

KENTUCKY V. KING: A NEW APPROACH TO CONSENT-BASED POLICE ENCOUNTERS?

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EDITOR'S NOTE

The Editorial Board is particularly pleased to publish this piece in this volume of the *Maine Law Review*. On the heels of the Supreme Court's grant of certiorari in *Kentucky v. King*, the members of the Board, together with their classmates, devoted many days (and nights) to scrutinizing jurisprudence on exigent circumstances. The academic endeavor—part of the first-year legal writing course at the University of Maine School of Law—involved taking on the role of Petitioner or Respondent, crafting an appellate brief, and taking part in mock oral arguments before panels of law school professors and members of Maine's bench and bar. Ms. Drake's article brings us full circle.

KENTUCKY V. KING: A NEW APPROACH TO CONSENT-BASED POLICE ENCOUNTERS?

Jamesa J. Drake*

INTRODUCTION

The exigent circumstances exception to the warrant requirement permits the police to enter a private residence, without prior judicial approval, whenever the police have an objectively reasonable basis for believing that the destruction of evidence is imminent or underway.¹ The United States Supreme Court's most recent pronouncement in the exigent circumstances realm—*Kentucky v. King*²—is not a case about exigent circumstances per se. Instead, *King* concerns the “police-created exigency” doctrine, a concept that the vast majority of federal and state courts already recognize.³ This doctrine adds a crucial caveat to the exigent circumstances rule, but it is not new. It provides that the police “may not rely on the need to prevent destruction of evidence when that exigency was ‘created’ or ‘manufactured’” by the police themselves.⁴

Additionally, *King* attempts to settle an arguable split among the lower federal and state courts about the type of conduct that “creates” exigent circumstances. *King* holds that the exigent circumstances exception applies when “the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.”⁵ In other words,

the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where . . . the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.⁶

The first part of the rule announced in *King* is tautological. Plainly, the police may not engage in conduct that violates the Fourth Amendment and then lawfully enter a private residence. The “fruit of the poisonous tree” doctrine recognizes as much, and has for nearly fifty years.⁷ The second part of the *King* police-created exigency rule, however, is new and much more interesting. Unfortunately, the precise contours of offensive, “threatening” police conduct are unclear.

King raises additional questions. Are there constitutional limitations to the investigative police tactic known as a knock-and-talk? And, exactly how should

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1. *Cf. Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (discussing the emergency aid exception species of exigent circumstances); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion).

2. 131 S. Ct. 1849 (2011).

3. *Id.* at 1857.

4. *Id.*

5. *Id.* at 1862.

6. *Id.* at 1858.

7. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

people “stand on their constitutional rights” without simultaneously supplying either the probable cause or exigent circumstances or both necessary to support the warrantless entry of their home?⁸ These difficult questions are likely to surface in a substantial number of Fourth Amendment cases and this essay attempts to answer them.

I. THE FACTS AND PROCEDURAL HISTORY

At around 9:50 p.m. on October 13, 2005, the Lexington, Kentucky police kicked in the door to King’s apartment. They did not have a warrant.

The police observed someone selling cocaine to an informant outside of King’s apartment complex.⁹ An undercover police officer radioed to three uniformed officers, who were waiting nearby, that the cocaine dealer entered the back right apartment of the apartment complex.¹⁰ The officers heard only part of the radio broadcast. They did not hear (and did not independently know) which apartment the cocaine dealer entered.¹¹ As the officers proceeded down the breezeway of the apartment complex, they heard a door slam.¹² The officers did not know which apartment door they heard shut, and they did not know which apartment the cocaine dealer entered.¹³

Midway down the breezeway, the officers detected the odor of burnt marijuana, which they believed emanated from the back left apartment.¹⁴ Officer Cobb, who was the only witness to testify at the hearing on King’s motion to suppress, gave the following account of what happened next:

As we got into the hallway, about midway, there was a very strong odor of burnt marijuana inside the breezeway. As we got closer to back left apartment, we could tell that it seemed to be the source of that, almost as if the door had been slammed right there. Detective Maynard made contact with the door, announced our presence, banged on the door as loud as we could, announced, “Police, police, police.”¹⁵

In response to further questioning by the prosecutor about exactly how the officers’ announced their presence at the door, Officer Cobb testified: “Detective Maynard banged on the door, said, ‘This is the police.’”¹⁶

Officer Cobb explained what happened next:

As soon as we started banging on the door, Detective Maynard turned to Sergeant Simmons to let him know that we could hear people inside moving. It sounded as—things were being moved inside the apartment.

8. *King*, 131 S. Ct. at 1862.

9. Petition Appendix at 2a, 35a, *Kentucky v. King*, 131 S. Ct. 1849 (2011) (No. 09-1272), [hereinafter Petition Appendix].

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 3a, 35a.

14. *Id.* at 2a, 35a.

15. Joint Appendix at 22, *Kentucky v. King*, 131 S. Ct. 11849 (No. 09-1272) [hereinafter Joint Appendix].

16. *Id.* at 23.

...

We knew that there was possibly something that was going to be destroyed inside the apartment.

At that point, Detective Maynard, with the— Sergeant Simmons— and we explained to them we were going to make entry inside the apartment. Detective Maynard attempted to get the— to go— to enter through the door, wasn't able to, and that's when I entered to through the door.

...

