at 50 (Stevens, J., dissenting):

> [I]t is well settled that police officers may enter a home without a warrant "when they reasonably believe that a person within is in need of immediate aid." We have stated the rule in the same way under federal law, and have explained that a warrantless entry is justified by the "need to protect or preserve life or avoid serious injury." The State bears the burden of proof on that factual issue . . . .

(quoting *Mincey*, 437 U.S. at 392; People v. Davis, 497 N.W.2d 910, 921 (Mich. 1993)). For the purposes of this Note, an apparent threat is one that is either self-evident because of its obvious nature or reasonably inferred from articulable and particularized evidence.

corroborate anonymous information and any subsequent search must be based on particularized evidence. Nonetheless, limited incursions into the curtilage of a home may be reasonable when investigating 911 hang-ups. But absent any additional indices of an extant or apparent emergency, or corroboration of a call's information, the emergency aid doctrine does not permit the warrantless entry of a home. Consequently, this framework aims to uphold constitutional protections of the home while accommodating community expectations regarding police responses to 911 calls.

II. THE FOURTH AMENDMENT AND THE EMERGENCY AID DOCTRINE

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.

—Fourth Amendment to the U.S. Constitution[7]

A. The Reasonableness Requirement

The Supreme Court has emphasized that, while a warrant is preferred,[8] "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."[9] As a threshold matter, the Fourth Amendment protects against unreasonable searches of people, houses, papers, and effects.[10] Individuals, therefore, have a constitutionally protected expectation of privacy in their homes that the government cannot unreasonably breach regardless of whether the matter motivating a search is criminal or noncriminal in nature.[11] Yet,

7. U.S. CONST. amend. IV.

8. *E.g.*, *King*, 131 S. Ct. at 1856.

9. *E.g.*, Terry v. Ohio, 392 U.S. 1, 19 (1968).

10. *See, e.g.*, Payton v. New York, 445 U.S. 573, 586 (1980) ("It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.") (internal quotation marks omitted).

11. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 403 (2006); *Payton*, 445 U.S. at 586; *see also* United States v. Jones, 132 S. Ct. 945, 949–53 (2012) (rejuvenating the trespass theory, thought to have been rejected in *Katz v. United States*, 389 U.S. 347, 351 (1967), under which even an intrusion onto private property may constitute a Fourth Amendment search); 3 WAYNE R. LAFAVE, SEARCH & SEIZURE § 6.6 (5th ed. 2013) (discussing the constitutional protection of privacy); Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 91–92 (1992).

warrantless searches are permitted if they are reasonable, which requires the government to have an objectively reasonable basis to breach an individual's expectation of privacy.[12]

Accordingly, the appropriate standard for analyzing warrantless searches is whether police action was reasonable.[13] Reasonableness is determined by objectively weighing the scope and nature of a warrantless search against an individual's expectation of privacy.[14] In the context of warrantless searches incident to 911 hang-ups, therefore, reasonableness is based on an individual's privacy expectations in his or her home and whether society recognizes those expectations in light of the scope, nature, and circumstances of the search.[15] The Court articulated this balancing of interests in the so-called emergency aid doctrine.[16]

---

12. *See Katz*, 389 U.S. at 353 ("[T]he Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures . . . .").

13. *See, e.g.*, Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 43 (1991).

14. For example, reasonable suspicion exists when there are facts sufficient to lead a reasonable officer to believe that a brief investigatory detention is necessary. If an officer believes that a person is armed and poses a threat to an officer (perhaps due to an officer's personal knowledge of the suspect, a bulge in the suspect's pants, or the suspect's possible involvement in a robbery), the subsequent detention and pat-down of the person for weapons may be permissible, which is commonly referred to as a "Terry frisk." *See Terry*, 392 U.S. 1. Probable cause is the standard for arrests and searches and it exists when there are sufficient facts or circumstances to lead a reasonable officer to believe that a crime is or has been committed. Beck v. Ohio, 379 U.S. 89, 91 (1964). Probable cause for a search exists when a reasonable officer believes that the items to be found or seized are in the place to be searched. *See* Brinegar v. United States, 338 U.S. 160, 175–76 (1949). Sometimes, not even probable cause plus a warrant is reasonable under the Fourth Amendment. *See* Winston v. Lee, 470 U.S. 753, 759 (1985) ("A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime."). The standard of belief for emergency circumstances is an objectively reasonable basis. *Brigham*, 547 U.S. at 406.

15. *See generally* Slobogin, *supra* note 13 (proposing that whether a search is reasonable should be based on its level of intrusiveness balanced against the degree of certainty that it will be successful).

16. Warrantless exceptions often reflect a community's expectations regarding police action, social control, and emergency responses that make it impractical or impossible to obtain a warrant. *See* Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 271–90; *see also* Mincey v. Arizona, 437 U.S. 385, 387–95 (1978) (one of the first United States Supreme Court cases explicitly discussing the validity of conducting an initial, warrantless emergency search of a residence in order to render aid); United States v. Najar, 451 F.3d 710, 714–15 (10th Cir. 2006) ("From . . . *Mincey*, the emergency aid exigency emerged, informed by the practical recognition of critical police functions quite apart from or only tangential to a criminal investigation.").

B. The Emergency Aid Doctrine

The emergency aid doctrine applies when emergency circumstances require an immediate police response to protect people from harm, to render aid, or even to protect property.[17] Unfortunately, the terms used to describe these situations vary, and this lack of conformity leads to lower-court confusion on how to interpret emergency situations.[18] Regardless, most courts applying this doctrine are addressing situations in which the police believe that they must take warrantless action to protect people or property from imminent harm.[19] To maintain continuity in current Fourth Amendment jurisprudence, lower courts must analyze 911 hang-ups under the Supreme Court's search-and-seizure framework.[20]

Two recent Supreme Court cases, *Brigham City v. Stuart*[21] and *Michigan v. Fisher*,[22] lay the foundation for analyzing emergency aid

---

17. Missouri v. McNeely, 133 S. Ct. 1552, 1558–59 (2013):

> A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, engage in "hot pursuit" of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause. As is relevant here, we have also recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because "there is compelling need for official action and no time to secure a warrant."

(citations omitted) (quoting Michigan v. Tyler, 436 U.S. 499, 509 (1978)); *see also* John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. CRIM. L. & CRIMINOLOGY 433, 441–44 (1999) (defining the emergency aid doctrine).

18. *See Decker*, *supra* note 17, at 441–48, 453–57. *See generally* State v. Vargas, 63 A.3d 175 (N.J. 2013) (discussing the differences between the emergency aid and community caretaking doctrines, and noting the lower court's conflation of the two); Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1489–1511 (2009) (discussing the logical underpinnings of the community caretaking doctrine and its proper application).

19. Some cases invoke the emergency aid doctrine. *E.g.*, Hunsberger v. Wood, 570 F.3d 546, 549 (4th Cir. 2009) (suspicious activity); People v. Scott, No. A100429, 2003 WL 21363553, at *1 (Cal. Ct. App. June 12, 2003) (911 hang-up medical emergency); Davis v. City of Clarksdale, 18 So. 3d 246, 247, 250–51 (Miss. 2009) (finding, in civil suit, no reckless disregard in police investigation of a 911 hang-up); Hannon v. State, 207 P.3d 344, 345 (Nev. 2009) (domestic dispute); *Varga*s, 63 A.3d at 177 (welfare check); State v. Frankel, 847 A.2d 561, 564 (N.J. 2004) (911 hang-up). Still other cases invoke the community caretaking doctrine. *E.g.*, People v. Ray, 981 P.2d 928, 931 (Cal. 1999) (open door); *In re* Welfare of J.W.L., 732 N.W.2d 332, 334 (Minn. Ct. App. 2007) (911 hang-up); State v. Bogan, 975 A.2d 377, 387 (N.J. 2009) (welfare check); State v. Myers, Nos. 9-02-65, 9-02-66, 2003 WL 21321402, at *1 (Ohio Ct. App. June 10, 2003) (endangered child); State v. Deneui, 775 N.W.2d 221, 227 (S.D. 2009) (ammonia leak); Cummings v. Lewis Co., 98 P.3d 822 (Wash. Ct. App. 2004) (civil lawsuit for failure to respond to a 911 call).

20. That is, to the extent there is any continuity, it is critical to maintain the framework that exists.

21. 547 U.S. 398, 403 (2006).

22. 558 U.S. 45, 47 (2009).

situations. In both cases, the Court had to decide whether the police could make a warrantless entry into a home when they believed immediate action was necessary to provide aid or protect property.[23]

In *Brigham*, officers were notified of a loud, early morning party.[24] Upon arrival, they heard shouting and observed two teens drinking in the backyard.[25] They also observed, through windows and a screen door, several adults attempting to restrain a teenager—who eventually broke free and struck one of the adults.[26] Having observed minors drinking alcohol and an ongoing assault, the officers decided that immediate action was necessary.[27] They announced their presence, entered the home, and gained control of the situation.[28] Ultimately, they charged the defendant, an adult in the home, with several minor offenses.[29] A Utah trial court, however, granted the defendant's motion to suppress the warrantless entry on Fourth Amendment grounds, and both the Utah Court of Appeals and the Utah Supreme Court affirmed.[30] The United States Supreme Court granted certiorari and reversed, stating that the specific facts and circumstances cited by the officers constituted an objectively reasonable basis to enter the home to stop imminent harm.[31]

In *Fisher*, police officers responded to a neighborhood disturbance. While investigating, officers observed a vehicle's smashed windshield, broken windows on a nearby house, and blood on both the vehicle and the door to the house.[32] Through a window, officers observed the defendant screaming and throwing objects.[33] He had a laceration on his hand, and he would not let officers enter his home.[34] An officer did enter, however, and the defendant pointed a firearm at him.[35] The police eventually arrested the defendant on weapons charges, but a Michigan trial court suppressed the officer's warrantless entry because it believed that the defendant's minor injuries failed to constitute an imminent

23. *Id.* at 47; *Brigham*, 547 U.S. at 403.

24. *Brigham*, 547 U.S. at 400.

25. *Id.* at 401.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 401, 407 (the charges included contributing to the delinquency of a minor, disorderly conduct, and intoxication).

30. *Id.* at 401.

31. *Id.* at 407.

32. Michigan v. Fisher, 558 U.S. 45, 45–46 (2009) (per curiam).

33. *Id.* at 46.

34. *Id.*

35. *Id.*

emergency.[36] An appeals court affirmed the decision, and the Michigan Supreme Court denied leave to review.[37] The United States Supreme Court granted certiorari and reversed, again indicating that the specific facts and circumstances cited by the officers constituted an objectively reasonable basis to enter the home to prevent imminent harm.[38]

Both the *Brigham* and *Fisher* Courts framed their analyses by first stating that searches and seizures inside a home without a warrant are presumptively unreasonable.[39] However, *Brigham* acknowledged that there may be compelling law enforcement needs that "obviat[e] the requirement of a warrant . . . [in order] to assist persons who are seriously injured or threatened with such injury."[40] Likewise, *Fisher* reaffirmed that " 'the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.' "[41] Both opinions reiterated that the "ultimate touchstone of the Fourth Amendment" is reasonableness.[42]

While the Supreme Court has not defined what constitutes an objectively reasonable basis in emergency situations, both *Brigham* and *Fisher* relied on contemporaneous and particularized evidence. The officers in *Brigham* observed an assault.[43] In *Fisher*, the officers observed damaged property, blood spatter, and injuries.[44] Both opinions explained that there were objectively reasonable bases for believing that injured parties needed help because officers were confronted with ongoing violence occurring within the home that they could see and hear.[45] Specific and articulable facts informed the officers' beliefs that harm was imminent. Thus, the Court deemed the officers' interventions necessary to quell ongoing emergencies with injured parties or the high probability of additional injuries if the police failed to intervene.[46]

---

36. *Id.*

37. *Id.*

38. *Id.* at 45, 46.

39. *Id.* at 47 (citing Groh v. Ramirez, 540 U.S. 551, 559 (2004)); Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (citing *Groh*, 540 U.S. at 559).

40. *Brigham*, 547 U.S. at 403 (quoting Mincey v. Arizona, 437 U.S. 385, 393–94 (1978)).

41. *Fisher*, 558 U.S. at 47 (quoting *Mincey*, 437 U.S. at 393–94).

42. *Brigham*, 547 U.S. at 403.

43. *Id.* at 401.

44. *Fisher*, 558 U.S. at 45–46.

45. *Id.* at 49 (additionally citing the need for officers to restore order, and the potential that someone else inside the home was being assaulted but was not visible from the officers' vantage point); *Brigham*, 547 U.S. at 406 (referencing nature of call, time, and specific observations such as "thumping and crashing" and people yelling "stop, stop" and "get off me").

46. *Fisher*, 558 U.S. at 49 ("It sufficed to invoke the emergency aid exception that it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else."); *Brigham*, 547 U.S. at 406:

Finally, the Court held in both cases that it would not consider an officer's subjective intent for conducting a search.[47] Rather, it would only consider an officer's pre-search factual and articulable observations.[48]

The Court's holdings in *Brigham* and *Fisher* are not surprising.[49] Despite the defendants' arguments that the injuries or actions in each case did not justify warrantless entry, each case examined extant and volatile situations with the potential to devolve into further harm without police intervention. Thus, the officers' need to immediately address ongoing or imminent harm was objectively reasonable and sufficiently compelling to overcome the defendants' expectation of privacy in their homes.

