

# Police as Community Caretakers: *Caniglia v. Strom*

*Christopher Slobogin\**

What *is* the proper role of the police? That question has been at the forefront of debates about policing for quite some time, but especially in the past year. One answer, spurred by countless news stories about black people killed by law enforcement officers, is that the power of the police should be reduced to the bare minimum, with some in the Defund the Police movement calling for outright abolition of local police departments.<sup>1</sup> Toward the other end of the spectrum is the notion that the role of the police in modern society is and must be capacious. Police should function as “community caretakers,” because “a police officer—over and above his weighty responsibilities for enforcing the criminal law—must act as a master of all emergencies, who is ‘expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety.’”<sup>2</sup>

That commodious language comes from the First Circuit Court of Appeals in the case of *Caniglia v. Strom*.<sup>3</sup> The court relied on the “special role of the police in our society” to hold that police may enter the home of a suicidal individual to seize his guns, when he is not present, in the absence of consent, and without a warrant.<sup>4</sup> As a matter

\*Milton Underwood Professor of Law, Vanderbilt University.

<sup>1</sup>See Asha Ransby Sporn, “Campaigns to Defund Police Have Seen Major Wins—and They’re Not Stopping,” Truthout, May 25, 2021, <https://bit.ly/3j7DAx2> (describing Defund movement and quoting one leader stating that “[i]t would be a failure to . . . try to gently bend policing to make it friendlier. We are proposing something that has not been done yet, which is to dismantle the policing and prison systems.”).

<sup>2</sup>*Caniglia v. Strom*, 953 F.3d 112, 124 (1st Cir. 2020).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

of formal legal doctrine, the First Circuit purported to be applying what courts have long called the “community caretaker exception” to the Fourth Amendment rule that warrants are usually required to carry out a search of a home and the seizure of items in it.

The First Circuit’s holding did not stand for long, however. In an opinion written by Justice Clarence Thomas, a unanimous Supreme Court (not a common phenomenon these days) reversed the First Circuit, taking only four pages to do so (also unusual in recent years).<sup>5</sup> While recognizing that one of its earlier cases, *Cady v. Dombrowski*,<sup>6</sup> had alluded to a community caretaker exception to the warrant requirement when police are engaged in something other than crime-fighting, Justice Thomas noted that *Cady* had involved a warrantless search of a disabled car and had “repeatedly stressed” that there is “a constitutional difference” between houses and cars.<sup>7</sup> Rebuking the First Circuit for extrapolating from *Cady* “a freestanding community-caretaking exception that applies to both cars and homes,” the Court admonished, “What is reasonable for vehicles is different from what is reasonable for homes.”<sup>8</sup> It concluded that Edward Caniglia’s lawsuit for damages against the city of Cranston, Rhode Island, and its police department was viable.

There were three concurring opinions, each agreeing with the result but carefully laying out what the majority opinion did *not* prohibit. Chief Justice John Roberts, joined by Justice Stephen Breyer, provided a reminder that earlier decisions had allowed warrantless home entries to prevent violence, restore order, and render first aid.<sup>9</sup> Similarly, Justice Samuel Alito suggested that the Fourth Amendment would not be violated by warrantless entries of residences when an occupant presents an imminent risk of suicide or is otherwise in “urgent need of medical attention and cannot summon help.”<sup>10</sup> Finally, Justice Brett Kavanaugh reviewed the cases in which the Court had allowed warrantless entries to fight a fire and investigate its cause, to prevent imminent destruction of evidence, to

<sup>5</sup>*Caniglia v. Strom*, 141 S. Ct. 1596 (2021).

<sup>6</sup>413 U.S. 433 (1973).

<sup>7</sup>*Caniglia*, 141 S. Ct. at 1599 (quoting *Cady*, 413 U.S. at 439).

<sup>8</sup>*Id.* at 1600.

<sup>9</sup>*Id.* at 1600 (Roberts, C.J., concurring).

<sup>10</sup>*Id.* at 1601 (Alito, J., concurring).

engage in hot pursuit of a fleeing felon, and to handle a number of other “exigent circumstances.”<sup>11</sup>

The seizure of guns in *Caniglia* fit none of these scenarios because it was not necessary to prevent imminent harm to anyone or to respond to some other emergency. The day before the seizure Edward Caniglia had placed a handgun on his dining room table and asked his wife to “shoot me and get it over with.” Rather than obliging, his wife left the home and spent the night at a hotel. The next morning, when she was unable to reach her husband by phone, she called the police and accompanied them to the house, where Edward was sitting on the porch. After some dialogue, the police convinced Edward to go to the hospital for a psychiatric evaluation and arranged for an ambulance to take him there. Only then, after Edward was gone, did the police go in to get the guns.

So the *Caniglia* opinion, on its face, is a narrow one: police cannot go into a home without a warrant in the absence of some type of extenuating circumstance. But the case still provides a springboard for raising a number of issues about the proper role of the police. The first is why the police were involved in this case at all. Edward Caniglia was not committing a crime, nor was he about to do so. His wife said she did not fear for her life, only for Edward’s. If something needed to be done about the situation, wouldn’t a team of mental health professionals have been a better fit? This is the type of question that many in the Defund the Police movement are asking.

A second set of issues, pertinent even when the police are the only option, is raised by the Court’s firm conclusion in *Caniglia* that police cannot excuse the failure to obtain a warrant with the mere fact that they are engaging in “tasks that go beyond criminal law enforcement,” to use Justice Alito’s phrase.<sup>12</sup> Justice Thomas’s opinion seemed to reject the idea of a “freestanding” caretaker exception in connection with home entries,<sup>13</sup> and Justice Alito interpreted the Court’s opinion to reject it in *any* setting.<sup>14</sup> At the same time, the various opinions in

<sup>11</sup>*Id.* at 1604–05 (Kavanaugh, J., concurring).

<sup>12</sup>*Id.* at 1600 (Alito, J., concurring).

<sup>13</sup>*Id.* at 1598 (noting that “the First Circuit extrapolated a freestanding community-caretaking exception that applies to both cars and homes” and holding that the exception did not apply to homes).

<sup>14</sup>*Id.* (“The Court’s decision in [*Cady*] did not recognize any such ‘freestanding’ Fourth Amendment category.”).

*Caniglia*, including Alito's, appear to contemplate that at least some tasks that go beyond criminal law enforcement do permit warrantless entry even when there is time to get a warrant. So the question is raised, what *are* police allowed to do in the name of "caretaking"? The suggestion made here is that, given the potential for police misuse of force and for pretextual actions by the police, warrantless home entries in the absence of real exigency should never be part of policing's mission, even when a "caretaking" goal can be articulated.

