The Protective Sweep Doctrine: Reaffirming a Limited Exception

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In Maryland v. Buie*, the U.S. Supreme Court articulated a standard defining the scope of a protective sweep that could be considered valid within the confines of the Fourth Amendment. This Note analyzes how state courts are applying the protective sweep standard defined in* Buie *and finds that courts tend to allow sweeps based on "categorization" rather than on "articulable facts," as* Buie *requires. In order to prevent protective sweeps from becoming a default method for law enforcement officials to perform searches and seizures, this Note argues that courts need to be more selective about the facts they allow to justify these searches. The police must articulate specific facts demonstrating a reasonable suspicion, developed after they arrived, that another person is present and must provide a reasonable basis for believing that the person believed to be present is a danger to those at the scene.*

I. INTRODUCTION

Police arrive at the home of a suspect, armed with an arrest warrant. Upon seeing the suspect walking towards his home, they jump out of the car and call out to him. The officers inform the suspect that they have a warrant for his arrest and that they are going to take him into custody. The suspect does not respond but moves towards the sliding door of his home. Just as he sets a

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foot inside his apartment, but before he can fully enter the doorway, the officers grab him and handcuff him.

With the suspect in custody, two of the officers go into the apartment to make sure that no one is inside who might pose a danger to them. They search the living room, bedroom, and bathroom. In the living room, one of the officers sees what he believes to be the butt of a gun sticking out from under a couch cushion. He lifts the couch cushion and confirms that it is a semi-automatic handgun. The officer then replaces the cushion and goes to get a search warrant, all before touching the gun itself. The search was found lawful as a result of the warrant, and the suspect is convicted of being a felon knowingly in possession of a firearm.

The above scenario, drawn from *United States v. Lemus*,[1] illustrates how courts have expanded the protective sweep doctrine as it was established in *Maryland v. Buie*.[2] The Ninth Circuit upheld the search of Lemus' apartment, even though he was arrested immediately outside his home.[3] *Lemus* is indicative of the way that many courts, both state and federal, are expansively reading *Buie* to the detriment of Fourth Amendment rights.[4] As Chief Judge Kozinski warned in his dissenting opinion,[5] the *Lemus* reading of *Buie* seems limitless and, when coupled with the plain view doctrine, substantially undermines the expectation of privacy in the home.[6]

In *Maryland v. Buie,* the United States Supreme Court held that a protective sweep is valid only where the "searching officer possesse[d] a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from

1. 582 F.3d 958, 960–62 (9th Cir. 2009), *reh'g en banc denied*, 596 F.3d 512, *petition for cert. filed*, No. 09-10988 (May 19, 2010).

2. 494 U.S. 325 (1990).

3. *Lemus,* 596 F.3d 512, 514 (9th Cir.) (Kozinski, C.J., dissenting), *petition for cert. filed*, No. 09-10988 (May 19, 2010).

4. *Lemus*, 596 F.3d at 516. *See also* Eugene Volokh, Searches of a Suspect's Home When the Suspect Is Arrested Immediately Outside the Home, http://volokh.com/2010/02/18/searches-of-a-suspects-home-when-the-suspect-is-arrested-immediately-outside-the-home/ (Feb. 18, 2010, 22:44 EST) (asserting that the decision in *Lemus* could allow the police to search the home so long as defendants are arrested nearby and could extend authority to search other people's homes).

5. *Lemus*, 596 F.3d at 513–17 (Kozinski, C.J., dissenting) (arguing that the panel's decision was inconsistent with the reasoning of *Buie* and would erode the Fourth Amendment's protection of the home).

6. *Id.* at 517.

those facts, reasonably warrant[ed] the officer in believing that the area to be swept harbored an individual posing a danger to the officer or others."[7] Though much of this language was taken from earlier Fourth Amendment case law creating an officer safety exception to the general rule that warrant-less searches violate the Constitution,[8] the logistics of the home have presented many new line-drawing questions. It is therefore important to define a working standard that prevents the officer safety exception from swallowing the norm that warrantless searches violate the Constitution.