I kicked the door open.¹⁷

King and two other people were inside, one of whom was sitting on the couch still smoking marijuana.¹⁸ The police observed marijuana on the coffee table in the middle of the room and cocaine sitting out on the kitchen counter.¹⁹ After the occupants' arrest, a subsequent search of the apartment revealed additional drugs, drug paraphernalia, and \$2,500 in cash.²⁰ The police later entered the back right apartment and arrested the cocaine dealer.²¹

At the suppression hearing, the parties and the trial court asked Cobb to explain what exactly he heard that lead him to believe that the destruction of evidence was imminent or underway. Initially, Cobb testified: "It sounded as— things were being moved inside the apartment."²²

In response to further questioning by the trial court, Officer Cobb clarified that he "couldn't discern exactly" what it was that he heard after all:

Q: When you were at the door of Apartment 78 and you said that you heard things being moved or heard movement inside the apartment, at first I thought you were talking about somebody moving furniture, but you're talking about people moving around?

A: Correct. Now, whether— Your Honor, whether they were moving furniture or things were being moved, we were just—

Q: I just— I just didn't know whether you were talking about the screeching of couches being moved on the floor or whether it was just— just foot traffic. That's all I was asking.

A: I couldn't discern exactly.²³

Cobb also candidly admitted that he believed that the occupants of King's apartment were only "possibly" destroying evidence. Cobb testified:

Q: What did you-all do once you heard these things being moved around in the apartment?

A: We know that there was possibly something that was going to be destroyed

17. *Id.* at 24.

18. *Id.* at 25-26; Petition Appendix, *supra* note 9, at 4a.

19. Joint Appendix, *supra* note 15, at 27, 49-50; Petition Appendix, *supra* note 9, at 4a-5a.

20. Petition Appendix, *supra* note 9, at 5a.

21. *Id.* at 6a, 35a.

22. Joint Appendix, *supra* note 15, at 24.

23. *Id.* at 58.

inside the apartment.²⁴

Later, Cobb reiterated:

Q: What was your basis for believing you could enter the apartment that these defendants were in?

A: There was a crime occurring inside and also possible destruction of evidence.

Q: And isn't it true that you actually wrote in your report that "We could hear persons inside the apartment and noises possibly consistent"— is that right—"possibly consistent with the destruction of potential evidence"?

A: Yes, I wrote "possibly consistent with the destruction of potential evidence."²⁵

Cobb further acknowledged that as a matter of course, "people move in apartments" and that "[m]ost people answer the door when the police knock at the door also."²⁶

The trial court made extensive, written findings of fact. Regarding the officers' conduct immediately prior to entering the apartment, the court found that:

Det. Maynard, who was accompanying Officer Cobb in the breezeway attempting to locate and arrest the suspect in question, banged on the door of the apartment on the back left of the breezeway identifying themselves as police officers and *demanding that the door be opened by the persons inside.*²⁷

Regarding the noises that Cobb heard, the court found:

After Det. Maynard announced the presence of the police officers at the door of the back left apartment, Apt 78, Officer Cobb and the others heard "things being moved in that apartment (78)". Officer Cobb later described the noise as people moving around as opposed to furniture being moved.²⁸

Regarding the officers' reasons for entering King's apartment, the court found:

When asked directly to articulate the reasons which he thought justified the forced entry into Apt 78 (apartment on the back left of hall) by knocking down the door, Officer Cobb testified that he and the other officers thought that there was a crime occurring inside Apt 78 based on the strong odor of burnt marijuana being detected from under the door and, from the noise heard through the door, that its occupants were engaging in [the] destruction of evidence.²⁹

The Kentucky Supreme Court held in King's favor, believing that it was reasonably foreseeable that the occupants would destroy evidence when the police knocked on the door and announced their presence.³⁰ The U.S. Supreme Court granted certiorari and reversed, however, finding "no evidence that the officers

24. *Id.* at 24.

25. *Id.* at 40-41.

26. *Id.* at 41.

27. Petition Appendix, *supra* note 9, at 3a-4a (underline in original; emphasis added).

28. *Id.* (emphasis in original).

29. *Id.* at 6a.

30. *King v. Commonwealth*, 302 S.W.3d 649, 656 (Ky. 2010), *rev'd and remanded sub nom. Kentucky v. King*, 131 S. Ct. 1849 (2011).

either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment.”³¹ Having decided that the police-created exigency doctrine did not preclude entry into the apartment, the Court remanded the case to the Kentucky Supreme Court to determine whether the circumstances confronting the officers were truly exigent.³² On remand, the Kentucky Supreme Court held that exigent circumstances did not exist.³³ The court reasoned that “the sounds as described at the suppression hearing were indistinguishable from ordinary household sounds, and were consistent with the natural and reasonable result of a knock on the door” and that the prosecution “must show something more than a *possibility* that evidence is being destroyed to defeat the presumption of an unreasonable search and seizure.”³⁴ Ultimately, the defendant in *King* prevailed. The police did not lawfully enter his apartment.

II. *KING*'S PRACTICAL APPLICATION IS FAR FROM CERTAIN

Law enforcement, lawyers, and lower courts can all be forgiven for struggling to understand the practical implications of *King*. As a general matter, the Supreme Court's Fourth Amendment jurisprudence consists of a “byzantine patchwork of protections” that is “a mess, an embarrassment, and a mass of contradictions.”³⁵

Complicating things further, Fourth Amendment cases are notoriously fact-specific.³⁶ They often present the same general fact outline,³⁷ but the devil is in the details. Small factual deviations among cases often explain different legal outcomes. *King* is a particularly challenging opinion to extrapolate from and properly apply because the officers' conduct strays significantly from even the generic narrative; the facts in *King* “read[] a bit like a Cheech and Chong script.”³⁸ The Court's failure to acknowledge that the officers' conduct in *King* was

31. *King*, 131 S. Ct. at 1863.

32. *Id.* at 1862-64.

33. *King v. Commonwealth*, No. 2008-SC-000274-DG, 2012 WL 1450081 at *3 (Ky. April 26, 2012), *petition for cert. filed sub nom.* *Kentucky v. King*, No. 12-140 (July 25, 2012).