Then there is the possibility, admittedly speculative, that *Caniglia* could also affect searches and seizures outside the home. First, if there is no such thing as a freestanding caretaker exception, then *Cady* itself—involving a nonexigent warrantless search of a vehicle—might be questioned, or at least framed more accurately. *Caniglia* could also lead to a rethinking of what the courts call "special needs" doctrine. This doctrine—like the community caretaking exception—relaxes the usual Fourth Amendment strictures when a search or seizure purports to be facilitative rather than aimed at "ordinary crime control."<sup>15</sup> Under the special-needs rubric, the Supreme Court has permitted searches of school children and public employees for disciplinary infractions not only in the absence of a warrant but also on something less than probable cause. It has also sanctioned warrantless and *suspicionless* searches and seizures in connection with government inspections for dangerous conditions, checkpoints set up for various regulatory purposes, and drug testing programs aimed at safety rather than prosecution. While the Court has offered various rationales for these decisions, *Caniglia*'s concern about an overly expansive community caretaking exception resonates with similar criticisms aimed at the elastic nature of its special needs cases. Perhaps some finetuning is necessary here as well.

### I. Who Are the Best "Caretakers"?

Police are heavily involved in dealing with people who have a mental illness. From 10 to 20 percent of 911 calls involve mental health crises.<sup>16</sup> In many communities, the response to those calls is

<sup>15</sup>See *infra* Part III; *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

<sup>16</sup>The 20 percent figure comes from Eugene, Oregon; see *infra* text following note 28. A nationwide estimate is that 10 percent of 911 calls require some sort of mental health intervention. Mike Maciag, "The Daily Crisis Cops Aren't Trained to Handle," *Governing.com*, Apr. 27, 2016, <https://bit.ly/2Sno8Sm>.

to send the police; in fact, even when the 911 caller is a concerned family member, he or she often *asks* for the police, as Caniglia's wife in fact did.

But that is probably the wrong move most of the time. Nearly a quarter of all people killed by the police in the past five years have been people with mental illness.<sup>17</sup> That statistic raises an obvious question. Why are people who are trained to use deadly force, and have the means to use it, the primary response to a suicide threat or to a person who is beyond the control of family members? Presumably the goal in these cases is to talk the person down, not shoot them or otherwise harm them. Yet the latter is often what happens. Two recent cases are illustrative. The first ended with police shooting a 13-year-old boy with an autism-related disorder whose mother had called because he was having a "mental breakdown."<sup>18</sup> The second involved Daniel Prude, a 43-year-old black man who was wandering in the streets naked and babbling. Police put a hood over his head (to prevent him from spitting on them), pressed him to the ground a la Chauvin, and killed him.<sup>19</sup>

Even when a person with mental illness has a weapon (neither the 13-year-old nor Prude did), bringing in the police is probably a bad idea. For instance, in *Kisela v. Hughes*,<sup>20</sup> someone called the police to report a woman hacking at a tree with a kitchen knife. Three officers responded and were met by the caller, who told them the woman had been behaving erratically and then had disappeared. Soon afterward, the police saw Hughes, who fit the caller's description, emerge from a house carrying a large knife and walk within six feet of another woman, who turned out to be a housemate named Chadwick. The three officers, separated by a chain link fence, drew their weapons and twice told Hughes to drop the knife. Although Chadwick told the police to "take it easy" and later

<sup>17</sup>Hasan T. Arslan, *Examining Police Interactions with the Mentally Ill in the United States*, in *Enhancing Police Service Delivery* (James F. Albrecht & Garthden Heyer eds., 2021).

<sup>18</sup>Rachel Treisman, "13-Year-Old Boy with Autism Shot by Salt Lake City Police," NPR, Sept. 9, 2020, <https://n.pr/3jazWm1>.

<sup>19</sup>Michael Gold & Troy Closson, "About Daniel Prude's Case and Death: What We Know," N.Y. Times, Apr. 16, 2021.

<sup>20</sup>138 S. Ct. 1138 (2018).

testified she did not feel endangered, and although Hughes appeared “calm” throughout, within less than a minute Officer Kisela had shot Hughes.

Mario Woods also had a weapon. The police received a call from a man who said Woods had slashed his arm with a knife, after walking back and forth on the sidewalk, talking nonsense, and appearing to be “under the influence of something.”<sup>21</sup> A video shows Woods, a few hours later, standing against a wall with a knife in his hands, surrounded by six to eight officers, most of them pointing guns. When he doesn’t put the knife down and starts limping away from the officers, he’s shot 20 times, many of the bullets hitting him in the back.<sup>22</sup>

The police might not be to blame in these situations. In Hughes’s case, the Supreme Court held that the police acted “in good faith” (although Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, stated in dissent that “it is ‘beyond debate’ that Kisela’s use of deadly force was objectively unreasonable”).<sup>23</sup> Woods had hurt someone with his knife. But the question remains whether cops were the best first responders.

A typical reaction to these types of situations is to push for better training of the police—training on how to handle people with mental illness, how to talk to people with delusions and hallucinations, how to de-escalate. A number of jurisdictions have established crisis intervention teams (CITs) that rely either entirely on specially trained police officers or on teams of officers and mental health professionals.<sup>24</sup> But the research is, at best, equivocal on whether CITs work or are used properly. In Rochester, New York, where Prude was killed, a CIT program had existed for 15 years.<sup>25</sup> A national study of

<sup>21</sup>Phil Matier & Andy Ross, “Mario Woods’ Last Moments: ‘You Better Squeeze That . . . and Kill Me,’” SFGate, Jan. 23, 2016, <https://bit.ly/3gS98p6>.

<sup>22</sup>Julia Carrie Wong, “Mario Woods, Black Man Killed by Police, ‘Had 20 Gunshot Wounds,’” The Guardian, Feb. 12, 2016, <https://bit.ly/3xVoxuB>.

<sup>23</sup>138 S. Ct. at 1161 (Sotomayor, J., dissenting).

<sup>24</sup>Univ. of Memphis, CIT Ctr.: Overview, <https://bit.ly/3gPyN1I> (last accessed May 20, 2021) (reporting over 2,700 CIT programs nationwide as of 2017).

<sup>25</sup>Noelle E.C. Evans, “One Year After Daniel Prude’s Death, Has Mental Health Care for People of Color Changed?,” NPR, Mar. 21, 2021, <https://bit.ly/3hfbsFF>.

CITs found that, while the programs resulted in more people with mental illness being diverted out of the criminal justice system to psychiatric treatment, they did not significantly decrease the number of people killed or injured.<sup>26</sup>

An award-winning documentary called “Ernie and Joe: Crisis Cops” depicts two officers with the San Antonio Police Department “diverting people away from jail and into mental health treatment, one 911 call at a time.”<sup>27</sup> There are several powerful moments in the film that show how well-trained, compassionate police officers can effectively de-escalate a situation without having, much less using, a weapon, and without any show of force. Perhaps the most potent message of the film, however, is that the officers are, in effect, mental health professionals. Not only do Ernie and Joe not have weapons, they often do not wear uniforms, and the techniques they use are similar to those that a good clinical social worker routinely uses in hospital wards. As Ernie says, they do not rely on the typical police academy use-of-force spectrum of “ask, tell, make”; instead, they listen, empathize, and hug.