Though the extension of the *Buie* doctrine is a recurring issue in federal district and circuit courts, the majority of cases dealing with the validity of protective sweeps occur in state courts.[9] Indeed, *Buie* was itself a state criminal prosecution. As opposed to their federal counterparts, state prosecutors have little discretion in cases of this sort and therefore bring a larger number of them.[10] It is thus important to look at the state courts in order to see how they are regulating or extending the scope of protective sweeps beyond the purview of what the Court allowed in *Buie*.

The Supreme Court used four concepts to ensure that the scope of a protective sweep was limited. First, the Court defined a protective sweep as being "incident to the arrest."[11] Second, the Court required that a police officer be able to point to "specific and articulable facts"[12] suggesting that the area to be swept harbored an individual posing a danger.[13] Third, the Court limited the scope of the search to "extend only to a cursory inspection of

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7. *Buie*, 494 U.S. at 327 (alteration in original) (internal citations and quotation marks omitted).

8. *See infra* Part II.

9. Over 90 percent of all criminal prosecutions take place in the state system. *See, e.g.*, Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce Clause–Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 970 (1997) (finding that federal prosecutions account for less than five percent of all prosecutions nationally); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1031 (1995).

10. Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1139–40 (2004).

11. *Buie*, 494 U.S. at 334.

12. *Id.* at 327 (internal quotation marks omitted).

13. The Court borrowed the "specific and articulable facts" language directly from *Terry v. Ohio*, 392 U.S. 1, 21 (1968) and *Michigan v. Long*, 463 U.S. 1032, 1049 (1983), in which the Court carved out exceptions to the general rule that a warrantless search is presumed unreasonable. *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 559 (2004).

those spaces where a person may be found."[14] Finally, the Court held that the search is only appropriate when the officers suspect that there is an individual who poses a danger.[15] These four factors amount to a significant burden for prosecutors to overcome in convincing a judge that a search was proper: a sweep is "decidedly not automati[c], but may be conducted only when justified."[16] However, a look at how the state courts are applying the *Buie* standard reveals that many of these limiting principles have disappeared from the analysis.

Over the past twenty years, courts have inconsistently delineated the boundaries of a valid protective sweep, more often to the benefit of law enforcement and the detriment of privacy rights. What most courts have agreed upon is that a protective sweep is not per se invalid merely because it is not conducted incident to an arrest.[17] This means that police can conduct protective sweeps after entering a home pursuant to consent. The result is an expansive version of the protective sweep doctrine that goes far beyond what the Court outlined in *Buie*.

This Note argues that courts have allowed broad categories — often based on information possessed prior to entering a home — to satisfy the *Buie* standard, leading to an expansion of the protective sweep exception that undermines the general prohibition against warrantless searches in the home. Furthermore, this Note argues that the coupling of doctrinal exceptions, particularly a protective sweep with entry pursuant to consent without a warrant, threatens to undermine the protection of the home that the Fourth Amendment guarantees.

Part II of this Note presents an overview of Fourth Amendment jurisprudence, placing *Buie* in context. Part III analyzes *Maryland v. Buie*, the only Supreme Court decision on the protective sweep doctrine. Part IV analyzes how state courts are applying the *Buie* standard. Finally, Part V presents a solution to en-

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14. *Buie*, 494 U.S. at 335.
15. *Id.* at 327.
16. *Id.* at 336 (alterations in original) (internal quotation marks omitted).
17. State v. Davila, 999 A.2d 1116, 1129 (N.J. 2010) ("The undeniable national trend toward greater availability of protective searches is marked by the same officer-safety concerns that animated *Buie*'s balancing test, and demonstrates a general agreement among reviewing courts that those concerns are not exclusive to the context of an in-home arrest.").

sure that protective sweeps remain limited searches, permissible only when accompanied by their circumstantial predicates.