34. *Id.* at *3 (emphasis added).

35. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment Cases*, 125 HARV. L. REV. 476, 479 (2011) (internal citations omitted); *see also* *California v. Acevedo*, 500 U.S. 565, 582 (1982) (Scalia, J., concurring) (“the ‘warrant requirement’ [has] become so riddled with exceptions that it [is] basically unrecognizable”); *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring) (“The course of true law pertaining to searches and seizures . . . has not—to put it mildly—run smooth.”).

36. *Cf.* *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (“[T]he ‘touchstone of the Fourth Amendment is reasonableness.’ . . . [W]e have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.” (internal citations omitted)).

37. For example: Police officer observes traffic violation; officer initiates traffic stop; driver stops; officer requests driver's license, registration, and proof of insurance; driver complies; officer notices the odor of narcotics, or alcohol on the driver's breath, or believes that the driver is behaving suspiciously; officer asks the driver to exit the vehicle; officer requests consent to search the vehicle, or officer requests that the driver submit to field sobriety tests; driver complies; officer's vehicle search uncovers contraband, or officer concludes that the driver is intoxicated, etc.

38. Dahlia Lithwick, *Crime and Blandishments: What happens when Supreme Court justices try to think like criminal suspects*, SLATE.COM (Jan. 12, 2011), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2011/01/crime_and_blandishments.html.

atypical,³⁹ and its concomitant failure to acknowledge that the “criminals” in *King* responded to the officers’ conduct in the same manner as any “innocent” person would, raises a variety of different—and newly vexing—questions about the fulcrum point between lawful and unlawful police activity.

A. Knock-and-Talk

At nearly ten o’clock at night, three uniformed police officers “banged” on the door to King’s apartment “as loud as [they] could” and “announced” either “This is the police” or “Police, police, police.”⁴⁰ By their own admission, the police were not seeking a consensual encounter with the occupants of King’s apartment. They were in pursuit of a cocaine dealer, who they believed was inside. The *King* Court, however, saw things differently.

The *King* Court repeatedly analogized the officers’ conduct to an investigative tactic known as a “knock-and-talk” and, in so doing, greatly expanded the legal bounds of a police practice that many had argued needs more, not less, restriction.⁴¹ A knock-and-talk

involves officers knocking on the door of a house, identifying themselves as officers, asking to talk to the occupant about a criminal complaint, and eventually requesting permission to search the house. If successful, it allows police officers who lack probable cause to gain access to a house and conduct a search.⁴²

This technique is highly effective at procuring warrantless searches and, therefore, routinely utilized.⁴³ It is also highly vulnerable to abuse or misuse; the fact that the police do not need probable cause in order to conduct a knock-and-talk gives them free reign to approach any house they wish for any reason or for no particular

39. For example, controlled drug buys between an undercover police officer and a drug trafficker are a fairly common occurrence, and it is not unusual for the trafficker to retreat to a different location before his eventual apprehension. See Alex Harocopos & Mike Hough, *Drug Dealing in Open-Air Markets*, CENTER FOR PROBLEM-ORIENTED POLICING 24 (Aug. 2011), <http://www.popcenter.org/problems/pdfs/DrugMarkets.pdf>. In *King*, however, the lead detective in charge of the undercover sting operation knew exactly where the cocaine dealer was at all times, Joint Appendix, *supra* note 15, at 19-21, but the officers responsible for apprehending the dealer pursued the cocaine dealer prematurely, lost radio contact with the lead detective, and had no idea where the dealer actually went, *id.* at 42-45. The officers were supposed to be pursuing a cocaine dealer, but they became distracted by the odor of burnt marijuana emanating from King’s apartment and somehow concluded that marijuana use was indicative of cocaine trafficking. *Id.* at 46-47. The police entered King’s apartment to prevent the destruction of “narcotics evidence” after hearing either “screeching of couches being moved” or “foot traffic,” although they curiously “couldn’t discern exactly” between the two. *Id.* at 58.

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

41. See, e.g., Craig M. Bradley, “Knock and Talk” and the Fourth Amendment, 84 IND. L. J. 1099 (2009).

42. *State v. Reinier*, 628 N.W.2d 460, 466 (Iowa 2001).

43. Andrew Eppich, Comment, *Wolf at the Door: Issues of Place and Race in the Use of the Knock and Talk Policing Technique*, 32 B.C. J.L. & SOC. JUST. 119, 121-22 n.29 (2012) (quoting William Dean Hinton, *Knock and Talk*, ORLANDO WKLY. (Jan. 9, 2003), <http://www2.orlandoweekly.com/features/story.asp?id=2940>) (reporting that the Central Florida Orange County Sheriff’s Office “alone performs an estimated 300 such ‘knock and talk’ encounters each month,” and that there is an entire squad within the sheriff’s office dedicated to carrying out knock and talks).

reason at all. In this context, there are no limitations on the number of fishing expeditions the police may undertake. And any “unusual” sights, sounds, or smells that the police may detect can form the basis for reasonable suspicion or probable cause to investigate further.

Courts have approved of the procedure, largely on theory that

[a]bsent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person’s right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man’s ‘castle’ with the honest intent of asking questions of the occupant thereof whether the questioner be a pollster, a salesman, or an officer of the law.⁴⁴

The Supreme Court echoed that sentiment in *King*: “[O]fficers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs. If consent is freely given it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent.”⁴⁵

The difficulty with this logic, of course, is that a pollster or a salesman is eager to quickly determine whether an occupant is at home and willing to come to the door, and then to move on to the next house. The police have an entirely different agenda.