Following that line of reasoning to its logical conclusion is a program called CAHOOTS (for Crisis Assistance Helping Out on the Streets) in Eugene, Oregon.<sup>28</sup> CAHOOTS teams are composed entirely of civilians, usually a medic and a behavioral specialist who, when on call, endeavor to avoid “pseudo-professional” demeanors, and are often people who at one time needed services themselves. In 2019, these teams responded to 24,000 calls, about 20 percent of all dispatches in Eugene. They called for police backup in about 150 of those cases. But most of the time they responded on their own to a wide range of situations, including “substance addiction crises, psychotic episodes, homeless residents and threats of suicide, [and] depressed children.”<sup>29</sup> The efficacy of the program is hard to measure, but Eugene’s chief

<sup>26</sup>Michael Rogers, Dale E. McNiel, & Renee L. Binder, Effectiveness of Crisis Intervention Programs, 47 *J. Am. Acad. Psychiatry & L.* 1 (2019).

<sup>27</sup>Ernie & Joe: Crisis Cops (HBO 2019).

<sup>28</sup>See CAHOOTS, Crisis Assistance Helping Out on the Streets, <https://whitebirdclinic.org/cahoots>.

<sup>29</sup>Scottie Andrew, “This Town of 170,000 Replaced Some Cops with Medics and Mental Health Professionals. It’s Worked for Over 30 Years,” CNN, July 6, 2020, <https://cnn.it/3jmQmrr>.

of police, who works closely with the CAHOOTS organization, says “When they show up, they have better success than police officers do. We’re wearing a uniform, a gun, a badge—it feels very demonstrative for someone in crisis.”<sup>30</sup> No deaths or injuries have been attributed to the teams. Note also the important role of the 911 dispatcher in this system. If *Caniglia* had happened in Eugene, the dispatcher might have resisted the request for police assistance from Edward’s wife, and instead sent a CAHOOTS team.

The kink in the CAHOOTS program is a lack of dispositional options. The teams can usually avoid putting people in jail (which is where they often end up when the police are involved). But if a detox program or a homeless shelter is full, clients may have to be left on the streets, making many of them repeat players.

CAHOOTS deals primarily with issues of mental health and homelessness. “Civilian” responses are also possible for many other types of situations that police have traditionally been called on to handle, including potentially violent ones. In post–George Floyd Minneapolis, for instance, four teams of 20 to 30 members, including former felons and gang members, roam high-crime zones and try to intervene “before verbal taunts give way to fists or firearms.”<sup>31</sup> They themselves are not armed. Their effectiveness, according to one journalistic account, “relies on quick thinking, calm persuasion, and a credibility that derives, in part, from who they aren’t.”<sup>32</sup> Also in Minneapolis, armed police in schools are being replaced by “civilian safety specialists” who are not armed and are trained to handle conflict. In the wake of the nation’s many mass school shootings, the move is not uncontroversial, but is seen as a way of, among other things, easing racial tensions that uniformed officers can create.<sup>33</sup> Most dramatically, beginning in 2022, the police department in Ithaca, New York will be replaced by a “Community Solutions and Public Safety Department,” composed of a significant number

<sup>30</sup>*Id.*

<sup>31</sup>Martin Kuz, “No Badges. No Guns: Can Violence Interrupters Help Minneapolis?,” *Christian Sci. Monitor*, Apr. 13, 2021.

<sup>32</sup>*Id.*

<sup>33</sup>Chelsea Sheasley, “In a Roiled Minneapolis, Schools Are Testing a New Model for Safety,” *Christian Sci. Monitor*, Apr. 20, 2021.



of unarmed public servants, and a smaller number of armed officers who will respond to serious life-threatening situations.<sup>34</sup>

In terms of sheer numbers, perhaps the move that could have the largest impact on changing the role of the police and their relationship with the community is in the domain of traffic enforcement. Across the country, police make 32 million car stops a year.<sup>35</sup> The number could easily be much higher, given the dozens of laws that all of us violate daily, including not just speeding and failure-to-stop rules, but laws on seat belts, outdated license plates, defective equipment, use of cellphones, crossing the median or shoulder, and failing to signal. Given the huge discretion traffic laws give the police, the potential for disparate application is also huge.

An unmeasurable but undoubtedly large number of traffic stops are pretextual—meaning that the real agenda behind the stop is not enforcement of the traffic laws but something much less benign, and perhaps racist.<sup>36</sup> The Supreme Court has held that pretextual stops do not violate the Constitution, in part for the understandable reason that discerning a cop’s motives is very difficult.<sup>37</sup> Even so, many black and brown people are convinced that traffic laws are applied in a discriminatory manner, and they are backed up by research, which shows that people of color are proportionately more likely to be stopped than whites, yet proportionately less likely to have evidence of crime in their cars.<sup>38</sup> Unfortunately, a not insignificant number of traffic stops also result in serious injuries, usually to the car’s occupants, sometimes to the police, and the occupants are often black.<sup>39</sup> All of this provides still another reason for communities of

<sup>34</sup>City of Ithaca & Tompkins Cty., N.Y., Reimagining Public Safety Collaborative, <https://bit.ly/3hZPGXU> (click on City of Ithaca Resolution, Apr. 21, 2021).

<sup>35</sup>Andrew Hurst, “Police Stop More than 32 Million Americans per Year for Traffic Violations,” ValuePenguin.com, June 24, 2021.

<sup>36</sup>Charles R. Epp et al., *Pulled Over: How Police Stops Define Race and Citizenship* 72–73, 155 (2014).

<sup>37</sup>*Whren v. United States*, 517 U.S. 806 (1996).

<sup>38</sup>The latest study, of many, to so find is reported in Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 *Nat. Human Behav.* 736 (2020).

<sup>39</sup>For instance, in 2015 more than 100 people were shot by police during traffic stops, one in three of them black. Wesley Lowery, “A Disproportionate Number of Black Victims in Fatal Traffic Stops,” *Wash. Post*, Dec. 25, 2015.

color to distrust the police, and still another plank in the Defund the Police campaign.

One response to this state of affairs is to separate traffic enforcement from other policing tasks and make it a job for civilians, as Ithaca may soon do.<sup>40</sup> Another is to rely on technology to catch traffic violators, who are then sent a summons, a process that avoids potentially lethal police-citizen confrontations (but also riles powerful constituencies, as the short life of many red-light camera programs attests).<sup>41</sup> A third solution is simply to discontinue stops for non-moving violations such as defective equipment and failing to signal. When the police chief in Fayetteville, North Carolina, ordered a move in that direction in the years 2013 through 2016, “investigative stops” went to zero and stops of blacks plummeted 50 percent.<sup>42</sup>

Many of these moves toward reducing the police role are still experimental, and some could backfire. But they all have in common the idea that, in situations that do not call for the immediate use of force, alternatives to armed police might function just as well, if not better. Conversely, as Egon Bittner, the renowned sociologist, suggested a half century ago, police might be most useful when there is an emergency calling for the use of physical or armed force. As he put it, “[t]he policeman, and the policeman alone, is equipped, entitled, and required to deal with every exigency in which force may have to be used, to meet it.”<sup>43</sup> That concept of the police role, in turn, gets us back to *Caniglia* and what it has to say about exigency and force.