The Court would likely adhere to *Brigham* and *Fisher*'s established framework when analyzing future cases involving the emergency aid doctrine. Thus, the Court prefers a warrant, but if the officers did not obtain one, constitutionality will turn on whether the warrantless search was reasonable.[50] Furthermore, warrantless entries under emergency circumstances will require the government to establish that the police had an objectively reasonable basis to believe that a situation required their immediate intervention to prevent imminent harm.[51] For the government to demonstrate this basis, the police must cite contemporaneous and specific observations.[52] Yet,

---

> In these circumstances, the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone 'unconscious' or 'semi-conscious' or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.

47. *Fisher*, 558 U.S. at 47; *Brigham*, 547 U.S. at 404–05; *see also* United States v. Richardson, 208 F.3d 626, 630 (7th Cir. 2000):

> Creating a subjective standard would be a double-edged sword: while it might protect some people from warrantless searches in those few instances where the police do not really believe an injured person is in need of assistance, it would also open up the possibility of warrantless searches anytime that police officers actually believed that an exigency existed—regardless of the objective basis of that belief.

48. *Fisher*, 558 U.S. at 47; *Brigham*, 547 U.S. at 404–05; *Richardson*, 208 F.3d at 630.

49. *Brigham*, 547 U.S. at 407 (Stevens, J., concurring) ("This is an odd flyspeck of a case. . . . And the Court's unanimous opinion restating well-settled rules of federal law is so clearly persuasive that it is hard to imagine the outcome was ever in doubt.").

50. *Fisher*, 558 U.S. at 47; *Brigham*, 547 U.S. at 402.

51. *Brigham*, 547 U.S. at 406. In many ways, this standard is quite similar to the criminal standard of probable cause. Yet, some argue that it is more similar to the criminal standard of reasonable suspicion. This debate is outside the scope of this Note and, regardless, the distinction is not necessary for its purposes as long as emergency aid situations are analyzed under the standards outlined in *Brigham* and *Fisher*.

52. *Id.*; *see also Fisher*, 558 U.S. at 49 ("[T]he test, as we have said, is not what [the officer] believed, but whether there was 'an objectively reasonable basis for believing' that medical

applying the standards articulated in *Brigham* and *Fisher* is challenging when there is not an observable danger but rather a presumption of danger based on the mere receipt of a 911 hang-up call.

C. How [Not] to Apply Brigham *and* Fisher

In the context of 911 hang-ups, some lower courts inexplicably abandon the framework articulated in *Brigham* and *Fisher*. Presumably, a 911 hang-up from within a residence without any observable or articulable facts would fail the test applied in *Fisher* and *Brigham*. Yet, despite the lack of auditory or visual evidence indicating that something is amiss, police officers regularly enter homes without warrants or specific and articulable facts indicating an ongoing emergency.[53] They enter based on a presumption that 911 hang-ups demonstrate the existence of an ongoing emergency and the threat of imminent harm.[54] Some police departments not only adopt these searches as common practice but as department policy and procedure.[55] And many courts subscribe to this reasoning by holding that a 911 hang-up, by itself or followed by an unanswered callback, constitutes an objectively reasonable basis to make a warrantless entry into a home.[56]

---

assistance was needed, or persons were in danger." (quoting *Brigham*, 547 U.S. at 406; Mincey v. Arizona, 437 U.S. 385, 392 (1978))); United States v. Espinoza, 403 F. App'x 239, 241 (9th Cir. 2010) (referring to *Fisher* and noting "[w]e do not read that fact-specific opinion to hold broadly that warrantless entry into a home is always justified where the police cannot confirm that there are no injured victims inside a house").

53. *See, e.g.*, *infra* text accompanying note 56.

54. *Id.*

55. *See, e.g.*, SIOUX FALLS POLICE DEP'T, POLICY AND PROCEDURE MANUAL POLICY # 1521, 911 HANGUPS (2009), *available at* http://www.siouxfalls.org/~/media/Documents/police/policy-manual/1500_misc.pdf, *archived at* http://perma.cc/78MX-HVBQ; TRURO POLICE DEP'T, E-911 HANGUP RESPONSE 2 (Oct. 25, 2002), *available at* http://www.truropolice.org/On%20Line%20Manuals/E911%20Hangup%20Response.pdf, *archived at* http://perma.cc/W82B-AG5P; Zak Failla & Robert Michelin, *911 Hang-Ups Are No Joke For Scarsdale Police,* SCARSDALE DAILY VOICE, Aug. 6, 2012, http://scarsdale.dailyvoice.com/police-fire/911-hang-ups-are-no-joke-scarsdale-police, *archived at* http://perma.cc/7QZK-WWZK; Dave Goldberg, *Eagle Scout Project Explains Dangers of False 911 Alarms*, SENTINEL, Dec. 27, 2001, http://ns.gmnews.com/news/2001-12-27/FRONT_Page/010.html, *archived at* http://perma.cc/44NB-UD7P; Marty Kasper, *911 Hang-ups Waste Police Resources*, MY STATELINE (Nov. 12, 2012, 9:27 PM), http://www.mystateline.com/story/911-hang-ups-waste-police-resources/d/story/H_sb2ZAYzkuBjNO6cBYh2w, *archived at* http://perma.cc/AH4E-U68J; Jonathan D. Silver et al., *Pittsburgh Police Formalize Policy on 'Unknown Trouble,' 911 Hang-up Calls*, PITTSBURGH POST-GAZETTE, May 29, 2013, http://www.post-gazette.com/local/city/2013/05/29/Pittsburgh-police-formalize-policy-on-unknown-trouble-911-hang-up-calls/stories/ 20130529012200000000#ixzz2sqytvHdV, *archived at* http://perma.cc/N75G-J7QG; s*ee also* People v. Greene, 682 N.E.2d 354, 356–57 (Ill. App. Ct. 1997) (discussing testimony regarding the sheriff's policy to enter homes after receiving 911 hang-ups).

56. *See, e.g.*, Johnson v. City of Memphis, 617 F.3d 864, 869 (6th Cir. 2010) (911 hang-up, open door); Hanson v. Dane Cnty., Wis., 608 F.3d 335, 337 (7th Cir. 2010):

In *Hanson v. Dane County*, police responded to a 911 hang-up when operators were unable to reach anyone after returning the call.[57] Upon arrival, officers entered an open garage without consent and spoke to Hanson, who was standing inside.[58] Hanson said that there was no emergency and that no one needed assistance.[59] Nevertheless, to ensure the safety of any occupants, officers entered Hanson's home without his consent.[60] Although no one inside was injured or in need of

---

> [W]e think that a 911 call provides probable cause for entry, if a call back goes unanswered. The 911 line is supposed to be used for emergencies only. A lack of an answer on the return of an incomplete emergency call implies that the caller is unable to pick up the phone—because of injury, illness (a heart attack, for example), or a threat of violence.

Nail v. Gutierrez, 339 F. App'x 630, 632 (7th Cir. 2009) (stating that a 911 hang-up call, on its own, "gave the officers all the exigent circumstances they needed" to conduct a warrantless entry); United States v. Taylor, 458 F.3d 1201, 1204 (11th Cir. 2006) (finding a 911 hang-up followed by two subsequent hang-ups justified entry onto property for "knock and talk"); United States v. Najar, 451 F.3d 710, 719–20 (10th Cir. 2006) (911 hang-up followed by a refusal to allow officers to enter); United States v. Obbanya, No. C 11-677 CW, 2012 WL 851129, at *1–4 (N.D. Cal. Mar. 13, 2012) (911 hang-up and refusal to answer questions); United States v. Robbins, No. CR11-0014, 2011 WL 1317280, at *5–6 (N.D. Iowa Apr. 5, 2011) (opining that a 911 hang-up with busy signal justified intrusion onto curtilage); Clark *ex rel* T.M.J. v. Pielert, Civil No. 07-3649(DSD/JJG), 2009 WL 35337, at *5 (D. Minn. Jan. 5, 2009) (911 hang-up and refusal to allow entry); United States v. Huang, No. CR-06-00487 DLJ, 2008 WL 360546, at *5 (N.D. Cal. Feb. 8, 2008) (discussing a 911 static disconnect and noting that "once the police have been summoned via a 911 call, it is incumbent on them to assure that their assistance is not truly needed"); United States v. Parker, No. CR 05-0505-PHX-NVW, 2006 WL 163562 at *3 (D. Ariz. Jan. 20, 2006) ("[A] 911 call itself is a call for assistance or protection in an emergency."); State v. Pearson-Anderson, 41 P.3d 275, 278 (Idaho Ct. App. 2001) (saying that a 911 hang-up constituted implied consent to conduct a limited, warrantless search); People v. Greene, 682 N.E.2d 354, 358 (Ill. App. Ct. 2003) (involving a 911 hang-up and officer's observation that an occupant hid something under a couch cushion); *In re* Welfare of J.W.L., 732 N.W.2d 332, 335–36 (Minn. Ct. App. 2007) (justifying a warrantless search after 911 hang-up and open door); State v. Frankel, 847 A.2d 561, 571 (N.J. 2003) ("An open line 9–1–1 call, by its very nature, may fairly be considered an SOS call, a presumptive emergency, requiring an immediate response."); State v. Hodge, No. 23964, 2011 WL 486516, at *6 (Ohio Ct. App. Feb. 11, 2011) (validating a warrantless search after receiving a 911 hang-up, finding an open front door, and seeing a television playing in the background); State v. May, No. 06CA10, 2007 WL 914871, at *4 (Ohio Ct. App. Mar. 23, 2007) ("[T]he 911 hang-up calls created sufficient exigent circumstances to impose a duty on police to investigate whether someone at the residence needed assistance and further negated any privilege on appellant's part to resist entry into the premises."); State v. Myers, Nos. 9-02-65, 9-02-66, 2003 WL 21321402, at *3 (Ohio Ct. App. June 10, 2003) (validating a warrantless search after receiving a 911 hang-up and observing through a window that a television set was on and "refus[ing] to base the reasonableness of a warrantless entry into a home from which a 911 call has originated, and the nature of which is unknown, on the percentage of these types of calls that are non-emergencies in nature" because the court "find[s] these types of calls to inherently be emergencies"); State v. Nelson, 823 N.W.2d 841, 841 ¶ 8, (Wis. Ct. App. 2012) (unpublished table decision) (holding that 911 hang-up provided reasonable suspicion to conduct a vehicle stop).

57. Hanson v. Dane Cnty., 599 F. Supp. 2d 1046, 1051 (W.D. Wis. 2009).

58. *Id.*

59. *Id.*

60. *Id.*

assistance, the officers, nearly an hour later, arrested Hanson for domestic abuse after he admitted he "bumped" into his wife during an argument.[61] The State later dropped the charges, and Hanson brought a civil 1983 claim[62] against the officers for violating his constitutional rights.[63]

On motion for summary judgment, the defendants contended that a warrantless entry was permissible based on their receipt of a 911 hang-up and an unanswered return call, which they believed amounted to exigent circumstances.[64] The court agreed: "By itself, a 911 call may be enough to support a warrantless search under the exigent circumstances exception" because it suggests that someone is "injured or otherwise incapacitated."[65] The court then held that the 911 hang-up call in conjunction with the operator's unanswered return call made it reasonable for the officers to believe that immediate assistance was necessary.[66] The Seventh Circuit affirmed, finding that "a 911 call provides probable cause for entry, if a [return] call goes unanswered."[67] Additionally, the court depended on its finding that the officers already established probable cause to be inside the home—probable cause that was based on the mere receipt of a 911 hang-up—to justify the officers' subsequent reentries into the home, interviews, and refusal to leave.[68]

Furthermore, warrantless entries may be permissible even when officers fail to contact anyone on scene. In *State v. Hodge*, like in *Hanson*, operators dispatched police after receiving a 911 hang-up followed by an unanswered callback.[69] The investigating officer approached the house and observed a closed outer screen door but an ajar inner door.[70] A television was on, but unlike in *Hanson*, no one answered when the officer yelled into the residence.[71] Based on these

61. *Id.*

62. *See* 42 U.S.C. § 1983 (2012) (permitting civil suits against government officials for their violation of a plaintiff's constitutional rights).

63. *Hanson*, 599 F. Supp. 2d at 1051–52.

64. *See id.* at 1053. Exigent circumstances are those situations in which the police must respond immediately, and such circumstances may obviate the need for a warrant. *See supra* note 17.

65. *Hanson*, 599 F. Supp. 2d at 1053 (citing United States v. Richardson, 208 F.3d 626, 630 (7th Cir. 2000)).

66. *Id.* at 1053–54.

67. Hanson v. Dane Cnty., Wis., 608 F.3d 335, 337 (7th Cir. 2010).

68. *Id.* at 338. What constitutes probable cause varies depending on the crime alleged and the facts involved. Yet, a 911 hang-up may be a medical emergency, a criminal emergency, or no emergency whatsoever. It is unclear in *Hanson* for what crime or emergency the 911 hang-up established probable cause.