The base assumption in knock-and-talk cases is that “[w]hen law enforcement officers who are not armed with a warrant knock on a door they do no more than any private citizen might do.”⁴⁶ When the police deviate from this, by doing something different than any other citizen would, they risk running afoul of the Fourth Amendment. For example, coercive conduct during the course of a knock-and-talk compromises the voluntariness of the homeowner’s consent, making any resulting consent-based entry or search unlawful.⁴⁷

A knock-and-talk is quite different from the “knock-and-announce” requirement, although both are relevant to the facts in *King*. The knock-and-announce rule is “a command of the Fourth Amendment”; it requires that, in most situations, “law enforcement officers must announce their presence and provide residents an opportunity to open the door” before executing a search warrant.⁴⁸ The knock-and-announce rule precedes an officer’s forcible—and preordained—entry into the home.⁴⁹ Accordingly, both the “knock” and the “announcement” are aggressive, authoritative, and intended to intimidate.⁵⁰ The idea is not to gain the occupant’s consent to search; rather, the goal is to give the occupants “the

44. *Id.* at 129 (quoting *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964)).

45. *King*, 131 S. Ct. at 1858 (internal citation omitted).

46. *Id.* at 1862.

47. *See* *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (“[T]he Fourth and Fourteenth Amendments require that a consent not be coerced . . .”).

48. *Hudson v. Michigan*, 547 U.S. 586, 589 (2006); *see also* *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997) (discussing exceptions to the “knock-and-announce” rule).

49. *Hudson*, 547 U.S. at 594.

50. *See, e.g.,* *United States v. Banks*, 540 U.S. 31, 33 (2003) (officers complying with the “knock and announce” requirement “rapped hard enough on the door to be heard by officers at the back door” before opening “the front door with a battering ram”).

opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.”⁵¹ The Respondent in *King* argued that the officers’ conduct was more akin to a “knock and announce” than a “knock and talk.”⁵² But the Court rejected that argument.⁵³

The Court’s suggestion that the officers in *King* were simply engaged in a “knock and talk” and its conclusion that it was presented with “no evidence” that the officers “threatened” to violate the Fourth Amendment before entering the apartment, are all difficult to square with the Court’s prior case law and with the “totality of the circumstances” approach that it adheres to in Fourth Amendment cases. In particular, harmonizing *King* with *Bumper v. North Carolina*⁵⁴ and *Schneckloth v. Bustamonte*⁵⁵ is challenging.

I. *Bumper v. North Carolina and Police Conduct that
“Threatens” to Violate the Fourth Amendment*

In *Bumper*, four police officers went to the home of “Mrs. Hattie Leath, a 66-year old Negro widow,” and one of them announced, “I have a search warrant to search your house.”⁵⁶ Mrs. Leath complied.⁵⁷ Inside, the police found evidence that was later introduced in the trial of Mrs. Leath’s grandson.⁵⁸ Because the police did not actually have a warrant to search Mrs. Leath’s home, the prosecution was forced to argue that Mrs. Leath consented to a search of her home.⁵⁹

The U.S. Supreme Court concluded: “When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.”⁶⁰ *Bumper* is widely understood to stand for the broader proposition that, in a warrantless search situation, the prosecution’s burden of proving that the homeowner’s consent was voluntarily given cannot be discharged by showing “acquiescence” to a show of authority.⁶¹

On the surface, *King* appears to reaffirm *Bumper*. It would be strange indeed for the Court to conclude, as it did in *Bumper*, that the consent exception to the warrant requirement is unavailable to the police when they claim authority to search that they do not actually have, but that the police may freely rely on the exigent circumstances exception under the same set of facts. Accordingly, in the parlance of the *King* opinion, lower courts might safely assume that a police officer’s false claim of authority “threatens” to violate the Fourth Amendment. In fact, the *King* Court seems to have been thinking about *Bumper* when it provides

51. *Id.* (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997)).

52. Brief for Respondent at 30, *Kentucky v. King*, 131 S. Ct. 1849 (2011).

53. *King*, 131 S. Ct. at 1863.

54. 391 U.S. 543 (1968).

55. 412 U.S. 218 (1973).

56. *Bumper*, 391 U.S. at 546.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 550.

61. *Id.* at 548-49.

the opinion's only example of police conduct that "threatens" to violate the Fourth Amendment—i.e., "by announcing that they would break down the door if the occupants did not open the door voluntarily."⁶² The Court also seems to have been thinking about *Bumper* when it noted that "[t]here is a strong argument to be made that, at least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted."⁶³

A closer reading of *King*, however, may suggest a fundamental shift in the Court's treatment of false claims of police authority. The Court begins its analysis of what the police actually did—knocking as loudly as they could and announcing either "This is the police" or "Police, police, police"—by rejecting the trial court's assessment that the officers' "demanded" entry to King's apartment.⁶⁴ Although the Court may have intended this passage as a critique of the trial court's factual findings,⁶⁵ an alternative reading—and one that seems more plausible—is that the Court views the trial court's "demand" characterization as a legal term of art—i.e., the officers' conduct simply did not constitute a "demand" as a matter of law.⁶⁶ Accordingly, one might equate an officer's "demand" with the sort of "threat" that violates the Fourth Amendment whenever the demand exceeds the bounds of the officer's lawful authority. This reading of *King* harmonizes it with *Bumper*.

The question then becomes: what—if anything—did the officers in *King* "demand" of the apartment's occupants? The Court identifies two types of demands that the police might make: a demand that the occupants open the door,⁶⁷ and a demand that the occupants permit the police to enter.⁶⁸ The Court ultimately concludes that the police officers did not demand entry into King's apartment because "no such actual threat was made."⁶⁹ Further, the Court concludes that there was "no evidence" that the officers demanded that the occupants open the door because the police did not "announc[e] that they would break down the door if the occupants did not open the door voluntarily."⁷⁰

This logic is troubling for two distinct reasons. First, it appears as though an officer's conduct qualifies as "threatening" only if the threat or demand is expressly

62. *Kentucky v. King*, 131 S. Ct. 1849, 1863 (2011).