## II. Caretaking of Home Emergencies

*Caniglia* involved entry into the home, an entry the lower courts and the Supreme Court assumed was nonconsensual, and thus involved force.<sup>44</sup> Under the Fourth Amendment, such force must

<sup>40</sup>For a discussion of this approach, see Jordan Blair Woods, *Decriminalization, Police Authority and Traffic Stops*, 62 *UCLA L. Rev.* 672, 754–59 (2015).

<sup>41</sup>Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 *Cal. L. Rev.* 199 (2007).

<sup>42</sup>Ahmed Jallow, “What Would Happen If Cops Didn’t Make Certain Traffic Stops? This North Carolina City Offers a Case Study,” *Burlington (N.C.) Times-News*, Apr. 15, 2021, <https://bit.ly/3qB8mzZ>.

<sup>43</sup>Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *The Potential for Reform of Criminal Justice* 17, 35 (Herbert Jacob ed., 1974).

<sup>44</sup>*Caniglia*, 141 S. Ct. at 1599; 953 F.3d at 122–23.

usually be authorized by a warrant. “A basic principle of Fourth Amendment law,” the Supreme Court has declared, “is that searches and seizures inside a home without a warrant are presumptively unreasonable.”<sup>45</sup> This rule protects the home—the ultimate sanctuary of individuals from state interference—from the unchecked discretion of officers in the field. However, the Court has also long made clear that police may enter a home without a warrant when there are “exigent circumstances.”<sup>46</sup> The Court has generally described exigent circumstances to include “hot pursuit of a fleeing felon, . . . imminent destruction of evidence, . . . the need to prevent a suspect’s escape, or the risk of danger to the police or to other persons inside or outside the dwelling.”<sup>47</sup>

Only the last exigency—sometimes called the “emergency aid exception”<sup>48</sup>—involves Justice Alito’s “tasks that go beyond criminal law enforcement” and thus might justify warrantless police entry on caretaker grounds. Consistent with this language, the sole exigency of this type that Justice Thomas mentioned in *Caniglia* was “emergency assistance to an injured occupant or to protect an occupant from imminent injury.”<sup>49</sup> Recall that most, if not all, of the other examples of permissible warrantless entries cited by the concurring justices also fit comfortably with this language. So the question naturally arises whether any noncriminal goal *besides* emergency aid authorizes warrantless entry under the Fourth Amendment.

The majority opinion in *Caniglia*—which references the exigent circumstances exception and then states that “[t]he First Circuit’s ‘community caretaking’ rule . . . goes beyond anything this Court has recognized”<sup>50</sup>—suggests the answer is no. Nonetheless, the four

<sup>45</sup>*Payton v. New York*, 445 U.S. 573, 586 (1980).

<sup>46</sup>*Id.* at n.25 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 474–75 (1973)).

<sup>47</sup>*Minnesota v. Olson*, 495 U.S. 91, 100 (1990).

<sup>48</sup>See, e.g., *Root v. Gauper*, 438 F.2d 361 (8th Cir. 1971) (“police officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance”). *Gauper* was one of dozens of cases cited by the Supreme Court in *Mincey v. Arizona*, in stating that “[n]umerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.” 437 U.S. 385, 392 (1978).

<sup>49</sup>*Caniglia*, 141 S. Ct. at 1599.

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

justices who signed on to the three concurring opinions seem to be hesitant about a warrant-unless-exigency rule, either because they believe there needs to be an additional exception, beyond the emergency-aid exception, or because they are worried that “emergency” will not be defined broadly enough. The tension on these issues came out during oral argument, through a series of hypotheticals thrown out by Chief Justice Roberts and the other justices. For instance, Roberts asked Caniglia’s attorney whether the Fourth Amendment would be violated by a warrantless entry after police received a call from neighbors of an elderly woman, who express concern that the woman had agreed to come over for dinner two hours earlier but had not shown up, could not be reached, and had not been seen leaving her home.<sup>51</sup> The answer given by the attorney was that police could not enter the woman’s home without a warrant even after 24 hours had gone by, and that, even after several days, they could enter only after obtaining “a warrant for a missing person.” That reply clearly was not satisfactory to most of the justices.<sup>52</sup>

Justice Breyer (who ultimately joined Chief Justice Roberts’s concurring opinion) also asked a series of questions, beginning with this commentary:

There are so many situations where it’s obvious the police should enter. You know—a baby’s been crying for five hours, nobody seems to be around. A rat’s come out of a house at a time when rats carry serious disease and have to be stopped. A person goes into the house . . . but the people inside the house don’t know that that person has a serious communicable disease. . . . If we call those “exigent circumstances” we weaken the exigent circumstances [rule]. And if we move to a whole new thing like caretaker, I don’t know *what* we do.<sup>53</sup>

Caniglia’s attorney did not directly address all of Justice Breyer’s hypotheticals, but he did insist that there must be a “true emergency” to justify a warrantless entry.<sup>54</sup>

There are certainly definitions of the emergency-aid component of exigency that address “true emergencies” without going down the

<sup>51</sup> Transcript of Oral Argument at 8, *Caniglia v. Strom*, 141 S. Ct. 1596 (2021) (No. 20-157).

<sup>52</sup> *Id.* at 8–9.

<sup>53</sup> *Id.* at 16 (emphasis added).

<sup>54</sup> *Id.* at 18.

rabbit hole that Caniglia's attorney did in answering Chief Justice Roberts's elderly woman hypothetical. Any such formulation must address: (1) the seriousness of the harm or threat that can trigger the exception, (2) the certainty the harm has occurred or will occur, and, if it hasn't occurred yet, (3) the imminence of the harm. In light of the observations in Part I, the test should also consider (4) the need for *police* to address the situation. An exigency standard that aims at limiting warrantless caretaker entries to "true emergencies" might prohibit warrantless caretaker entries unless police have *probable cause* to believe that *serious physical injury* to a person either *has occurred* or is *likely to occur*, and that *immediate assistance from the police* is therefore needed.

This definition of exigency is relatively narrow. But it is consistent with the Court's exigency exceptions in noncaretaker situations ("*hot pursuit of a fleeing felon*," "*imminent destruction of evidence*," "*the need to prevent a suspect's escape*"). It thus strongly reinforces "*the basic Fourth Amendment principle*" that warrantless entries into the home are presumptively unreasonable. At the same time, it signals, in tune with the first part of this article, that other government actors besides the police might be more appropriate responders. Yet, despite these various restrictions, this narrower definition would probably produce the result Chief Justice Roberts seemed to want in his hypothetical, at least if the police were the only available option: if an officer was dispatched after the neighbors' 911 call, checked on their story, knocked on the woman's door, and got no answer, warrantless entry would be permitted under this formulation. Whether it would resolve Justice Breyer's quandaries would depend on the relevant facts. But to the extent his hypotheticals do not involve real exigency, a visit from the welfare or public health agency, not the police department, would be a much more appropriate response.