69. State v. Hodge, No. 23964, 2011 WL 486516, at *1 (Ohio Ct. App. Feb. 11, 2011).

70. *Id.*

71. *Id.*

benign observations, the officer entered and searched the home, which was vacant.[72] During the search, the officer uncovered pill bottles, baggies with white powder, and money laying on a bed.[73] Shortly thereafter, the tenant, Hodge, returned and explained that a neighbor asked to use his phone to report a fire at the neighbor's apartment.[74] The neighbor began to call but changed her mind and instead asked Hodge for help.[75] He helped extinguish the fire and returned to find a police officer waiting at his home.[76] Officers eventually arrested Hodge on narcotics and other charges.[77]

Hodge's primary defense was that the 911 hang-up was insufficient to justify the officer's warrantless entry into his home.[78] He argued that for the officer to have an objectively reasonable basis to enter his home, she needed more than a subjective belief that someone possibly needed aid.[79] Instead, Hodge argued there must have been a "real and immediate necessity to enter" his home.[80] Furthermore, the fact that Hodge did not respond when the officer yelled through the screen door was insufficient, together with the 911 hang-up and unanswered return call, to indicate an imminent emergency.[81] The court disagreed, stating that "the 911 hang-up created a reasonable belief that an emergency existed, requiring investigation by law enforcement officers [because] 'we find these types of calls [i.e., 911 hang-up calls] to inherently be emergencies. In fact, the emergency of these situations only ceases once the emergency responder is able to ascertain whether someone is in need of aid.' "[82] While the majority failed to mention the Supreme Court's decisions in *Brigham* and *Fisher*, the dissent recognized that *Brigham* and *Fisher* prohibited a search based on mere suspicion and in the absence of "some other positive indication that an occupant of the premises may actually be in need of immediate aid . . . ."[83]

As these cases illustrate, within some jurisdictions, 911 hang-ups for which callbacks go unanswered are sufficient evidence of an

72. *See id.* at *2.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at *11.
78. *Id.* at *4.
79. *Id.*
80. *Id.* (internal quotation marks omitted).
81. *Id.*
82. *Id.* at *4–5 (citing State v. Myers, Nos. 9-02-65, 9-02-66, 2003 WL 21321402, at *3 (Ohio Ct. App. June 10, 2003)).
83. *Id.* at *12 (Grady, Presiding J., dissenting).

ongoing emergency. As discussed in Part III, however, the differences between the facts and holdings of *Brigham* and *Fisher* on the one hand and the very nature of 911 hang-ups on the other casts doubt on that assumption.

III. THE 411 ON 911: RESPONDING TO 911 CALLS IN THE ERA OF RAPIDLY EVOLVING TECHNOLOGY

Police responses to 911 hang-ups involve competing interests: while the Fourth Amendment limits the circumstances in which the government may invade a home, individuals have strong expectations of receiving help when calling 911. The key question, therefore, is whether 911 hang-ups convey sufficient information to overcome Fourth Amendment protection. In fact, 911 hang-ups may convey little or no information regarding a caller's identity, location, or reason for the call. Consequently, 911 hang-ups alone do not justify warrantless searches due to their lack of any indices that an actual emergency exists.

A. Technological Limitations

The various means of communicating emergencies present challenges for the emergency services system. Americans make nearly 240 million 911 calls through wired and wireless phones each year,[84] and other means of emergency communication, such as Internet-based and text-message reporting, are rapidly developing.[85] Unfortunately, emerging technologies are often incompatible with older 911 infrastructures.[86] The problem is further complicated by a lack of

84. *9-1-1 Statistics*, NAT'L EMERGENCY NO. ASS'N, http://www.nena.org/?page=911Statistics, *archived at* http://perma.cc/QG6C-RXVL (last visited Mar. 3, 2015).

85. *See* Ann Marie Squeo, *Cellphone Hangup: When You Dial 911, Can Help Find You?*, WALL ST. J., (May 12, 2005, 12:01 AM), http://online.wsj.com/news/articles/SB111584956319131012; NAT'L EMERGENCY NO. ASS'N, NENA INFORMATION DOCUMENT FOR HANDLING TEXT-TO-9-1-1 IN THE PSAP 5–15 (Oct. 9, 2013), *available at* https://c.ymcdn.com/sites/www.nena.org/resource/resmgr/Standards/NENA-INF-007.1-2013_Text_Mes.pdf, *archived at* https://perma.cc/7764-WGTA (discussing the prevalence of texting as a primary means of communication and the need for technological and procedural mechanisms to accommodate this developing trend).

86. *See* NAT'L EMERGENCY NO. ASS'N, *supra* note 85 (explaining that the 911 and E911 systems were never meant to handle nonvoice communications); *see also* James E. Holloway et al., *Regulation and Public Policy in the Full Deployment of the Enhanced Emergency Call System (E-911) and Their Influence on Wireless Cellular and Other Technologies*, 12 B.U. J. SCI. & TECH. L. 93, 101 (2006) ("The implementation of wireless E-911 emergency systems is complicated by wireless carriers' use of different technologies. . . . Consequently, LECs and PSAPs need different software, relays, and routers to handle each type of wireless technology, thus making implementation of E-911 slower and more costly than expected.").

uniformity in 911 technologies.[87] Because not every area can afford to upgrade to the newest and most capable technologies, 911 capabilities vary greatly among different municipalities.[88] There are currently four main types of 911 services: Basic 911, Enhanced 911 ("E911"), Wireless Phase I, and Wireless Phase II.[89]

Basic 911 and E911 systems manage all wired calls (i.e., calls along physical telephone lines) but do not handle those from cell phones or over the Internet. Basic 911 systems do not have the ability to obtain the caller's identity or location;[90] thus, an operator must gain this information by speaking directly to the caller.[91] This process is not necessary with E911 systems. The E911 system employs sophisticated computer systems that are capable of recognizing the origin of a call, thereby providing the operator with the caller's telephone number and location.[92]

The process for obtaining wireless information is less streamlined.[93] There are two types of dedicated wireless systems, Phase I and Phase II. Phase I wireless systems find a 911 caller by cross-referencing a caller's phone number with information that wireless carriers are legally obligated to provide to 911 call centers upon request.[94] Since this information often consists of just a telephone number and the registered location of the cell site or base station transmitting the call, the information is commonly stale.[95] Phase II

87. Throughout most of the United States, dialing 911 will start a process in which one of over six thousand centrally located routing centers directs a call to the appropriate emergency services center. *See* NAT'L EMERGENCY NO. ASS'N, *supra* note 85 (noting that as of November 2014, the United States had 5,926 primary and secondary Public Safety Answering Points (PSAPs)); *see also* Holloway et al., *supra* note 86, at 98–99 (discussing 911 technology and arguing that the lack of uniformity of 911 services on the state level inhibits federal policy).

88. *See* NAT'L EMERGENCY NO. ASS'N, *supra* note 85.

89. Darren Handler, *An Island of Chaos Surrounded by a Sea of Confusion: The E911 Wireless Device Location Initiative*, 10 VA. J.L. & TECH, Winter 2005, at 8.

90. *See Cell Phones and 9-1-1*, NAT'L EMERGENCY NO. ASS'N, http://www.nena.org/?page=911Cellphones, *archived at* http://perma.cc/89H4-LA28 (last visited Mar. 6, 2015).

91. Holloway et al., *supra* note 86, at 99.

92. Handler, *supra* note 89, at 11 (describing Automatic Number Identification ("ANI") capabilities); Holloway et al., *supra* note 86, at 98. Essentially, the system recognizes and routes calls based on the ANI and Automatic Location Identification ("ALI"), or caller-ID. Thus, a call made from City X is automatically routed to an emergency service dispatcher in City X's jurisdiction.

93. Wireless callers account for nearly one-third or eighty million of all 911 calls made each year. *See 9-1-1 Statistics*, *supra* note 84. Yet, many centrally located routing centers are unable to recognize wireless number identifiers, thus requiring an operator to question the caller in order to correctly route the call.

94. Handler, *supra* note 89, at 16.

95. *See FCC Enhanced 9-1-1 – Wireless Services*, http://www.fcc.gov/encyclopedia/enhanced-9-1-1-wireless-services, *archived at* http://perma.cc/6UFQ-SNL4 (last visited Mar. 2, 2015).

services collect real-time data from a cell phone's GPS locator, if the caller's phone is so equipped, or by triangulation.[96] Triangulation and GPS locators allow operators to direct officers to a caller's approximate locale even if the caller is unable to communicate.[97]

Finding a specific caller, however, is nonetheless difficult in highly populated, urban environments where houses are close together or in a multifamily housing unit. Due to this limitation, an operator may attempt to corroborate a GPS or triangulated location with the information provided by the service provider.[98] If the real-time information is in close proximity to a caller's physical address, emergency services can confidently respond directly to that address.[99] If real-time data does not correspond to a physical address, call centers often direct officers to the landmarks, buildings, or intersections closest to the call's origin.[100] From there, an officer's only recourse is a door-to-door and person-to-person inquiry into whether anyone knows of an ongoing problem.

The inability to locate a caller is particularly acute with emerging means of calling 911, such as Internet-based phone services.[101] Much of the difficulty is due to an inability to route an

96. Handler, *supra* note 89, at 17–18; Holloway et al., *supra* note 86, at 103–05.

97. The GPS method can yield a caller's location within fifty to one hundred feet. The triangulation method is accurate within one hundred to three hundred feet. *See* Handler, *supra* note 89, at 20–21 (describing FCC mandates regarding the accuracy of each method).

98. Additionally, it has been the author's experience that police and emergency services databases, the Internet, public records, and phone listings are often used to corroborate a name or GPS or triangulated location with a physical address. *See* NAT'L EMERGENCY NO. ASS'N, SILENT OR HANG-UP 9-1-1 CALLS FOR SERVICE at 19 (Aug. 23, 2002), *available at* http://www.nena.org/resource/collection/ABEAA8F5-82F4-4531-AE4A-0AC5B2774E72/NENA_56-501_Silent_or_Hang-Up_9-1-1_Calls.pdf, *archived at* http://perma.cc/H66X-7WT5 (suggesting that call centers integrate information sources to increase their ability to locate callers).

99. Officers often check real-time locations first and then check the surrounding area and past addresses if the initial response was fruitless. See Walker v. Jackson, 952 F. Supp. 2d 343, 346 (D. Mass. 2013) (noting that officers responded to both a claimed, given address and the caller's actual address determined through a trace).

100. *See id*.

101. NAT'L EMERGENCY NO. ASS'N, NENA TECHNICAL INFORMATION DOCUMENT ON NETWORK INTERFACES FOR E9-1-1 AND EMERGING TECHNOLOGIES at 4-4 to 4-6 (Sept. 11, 2002), *available at* https://c.ymcdn.com/sites/www.nena.org/resource/collection/91E03A3A-B334-4EB6-9205-E25BBF6AF8E7/NENA_07-503-v1_Network_Interfaces_for_9-1-1_and_Emerging_Technologies.pdf, *archived at* http://perma.cc/B9SM-7WEL (noting that emerging methods of contacting 911 include VoIP, inter-exchange replacement, local exchange replacement, enterprise networks, cable TV/telephony, Digital Subscriber Line ("DSL") and VoIP-enabled E9-1-1 call handling equipment); *see also* Andrea W.M. Louie, *Imposing Geographical "Locateability" for Voice Over Internet Protocol*, 51 N.Y.L. SCH. L. REV. 655, 655–57 (2007) (discussing VoIP and its lack of "locateability" within the 911 system); Shawn Young, *Internet Calling's Downside: Failing to Link Callers to 911*, WALL ST. J. (May 12, 2005, 12:01 AM), http://online.wsj.com/news/articles/SB111585619278031205:

Internet communication through existing emergency services technology,[102] as well as the system's inability to identify Internet-based users.[103] Thus, an Internet-based 911 call may not be routed to the caller's jurisdiction, and the call center may not be able to identify the caller.[104] In these situations, direct communication may be necessary to determine the caller's true location and identity. Additionally, some Internet service providers do not allow users to connect to 911, or they route 911 calls to nonemergency numbers.[105]

In sum, 911 technology varies across jurisdictions. Although wired phone lines almost uniformly provide E911 call centers with critical information—the caller's number and registered address—not all service centers are equipped with E911 systems. Additionally, Americans are increasingly relying on cell phones.[106] Almost one-third of the estimated 240 million 911 calls made each year are completed via cell phone.[107] And only 41 percent of call centers are equipped to locate wireless callers.[108] Thus, for the majority of call centers, if a cell phone user called 911 and hung up without communicating any information, the only data available, if any, was the caller's approximate location and telephone number. The problem is growing as cell phone and Internet-based services increase in popularity faster than emergency services centers can update their systems.[109]

> Calls from these services sometimes ring at general or administrative numbers at emergency-call centers instead of connecting directly to 911 operators. In some places, those general numbers aren't staffed after normal business hours. Even when the calls are answered, the person on the other end may not be a trained emergency operator and can't see the caller's address automatically.

102. *See, e.g.*, Squeo, *supra* note 85.

103. NAT'L EMERGENCY NO. ASS'N, *supra* note 101 at 4-4 to 4-6; Young, *supra* note 101. For example, some service providers allow internet-based users to choose their phone's area code regardless of where they live, so calls placed in one state may list an area code belonging to another. *See id.*

104. NAT'L EMERGENCY NO. ASS'N, *supra* note 101 at 4-4 to 4-6; Young, *supra* note 101.

105. *See* Squeo, *supra* note 85. Nonemergency numbers may not automatically identify the user's phone number or pertinent information. Thus, gaining this information from a restricted or blocked number may require direct communication.

106. Nearly ninety percent of all homes use wireless service, of which fifty-four percent primarily rely on wireless services. The percentage is rapidly increasing. *See Wireless Quick Facts*, CTIA, http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts, *archived at* http://perma.cc/85UG-G3QT (last visited Mar. 6, 2015); Squeo, *supra* note 85 ("Virtually all of the nation's 6,000 call centers can locate land-line phones, but only 41% of them can locate cell phones . . . .").