63. *Id.* at 1858 n.4.

64. *Id.* at 1854.

65. The Court rejects the trial court's "demand" assessment as inconsistent "with the testimony at the suppression hearing and with the findings of the state appellate courts." *Id.* at 1863.

66. *Cf.* Fed. R. Civ. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

67. *See King*, 131 S. Ct. at 1863 (the police threaten to violate the Fourth Amendment "by announcing that they would break down the door if the occupants did not *open the door* voluntarily" (emphasis added)).

68. *Id.* at 1858 n.4 ("There is a strong argument to be made that, at least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will *enter* without permission unless admitted." (emphasis added)).

69. *Id.* ("In this case, however, no such actual threat was made, and therefore we have no need to reach that question.").

70. *Id.* at 1863.

made.⁷¹ The Court's insistence on an "actual threat" or an "announcement" by the officers that the homeowners must behave in a particular manner is new. It suggests a severely constrained reading of *Bumper*, and it is at odds with the Court's extensive case law—in both the Fourth and Fifth Amendment contexts—which recognizes that people may be strongly influenced by both overt and subtle police tactics.⁷²

Second, if, as the Court acknowledges, an occupant "has no obligation to open the door to speak" to the police, and if, as the Court opines, threatening police conduct that induces or coerces an occupant to open the door offends the police-created exigency doctrine, then the Court's insistence that there was "no evidence" of such a threat in *King* is plainly wrong—although the Court's observation that there was no *actual* threat to that effect is correct. In Fourth Amendment cases, police conduct is evaluated from the standpoint of a putative "reasonable person,"⁷³ and courts are instructed to consider the "totality of the circumstances."⁷⁴ At nearly ten o'clock at night, three uniformed police officers "banged on the door" to King's apartment "as loudly as they could" and announced either "Police, police, police" or "This is the police." In those circumstances, who wouldn't come to the door?

The Court's knock-and-announce cases are instructive here. The Court has long recognized that an authoritative knock followed by the announcement of a police presence is *designed* to induce the occupants to open the door so that the police may avoid breaking it with a battering ram.⁷⁵ Moreover, the Court has repeatedly *presumed* that such police conduct will, in fact, compel a response from the occupants.⁷⁶

The problem with the logic in *King* becomes more pronounced when the Court's treatment of the "genuine exigency" question is factored into the analysis. In addition to deciding whether the police created or manufactured the exigency, courts also must consider whether the situation confronting the officers was truly exigent.⁷⁷ The *King* Court expressly reserved that question for the Kentucky Supreme Court to address on remand, reasoning that "[a]ny question about whether an exigency actually existed is better addressed by [that court]."⁷⁸ But that

71. See, e.g., *United States v. Canas*, 462 Fed. Appx. 836, 839 (10th Cir. 2012) (recognizing the possible distinction drawn in *King* between actual and implied threats).

72. See, e.g., *Rhode Island v. Innis*, 446 U.S. 291, 296 (1980) (discussing "subtle coercion" in the context of the Fifth Amendment); *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971) (recognizing "the more subtle techniques of suggestion that are available to officials" in the search and seizure context).

73. See *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988).

74. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) ("In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances.").

75. See, e.g., *Richards v. Wisconsin*, 520 U.S. 385 at 393 n.5 (1997) ("[The knock-and-announce rule gives individuals] the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.").

76. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) ("[The knock and announce rule] assures the opportunity to collect oneself before opening the door."); *Richards*, 520 U.S. at 393 n.5 ("The brief interlude between announcement and entry...may be the opportunity that an individual has to pull on clothes or get out of bed.").

77. Cf. *Brigham City v. Stuart*, 547 U.S. 398 (2006).

78. *Kentucky v. King*, 131 S. Ct. 1849, 1863 (2011).

question should not have been difficult for the Court to answer. In the middle of the night, any reasonable person would naturally respond to an officer's loud banging and announcement of "Police, police, police"—not necessarily by opening the door, but at least by moving in some way (for example, by jolting out of bed)—and, given that this Court presumes that people will move in response to an authoritative knock-and-announce, the Court should have easily concluded that the officers' conduct in *King* induced some degree of movement on the part of the apartment's occupants. Recall that it was the sound of "people moving around inside" that the officers pointed to as proof that evidence was "possibly" being destroyed.

If, as the Court appears to suggest, the officers' conduct in *King* did not induce a response from the occupants—e.g., "movement"—then it is exceedingly difficult for lower courts to know when the police have "created" an exigency. The Court observes that but-for causation will exist in every exigent circumstances case.⁷⁹ But its treatment of the sequence of events in *King* creates a whole host of new questions about exactly how extreme the officers' conduct must be before it can be said to constitute a "demand" of some sort, or before it can be said to exceed the sort of but-for causation that the Court envisions exists in every case.

The officers' conduct in *King* surely constitutes "some" evidence of an implicit demand that the occupants respond to the show of police authority.⁸⁰ Certainly, had the prosecution relied on the consent exception to the warrant requirement as opposed to the exigent circumstances exception, the officers' conduct would have constituted "some" evidence that consent was coerced.

By analogizing what the officers in *King* did to a simple knock-and-talk, the Court appears to suggest that the police did not "show authority" at all. The notion that what the police in *King* did was "no more than any private citizen might do" is not only absurd, but also greatly expands an officer's ability to conduct a knock-and-talk investigation—including doing so at night.⁸¹ There is a manifest difference between "banging" on the door at ten o'clock at night and hearing someone yell out, "It's John, your next door neighbor!" and another when the person yells, "Police, police police" or "This is the Police."