In short, one could, and arguably should, read *Caniglia* to mean there is no caretaker exception independent of the emergency aid exception. Yet numerous courts have resisted that position.<sup>55</sup> And, again, at least some of the justices may be hesitant about adopting it.

<sup>55</sup>See, e.g., *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009) (noting that, while the two exceptions "overlap conceptually," they are "not the same," because "[t]he community caretaking doctrine requires a court to look at the *function* performed by a police officer, while the emergency exception requires an analysis of the *circumstances* to determine whether an emergency requiring immediate action existed") (emphasis original).

One source of this reluctance could stem from a concern that the traditional warrant regime is not a good fit in situations that do not involve crimefighting. For instance, in his concurring opinion in *Caniglia*, Justice Alito stated that “circumstances are exigent only when there is not enough time to get a warrant, and warrants are not typically granted for the purpose of checking on a person’s medical condition.”<sup>56</sup> Similarly, the “missing person warrant” conjectured by *Caniglia*’s attorney would be a new phenomenon.

But the argument that warrants should not be required in such situations because they have not been in the past is, at best, unimaginative. As the Court has recognized in the investigative context, the advent of telephonic warrants means that judicial authorization can be obtained relatively expeditiously,<sup>57</sup> meaning that the process of obtaining a court order today is nowhere near as cumbersome as in the days when *Cady* was decided. And the judicial process can easily be adapted to the nonemergency caretaker scenario. Justice Alito himself speculates, after noting the atypicality of caretaker warrants, “[p]erhaps States should institute procedures for the issuance of such warrants.”<sup>58</sup> In fact, that is precisely what many states have done in addressing situations like the one in *Caniglia*. Today at least 19 states—including Rhode Island, where Edward *Caniglia* lived—have enacted “red flag laws” that provide for “Extreme Risk Protection Orders” or “Gun Violence Restraining Orders” authorizing confiscation of weapons from people with mental illness who are considered dangerous.<sup>59</sup> Some of these laws can be triggered only by a mental health professional; in others, family members, school administrators, and the police can do so. In some states, such orders can also be issued in response to other people considered possible threats, such as domestic abusers and those who abuse substances.<sup>60</sup> While these orders are normally not called “warrants,” they fulfill

<sup>56</sup>*Caniglia*, 141 S. Ct. at 1602 (Alito, J., concurring).

<sup>57</sup>*Missouri v. McNeely*, 569 U.S. 141, 154–55 (2013) (making this observation in a case in which a warrantless draw of the defendant’s blood occurred 25 minutes after his arrest).

<sup>58</sup>*Caniglia*, 141 S. Ct. at 1602 (Alito, J., concurring).

<sup>59</sup>Sean Campbell, Alex Yablon, & Jennifer Mascia, “Red Flag Laws: Where the Bills Stand in Each State,” *The Trace*, Dec. 22, 2020, <https://bit.ly/3h25fxP>.

<sup>60</sup>*Id.*

the same role by identifying the place to be searched and the item to be seized (or, in the case of missing or injured persons, the person to be searched for).

A closely related argument on behalf of a relaxed exigency exception in caretaker situations is that a more restrictive approach is not flexible enough to allow police to respond to all of the important circumstances in which they are needed. Requiring probable cause to believe a person is hurt or in danger, it might be said, is too onerous a standard given the potential harm involved. This may be Justice Kavanaugh's main concern. In his concurring opinion in *Caniglia*, Kavanaugh approvingly cited a lower court judge's law review article noting that "municipal police spend a good deal of time responding to calls about missing persons, sick neighbors, and premises left open at night" and asserting that "the responsibility of police officers" to carry out these tasks "has never been the subject of serious debate."<sup>61</sup> Justice Kavanaugh then posits two hypotheticals, one involving a woman who calls 911 saying she is contemplating suicide and who does not respond when police knock, and the second an elderly man who uncharacteristically misses church services, repeatedly fails to answer his phone through the day and night, and does not answer to police performing a wellness check. In both cases, Kavanaugh declared that "of course" police may enter the home without a warrant.<sup>62</sup>

The point of these hypotheticals may have been to demonstrate that there are many instances when the injury or potential for injury is not certain, but police should be able to act anyway. Of course, the "probable cause" standard, which can be satisfied on something less than a "preponderance of the evidence,"<sup>63</sup> takes that fact into account. But there are signs the Court believes that this standard is insufficiently malleable. In fact, in another caretaker-type case, *Brigham City v. Stuart*,<sup>64</sup> the Court said as much. *Brigham City* involved

<sup>61</sup>*Caniglia*, 141 S. Ct. at 1604 (Kavanaugh, J., concurring) (citing Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. Chi. Legal F. 261, 263 (1998)).

<sup>62</sup>*Id.* at 1604–05.

<sup>63</sup>See Am. L. Inst., *Model Code of Pre-Arrestment*, §§ 120.1(2), 210.1 (the comments to both sections make this point).

<sup>64</sup>547 U.S. 398 (2006).

police entry of a home after they had been called to the scene by a noise complaint and witnessed a struggle through a screen door. In upholding the warrantless entry, the Court eschewed probable cause language in favor of a test requiring “an objectively reasonable basis for believing” that aid is needed.<sup>65</sup> Some lower courts have been explicit about lowering the certainty required for police to act on caretaking rationale.<sup>66</sup>

Although this stance has occasioned some academic criticism, it is consistent with the idea that when the government’s objective is prevention, rather than investigating an already completed act, the requisite justification may be relaxed. This, for instance, is one explanation for the Court’s well-known decision in *Terry v. Ohio*,<sup>67</sup> authorizing a “protective frisk” on reasonable suspicion, a lower standard than probable cause. It is also one basis for the Court’s decision in *Addington v. Texas*,<sup>68</sup> which refused to require that, in civil commitment proceedings, dangerousness to self or others be proven beyond a reasonable doubt, and instead permitted involuntary hospitalization on the less demanding clear and convincing standard of proof. My proposed exigency rule, which refers to probable cause to believe that harm is *likely* to occur, rather than probable cause to believe it *will* occur, in fact recognizes this point. Perhaps, with that understanding, Justice Kavanaugh would be satisfied with the rule.<sup>69</sup>

<sup>65</sup>*Id.* at 399.

<sup>66</sup>One often-cited case is *People v. Mitchell*, which held that, for the exception to apply, (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.” 39 N.Y.2d 173, 177–78 (1976).

<sup>67</sup>392 U.S. 1 (1968).