107. *9-1-1 Statistics*, *supra* note 84.

108. *Wireless Quick Facts*, *supra* note 106.

109. Julie Crothers, *911 Hang-up Calls Plague Police*, J. GAZETTE (Fort Wayne, Ind.) (Mar. 3, 2013, 12:01 AM), http://www.fortwayne.com/apps/pbcs.dll/article?AID=/20130303/NEWS/320133884/-1/NEWS05, *archived at* http://perma.cc/CVQ5-VE5E (police noted that three-fourths

B. Can You Know What You Don't Know?

The uncertainty regarding the reason for a particular call compounds the technological problems identified above. Evidence suggests that most 911 calls do not require immediate responses to save lives or property.[110] Citizens frequently call for nonemergency reasons such as juvenile delinquency, late reports of larcenies and vandalisms, gang graffiti, noninjury accidents, and benign questions.[111] Moreover, many 911 calls are simply inadvertent or ambiguous.[112] These types of calls saturate phone lines dedicated to handling emergency calls and ultimately threaten the efficiency of the emergency services system.[113]

1. Illegitimate and Ambiguous 911 Calls

Open-line 911 calls, which cell phone users frequently make, occur when an individual dials 911 and the line remains open but no one responds. The operator will listen closely for background noises and dispatch the call accordingly. By contrast, electronic malfunctions,

---

of all 911 calls in 2005 were from landlines, but seventy-seven percent of all 911 calls in 2012 were from cellphones); Squeo, *supra* note 85.

110. *See, e.g.*, United States v. Cohen, 481 F.3d 896, 900 (6th Cir. 2007) ("A citizen may call 911 in order to report an emergency, be it criminal activity, a fire, or a medical emergency, but someone may also call 911 because he or she misdialed another number, accidentally activated a speed dial feature, or wished to pull a prank on the authorities."); NAT'L EMERGENCY NO. ASS'N, GUIDELINES FOR MINIMUM RESPONSE TO WIRELESS 9-1-1 CALLS 8–15 (Nov. 18, 2004), *available at* http://c.ymcdn.com/sites/www.nena.org/resource/collection/ABEAA8F5-82F4-4531-AE4A-0AC5B2774E72/NENA_56-001_Minimum_Response_Wireless_911_Calls.pdf?hhSearchTerms=%2256-001%22, *archived* at http://perma.cc/VN29-6HES (discussing response requirements for 911 calls); *see also infra* notes 112, 113.

111. *100 Ways to Mis-dial 911*, DISPATCH MAG. ON-LINE, http://www.911dispatch.com/911/911_misdials, *archived at* http://perma.cc/PR6V-3REV (last visited Jan. 23, 2015).

112. *See, e.g.*, WINBOURNE CONSULTING, LLC, CITY OF NEW YORK, 9-1-1 CALL PROCESSING REVIEW (911CPR) 11 (May 1, 2012), *available at* http://pdf.911dispatch.com.s3.amazonaws.com/nyc_911_report_may2012.pdf, *archived at* http://perma.cc/T8RF-Y8WB (citing over four million inadvertent calls received in New York City in 2010, half a million more than legitimate calls requiring a police response during the same period).

113. *See Accidental 911 Calls From Wireless Phones Pose Risk to Public Safety*, FCC (Oct. 29, 2014), *available at* http://www.fcc.gov/guides/accidental-911-calls-wireless-phones, *archived at* http://perma.cc/Y8YL-NNLD (discussing the dangers posed by accidental 911 calls); 9-1-1 INDUS. ALLIANCE, THE OVERLOADED 9-1-1 SYSTEM 7–27 (Oct. 5, 2011), *available at* http://www.theindustrycouncil.org/publications/overloaded9-1-1system.pdf, *archived at* http://perma.cc/EDC3-LSVP (discussing case studies from across the nation regarding nonemergency use of 911); *see also* Erin Maloney, *Tampa Police Launch Campaign to Cut Down on Needless 911 Calls*, BAY NEWS (Feb. 17, 2014, 4:46 PM), http://www.baynews9.com/content/news/baynews9/news/article.html/content/news/articles/bn9/2014/2/17/tampa_police_launch_.html, *archived at* http://perma.cc/J9EV-K7HE ("The Tampa Police Department says more than half of the people who call 9-1-1 in the city don't have an emergency at all, so officials have launched a new social media campaign to get the word out about how not to call 9-1-1."); *100 Ways to Mis-dial 911*, *supra* note 111 (highlighting the many encumbrances on the 911 response system).

damaged equipment, and lightning strikes frequently cause static 911 calls.[114] These malfunctions initiate a callerless 911 call resulting in an operator hearing only static. Unfortunately, the police respond to many of these calls for fear there is an actual emergency, thus straining already-scarce police resources.

The larger problem plaguing emergency services is the 911 hang-up call. These calls are particularly troublesome because of their frequency and how little information they convey.[115] After receiving a hang-up call, dispatchers usually call the number back, if possible, and attempt to speak to the caller.[116] If this attempt is unsuccessful, law enforcement often investigates, even though the origin of the hang-up call may be ambiguous.[117] Even if someone answers the return call, law enforcement may be dispatched if the dispatcher receives an unsatisfactory explanation.[118] Additionally, some police departments respond whether the caller provides an explanation or not.[119] The usual explanations for hang-ups include misdials, inadvertent calls (pocket-dials), children playing with the phone, cell phone malfunctions, pranks, a change in circumstances, and glitches.[120] In fact, hang-up calls are so common that the Federal Communications Commission cites unintentional calls, including hang-up calls, as posing a risk to public safety.[121]

The scope of the problem is staggering. Nationwide, callers accidently made over eighty million wired and wireless 911 calls in the

---

114. *See* United States v. Martinez, 643 F.3d 1292, 1297 (10th Cir. 2011) (saying that a static 911 call is insufficient to form a reasonable basis for a warrantless search).

115. Since the public expects the police to respond when summoned, police departments may fear that a failure to thoroughly investigate 911 hang-ups will expose officers or departments to liability. *See* SILENT OR HANG-UP 9-1-1 CALLS FOR SERVICE, *supra* note 98, at 13.

116. *See* NAT'L EMERGENCY NO. ASS'N, *supra* note 110 (noting the standard procedure for 911 operators who receive hang-up calls).

117. *See, e.g.*, SIOUX FALLS POLICE DEP'T, *supra* note 55; *see also* Failla & Michelin, *supra* note 55 ("If there is no response to a call back, officers are sent to the location to ensure everyone's safety."); Goldberg, *supra* note 55 ("In 2000, the North Brunswick Police Department responded to 1,814 911 calls and only 165 of them were valid."); Kasper, *supra* note 55; ("Anytime an emergency call center gets a 911 hang-up, [police] have to send two officers to the residence or business to make sure it's not an emergency.").

118. *See* NAT'L EMERGENCY NO. ASS'N, *supra* note 110, at 8–15.

119. *Id.*

120. *See* RANA SAMPSON, U.S. DEP'T OF JUSTICE, PROBLEM-ORIENTED GUIDES FOR POLICE NO. 19: MISUSE AND ABUSE OF 911, at 2–7 (Aug. 22, 2002), *available at* http://www.cops.usdoj.gov/Publications/e07042423_web.pdf, *archived at* http://perma.cc/9JRY-4GDA (explaining the scope of the 911 problem, its impact on services, and proper police responses—and opining that a homeowner's refusal to allow police to enter the home when investigating a 911 hang-up, absent more, is unlikely sufficient justification for a warrantless search).

121. *See Accidental 911 Calls from Wireless Phones Pose Risk to Public Safety*, *supra* note 113.

year 2011 alone.[122] The problem affects small and large cities alike.[123] For example, the Valley Emergency Communications Center in West Valley City, Utah, fielded three hundred thousand emergency calls from September 2011 to October 2012.[124] A total of 116,243 were 911 hang-ups,[125] and valid emergencies constituted a staggeringly low one percent of those calls.[126] Likewise, the Virginia Beach Emergency Communications Center estimates that ninety-nine percent of all 911 wireless calls it received were accidental, and less than one percent turned out to be valid emergencies.[127] New York City alone fielded nearly four million accidental 911 calls in the year 2010.[128]

---

122. *See* Katherine Bindley, *Butt Dials Overwhelm 911 Call Centers: Report*, HUFFINGTON POST (Oct. 10, 2012, 2:46 PM), http://www.huffingtonpost.com/2012/10/10/butt-dialing-overwhelming-911-call-centers-_n_1954420.html, *archived at* http://perma.cc/PFS5-T57J; Erin Hong, *Pocket-Dialing Creating Headaches at 911 Call Centers Across the Nation*, DESERET NEWS (Oct. 26, 2012, 6:31 PM), http://www.deseretnews.com/article/865565400/Pocket-dialing-creating-headaches-at-911-call-centers-across-the-nation.html, *archived at* http://perma.cc/Y4V8-CWMB.

123. One small Midwest call center fielded nearly eighty-six thousand incoming 911 calls in 2012. *See* METRO COMMC'NS AGENCY, 2012 ANNUAL REPORT 13 (2013), *available at* http://www.911metro.org/documents/annual%20reports/2012-Annualreport.pdf, *archived at* http://perma.cc/9FQP-TFD2. Hang-ups accounted for 10,733 of these calls, just 318 less than the most common type of call to which officers responded: disorderly subjects. *Id*. at 8.

124. *See* Pat Reavy, *'Pocket Dialing' Has Consequences for 911 Dispatchers, Police*, DESERET NEWS (Oct. 26, 2012, 6:30 PM), http://www.deseretnews.com/article/865565402/Pocket-dialing-has-consequences-for-911-dispatchers-police.html?pg=all, *archived at* http://perma.cc/GVZ5-WAZA.

125. *Id.*

126. *Id.*:

> From Sept. 1, 2011, to Oct. 1, 2012, VECC received 301,730 calls to 911. More than 245,000 – or more than 80 percent of those calls – were made from cellphones. Of those cellphone calls, 116,243 came in as '911 hangup,' meaning a dispatcher did not immediately talk to the person making the call. From that number: 95,752 were calls the either an offer responded to that turned out to be a false alarm or the caller had a phone that dispatchers could not pinpoint a location; 19,270 were 911 hangups that the dispatcher was able to call the person back and verify a false alarm; 430 were calls made on deactivated cellphones that dispatcher could not call back or trace. Old cellphones that are deactivated still have the ability to call 911, but they cannot receive calls.

127. *See VB Call Center Reporting High Number of Accidental 911 Calls* (WAVY TV Oct. 16, 2012), *available at* https://www.youtube.com/watch?v=BpostKul4_g; *see also* United States v. Martinez, 643 F.3d 1292, 1297 (10th Cir. 2011) (citing trial testimony that approximately half of all hang-up calls were not emergencies); Crothers, *supra* note 109 (noting that "[d]ispatchers responded to 23,936 hang-up calls," and that "[a]ccording to the Fort Wayne Police Department, 911 hang-up calls are the second most frequent calls for service in the county," and that "[r]eal emergencies makeup less than 10 percent of all 911 hang-up calls").

128. *See* WINBOURNE CONSULTING, LLC, *supra* note 112, at 11; *NYC Mayor Releases 911 Report Critical of System*, DISPATCH MAG. ON-LINE (May 7, 2012), http://www.911dispatch.com/2012/05/07/nyc-mayor-releases-911-report-critical-of-system/, *archived at* http://perma.cc/9C6D-5BYW.

2. Determining Caller Identity and Police Responses

Nine-one-one misuse is rampant, and the inherent limitations of the 911 system also result in significant and substantive problems. Should officers respond in the first place, to where, and what is the nature of the caller's need? A police response first requires knowing where the call originated. As discussed above, some 911 calls yield no location or caller identity, thereby making a police response impossible. And while most wired calls yield an address to which the police can respond, such calls generally constitute a minority of calls received, and their frequency will likely decrease as cell phone use increases.[129] Determining the location of wireless callers is more challenging because when a cell phone does transmit location information, operators often need to cross-reference the telephone number, the name associated with the number, or the phone's GPS or triangulated location with call center databases to ascertain a physical address.[130] When a GPS or triangulated location is known, operators dispatch officers to that location or to a nearby address associated with the phone number.[131] If the phone did not transmit a location, but the phone number is associated with a known address or a specific person, officers may be sent to that location even though a cell phone owner could be using that phone anywhere.[132]

Furthermore, even if a location is known, officers responding to 911 hang-ups do not know who called or why. The usual response, therefore, is to observe the location for problems.[133] This includes

---

129. *See, e.g.*, Kasper, *supra* note 55; *9-1-1 Statistics*, *supra* note 84.

130. *See* Walker v. Jackson, 952 F. Supp. 2d 343, 346 (D. Mass. 2013) (involving officers who responded to both a given address and the caller's actual address determined through a trace). The information conveyed in a hang-up call depends on whether a call center can interpret Phase I or Phase II calls or if the caller's phone has Phase I or Phase II capabilities. Handler, *supra* note 89, at 16; *see also supra* note 98.

131. *See* sources cited *supra* note 130.

132. *See* NAT'L EMERGENCY NO. ASS'N, *supra* note 98, at 16–18 (describing standard operating procedures and best practices for operators receiving 911 hang-ups).