The Court's attempt to justify the officers' behavior in the context of a knock-and-talk is difficult to accept. The Court states the obvious when it notes that "[p]olice officers may have a very good reason to announce their presence loudly and to knock on the door with some force. Furthermore, unless police officers identify themselves loudly enough, occupants may not know who is at their door step."⁸² But this does not mean that the police have not acted in a coercive or threatening manner, to some degree. Furthermore, *why* the police did what they did—i.e., the officers' subjective intent—is irrelevant. *King* admonishes that the

79. *Id.* at 1857 ("in some sense the police always create the exigent circumstances" (quoting *United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1990))).

80. See *United States v. Reyes-Montes*, 233 F. Supp. 2d 1326, 1330 (D. Kan. 2002) ("This 'knock and talk' was conducted at almost one o'clock in the morning. It involved four armed officers. The officers had to knock repeatedly on the door to roust the residents of the house. These circumstances would likely be very intimidating to most people.").

81. *King*, 131 S. Ct. at 1862.

82. *Id.* at 1861 (internal citation omitted).

reasonableness analysis looks to “objective standards.”⁸³ The question is not whether the police had a good reason for doing what they did; rather, the question is how a reasonable person would interpret their conduct, the officers’ motives—good or bad—aside.

The facts in *King* stray so far from the typical knock-and-talk scenario⁸⁴ that lower courts should avoid reading too much into the *King* opinion, the foregoing notwithstanding. After all, the *King* Court provided one—and only one—example of the type of police conduct that might constitute a “threat” that violates the Fourth Amendment. By failing to define the concept further, the Court has implicitly invited lower courts to attempt their own definitions. Lower courts are at liberty, should they choose, to take a rather broad view of the term. Courts should conclude that the very same type of police conduct that undermines the voluntariness of a homeowner’s consent also violates the police-created exigency doctrine. Police activity, including but not limited to false claims of police authority, that is coercive or potentially coercive in one context (*Bumper*) should also qualify as some evidence of a threatened Fourth Amendment violation in a different context (*King*).

2. *Schneckloth v. Bustamonte* and the *King* Court’s (Un)willingness to Consider the Totality of the Circumstances

In the context of evaluating whether the police “threatened” to violate the Fourth Amendment, the Respondent in *King* urged the Court to consider “the officers’ tone of voice in announcing their presence and the forcefulness of their knocks.”⁸⁵ The Court refused, noting that “the ability of law enforcement officers to respond to an exigency cannot turn on such subtleties.”⁸⁶ The difficulty with considering such facts, the Court explained, is that

it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock without running afoul of the police-created exigency rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed.⁸⁷

This reasoning in *King* would have come as a surprise to the predecessor *Schneckloth* Court.

The Court has considered the “subtleties” of police conduct in Fourth Amendment cases for nearly forty years. In the seminal case of *Schneckloth v. Bustamonte*, for example, the Court repeatedly instructed that the “totality of the

83. *Id.* at 1859.

84. Even the prosecution concedes that the police in *King* were in pursuit of a fleeing felon, not attempting a consensual encounter with the occupants of King’s apartment. After the Kentucky Supreme Court vacated King’s conviction on remand, the Commonwealth of Kentucky again filed a petition for certiorari. Petition for Writ of Certiorari, *Kentucky v. King*, No. 12-140 (July 25, 2012), available at <http://www.scotusblog.com/case-files/cases/kentucky-v-king-2/> (click “Petition for a writ of certiorari filed”). The Commonwealth advances this argument—i.e., that the police were actually in hot pursuit when they entered King’s apartment—in that petition. *Id.* at 10-24.

85. *King*, 131 S. Ct. at 1861.

86. *Id.*

87. *Id.*

circumstances approach” utilized in Fourth Amendment cases requires an assessment “of all the surrounding circumstances,” including such factors as “subtly coercive police questions” and “the possibly vulnerable subjective state of the person” being questioned.⁸⁸ Clearly, those factors are at least as difficult to measure as the forcefulness of an officer’s knock on the door. Time and again, the *Schneckloth* Court recognized that “subtle” and “implicit” conduct on the part of the police may have a significant impact on how a reasonable person perceives the situation.⁸⁹ And it has directed the lower courts to examine both “the nature” of the police conduct and “the environment in which it took place.”⁹⁰

The *King* Court’s unwillingness to consider the “subtleties” of police conduct for purposes of the police-created exigency doctrine, on the theory that “it would be nearly impossible for a court” to do so, gives the lower courts far too little credit. Courts already consider these—and many other—“nebulous” factors in the Fourth Amendment context; they are well equipped to do so, and have been doing so ever since *Schneckloth* was decided.⁹¹

In addition, by excising the officers’ tone of voice or the forcefulness of their knock from the analysis of whether the police “threatened” to violate the Fourth Amendment, the Court does more than simply underestimate the lower courts’ ability to sift through *Schneckloth*-like facts. It sanitizes the police conduct to such a degree that any amount of “banging” qualifies as a simple “knock,” and the tone of an announcement, however menacing or intimidating, qualifies as a simple declaration of the officers’ presence. Again, this greatly enlarges the traditional notion of a knock-and-talk, and it creates a strange dichotomy between the consent and exigent circumstances exceptions to the warrant requirement.

Lower courts should continue to evaluate the “totality” of the circumstances as they always have, even when applying the police-created exigency rule. And they should make every attempt not to create a substantial theoretical rift between the consent and exigent circumstances exceptions to the warrant requirement. It is difficult to conceive of the logic that would support such a division. The *King* Court’s concern that “it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule” is part and parcel of a much larger debate that was settled—and almost certainly remains settled, *King* notwithstanding—decades ago.⁹² Bright-line rules in the Fourth Amendment context have the obvious benefit of better enabling the police to avoid “unreasonable” conduct. But, the modern Court has “consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.”⁹³ Dictum in the *King* opinion is unlikely to change that abiding precedent.