<sup>68</sup>441 U.S. 418 (1979).

<sup>69</sup>Justice Kavanaugh elaborated on his view of *Sanders v. United States*. 956 F.3d 534 (8th Cir. 2020). There, the dispatcher received a call from the grandmother of an 11-year-old child, who had called her saying that her mother and her boyfriend were “fighting real bad”; the grandmother added that there were three children inside the house and that she couldn’t tell from the child’s report whether a weapon was involved. Upon arrival, police saw the child through a window “acting excited” and gesturing. When they knocked on the door, the mother came outside, had red marks on her face, was emotionally unstable, and told police not to tell her boyfriend that the 11-year-old had called. When the police asked to talk



A final reason for favoring a relaxed exigency requirement may simply be the assumption that the motives of the police in these types of cases are benign, and thus that the usual restrictions are not needed. Of course, if the police are really there to help, consent will often be forthcoming. And when it is not, benign motives do not necessarily eliminate the violation experienced by those whose homes are mistakenly or precipitously invaded by the police (as evidenced by the many lawsuits that are brought in such situations<sup>70</sup>). Most important, as many courts have recognized, police motives can be mixed.<sup>71</sup> For instance, some cases have held that the caretaker exception applies when police serving a court order knock on a door and receive no response, under circumstances suggesting there should be one.<sup>72</sup> That rule creates an incentive for the police to use service of process as a pretext to carry out a house search they cannot get a magistrate to authorize, simply by waiting until a person is not home and then using the lack of response to enter, out of “concern” the person may

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to the boyfriend, the mother said she would get him to come outside, but when she opened the door, the police heard a baby crying. The police entered at that point, despite the mother saying everything was okay and making clear she did not want the police to enter, and despite the boyfriend, who was just inside the door, also telling them not to enter. The Eighth Circuit upheld the entry under the caretaker exception, but the Supreme Court remanded in light of *Caniglia*'s rejection of that exception. Justice Kavanaugh wrote an opinion agreeing with the remand but stating that the Eighth Circuit's conclusion was not necessarily wrong, given the Court's decision in *Brigham City*. *Sanders v. United States*, 141 S. Ct. 1646, 1647 (2021) (Kavanaugh, J., concurring). Since the police had probable cause to believe an assault had occurred and that children inside the house were fearful, the emergency aid component of exigency, as defined here, was present. Consider, however, whether a CAHOOTS-type intervention would have been preferable.

<sup>70</sup>See, e.g., *Smith v. Kan. City, Mo. Police Dep't*, 586 F.3d 576, 580–81 (8th Cir. 2009) (officer not entitled to qualified immunity when he entered a third party's home looking for a domestic violence suspect without a warrant); *Briones v. City of San Bernardino*, 2012 WL 13124164 (C.D. Cal. 2012) (officer denied summary judgment on claim that entering a locked gate, opening closed door and shooting dog was justified under caretaker exception because of belief that a “hung up” 911 call was from plaintiff's home).

<sup>71</sup>See, e.g., Mitchell, *supra* note 66.

<sup>72</sup>*United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006); *Phillips v. Peddle*, 7 Fed. Appx. 175, 179 (4th Cir. 2001).

be injured.<sup>73</sup> Many other caretaking pretexts, real or imagined, are available—from hearing loud noises to Justice Breyer’s rats.<sup>74</sup> Most disturbingly, the government has frequently argued that warrantless entry should be permitted on a caretaker rationale even when it is clear the real goal of the police was obtaining evidence of crime; unfortunately, occasionally courts have agreed.<sup>75</sup>

There are at least four responses to the pretext problem. The first is to allow individuals to argue that the police used the community caretaker exception as a pretext. But motive is very difficult to prove, and, in any event, the Court held in the aforementioned *Brigham City* case (where there was some dispute as to the real agenda of the cops who entered), that “as long as the circumstances, viewed objectively, justify the action,” police motives are irrelevant.<sup>76</sup> A second solution is to require exclusion of any evidence found during a community caretaker entry, regardless of motive.<sup>77</sup> While this rule may deter some pretextual actions, in many such cases the police have nothing to lose by going ahead since, by definition, they know they cannot make their case through a legally authorized investigation. Further, if they do find evidence of a crime, it can always be confiscated even if it isn’t admissible, and it could also facilitate subsequent legitimate investigation. In any event, the Supreme Court, already antagonistic

<sup>73</sup>Cf. *Vale v. Louisiana*, 399 U.S. 30 (1970) (excluding evidence found inside Vale’s home after police, with warrants to detain him for a court appearance, delayed execution of the warrants until Vale came outside the house and engaged in suspicious behavior that gave them grounds for conducting a search of his home incident to arrest).

<sup>74</sup>Cf. *United States v. Rohrig*, 98 F.3d 1506, 1523 (6th Cir. 1996) (officers responding to loud noise report entered back door and went into basement after getting no response at front door).

<sup>75</sup>*United States v. Pichany*, 687 F.2d 204, 207 (7th Cir. 1983) (finding exception did not apply when officers were searching for stolen property); *United States v. Erickson*, 991 F.2d 529, 530–31 (9th Cir. 1993) (finding exception did not apply when officers were investigating a burglary); *United States v. Bute*, 43 F.3d 531, 540 (10th Cir. 1994) (same); *State v. Pinkard*, 785 N.W.2d, 594–95 (Wis. 2010) (finding exception did apply when police entered to investigate an anonymous tip that cocaine was inside and found door open).

<sup>76</sup>547 U.S. at 404.

<sup>77</sup>Mark Goreczny, *Taking Care While Doing Right by the Fourth Amendment: A Pragmatic Approach to the Community Caretaker Exception*, 14 *Cardozo Pub. L. Pol’y & Ethics J.* 229, 251 (2015).

to the exclusionary rule,<sup>78</sup> is not likely to extend it unless its application is likely to bring significant deterrence.

The solution to the pretext problem that is closest to the majority's holding in *Caniglia* is to require police to obtain a court order in the absence of real exigency, just as they must do when they want to enter a home for investigative purposes. While police control the storyline whether they appear before a magistrate *ex post* (in a suppression hearing) or *ex ante* (when seeking a warrant), at least in the latter situation they do not have the advantage of hindsight bias when they try to explain their community caretaking reason for entering the home.<sup>79</sup> Pretextual searches of homes are harder to pull off if the pretext has to be justified before entry occurs.

The fourth solution, of course, is to avoid police involvement entirely, for all the reasons explored in Part I. If the bulk of caretaker situations are handled by civilians, there will be fewer entries (because pretexts will not be manufactured as a ruse to obtain criminal evidence) and fewer pretextual entries (because civilians are not interested in criminal evidence). This solution also suggests how the courts might approach the many searches and seizures that the courts have said involve "special needs."