133. *E.g.*, TRURO POLICE DEP'T, *supra* note 55:

> If no contact is made with the caller, an officer will be sent to the caller location. Officers should use common sense, and evaluate and consider the following conditions prior to making entry:
>
> 1. Visually inspect the premises to see if there are any signs of a break
> 2. Do they hear/see anything unusual emanating from within
> 3. Attempt to obtain any information from the neighbors
> 4. Are the police aware of any past problems at that address

Silver et al., *supra* note 55 (describing steps for officers responding to unknown trouble calls, including checking for signs of a struggle, verifying whether a callback was attempted, knocking on the door, calling and listening for a ringing phone from within the residence, and talking to neighbors).

looking for open doors and windows, noting unusual sights and sounds, and attempting to contact occupants. If no one answers, officers often conclude with a perimeter inspection.[134] Persistent officers continue to knock, call inside, speak to neighbors, and check databases for alternate phone numbers, other means of contact, and any previous call history at that location.[135] At that point, if officers still lack a reason to believe anything is out of the ordinary, they have exhausted most of their nonintrusive means to ascertain the validity of the call. Notably, officers customarily use these less intrusive means before resorting to a warrantless entry.[136] Doing so reflects the sensitive nature of a home intrusion and the lack of information available to otherwise justify an immediate entry.[137] Once nonintrusive techniques have been exhausted, the question remains whether the police should continue the investigation through more invasive means.

How departments allow their officers to act under such circumstances varies. Some departments simply do not respond to 911 hang-ups unless there is clear evidence of trouble.[138] Others direct their officers to stop investigating if they fail to observe anything unusual.[139] Some departments, however, not only authorize but also require entering homes to ensure that no one needs emergency assistance.[140] For instance, one department's policy and procedure manual states the

---

134. *See* Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (noting that officers do not violate the law by knocking at the door when attempting to contact those within when the average citizen may do the same).

135. This procedure is commonplace, including at the Sioux Falls, South Dakota police department. SIOUX FALLS POLICE DEP'T, *supra* note 55.

136. This practice is taught in training and reinforced through custom. *See id.*; TRURO POLICE DEP'T, *supra* note 55, at 2.

137. Yet, the Court has repeatedly held that police do not need to employ the least intrusive measures. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 837 (2002) ("[T]his Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means . . . ."); People v. Ray, 981 P.2d 928, 938 (Cal. 1999) ("The fact officers could have done something more before entering is not dispositive . . . ."). *But see* State v. Reynolds, 197 P.3d 327, 332 (Idaho Ct. App. 2008) (holding that officers should have used less intrusive means before conducting a warrantless entry into a home).

138. *See* SAMPSON, *supra* note 120, at 19–20.

139. *Id.*

140. *See* Hanson v. Dane Cnty., 599 F. Supp. 2d 1046, 1051 (W.D. Wis. 2009) ("policy to personally check on everyone in the house"); United States v. Obbanya, No. C 11-677 CW, 2012 WL 851129, at *1 (N.D. Cal. Mar. 13, 2012) (policy to ensure that no one needs help); United States v. Huang, No. CR-06-00487 DLJ, 2008 WL 360546, at *2 (N.D. Cal. Feb. 8, 2008) (policy to check the welfare of occupants); United States v. Meixner, No. 00-CR-20025-BC, 2000 WL 1597736 at *4 (E.D. Mich. Oct. 26, 2000) (routine to check residence regardless of whether 911 call was accidental); State v. Pearson-Anderson, 41 P.3d 275, 278 (Idaho Ct. App. 2001) (policy to enter and search homes incident to 911 hang-up); SIOUX FALLS POLICE DEP'T, *supra* note 55 (detailing department policy in response to inadvertent 911 calls); TRURO POLICE DEP'T, *supra* note 55, at 2 (discussing response protocol for 911 hang-up calls).

following: "If contact is made [with an occupant], the officers will perform a cursory search of the residence or business for any injured or distressed persons. Officers should also be looking for any outward signs of a struggle or other criminal activity."[141] The department's manual also addresses situations where officers do not make contact with an occupant: "If officers fail to establish phone contact with someone inside the location, they will contact a supervisor for permission to enter the residence or business," and "[u]pon supervisor approval, the officers will enter the residence using the least destructive means available to them."[142] In practice, most homes and businesses from which 911 hang-ups occur in this department's jurisdiction are subject to a "cursory search."[143] The officer completes the search regardless of whether the officer made contact with occupants, regardless of the explanation, and regardless of whether an occupant gave permission.[144] This department's policy of conducting mandatory searches is not unique.[145]

The challenges officers encounter when responding to 911 hang-ups highlight the importance of defining the boundaries of police power under the emergency aid doctrine. Because mere hang-ups do not convey particularized information, one of the difficulties police encounter when responding to 911 hang-ups is the lack of legal options.[146] Warrants are generally issued only in those circumstances where an officer can identify with particularity the item or person to be searched or seized.[147] If a medical emergency exists but there are no outward signs of criminal activity, no assurances that the call originated from the dwelling, or no clues as to who initiated the call, officers have little recourse. Yet society often expects the police to act immediately based on their discretion, training, and experience.[148]

141. *See* SIOUX FALLS POLICE DEP'T, *supra* note 55.

142. *Id.*

143. *Id.*

144. *Id.*

145. *See* sources cited *supra* note 140; *see also* SAMPSON, *supra* note 120, at 11, 20.

146. *See generally* Brinegar v. United States, 338 U.S. 160 (1949) (discussing the probable cause standard).

147. U.S. CONST. amend. IV; *see* South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976) (noting that warrants and "[t]he standard of probable cause [are] peculiarly related to criminal investigations"); Dimino, *supra* note 18, at 1486–88. *See generally* Slobogin, *supra* note 13 (discussing the Supreme Court's idiosyncratic jurisprudence regarding warrants).

148. *See* Kentucky v. King, 131 S. Ct. 1849, 1860 (2011) ("We have noted that '[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.' " (quoting Graham v. Connor, 490 U.S. 386, 396–97 (1989))).

Consequently, the emergency aid doctrine might be an officer's sole guide when responding to potential emergencies.[149]

In addition to providing guidance for emergency situations, clearer definition of the emergency aid doctrine also mitigates an inevitable consequence: a significant number of warrantless seizures.[150] Police seize contraband under the plain view doctrine, which allows officers to seize items when two thresholds are met.[151] First, the initial intrusion must be supported either by a warrant or one of the recognized exceptions to the warrant requirement.[152] The emergency aid doctrine permits the warrantless entry of a home under certain circumstances, thus satisfying the first threshold.[153] Second, the contraband nature of the items seized must have been apparent.[154] Consequently, a warrantless entry into a home based on the emergency aid doctrine and the subsequent viewing of apparent contraband may fall under the plain view doctrine. A clearly defined emergency aid doctrine is therefore the only means to protect individuals from nearly unfettered police discretion to search homes and seize property after receiving 911 hang-ups.

Defendants typically argue that when police find contraband items incident to 911 searches, the police lacked articulable facts or

149. While giving officers unfettered discretion is excessive, too little discretion prevents the police from responding to real emergencies in which a victim is unable to respond.

150. *E.g.*, United States v. Taylor, 458 F.3d 1201, 1203 (11th Cir. 2006) (finding firearm and knife); United States v. Obbanya, No. C 11-677 CW, 2012 WL 851129, at *2 (N.D. Cal. Mar. 13, 2012) (finding firearms, ammunition, chemicals, computer equipment); United States v. Robbins, No. CR11-0014, 2011 WL 1317280, at *3 (N.D. Iowa Apr. 5, 2011) (finding marijuana grow operation); United States v. Huang, No. CR-06-00487 DLJ, 2008 WL 360546, at *2 (N.D. Cal. Feb. 8, 2008) (finding marijuana grow operation); United States v. Parker, No. CR 05-0505-PHX-NVW, 2006 WL 163562, at *2 (D. Ariz. Jan. 20, 2006) (finding firearm); State v. Pearson-Anderson, 41 P.3d 275, 277 (Idaho Ct. App. 2001) (finding methamphetamine laboratory); People v. Greene, 682 N.E.2d 354, 355–56 (Ill. App. Ct. 1997) (finding marijuana); *In re* Welfare of J.W.L., 732 N.W.2d 332, 335 (Minn. Ct. App. 2007) (taking pictures of graffiti inside the home); State v. Frankel, 847 A.2d 561, 566 (N.J. 2003) (finding marijuana grow operation); State v. Hodge, No. 23964, 2011 WL 486516, at *2 (Ohio Ct. App. Feb. 11, 2011), (finding "drugs kind of everywhere" (internal quotation marks omitted)).

151. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971). A search must be within the scope permitted by the initial entry. In the case of the emergency aid doctrine, the scope of a search is generally considered anywhere inside the home where an injured party may be found. Generally, the officer must stop his or her search when the person is found or the emergency ceases to exist. In actuality, the entire house is searched regardless of whether a victim was previously found because, theoretically, there may be other victims or a hiding perpetrator.

152. *See id.*

153. *See* Michigan v. Fisher, 558 U.S. 45, 47 (2009) (per curiam); Brigham City, Utah v. Stuart, 547 U.S. 398, 401–02 (2006).

154. Arizona v. Hicks, 480 U.S. 321, 326–27 (1987).

circumstances sufficient to justify a warrantless search.[155] On the other hand, the state often asserts that 911 hang-ups, by their very nature, are significant indicators of ongoing emergencies.[156] The police, therefore, have a reasonable basis to believe that an emergency exists, which justifies a warrantless search.[157] These arguments dominate most emergency aid cases regarding the permissible boundaries of the doctrine, and they lead to many suppression challenges.[158] But, as discussed below, lower courts have difficulty analyzing the countervailing interests involved when police respond to 911 hang-ups.

C. Interpretive Conflicts

A main point of contention is what proof sufficiently justifies the belief that an emergency aid search was necessary.[159] Since 911 hang-ups do not indicate whether a caller is being assaulted, needs an ambulance, or has simply misdialed, officers are prepared to respond in various ways, such as investigating crimes, rendering emergency aid to injured parties, or explaining to a child that dialing 911 is only for emergencies.[160] Because of this ambiguity and the risk of justifying searches after the fact, *Brigham* rejected an inquiry into the subjective intent of an officer.[161] The Court noted "that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . .; the issue is not his state of mind, but the objective *effect of his actions*."[162] In other words, officers cannot justify a search based solely on their subjective belief that an emergency existed; instead, they must first identify facts or circumstances that a court can independently verify and that are sufficient to justify a warrantless search.

The lack of individualized suspicion in the context of 911 hang-up responses is problematic because the Supreme Court has reiterated, " 'the fact-specific nature of the reasonableness inquiry' demands that

155. *See, e.g.*, *Frankel*, 847 A.2d at 567. Another common argument is that officers exceeded the permissible scope of an emergency-circumstances search or that officers searched specific items without probable cause. *See, e.g.*, *In re Welfare of J.W.L.*, 732 N.W.2d at 338–40.

156. *See* cases cited *supra* note 150.

157. *Id.*

158. *Id.* Plaintiffs often make these same arguments in civil suits against the government, under 42 U.S.C. § 1983 (2012), for violations of their constitutionally protected rights. *See* Hanson v. Dane Cnty. Wis., 608 F.3d 335, 337 (7th Cir. 2010).

159. *See* cases cited *supra* note 56.

160. *See* Dimino, *supra* note 18, at 1486 (noting only one-fifth to one-third of an officer's activity is directed towards crime control).

161. Brigham City, Utah v. Stuart, 547 U.S. 398, 405 (2006).

162. *Id.* at 404 (emphasis added) (quoting Bond v. United States, 529 U.S. 334, 338 n.2 (2000)).

we evaluate each case of alleged exigency based 'on its own facts and circumstances.' "[163] This language strongly suggests that the Court favors particularized suspicion, which many 911 hang-ups lack. Furthermore, the Court seemingly disfavors generalized suspicion.[164] Generalized suspicion is a belief that one person or thing is suspect just because that person or thing shares noncriminal traits with those who are known to be suspect.[165] Generalized suspicion is often based on profiles, statistical information, and the likelihood that a situation exists. The likelihood that these profiles, statistics, or likelihoods are accurate should determine whether generalized suspicion is reasonable in a specific circumstance.[166] So, if a significant number of 911 hang-ups were shown to be valid emergencies, the police might generalize that a particular hang-up is also an emergency. Yet, the Court prefers particularized evidence, and current statistics tentatively indicate the opposite: 911 hang-ups generally do not indicate valid, imminent emergencies.[167]

Relatedly, in a particularly disturbing trend, courts are allowing the government to use an individual's exercise of his or her Fourth Amendment rights as evidence that the police had particularized

163. *See* Missouri v. McNeely, 133 S. Ct. 1552, 1559 (2013) (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)) (internal citation omitted); *see also* Ybarra v. Illinois, 444 U.S. 85, 91 (1980) ("[A] search or seizure of a person must be supported by probable cause particularized with respect to that person."); Terry v. Ohio, 392 U.S. 1, 21 (1968) ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts . . . ."). Checking an address's call history could yield evidence of repeated emergencies, which may constitute suspicion because such information is specific to an exact address or possibly a person. Yet, whether an extensive call history, on its own, justifies a warrantless entry is also questionable because it still relies on prior occurrences as generalized suspicion. *See infra* note 164.