88. 412 U.S. 218, 226, 229-30 (1973).

89. *Id.* at 228-30, 247-49.

90. *Id.* at 247.

91. *King*, 131 S. Ct. at 1861.

92. *Id.*

93. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

B. Asserting Constitutional Rights

To underscore the supposedly voluntary nature of a knock-and-talk, the *King* Court makes much of the notion that an “occupant has no obligation to open the door or to speak.”⁹⁴ The encounter will simply end, the Court suggests, whenever the occupants “choose not to respond or to speak.”⁹⁵ Moreover, the Court explains, “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.”⁹⁶ Occupants have the option to “stand on their constitutional rights”⁹⁷ and either ignore or rebuke the police.

Whether this is a highly idealized notion of the way that ordinary Americans regard police-citizen encounters is a subject for a different article. One could easily argue that the foregoing, coupled with the Court’s suggestion that “[c]itizens who are startled by an unexpected knock on the door or by the sight of unknown persons in plain clothes on their doorstep may be relieved to learn that these persons are police officers,” evinces a majority of the Justices’ profound misunderstanding of community-police relations in many pockets of this country.⁹⁸ Moreover, the Court’s track record in cases where homeowners or other citizens have attempted to “stand on their constitutional rights” is not good. The Court’s precedent strongly suggests that people who attempt to stand on their rights often do so at their own peril. Two cases are particularly instructive.

In *California v. Hodari D.*,⁹⁹ two police officers wearing jackets with “Police” embossed on both the front and back were on patrol in a high-crime area when they observed four or five youths huddled around a parked car.¹⁰⁰ When the youths saw the officers, “they apparently panicked, and took flight.”¹⁰¹ The officers “were suspicious and gave chase.”¹⁰² During the course of the chase, Hodari discarded an item that was later determined to be crack cocaine.¹⁰³ The question before the Supreme Court was “whether, at the time he dropped the drugs, Hodari had been ‘seized’ within the meaning of the Fourth Amendment.”¹⁰⁴ Hodari argued that the officers’ show of authority triggered the Fourth Amendment’s protection against “unreasonable” seizures; that he was seized without the requisite level of reasonable suspicion; and that the drugs were the fruit of an unlawful seizure and thus properly excluded by the lower court.¹⁰⁵ The Respondent argued that Hodari was not “seized,” and therefore not entitled to any Fourth Amendment protection,

94. *King*, 131 S. Ct. at 1862.

95. *Id.*

96. *Id.*

97. *Id.*

98. For a thoughtful discussion of policing in minority communities, see Tracey Maclin, Terry v. Ohio’s Fourth Amendment Legacy: *Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271 (1998). See also Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998).

99. 499 U.S. 621 (1991).

100. *Id.* at 622.

101. *Id.* at 623.

102. *Id.*

103. *Id.*

104. *Id.* at 623.

105. *Id.* at 623-24.

and that Hodari had simply abandoned the drugs, which were subsequently recovered lawfully by the police.

A person is under no legal obligation to speak with a police officer.¹⁰⁶ In *King's* parlance, Hodari “stood on his constitutional rights” by running away; although running from the police is somewhat dramatic, there is no requirement that any person stay put and wait to see what, if anything, an officer might need or want. Nevertheless, the Court chastised Hodari for asserting his constitutional right to be left alone,¹⁰⁷ and it admonished the rest of us against doing the same. The Court cautioned that “compliance with police orders . . . should . . . be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply.”¹⁰⁸ This advice is especially ironic because the California Court of Appeals had already decided that the police lacked a reasonable basis for suspecting Hodari of any criminal wrongdoing—a conclusion that was not reversed by the Supreme Court on appeal.¹⁰⁹

The Court held that because Hodari ran from the police—i.e., because he “stood on his constitutional rights” to be left alone and to be free from an unreasonable seizure—Hodari was, in fact, not “seized” at all. In other words, Hodari cost himself the protection of the Fourth Amendment when he asserted the very rights that the Fourth Amendment aims to protect; had he submitted to the police (notwithstanding the fact that the officers’ show of authority was “unreasonable”), he would have benefited from the Fourth Amendment’s exclusionary rule.

In a different case, decided after *King*, the homeowner’s decision to stand on her constitutional rights proved perilous as well. In *Ryburn v. Huff*,¹¹⁰ a high school principal informed the police that a student, Huff, was rumored to have written a letter threatening to “shoot up” the school. The police went to Huff’s house, “knocked on the door,” and identified themselves as police officers.¹¹¹ When no one responded, the police called Huff’s mother’s cell phone.¹¹² Huff’s mother answered the phone, told the police that she and her son were inside, and then hung up when the police told her that they were outside and requested to speak with her.¹¹³ Several minutes later, Huff and his mother came outside and stood on the front steps.¹¹⁴ The police asked if “they could continue the discussion inside

106. See, e.g., *Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011) (a homeowner “has no obligation to open the door or to speak” to the police).

107. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (“[The Fourth and Fifth Amendments] confer[], as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”) (Brandeis, J., dissenting).

108. *Hodari*, 499 U.S. at 627.

109. *In re Hodari D.*, 265 Cal. Rptr. 79, 85 (Cal. Ct. App. 1989), *rev’d sub nom.* *California v. Hodari D.*, 499 U.S. 621 (1991).