### III. Caretaking Outside the Home

In *Cady v. Dombrowski*,<sup>80</sup> the police, looking in a car for the revolver of another officer after he had crashed the car, came upon evidence eventually connected with a murder. Dombrowski, the officer, argued that, since at the time of the search the car had been impounded and he had been in jail on drunk driving charges, there was no exigency and the officers should have obtained a warrant. The police claimed that their only goal in searching the car was to find Dombrowski's gun, which was supposed to be in an officer's

<sup>78</sup>Herring v. United States, 555 U.S. 135, 144 (2009) (in expanding the good faith exception to the rule, stating that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system").

<sup>79</sup>This was one of William Stuntz's arguments in favor of a warrant requirement. See William Stuntz, The Role of Warrants in an Exclusionary Rule System, 77 Va. L. Rev. 881, 910-18 (1991).

<sup>80</sup>413 U.S. 433 (1973).

possession at all times and had not been found on his person. They did not see the revolver in the car. But they did find, in the trunk of the car, clothes and various other items covered with blood. The Supreme Court upheld the search, despite the lack of a warrant.

In so doing, *Cady* used the language that became the focus of attention in *Caniglia*. The *Cady* Court noted that police “frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to a violation of a criminal statute.”<sup>81</sup> In *Caniglia* Justice Thomas emphasized that this language in *Cady* was closely linked to searches of cars, with *Cady* stressing throughout that “for purposes of the Fourth Amendment there is a constitutional difference between houses and cars.”<sup>82</sup> On its face, then, *Caniglia*, which involved the search of a house, had nothing to say about the caretaker exception and car searches.

It does not necessarily follow, however, that *Caniglia*’s concern about a “freestanding” caretaker exception disappears when the caretaker search is of a car rather than a home. As demonstrated in Part I, pretextual searches of cars are exceedingly common, probably much more so than pretextual searches of houses. Of course, in the typical car search case, the Court has already made clear that, because of their mobility and the lesser expectation of privacy associated with them, automobiles can usually be searched without a warrant.<sup>83</sup> But a warrant might still be required when a car is within the police’s control and there is clearly time to get a warrant; the question then arises whether a caretaker exception should apply.

One could be excused for concluding that *Cady* held precisely that. At one point, the Court stated that the search of the car was needed “to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands” because the car was in a lot over which no guard had been posted.<sup>84</sup> In support of a caretaker

<sup>81</sup>*Id.* at 441.

<sup>82</sup>*Id.* at 439.

<sup>83</sup>See *Robbins v. California*, 453 U.S. 420, 424–25 (1981).

<sup>84</sup>*Cady*, 413 U.S. at 443.

exception, one could point to this language and argue that, so long as police have some reason to believe the contents of a car pose a danger to the public, warrantless entry is permissible, even if no immediate exigency exists.

However, read more closely and with the aid of hindsight, *Cady* is not about a freestanding caretaker exception at all. Rather, it was based on a nascent version of what would come to be called the inventory exception to the warrant requirement, which is meant to allow police departments to conduct warrantless searches of impounded cars for dangerous items and valuables that might otherwise be stolen, and to protect the police against false claims of theft. As developed in cases like *Opperman v. South Dakota*,<sup>85</sup> decided three years after *Cady*, warrantless searches of cars are authorized if (1) the car has been lawfully impounded, (2) the search is conducted pursuant to a written policy, and (3) the search is not pretextual.<sup>86</sup> *Cady* was not as specific as one might desire on all three of these points, but it did point out both that Dombrowski's car had been properly impounded after the accident and that the police followed "standard procedure" in looking for weapons in the car.<sup>87</sup> Further, relevant to the pretext point, the Court emphasized that "at the time the search was conducted Officer Weiss was ignorant of the fact that a murder, or any other crime, had been committed."<sup>88</sup>

All of this is important not only because it constrains use of caretaker language in cases involving cars, but also because it could have significant implications for police involvement in a large set of search-and-seizure scenarios that have come to be called "special needs" cases. The first Supreme Court opinion using this phrase, *New Jersey v. T.L.O.*,<sup>89</sup> involved the search of a school child's purse for cigarettes, in the absence of a warrant and on only minimal suspicion. The Court upheld the search because, in the words of Justice Harry Blackmun's concurring opinion, school searches involve "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause

<sup>85</sup>428 U.S. 364 (1976).

<sup>86</sup>*Id.* at 374–76 (citing *Cady* in support).

<sup>87</sup>*Cady*, 413 U.S. at 443.

<sup>88</sup>*Id.* at 447.

<sup>89</sup>469 U.S. 325 (1984).

requirements impracticable.”<sup>90</sup> This language later found its way into an entirely different type of case—involving health and safety inspection regimes; license, sobriety, and immigration checkpoints; school and work drug-testing programs; and other “programmatically” searches and seizures—where the Court has permitted searches and seizures of *groups* conducted in the *absence* of suspicion with respect to any particular person or entity, so long as there is an “adequate substitute” for a warrant.<sup>91</sup>

A key reason the Court has been willing to relax traditional Fourth Amendment strictures in these cases is that, at least in the Court’s eyes, the searches and seizures they involve are not focused on “a general interest in crime control” but rather on enforcement of disciplinary infractions and regulatory violations.<sup>92</sup> Concomitantly, these searches and seizures typically are carried out not by police but by “civilians”—public school teachers, public employers, and bureaucrats working for agencies like the Occupational Safety and Health Administration. Indeed, one reason the Court has been willing to relax the warrant and probable-cause requirements in these cases is that it does not want to burden civilian officials with a warrant process and worries about the “niceties” of probable cause.<sup>93</sup>

The Court’s special-needs jurisprudence has been roundly criticized for blinking at the fact that criminal prosecution often lurks in the background of these cases, and for too readily giving up on the probable-cause requirement. But the point here is more circumscribed. Whatever may be the right interpretation of the Fourth Amendment when civilian officials are carrying out these searches and seizures, when the *police* are conducting them, the Fourth Amendment should apply with full force. When civilians are the government’s emissaries, concerns about misuse of force and pretextual actions may be minimal. But when the

<sup>90</sup>*Id.* at 351 (Blackmun, J., concurring).

<sup>91</sup>Eve Brensike Primus, *Disentangling Administrative Searches*, 111 *Colum. L. Rev.* 254, 275–76 (2011) (pointing out these two variants).

<sup>92</sup>See, e.g., *Los Angeles v. Patel*, 576 U.S. 409, 420 (2015) (“Search regimes where no warrant is ever required may be reasonable where ‘special needs . . . make the warrant and probable-cause requirement impracticable,’ and where the ‘primary purpose’ of the searches is ‘[d]istinguishing from the general interest in crime control.’”) (citing inspection, parole, and checkpoint cases).

<sup>93</sup>*T.L.O.*, 469 U.S. at 340–43 (involving searches by school teachers); *O’Connor v. Ortega*, 480 U.S. 709, 724 (1987) (involving searches by employers).

police are the government's agents, those concerns are at their height, and traditional Fourth Amendment constraints should apply.