164. Generalized suspicion is often based on commonalities or the probability that an unknown incident (or person) is likely to share the characteristics of a profile, a prior occurrence, or the traits of another. *See Ybarra,* 444 U.S. 85 (deciding that a bar patron could not be detained where police only had generalized suspicions of drug activity in the tavern, but no particularized suspicion that the patron was involved in the illegal drug activity); *see also* Florida v. Royer, 460 U.S. 491 (1983) (involving a suspect who matched seven indicators of a drug courier profile, justifying reasonable suspicion for a brief investigatory detention, but the match was insufficient to establish probable cause for an arrest); Christopher Slobogin, *Let's not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1085–91 (1998) (noting that fine distinctions between individualized and generalized suspicion are conceptually misguided and that generalized suspicion may be valid as long as the information is credible, reliable, and sufficient (corroborated to the point of near particularized evidence) to justify the government's intrusions).

165. *See supra* note 164.

166. The Supreme Court has not directly ruled on the scope of such evidence. *See* CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION 152 (5th ed. 2012).

167. *See supra* Part III.B.1.

suspicion.[168] Officers now frequently refer to a homeowner's refusal to allow officers into the home as evidence that an emergency exists.[169] Likewise, the police often cite an occupant's refusal to answer the door as evidence of an emergency.[170]

While some courts wrestle with standards of proof, others invoke consent to bypass the issue altogether.[171] Absent a warrant or exception to the warrant requirement, a party must voluntarily and validly give consent with some specificity as to the scope of any search.[172] Normally, a caller who remains on the line explains the nature of the problem and asks for assistance. Thus, during traditional 911 calls, the caller is often present and has an opportunity to extend or withdraw his or her consent regarding a search. Drawing on this body of law, courts have found that mere 911 hang-ups are the equivalent of waivers or consent because callers presumably dialed 911 to receive help with the expectation that officers would fully investigate.[173]

---

168. Nelms v. Wellington Way Apartments, LLC, 513 F. App'x 541, 547 (6th Cir. 2013) ("[A] failure to respond to a knock on the door certainly can be a factor supporting a reasonable belief that someone inside needs immediate aid, but it cannot *create* that belief."); Causey v. City of Bay City, 442 F.3d 524, 530 (6th Cir. 2006) (suggesting that an officer need not rely on the assurances of the person responding to the door because they could just as easily be attempts to conceal injured parties or the result of intimidation by an unseen attacker in the residence).

169. *See, e.g.*, Kentucky v. King, 131 S. Ct. 1849, 1862 (2011) ("And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time."); Clark *ex rel* T.M.J. v. Pielert, Civil No. 07-3649(DSD/JJG), 2009 WL 35337, at *6 (D. Minn. Jan. 5, 2009) (finding no affirmative duty to assist an officer's entry, but noting that a refusal to allow an officer's entry supports a reasonable belief of an emergency); State v. Lynd, 771 P.2d 770, 771 (Wash. Ct. App. 1989) (involving a 911 hang-up along with a homeowner's refusal to allow officer's entry). *But see* United States v. Shook, No. 1:12-CR-74-BLW, 2013 WL 2354085, at *4 (D. Idaho May 29, 2013) ("There is nothing inherently suspicious about the quite common event of a dog barking in response to a doorbell and nobody answering the door.").

170. *E.g.*, *Nelms*, 513 F. App'x at 547; United States v. Troop, 514 F.3d 405, 410 (5th Cir. 2008) ("Without any objective evidence of physical distress, the failure of anyone to respond to the agents' knocking at the front and back doors of Troop's house also becomes insufficient to create exigent circumstances."); *supra* note 169 and accompanying text.

171. *See, e.g.,* Rakun v. Kendall Cnty., Texas, No. SA-06-CV-1044-XR, 2007 WL 2815571, at *22 (W.D. Tex. Sept. 24, 2007).

172. The validity of consent generally relies on voluntariness, *see* Schneckloth v. Bustamonte, 412 U.S. 218, 223–24 (1973), the scope of consent, *see* Florida v. Jimeno, 500 U.S. 248, 250–51 (1991), and the authority to give consent, *see* United States v. Matlock, 415 U.S. 164, 170–71 (1974).

173. *Rakun*, 2007 WL 2815571, at *22:

> Thus, 'a homeowner's 911 call requesting immediate assistance at his home is . . . actual consent shown by circumstantial evidence.' By making an emergency 911 call, 'surely the objectively reasonable homeowner envisions that the responding police will enter his home, view the scene, take pictures of that scene, and make a cursory search for relevant evidence directly relating to the homeowner's emergency call.'

(internal citation omitted) (quoting Johnson v. State, 226 S.W.3d 439 (Tex. Crim. App. 2007)); *see* State v. Pearson-Anderson, 41 P.3d 275, 279 (Idaho Ct. App. 2001) ("[W]e cannot ignore the fact

Other issues, such as concerns over an officer's civil liability, may tacitly affect a court's analysis. For instance, courts may be inclined to find warrantless searches after 911 hang-ups permissible due to the need to protect officers and departments from potential liability for actions that their communities support. After all, communities (and their police departments) may find some comfort and only minimal inconvenience in the certitude of 911 hang-up responses.[174] For example, an officer may decide to enter a home just in case an emergency was preventing the caller from communicating. The officer might avoid civil liability if she acted in good faith, even if the search was unconstitutional.[175] Yet, some courts have reasoned that if the officer's search was not objectively reasonable, the officer cannot claim that she acted in good faith.[176] Consequently, the officer or her department may be subject to heightened criticism and possibly liability if a court determines that her search was not objectively reasonable.[177] Presuming that 911 hang-ups are emergencies therefore helps protect officers for actions taken in good faith, even if an emergency was not apparent. Ironically, such a presumption not only facilitates an extraconstitutional search, but it also protects an officer from liability for the search, whether undertaken in good faith or not.

Finally, courts may not want to discourage the police from responding promptly and effectively to emergency situations. The police are identified and trained as first responders, and they are integral and necessary parts of emergency responses. They may be the first on scene, and they are trained and equipped to assess and deescalate volatile

---

that by making the 911 call, Pearson-Anderson herself diminished her reasonable expectation of privacy within her home by summoning police officers to the premises with an implied representation that an emergency was occurring.").

174. United States v. Snipe, 515 F.3d 947, 954 (9th Cir. 2008) ("The possibility that immediate police action will prevent injury or death outweighs the inconvenience we suffer when the police interrupt our ordinary routines in response to what turns out to be a non-emergency call."). In contrast to the *Snipe* court's characterization, this Note does not view a warrantless search of a home a mere "inconvenience."

175. *See* Anderson v. Creighton, 483 U.S. 635, 641 (1987) (holding that for § 1983 liability, good faith is not enough and conduct must be reasonable). *But see* Fletcher v. Town of Clinton, 196 F.3d 41, 49–51 (1st Cir. 2009) (finding no liability when an officer entered a home without a warrant and without any indication of an ongoing emergency, but based on a good faith intent to prevent domestic violence). *See generally* Badway v. City of Philadelphia, No. 07-1333, 2009 WL 2569260, at *5–10 (E.D. Pa. Mar. 15, 2010) (discussing municipal liability for flawed 911 services).

176. *See Anderson*, 483 U.S. 635.

177. This concern may be what prompts departments to adopt wide-ranging 911 hang-up search policies similar to the mandatory search policies discussed above. An officer may not be found personally liable because he or she followed published and standardized department procedures. Policies of this nature still do not address the fundamental issue of whether the search was constitutionally permissible. These policies may merely shift liability from the officer to the department and its parent organization.

situations. Importantly, they also have the means to ensure the safety of other responders.[178] Restricting an officer's response to emergency situations, therefore, impacts other responders.[179] In addition, limiting the ability of the police to secure a scene prevents the collection of evidence and statements, and it puts other emergency responders in danger of entering volatile situations for which they are not trained.

IV. WITH GREAT POWER COMES GREAT RESPONSIBILITY: ENSURING PUBLIC SAFETY DOES NOT OVERTAKE CONSTITUTIONAL PROTECTION

The Supreme Court avoids strict search-and-seizure rules in favor of a totality of the circumstances analysis.[180] For this reason, the Supreme Court may be hesitant to adopt bright-line rules that 911 hang-ups, on their own, cannot justify warrantless searches. Likewise, the Court is unlikely to deem generalized suspicion sufficient to justify warrantless searches of homes because of the Court's stated preference for particularized evidence. Consequently, this Note emphasizes that 911 hang-ups and other warrantless searches based on the emergency aid doctrine must be analyzed under the evidentiary standards set forth in *Brigham* and *Fisher*. That is, each search must be undertaken based on its own specific facts and circumstances, not generalized suspicion.

A. An Analytical Framework

The context in which *Brigham* and *Fisher* arose is the key to understanding the Court's emergency aid doctrine. Lower courts confuse a general possibility of imminent harm with the contemporaneous and particularized indices of imminent harm identified in both *Brigham* and *Fisher*.[181] Part of the confusion arises from the Court's suggestion in *Fisher* that a police officer's need to ensure the protection of unknown parties is an objectively reasonable

178. Thacker v. City of Columbus, 328 F.3d 244, 253–55 (6th Cir. 2003) (commenting on the dual needs of safeguarding paramedics while also tending to a patient's injuries).

179. Stricker v. Town of Cambridge, 710 F.3d 350, 359 (6th Cir. 2003) (holding a warrantless entry permissible because there was affirmative evidence of a medical emergency and a need to protect ambulance personnel from a hostile situation).

180. Totality of the circumstances means all the facts, the context, and the circumstances of a particular incident that, considered together, either support or fail to support government action. *See* Illinois v. Gates, 462 U.S. 213, 230–39 (1983).

181. United States v. Black, 482 F.3d 1035, 1042 (9th Cir. 2006) (Berzon, J., dissenting) ("To prove that such [emergency] circumstances existed, the government cannot rely on speculation about what may or might not have happened. Instead, it must point to specific and articulable facts which, taken together with rational inferences support the warrantless intrusion." (internal quotations and citation omitted)).

basis for a warrantless search.[182] Context, however, is important. In *Fisher*, there was an apparent threat: the police saw the defendant destroying and throwing property.[183] That apparent threat was the basis for a contemporaneous belief that another unseen party was or could become injured.[184] In their interpretation and application of *Fisher*, lower courts are expanding the emergency aid doctrine by ignoring the factual basis behind *Fisher*'s decision—a contemporaneous apparent threat. Instead, some lower courts justify warrantless searches based on the theoretical possibility of imminent harm, inferred from a 911 hang-up, without first identifying any observable, actual threat.[185]

Identifying an apparent threat is a key threshold. It links the possibility of danger to unseen parties to a concrete and contemporaneous event.[186] Absent this link, the emergency aid doctrine becomes a probabilities experiment divorced from reasonableness, and it fails to align with the Court's existing Fourth Amendment jurisprudence. In both *Brigham* and *Fisher*, the police made contemporaneous and particularized observations, which led to reasonable beliefs that their entries were necessary to protect people and property. Only then were warrantless entries into the defendants' homes permissible.

Initially, a court must decide what contemporaneous and particularized evidence a given 911 hang-up actually conveys. At most, 911 hang-up calls that go unanswered on callback merely demonstrate that a means of communication was activated (either intentionally or unintentionally) from a caller's location. This potential effort to communicate should not be interpreted as an emergency: what any given hang-up communicates is too tenuous to justify a general presumption that 911 hang-ups are emergencies. Hang-ups convey nothing about who actually called or why. As a result, the police need to develop their own independent evidence about whether an actual emergency exists. Thus, the proper focus of any judicial inquiry should be the quality and quantity of the information conveyed to the police, which they may use to form an objectively reasonable basis that

182. Michigan v. Fisher, 558 U.S. 45, 49 (2009) (per curiam).

183. *Id.*

184. *Id.*

185. *See generally* cases cited *supra* note 56.

186. *E.g.,* United States v. Meixner, No. 00-CR-20025-BC, 2000 WL 1597736, at *9 (E.D. Mich. Oct. 26, 2000) ("[W]ithout some positive indication to the contrary-some objective manifestation of the existence of an emergency situation demanding immediate action-the officers were not justified in physically intruding into the sanctity of the home.").

imminent harm exists, as *Brigham* and *Fisher* require.[187] Ultimately, interpreting 911 calls in this manner maintains a court's focus on objective indicators of an emergency and away from generalized presumptions.

On the other hand, if the Court does change course and legitimize generalized suspicion, such evidence will still require some corroboration (i.e. showing that a particular 911 hang-up shares sufficient traits with known emergencies). Yet, little or no corroboration may be possible because many 911 hang-ups convey little or no information.[188] If police respond to a location believed to be the origin of a 911 hang-up and no one responds to their inquiries and they fail to observe anything out of the ordinary, there is no corroboration that an emergency exists. Furthermore, even if most 911 hang-ups were found to be emergencies, it is unclear whether corroborating only the receipt of a 911 hang-up would justify the warrantless entry and search of a home's interior.[189] The difficulty of determining a caller's identity, location, and reason for the hang-up call further suggests the need for *some* independent corroboration that an emergency exists.[190] Thus, allowing warrantless searches based on a generalized suspicion that 911 hang-ups are emergencies is nearly tantamount to a general police warrant authorizing indiscriminate searches and seizures, the very intrusion the Fourth Amendment was designed to prevent.

Additionally, presuming that 911 hang-ups are emergencies results in implicit burden shifting whereby citizens are required to prove why their privacy should not be infringed, instead of the government proving why their privacy should be invaded. Fourth Amendment jurisprudence requires the police to develop a certain

187. Where exactly this standard lies within our established framework of reasonable suspicion and probable cause is outside of the intended scope of this Note. Regardless, officers must be able to point to some apparent and imminent threat, yet not be required to actually see or hear an injured party before acting. As *Brigham* noted, "The role of a peace officer includes preventing violence and restoring order . . . ." Brigham City v. Stuart, 547 U.S. 398, 406 (2006).