110. 132 S.Ct. 987, 988 (2012) (per curiam).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

the house,” but Huff’s mother refused.¹¹⁵ The police then asked if there were any guns in the house, and Mrs. Huff “responded by ‘immediately turning around and running into the house.’”¹¹⁶ One of the officers entered the house without a warrant; he was “scared because he didn’t know what was in that house” and had “seen too many officers killed.”¹¹⁷ Eventually, Huff’s father challenged the officers’ authority to be inside his house, and they left.¹¹⁸

The Huffs sued the police under 42 U.S.C. § 1983.¹¹⁹ A divided panel of the Ninth Circuit concluded that “any belief that the officers or other family members were in serious, imminent harm would have been objectively unreasonable given that Mrs. Huff merely asserted her right to end her conversation with the officers and returned to her home.”¹²⁰ The majority determined that

it was irrelevant that the Huffs did not respond when the officers knocked on the door and announced their presence . . . because the Huffs had no legal obligation to respond to a knock And, . . . the officers should not have been concerned by Mrs. Huff’s reaction when they asked her if there were any guns in the house because Mrs. Huff merely asserted her right to end her conversation with the officers and returned to her home.¹²¹

The Supreme Court reversed in a tersely-written per curiam opinion. Before holding that the police lawfully entered the Huff residence because

there was an objectively reasonable basis for fearing that violent was imminent,” the Court admonished that “the panel majority apparently seems to have taken the view that conduct cannot be regarded as a matter of concern so long as it is lawful It should go without saying, however, that there are many circumstances in which lawful conduct may portend imminent violence.”¹²²

Together, *King*, *Hodari D.*, and *Ryburn* appear to instruct that a homeowner’s theoretical ability to stand on her constitutional rights may serve as a post-hoc justification for the reasonableness of police conduct—at the direct expense of the homeowner. The message, it appears, is that a homeowner can assert her right to be free from the unwarranted entry of her home, but that she should be careful about doing so because “lawful conduct may portend imminent violence” or the destruction of evidence or any other exigency that a court or a savvy police officer can conjure. Although *King* recognizes that, technically, a homeowner can “stand on her constitutional rights” and refuse to respond to the police presence at her door, *Hodari D.* cautions that “it almost invariably is the responsible course to comply” with the police. If compliance means moving about the house in order to open the door, as it almost certainly does, then the homeowner runs the risk—as was the case in *King*—of making some sort of movement that is “indicative,” at least in the minds of some police officers, of evidence destruction. Worse, *Ryburn*

115. *Id.*

116. *Id.* at 989.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 989-90 (internal citations omitted).

121. *Id.* at 991 (internal citations omitted).

122. *Id.* at 991-92.

suggests that not responding at all—e.g., sitting silent and simply hoping that the police go away—is suspicious behavior in its own right. Exacerbating things further, the *Ryburn* Court admonishes lower courts to “be cautious about second-guessing a police officer’s assessment, made on the scene, of the danger presented by a particular situation.”¹²³

This naturally raises two questions. First, as a practical matter, what is a citizen to do when the police come “knocking” at the door? And, second, precisely how should a lower court interpret a homeowner’s decision to “stand on her constitutional rights”?

If the police lack probable cause or even reasonable suspicion of any criminal activity on the part of the occupants of a home, it seems fairly safe to assume that a citizen who rebukes the police is on safe constitutional footing. The difficulty, of course, is that when deciding how to respond to the police, the homeowner is almost certainly unaware of what information (if any) the police have gathered about him or her. If the police have any reason to suspect that something might be awry, then *Hodari D.* and *Ryburn* together caution that “standing on constitutional rights” is a poor course of action; it may supply the probable cause that had previously eluded the police. A lawyer might be inclined, then, to advise her clients to respond to the police presence and to very politely assert the right to be left alone. Whether most people could actually stay calm and level-headed enough to do that (especially if the police come calling at ten o’clock at night, banging, and announcing, “Police, police, police”) is an entirely different matter.

King, *Hodari D.*, and *Ryburn* notwithstanding, lower courts should zealously guard a person’s right, when appropriately asserted, to either terminate an encounter with the police or to decline an officer’s invitation for an encounter in the first place. Nothing about *King*, *Hodari D.*, or *Ryburn* alters the core tenets of Fourth Amendment jurisprudence. As the Court explained in the seminal case of *Weeks v. United States*:¹²⁴

[t]he effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws.¹²⁵

Fourth Amendment protection is at its apex when the police enter or search a person’s home without a warrant,¹²⁶ and even the most well-intentioned police officers are susceptible to misjudgment when “engaged in the often competitive enterprise of ferreting out crime.”¹²⁷ Nothing about *King* alters these precepts. At

123. *Id.* at 991-92.

124. 232 U.S. 383 (1914).

125. *Id.* at 391-92.

126. *Cf.* *Payton v. New York*, 445 U.S. 573, 596-97 (1980) (“[B]oth in England and in the colonies ‘the freedom of one’s house’ was one of the most vital elements of English liberty.” (quoting 2 LEGAL PAPERS OF JOHN ADAMS 142 (L. Wroth & H. Zobel eds. 1965))).

127. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); *see also id.* (“The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in

the very least, courts should exercise extreme caution when citing to a citizen's invocation of his or her Fourth Amendment rights as a justification for any subsequent police action.

III. CONCLUSION

Because *King* simply gave a name to a concept that nearly all lower courts had already recognized some time ago, i.e., “the police-created exigency doctrine,”¹²⁸ and because the Court-articulated test for evaluating when the police violate that doctrine is wide open to different interpretations, the most one can say about *King*'s lasting impact is that it is the beginning—but certainly not the end—of what may become a long line of police-created-exigency cases. Ultimately, it will be difficult for a lower court to interpret *King* because it provides precious little guidance about the meaning of “threatening” conduct, about where the constitutional margins of a permissible knock-and-talk lie, or about how, exactly, a homeowner should stand on her constitutional rights.

requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”).

128. *Kentucky v. King*, 131 S. Ct. 1849, 1857 (2011).