II. FOURTH AMENDMENT DOCTRINE AND BACKGROUND TO *BUIE*

Any introduction to Fourth Amendment[18] jurisprudence must begin with the basic premise that searches conducted "outside the judicial process,"[19] are per se unreasonable under the Fourth Amendment, subject to a few exceptions. Although the Court has held that "the Fourth Amendment protects people, not places,"[20] the Court has consistently recognized the heightened importance and expectation of privacy in the home and has therefore granted the home greater Fourth Amendment protection.[21] Where police are considered to be lawfully present, an officer may seize evidence and contraband under the plain view doctrine.[22] Though it is important to distinguish between the validity of an entry and the validity of a search, where an initial entry is unlawful, a subsequent protective sweep cannot be valid.[23]

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18. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

All states have provisions similar to the Fourth Amendment in their State Constitutions. Regardless, the Federal Constitution sets the floor. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975); Cooper v. California, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

19. Katz v. United States, 389 U.S. 347, 357 (1967).

20. *Id.* at 351.

21. *See* Lewis v. United States, 385 U.S. 206, 211 (1966) ("Without question, the home is accorded the full range of Fourth Amendment protections."); Silverman v. United States, 365 U.S. 505, 511–12 (1961) (explaining that an individual's right to have his home be free from government intrusion is at the core of the Fourth Amendment's protections).

22. *See* Arizona v. Hicks, 480 U.S. 321, 326 (1987). The plain view doctrine allows the police to seize readily available evidence. Coolidge v. New Hampshire, 403 U.S. 443, 464–65 (1971). In order for the officer to seize the item, the officer must have probable cause to believe the item is evidence of a crime or is contraband. *Id.* In *Horton v. California*, the United States Supreme Court eliminated the requirement that the discovery of evidence in plain view be inadvertent. 496 U.S. 128 (1990).

23. *See, e.g.*, People v. Davis, 924 N.E.2d 67 (Ill. App. Ct.) ("[T]o allow a protective sweep to legitimize the discovery of evidence in plain view where the initial entry was unlawful would be to legitimize the discovery of the evidence on circumstances directly

A ruling on the validity of a search has important consequences because admission or suppression of evidence often determines the fate of the defendant. When a judge deems a search to be unreasonable, the evidence gained from the search must be suppressed and excluded from evidence. This so-called "exclusionary rule"[24] is the principal means of discouraging lawless police conduct[25] and minimizing arbitrary police action.[26] It is common for a defendant to plead guilty after the denial of suppression, preserving his right to appeal that denial.[27] Therefore, when police find key evidence in the course of a protective sweep, whether or not the sweep was valid can often be outcome determinative.

The Fourth Amendment forbids only unreasonable searches and seizures.[28] In determining reasonableness, a court must balance the intrusion on the individual's Fourth Amendment rights against the promotion of legitimate governmental interests.[29] Under this balancing test, a search of a home or office is general-

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attributable to the officers' illegal entry."), *appeal denied*, 236 Ill. 2d 560 (2010); State v. Lane, 922 A.2d 828, 841 (N.J. Super. Ct. App. Div. 2007) ("Fundamental to determining the legitimacy of a protective sweep is the notion that the police may not illegally enter or remain in the area in which the sweep is performed.").

24. The exclusionary rule protects the right of the individual by rendering evidence gathered during an "unreasonable" search or arrest inadmissible at trial. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (establishing the exclusionary rule in federal cases); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (establishing the exclusionary rule in states via incorporation into the Fourteenth Amendment's Due Process Clause).

25. Though many argue that the purpose of the exclusionary rule is to deter improper police conduct, it also serves to ensure that the court is not complicit in any unlawful police conduct and to assure the public that the government will not profit from its lawless behavior, thus minimizing the risk of undermining public trust in government. *See* WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(f) (4th ed. 2009).

26. *See* Daniel Richman, Terry *and the Fourth Amendment: The Process of Terry-Lawmaking*, 72 ST. JOHN'S L. REV. 1043, 1047 (1998). *See also* Margaret Raymond, Terry *on the Job, Police Policing Police: Some Doubts*, 72 ST. JOHN'S L. REV. 1255, 1258 (1998) (arguing that judicial oversight of officers is necessary because departmental administration might be part of the reason that police find it hard to follow legal doctrine). Judicial review of police action ensures Fourth Amendment protections.

27. *See, e.g.*, Guzman v. Commonwealth, No. 2009-CA-001117-MR, 2010 WL 2010865, at *1 (Ky. Ct. App. May 21, 2010); State v. Martinez, 233 P.3d 791, 793 (N.M. Ct. App. 2010), *cert. denied*, No. 32,318 (May 5, 2010); State v. Foster, 217 P.3d 168, 170 (Or. 2009) (en banc); State v. Drown, 937 A.2d 157, 158 (Me. 2007).