188. *See* United States v. Simmons, 560 F.3d 98, 105 (2d Cir. 2009) (adopting a proportionality analysis that balances a call's reliability with its level of corroboration; if more of one existed, less of the other was needed); People v. Lomax, 975 N.E.2d 115, 139 (Ill. App. Ct. 2012) (Garcia, J., dissenting) (noting that the anonymous call received was not corroborated in any way prior to the warrantless entry).

189. *Lomax*, 975 N.E.2d at 140–41 (Garcia, J., dissenting) ("Whether a single call provides a reasonable basis necessarily turns on the details conveyed in the 911 call."); *cf.* Florida v. Royer, 460 U.S. 491, 502 (1983) (holding that a suspect matching a "drug courier profile" did not provide the police with probable cause warranting even a detention).

190. *See* Anthony v. City of New York, 339 F.3d 129, 136 & n.2 (2d Cir. 2003) (noting the significance of the caller's location being corroborated and the certitude that the 911 call came from an exact address).

quantum of proof in order to justify an intrusion.[191] In deeming 911 hang-ups per se emergencies, courts allow warrantless entries without the need to form particularized suspicion.[192] Consequently, the burden implicitly shifts to the homeowner to rebut an emergency presumption.[193] And because the police may not believe a homeowner's reassurances that there are no problems, the only way for an officer to dispel a 911 emergency presumption is to search a home to ensure that an emergency truly does not exist.[194]

It is therefore critical for the police to articulate a contemporaneous belief that an apparent emergency exists, thus ensuring that officers acted within the sphere of a true crisis like that

---

191. Michigan v. Fisher, 558 U.S. 45, 50 (2009) (Stevens, J., dissenting) (commenting that the government bears the burden of proof to justify a warrantless entry to protect or preserve life). State courts are free to impose higher standards for searches and seizures than those required by the Federal Constitution. *See* Virginia v. Moore, 553 U.S. 164, 171 (2008). Federal courts and many states adhere to *Brigham*'s objective tests. *See, e.g.*, Commonwealth v. Entwistle, 973 N.E.2d 115, 123 (Mass. 2012). A few states additionally require an inquiry into the subjective intent of the officer. *See, e.g.*, State v. Gibson, 267 P.3d 645, 658 (Alaska 2012) (setting forth a three-part test); Hall v. State, 14 A.3d 512, 515–16 (Del. 2011) (same); State v. Schultz, 248 P.3d 484, 487–88 (Wash. 2011) (adopting a six-part inquiry).

192. *See* State v. Hodge, No. 23964, 2011 WL 486516, at *4–5 (Ohio Ct. App. Feb. 11, 2011):

> In our view, the 911 hang-up call created a reasonable belief that an emergency existed, requiring investigation by law enforcement officers . . . . [W]e find these types of calls to inherently be emergencies. In fact, the emergency of these situations only ceases once the emergency responder is able to ascertain whether someone is in need of aid. . . . [A]t times, this discovery can only be made by gaining entrance to the location from which the call was placed.

But see United States v. Bridges, No. 1:08CR5, 2008 WL 2433881, at *3, 6–10 (N.D. W. Va. June 12, 2008) (invalidating an emergency aid search based on a neighbor's anonymous 911 call regarding a possible domestic dispute at the defendant's home because the police were unable to corroborate that an emergency existed but nevertheless entered the home). Unlike in *Hodge*, the officers in *Bridges* had the benefit of additional information: the 911 call gave a specific complaint occurring at a specific address, and the officers spoke to the defendant and observed him, his son, and the inside of his home through the doorway. Yet, the officers acknowledged and the court properly determined that the officers failed to observe anything out of the ordinary before entering the home. Without corroboration, the officers' warrantless entry was impermissible.

193. *See, e.g.*, United States v. Huang, No. CR-06-00487 DLJ, 2008 WL 360546, at *5 (N.D. Cal. Feb 8, 2008) ("[O]nce the police have been summoned via a 911 call, it is incumbent on them to assure that their assistance is not truly needed.").

194. *See, e.g.*, United States v. Parker, No. CR 05-0505-PHX-NVW, 2006 WL 163562 at *3–4 (D. Ariz. Jan. 20, 2006):

> [T]he events following the initial 911 hang-up call did not dispel the police officers' concern that an emergency was occurring . . . . The court finds as a matter of fact that the entering officers were directly motivated by their authority and duty to investigate the unresolved 911 call, to which they could get no information short of entry . . . .;

State v. Myers, Nos. 9-02-65, 9-02-66, 2003 WL 21321402, at *3 (Ohio Ct. App. June 10, 2003) (concluding that information that children could be in a house without parents present but not knowing whether anyone in the house was harmed justified entering without a warrant).

in *Brigham* and in *Fisher*.[195] *Brigham* and *Fisher* were clear: officers must justify their actions with specific and particularized suspicion in order to justify a subsequent search. A court's analysis, then, ought to be limited to evidence known and considered by the officer and used to justify a warrantless search.[196] This inquiry includes only those factual circumstances that are indices of an apparent emergency and can be corroborated in a judicial proceeding.[197] This way, courts will exclude uncorroborated subjective beliefs, thus maintaining the *Brigham* objectiveness standard. Such a standard still enables police to meet societal expectations regarding 911 police responses while excluding those situations where dangers are not apparent, such as 911 hang-ups where the responding officers encounter calm, silent, or otherwise benign circumstances.[198] Adhering to these simple rules properly focuses the judicial inquiry on the government's burden to justify its actions, and it maintains the balance between compelling government interests and individual rights.

Relatedly, courts should not consider the exercise of constitutional rights as evidence to justify a warrantless entry. Individuals have no obligation to respond to an officer's knocks and are not required to let officers into their homes without a warrant. Instead, a citizen has the continuous right not to be subject to unreasonable searches.[199] As one federal court noted, "There is nothing inherently suspicious about the quite common event of a dog barking in response to a doorbell and nobody answering the door."[200] Nor does the "theoretical possibility of exigent circumstances" justify a warrantless

195. *See generally* sources cited *supra* note 56 and accompanying text. Unsubstantiated generalized suspicion may at times be a proxy for the court's own subjective beliefs. *See Myers*, 2003 WL 21321402, at *3:

> We refuse to base the reasonableness of a warrantless entry into a home from which a 911 call has originated, and the nature of which is unknown, on the percentage of these types of calls that are non-emergencies in nature. Rather, we find these types of calls to inherently be emergencies. In fact, the emergency of these situations only ceases once the emergency responder is able to ascertain whether someone is in need of aid.

196. Kentucky v. King, 131 S. Ct. 1849, 1865 (U.S. 2011) (Ginsburg, J., dissenting) ("The existence of a genuine emergency depends not only on the state of necessity at the time of the warrantless search; it depends, first and foremost, on 'actions taken by the police *preceding* the warrantless search.' " (quoting United States v. Coles, 437 F.3d 361, 367 (3d Cir. 2006))).

197. This may include the consideration of generalized suspicion in the overall totality of the circumstances if such suspicion were corroborated.

198. *See* State v. Deneui, 775 N.W.2d 221, 226–29 (S.D. 2009) (discussing a methamphetamine lab found during a warrantless search and investigation of an ammonia leak).

199. *See* United States v. Troop, 514 F.3d 405, 410 (5th Cir. 2008).

200. United States v. Shook, No. 1:12-CR-74-BLW, 2013 WL 2354085, at *4 (D. Idaho May 29, 2013).

entry.[201] An omnipresent right to be free from unreasonable searches attaches wherever an expectation of privacy in the home exists.[202] To use a person's exercise of his or her Fourth Amendment right to justify its very abrogation is unconscionable. Accordingly, courts should not entertain any notion that a citizen must dispel an officer's mere presumption that an emergency exists.

Likewise, a caller's reasonable expectation of receiving help should not shift the burden or abrogate the constitutional right to be free from unreasonable searches.[203] A state's constitution and common law may provide more protection against searches than the Federal Constitution, but they may not afford less.[204] Thus, even if there were mainstream support for 911 hang-up warrantless searches, those desires should not trump the constitutional interests of a minority who may find warrantless searches abhorrent.[205]

Incidentally, many courts refuse to imply tort and contractual duties upon both 911 operators and the police for their actions or failures to act in the course of investigating 911 calls.[206] Additionally, Supreme Court precedent strongly indicates that neither due process nor equal protection commands such responsibility.[207] Thus, requiring

---

201. Moreno v. City of Brownsville, No. B-08-504, 2011 WL 3813105, at *13 (S.D. Tex. Aug. 26, 2011).

202. The right to refuse unreasonable entry expressly or through silence may be analogized to the Fifth Amendment right to remain silent. Once the right attaches, the use as evidence of one's constitutional rights should be prohibited. *See* Payton v. New York, 445 U.S. 573, 586 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (quoting Coolidge v. New Hampshire, 403 U.S. 443, 477 (1971))); *supra* text accompanying note 11.

203. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202 (1989) (noting that there is no affirmative constitutional duty to protect individuals, although a common-law duty to respond may exist); Cummins v. Lewis Cnty., 98 P.3d 822, 826 (Wash. Ct. App. 2004) (refusing to find duty and reliance when officers failed to respond to 911 caller who merely said an address and hung up, and rejecting the plaintiff's assertion that "the enhanced 911 system *automatically* creates privity between the caller and the operator by electronically identifying the call's location and eliminating the caller's need to speak to the operator").

205. Virginia v. Moore, 553 U.S. 164, 171 (2008) (noting that states remain free to impose standards for searches and seizures greater than those required by the Federal Constitution).

205. Yet, an unreasonable search is itself a Fourth Amendment constitutional injury for which there is a remedy through 42 U.S.C. § 1983 (2012). Thus, an aggrieved party may sue police officers and police departments for unreasonable searches. This is a strong indication that the Court favors a person's right against unreasonable searches, for which there is a remedy, over an individual's expectation that the police will respond, for which there is no remedy, at least in situations where an apparent emergency does not exist.

206. *See Cummins*, 98 P.3d at 826.

207. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) (noting that a benefit is not a protected entitlement under the Due Process Clause if the government may grant or deny the benefit at its discretion); *DeShaney*, 489 U.S. at 195, 200:

> [T]he language of the Due Process Clause itself [does not] require[ ] the State to protect the life, liberty, and property of its citizens against invasion by private actors. . . . The

the government to prove its burden is not only consistent with current Fourth Amendment jurisprudence but also with related constitutional doctrines regarding law enforcement's duties and responsibilities.

Furthermore, hang-ups lack particularized evidence sufficient to demonstrate knowing and voluntary consent. In fact, substantial evidence shows that most 911 hang-ups are inadvertent.[208] Moreover, hang-ups do not identify callers, their authority to consent, or the permissible scope of a search.[209] Furthermore, a search incident to a 911 hang-up often occurs outside the presence of the caller and without his or her ability to withdraw or limit the scope of the search. For these reasons, the consent theory must fail.[210]

Taking the consent argument to its logical conclusion also leads to two strange circumstances. First, 911 calls may be criminal, civil, or medical in nature.[211] Consent based on 911 hang-ups, therefore, could lead to unlimited police power to investigate 911 hang-up calls. Since the nature of any given 911 hang-up is unknown, a resulting search could likewise be nearly unlimited. Second, consent based on 911 hang-ups would constitute full consent, even though a caller who remains on the line preserves the right to limit a search of his or her home. The consent theory shifts the government's burden onto homeowners, requiring them to dispel a presumption of consent. This burden shifting

---

> affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

208. *See* discussion *infra* Part III.B.1.

209. *See generally* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society*," 42 DUKE L.J. 727, 738–39 (1993). The authors conducted a survey that ranked respondents' perceptions regarding invasion of privacy, with one being the least intrusive and fifty the most intrusive. They found that a search of a mobile home ranked forty-five and a search of a bedroom forty-seven, thus indicating that respondents found these invasions to be some of the most intrusive. These are the same types of invasions occurring during many 911 hang-up warrantless searches, and it is questionable whether even intentional 911 callers intend their mere calls to constitute consent to invade sensitive areas of their homes. Professor Slobogin also suggests an approach whereby the invasiveness of a search must be proportional to the suspicion justifying the search. *See* Slobogin, *supra* note 13, at 68–75. Under this approach, presuming that 911 hang-ups constitute implicit consent for the police to search a home ignores whether the intrusiveness of the search (which respondents of his study ranked as highly intrusive) is proportional to the likelihood that an emergency exists (which is not statistically supported).

210. *See* Thacker v. City of Columbus, 328 F.3d 244, 254–55 (6th Cir. 2003) (deciding that calling 911 does not amount to consent, but that it may indicate a lessened expectation of privacy).

211. People call 911 for many reasons, not just to report a crime or to seek medical assistance. They also call about vehicle accidents, child custody disputes, abandoned vehicles and parking complaints, domestic discord, mental health issues, juvenile behavioral problems, questions regarding civil law issues, lost property, and requests to check the wellbeing of the elderly, intoxicated, and mentally ill, just to name a few. *See* THE OVERLOADED 9-1-1 SYSTEM, *supra* note 113, at 13–15 (describing 911 abuses).

is contrary to established principles regarding the waiver of constitutional rights and contrary to the government's burden to show voluntary and knowing consent before conducting a warrantless search.