With respect to the first special-needs variant—focused on a particular individual—those constraints are clear. The usual warrant, probable-cause, and exigency rules should govern. That would mean, for instance, that if a “school resource officer” is an off-duty police officer or a cop in disguise, armed with a gun and trained in investigative techniques, even a search aimed at enforcing a school disciplinary rule would require a warrant in the absence of exigency.

If, instead, a special-needs search or seizure is programmatic—as with checkpoints, inspections, and drug testing—the group nature of the police action means an individualized suspicion requirement cannot work. But a stricter version of the inventory model broached in *Cady* (also alluded to in a smattering of other Supreme Court cases<sup>94</sup>) could. As I have argued elsewhere,<sup>95</sup> the most effective way of preventing arbitrary police action in programmatic search-and-seizure situations is to require statutory authorization of the program, even-handed implementation across the entire target group, and a ban on pretextual action. The latter prohibition could be enforced by exclusion of any evidence found that is not within the statutory remit (a sanction that is likely to have greater deterrent impact here than in individual home entry cases because it applies program-wide). Or, as the Court itself recently required in some inspection settings, the pretext concern could be addressed by allowing targets to argue to a neutral decisionmaker, pre-search, that the inspection is not consistent with the statutory mandate or an even-handed application of it.<sup>96</sup>

<sup>94</sup>The best case in this regard is *Donovan v. Dewey*, 452 U.S. 594 (1981), which involved inspections of coal mines. The Court upheld the inspection scheme because that statute (and accompanying regulations) “requires inspection of *all* mines and specifically defines the frequency of inspection,” and establishes “the standards with which a mine operator is required to comply . . . rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers. . . .” *Id.* at 603–04 (emphasis original). However, the Court has been less than punctilious in following the rules developed in cases like *Cady*, *Opperman*, and *Dewey*. See Christopher Slobogin, *Advanced Introduction to U.S. Criminal Procedure* § 4.8 (2020).

<sup>95</sup>Christopher Slobogin, *Policing as Administration*, 165 U. Pa. L. Rev. 91 (2016).

<sup>96</sup>Patel, 576 U.S. at 420. See also *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 539–40 (1967) (requiring an “area warrant” before nonconsensual entry by inspectors).

Thus, for instance, field officers would not be permitted to set up “license checkpoints” on a whim, in whatever neighborhood they want, with drug-sniffing dogs waiting in the wings.<sup>97</sup> Instead, the legislature would have to authorize such checkpoints and set out general guidelines for their use. Further, the police agencies implementing the statute would have to create a neutral plan (for instance, one calling for checkpoints at every major thoroughfare—including those in predominantly white neighborhoods—a certain number of times a year), make sure it is neutrally applied (by requiring, for instance, that every driver is stopped), and avoid engaging in any action that goes beyond the scope of a license check (including have dogs standing by). While there are good reasons for requiring this type of regulatory regime in every programmatic special-needs situation, it is crucial when the police, or facsimiles thereof, are the instigators, as is the case not only with license checkpoints, but sobriety and immigration checkpoints as well. The same holds true for inspections when police are involved. For instance, in *City of Los Angeles v. Patel*,<sup>98</sup> the police, acting under authority of a city ordinance, arbitrarily checked hotel registries for evidence of drug dealing or prostitution. In such cases, objectors should be entitled to pre-compliance review, regardless of the rules that might apply when the inspectors are civilians. Otherwise, as the Supreme Court noted in *Patel*, the statutory authorization “creates an intolerable risk that searches . . . will exceed statutory limits, or be used as a pretext to harass. . . .”<sup>99</sup>

Finally, to repeat the central point of this article, if the special needs situation does not require armed officers trained to detect and deter crime, police should not be involved at all. In *Ferguson v. City of Charleston*,<sup>100</sup> decided in 2001, the Supreme Court came close to saying as much. There the Court invalidated a police-initiated drug testing program for pregnant women, despite claims that the program was designed primarily to obtain treatment for the women. Unfortunately, however, earlier Court decisions involving programmatic searches and seizures had no difficulty allowing police to conduct

<sup>97</sup>A common practice, apparently. See, e.g., *Lujan v. State*, 331 S.W.3d 1668 (Tex. Ct. Crim. App. 2011) (upholding such a checkpoint); *McCray v. State*, 601 S.E.2d 452 (Ga. 2004) (same).

<sup>98</sup>576 U.S. 409.

<sup>99</sup>*Id.* at 421.

<sup>100</sup>532 U.S. 67 (2001).



them even in the absence of serious restrictions, at least if no other agency was available to take up the task.<sup>101</sup>

Perhaps *Caniglia*, along with *Patel* and *Ferguson*, signal a change in attitude. While *Caniglia* does not purport to pronounce anything about special-needs doctrine, it does bolster *Ferguson's* rejection of the notion that Fourth Amendment protections can be diluted simply on the ground that the police are engaged in something other than investigation of crime. In describing the First Circuit's holding in *Caniglia*, Justice Thomas was clearly displeased with that court's justification for its broad caretaker exception and its application to Edward Caniglia's case:

[T]he First Circuit saw no need to consider whether anyone had consented to respondents' actions; whether these actions were justified by "exigent circumstances"; or whether any state law permitted this kind of mental-health intervention. All that mattered was that respondents' efforts to protect petitioner and those around him were "distinct from 'the normal work of criminal investigation,'" fell "within the rule of reason," and generally tracked what the court viewed to be "sound police procedure."<sup>102</sup>

Relying on *Caniglia's* disdain for the First Circuit's formulation, the argument is strong that, when a nonexigent search or seizure is carried out by police, the assertion that it is not aimed at "ordinary crime control" should be irrelevant to Fourth Amendment analysis, regardless of whether it occurs inside or outside the home.

<sup>101</sup>See in particular, *New York v. Burger*, involving searches of junkyards for stolen car parts under a state statute that allowed police to conduct warrantless searches during business hours, any time and as many times as they wanted to do so. There the Court stated:

[W]e fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted to conduct the . . . inspection. . . . [S]tate police officers . . . have numerous duties in addition to those associated with traditional police work. . . . As a practical matter, many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. 482 U.S. 691, 717 (1987).

<sup>102</sup>*Caniglia*, 141 S. Ct. at 1599.

## Conclusion

Among government officials, police have a near monopoly on the use of physical force and the greatest incentive to hide their motives. An expansive interpretation of *Caniglia v. Strom*'s rejection of a free-standing caretaker exception would help curb both police misuse of force and police use of pretexts to pursue illegitimate agendas, because it would limit police-initiated searches and seizures purporting to be for benign purposes. It might also provide doctrinal support for the fledgling movement to de-police those government services that, whatever might be the tradition, do not require the intervention of armed individuals trained to fight crime, at the same time it would put guardrails around the special-needs doctrine. It may be that, outside of real emergencies, the last thing we want police to do is function as "caretakers" of the community.