Finally, the consent theory is unnecessary. While the government's compelling need to respond to an emergency may supersede the need to obtain consent, emergency aid searches do not require consent at all. Emergency aid warrantless searches and consent are independent and alternative means of accomplishing the same goal: gaining entry into a protected area. Allowing police to claim implied consent to justify a warrantless search based solely on the receipt of a 911 hang-up, absent any particularized evidence that an emergency exists, impermissibly bypasses the government's burden of proof for both warrants and consent. Consequently, the consent theory, like the 911 hang-up emergency presumption, risks sanctioning nearly indiscriminate and limitless searches based on unknown facts and circumstances.

B. An Analogy and a Reasonable Compromise

The above discussion illustrates that the only remaining bulwark against impermissible police discretion to investigate 911 hang-ups is a resolute adherence to particularized evidence. A separate but analogous analysis occurs in the context of anonymous calls. Due to the questionable veracity of information provided by anonymous callers, courts are generally wary of giving anonymous information too much weight.[212] In fact, courts often treat anonymous information as inherently suspect. The police must corroborate anonymous information to ensure that they develop their own objective and particularized evidence before acting upon the anonymous tip. This Note argues that a similar analysis should apply to 911 hang-ups, an approach that at least some courts have adopted.[213]

In *United States v. Cohen*,[214] law enforcement received a 911 hang-up call. While responding to the call, an officer stopped a vehicle leaving the address from which the call originated and arrested the driver.[215] The driver challenged his arrest on the basis that the officer

212. *See* Alabama v. White, 496 U.S. 325, 329 (1990) ("[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity."); *infra* text accompanying note 220.

213. Florida v. J.L., 529 U.S. 266, 270 (2000) ("[T]here are situations in which an anonymous tip, *suitably corroborated*, exhibits 'sufficient indicia of reliability to provide reasonable suspicion . . . .' " (emphasis added) (quoting *White*, 496 U.S. at 327)).

214. United States v. Cohen, 481 F.3d 896, 897–98 (6th Cir. 2007) (arresting the driver for an unrelated warrant).

215. *Id.*

lacked sufficient cause to stop his vehicle.[216] The court agreed, "We believe that the 911 hang-up call, standing alone without follow-up calls by a dispatcher or other information is most analogous to an anonymous tip."[217] Citing *Florida v. J.L.*,[218] the court added that anonymous tips may "provide[ ] no predictive information and therefore [leave] the police without means to test the informant's knowledge or credibility."[219] Since the knowledge or credibility of a caller often cannot be corroborated, the *Cohen* court stated that the 911 hang-up had limited or no weight in evaluating the totality of the circumstances.[220] Thus, the officer in *Cohen* lacked even reasonable suspicion to make the initial, investigatory traffic stop.[221]

Likewise, the court in *Kerman v. City of New York* reached similar conclusions where a 911 caller provided the dispatcher with limited information and remained anonymous.[222] The sparse information directed police to an address where there was allegedly a suicidal man with a gun.[223] Although the police could not corroborate the anonymous tip, they forcefully entered the home and took its resident into custody.[224] The resident subsequently brought suit alleging a violation of his Fourth Amendment rights.[225] Citing *Florida v. J.L.*'s anonymous tip analysis, the *Kerman* court found that the officers lacked a basis for conducting a warrantless entry, notwithstanding the alleged gravity of the tip: "Based on the absence of evidence in the record to corroborate the 911 call and the protections afforded to private dwellings under the Fourth Amendment, we find that the officers' warrantless entry into Kerman's apartment violated the Fourth Amendment."[226]

---

216. *Id.*

217. *Id.* at 899.

218. 529 U.S. at 271.

219. *Cohen*, 481 F.3d at 899 (quoting *J.L.*, 529 U.S. at 271).

220. *Id.* at 901:

> Even if we were to assume that an anonymous 911 report is more reliable than other similar anonymous tips, however, we believe that the virtually complete lack of information conveyed by the silent 911 hang-up call and the total absence of corroborating evidence indicating that criminal activity was afoot requires us to give the 911 hang-up call little weight in evaluating the totality of the circumstances.

221. *Id.*

222. Kerman v. City of New York, 261 F.3d 229, 232–33 (2d Cir. 2001). Other courts have come to similar conclusions. *See, e.g.*, United States v. Sikut, 488 F. Supp. 2d 291, 316 (W.D.N.Y. 2007) (finding an anonymous 911 call without any on-scene objective indicators was insufficient to justify a warrantless entry).

223. *Kerman*, 261 F.3d at 232–33.

224. *Id.*

225. *Id.* at 234.

226. *Id.* at 236.

Under the anonymous tip analysis, officers must attempt to corroborate anonymous information through affirmative, articulable observations because the reliability of the anonymous information is suspect.[227] As a result, the police do not need ironclad proof of an emergency, but their belief must be based on more than a mere hunch or possibility that an emergency exists.[228] Similarly, the court in *United States v. Espinoza* aptly noted: "We do not read [*Fisher*'s] fact-specific opinion to hold broadly that warrantless entry into a home is always justified where the police cannot confirm that there are no injured victims inside a house."[229] Applying the anonymous tip analysis to 911 hang-ups means that officers investigating 911 hang-ups must corroborate their information and develop particularized evidence sufficient to justify taking immediate and warrantless action.

Although the police may not discover some valid emergencies if this analysis applies, our criminal justice system is not predicated on maximum utility at the expense of personal liberty. To the contrary, our system attempts to achieve optimal efficiency while also maintaining fundamental rights, even if the system thereby produces the occasional undesirable result.[230] In the interest of preserving fundamental rights, it may be better that some emergencies go unaddressed rather than many more people suffer the indignity of unreasonable government

---

227. *See* United States v. Bridges, No. 1:08CR5, 2008 WL 2433881 at *2–3 (N.D. W. Va. June 12, 2008) (finding an anonymous 911 call regarding possible domestic assault insufficient to justify a warrantless search of home when the occupant gave a clear rebuke refusing the officer's entry and there was no other corroborating evidence that an assault occurred); *see also* United States v. Delgado, 701 F.3d 1161, 1165 (7th Cir. 2012) ("[I]t is . . . incumbent upon the government to point to some *affirmative* sign of exigency" beyond merely remaining silent to an officer's inquiries.).

228. *See* Michigan v. Fisher, 558 U.S. 45, 48–50 (2009) (per curiam); *Delgado*, 701 F.3d at 1165.

229. United States v. Espinoza, 403 F. App'x 239, 241 (9th Cir. 2010); *see also* United States v. Shook, No. 1:12-CR-74-BLW, 2013 WL 2354085, at *5 (D. Idaho May 29, 2013) (citing United States v. Reid, 226 F.3d 1020, 1028 (9th Cir. 2005)) ("The Government has not borne its 'heavy burden' of presenting 'particularized evidence' to justify the application of the emergency exception."); Moreno v. City of Brownsville, No. B-08-504, 2011 WL 3813105, at *13 (S.D. Tex. Aug 26, 2011) ("Exigent circumstances are not created by the theoretical possibility of exigent circumstances being present within a home."). Relatedly, the inability to gain the exact location from wireless callers additionally creates a problem in establishing a link between the person calling 911 and the place to be searched. Under this Note's analysis, a warrantless entry in order to verify a 911 hang-up is invalid without contemporaneous and particularized evidence of an emergency. *See* United States v. Deemer, 354 F.3d 1130, 1132–33 (9th Cir. 2004) (invalidating a warrantless entry into a hotel room because the 911 call received could not be associated with a specific room).

230. Blackstone's maxim, in all its harshness, nicely illustrates the importance of uniform and just laws: "It is better that ten guilty persons escape than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

searches. Fortunately, available data suggest that very few 911 hang-ups are imminent emergencies.[231]

Nonetheless, police should be allowed a limited and reasonable incursion onto the curtilage of the home in order to effectively respond to 911 hang-ups.[232] For instance, when responding to the suspected source of a hang-up call, courts might permit the police to enter a home's curtilage,[233] including walking around and inspecting a home's exterior.[234] These actions are minimally intrusive yet frequently successful when attempting to contact an occupant.[235] Thus, drawing a "bright line" at the threshold of the home, while still allowing limited but reasonable entry into the curtilage for responses to a *possible* emergency, may be compatible with already-established Fourth Amendment standards.[236]

Likewise, officers investigating 911 hang-ups may need to extend their attempts to contact an occupant to other areas outside the home, such as back doors and windows. While these are often protected areas, officers investigating 911 hang-ups are merely attempting to contact someone within the home. While a 911 call does not indicate an emergency situation, it does establish that a means of communication was triggered, even if inadvertently. Attempting to contact an occupant while responding to a 911 call, therefore, is fundamentally different than an investigatory search inside the home. Thus, a nonintrusive response, including a limited incursion into a home's curtilage, should be reasonable if confined to areas outside the home and limited to the

---

231. *See supra* Part III.B.1.

232. *See supra* text accompanying note 134.

233. *See* United States v. Robbins, No. CR11-0014, 2011 WL 1317280, at *5–6 (N.D. Iowa Apr. 5, 2011) (holding that a 911 open line (busy signal) justified a limited intrusion onto curtilage).

234. United States v. Moore, 453 F. App'x 401, 403 (4th Cir. 2011) (citations omitted):

> We have noted, however, that the Fourth Amendment does not invariably forbid an officer's warrantless entry into an area surrounding a residential dwelling, even when the officer has not first knocked at the front door. A police officer may enter property adjacent to a home when the officer possesses a legitimate reason for doing so that is unconnected with a search of the premises.

235. *See* Thacker v. City of Columbus, 328 F.3d 244, 254 n.2 (6th Cir. 2003) (declining to hold that a 911 call alone may justify a warrantless entry, but suggesting that it may justify a lesser, limited response); *Shook*, 2013 WL 2354085, at *3 (allowing limited investigation into the curtilage of a home after a 911 hang-up).

236. *See* Payton v. New York, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."). Thus, the protection afforded to areas outside the home may be distinguishable from areas inside it. For example, the police are reasonably permitted to enter a home's curtilage for the purpose of contacting occupants within. *See, e.g.*, United States v. Walker, 474 F.3d 1249, 1253 (10th Cir. 2007) (finding that opening a storm door was not a search); People v. Ray, 981 P.2d 928, 935 (Cal. 1999) (suggesting that an officer's intrusion onto private property during a potential emergency is permissible because a similarly situated private citizen may intrude onto private property to responding to a potential emergency).

express purpose of responding to an occupant's apparent attempt to communicate.[237]

If additional observations suggest that an emergency exists, further investigatory efforts may be appropriate. If these efforts yield no additional information, however, officers have responded to the maximum extent the law deems reasonable while not violating the inner sanctum of the home. Distinguishing between the curtilage and the interior of the home thus balances the need to respond to emergencies against the high level of government intrusion inherent in any search of the interior of a home.

The above framework protects an individual's right to be free from unreasonable government intrusions, while giving the police better guidelines for executing emergency aid warrantless searches and the courts a basis for analyzing those searches. The framework achieves this balance by requiring the police to observe particularized evidence of an apparent emergency. It also requires the government to bear the burden of proving such an emergency existed while prohibiting the use of uncorroborated generalized evidence or implicit consent. This framework also seeks a reasonable compromise by allowing a limited intrusion into the curtilage of a home to investigate a potential emergency after receipt of a 911 hang-up. The resulting framework thus realigns lower-court practice with the standards articulated in *Brigham* and *Fisher*, while also attempting to meet contemporary expectations for 911 hang-up responses.

V. CONCLUSION

Of the tens of millions of 911 hang-ups occurring on a yearly basis, studies indicate that few are legitimate calls for help, and fewer yet are imminent emergencies. Unfortunately, some lower courts fail to narrowly interpret the emergency aid doctrine, which allows the police to enter homes when they have a reasonable basis to believe that an emergency exists. The failure to narrowly interpret the doctrine has transformed the exception into an amorphous, untamed general writ. The result is an extraordinary expansion of police power to intrude into the home, make arrests, and allow courts to convict under circumstances divorced from apparent emergencies.

This Note suggests that the omnipresent constitutional interest against unreasonable searches must take priority over the expectations of those who fail to adequately communicate the existence of an

237. *See Robbins*, 2011 WL 1317280, at *5–6 (holding that a 911 open line (busy signal) justified a limited intrusion onto curtilage).

emergency. Furthermore, the government must point to contemporaneous and particularized evidence of apparent imminent harm before conducting a warrantless search under the emergency aid doctrine. Strict adherence to *Brigham* and *Fisher* ensures that officers have the flexibility they need, while preserving a citizen's core constitutional right to be free from unreasonable searches.

In addition, treating 911 hang-ups like anonymous tips and permitting the police to make limited incursions into the curtilage of a home accommodates evolving means of communication and changing societal expectations regarding emergency police responses. It also maintains consistency with current search-and-seizure jurisprudence while recognizing the difficulty of divorcing police officers' crime-fighting and community protecting roles. Thus, adhering to the contextual tenets of *Brigham* and *Fisher* and following this Note's suggested framework may prevent the emergency aid doctrine from devolving into the modern general warrant.

*Alexander C. Ellman**

* J.D. Candidate, 2015, Vanderbilt University Law School; B.S., 2010, University of South Dakota; former law enforcement officer. I am grateful for the assistance and support of June Ellman, Ed.D, Matthew Downer, J.D., the Vanderbilt Law Review staff, and particularly Andrea Bilbija and Kimberly Ingram for their thoughtful reviews. I especially thank my wife, Christy, for her support and understanding during this arduous process. Of course, any errors herein are my own.