28. Elkins v. United States, 364 U.S. 206, 222 (1960).

29. Terry v. Ohio, 392 U.S. 1, 20–21 (1968); *see also* Bell v. Wolfish, 441 U.S. 520, 559 (1979).

ly not reasonable without a warrant issued upon probable cause.[30] There are, however, some important exceptions. The Supreme Court has long approved consensual searches on the grounds that it is reasonable for the police to conduct a search once they have been permitted to do so.[31] Police often gain consent while conducting a "knock and talk."[32] Where police lack probable cause, they often use a knock and talk as an opportunity to gather further evidence or to dispel their suspicions.[33]

As the Supreme Court found in *Terry v. Ohio* and in subsequent cases, there are some contexts in which the governmental interest is so great, such as when exigent circumstances exist[34] or when police safety is threatened, that neither a warrant nor probable cause is required in order for the police to act.[35] *Buie* is best understood as the latest in a line of cases that recognize a police safety exception, allowing officers to protect themselves from dangers they encounter on the job.[36] Beginning with *Terry v. Ohio*, the Supreme Court delineated certain circumstances in which limited warrantless searches are allowed in order to pro-

30. Where police have probable cause, they can ask a neutral magistrate for a warrant. An arrest warrant justifies police entry into a home when the suspect is believed to be inside. Payton v. New York, 445 U.S. 573, 602–03 (1980).

31. The sufficiency of consent and its implications for Fourth Amendment protections is a larger issue that is beyond the scope of this Note. *See, e.g.*, Florida v. Jimeno, 500 U.S. 248, 250–52 (1991) (holding that the standard for measuring the scope of a suspect's consent is that of objective reasonableness, i.e., what a reasonable person would have understood from the exchange between the officer and the suspect); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (whether a consent to a search is "voluntary" or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances).

32. A "knock and talk" allows police to knock on the door and interview potential residents to see if the information that they have is accurate and whether they can gain any new information. Knock and talks conducted in an investigatory capacity are distinct from a police officer's response to noise complaints, which stems from their protective capacity. *See generally* Craig M. Bradley, "*Knock and Talk" and the Fourth Amendment*, 84 IND. L.J. 1099, 1123 (2009) [hereinafter *Knock and Talk*].

33. *Id.* at 1104.

34. Exigent circumstances are present where officers need to act in order to protect their or others' lives or their or others' property; the search is not motivated by an intent to arrest and seize evidence; and there is some reasonable basis to associate an emergency with the area or place to be searched. United States v. Smith, 797 F.2d 836, 840 (10th Cir. 1986).

35. Terry v. Ohio, 392 U.S. 1, 20 (1968).

36. *See, e.g.*, United States v. Miller, 430 F.3d 93, 98 (2d Cir. 2005) ("*Buie*'s protective sweep exception to the warrant requirement was constructed on the foundational reasoning of *Terry* and *Long* both of which permitted warrantless searches in specific contexts to ensure the safety of officers." (internal citations omitted)).

tect the safety of officers and others in the nearby vicinity. Such "safe harbor" rules[37] offer guidance to police; provide judicial standards for determining ex post whether the search was valid; and move judicial review away from the need to make case-by-case determinations.[38]

The Court first articulated the police safety exception in *Terry v. Ohio*,[39] which recognized the right of police to conduct a "stop and frisk" for weapons, in an on-the-street encounter. In so doing, the Court identified a "rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant procedure."[40] Requiring a warrant for stop and frisks would be a new, time-consuming, and impractical obstacle for police officers.[41] In *Terry*, the Court first articulated the "reasonable suspicion" standard it later espoused in *Long* and *Buie*. Nevertheless, the Court has consistently "demand[ed] . . . specificity" from police officers when making a Fourth Amendment ex post evaluation of their conduct.[42]

In *Michigan v. Long*, the Court extended the principles of *Terry* to the context of a roadside encounter.[43] The Court used the same "reasonable suspicion standard" to delineate when police can search a car, finding that the balancing required by *Terry* weighed in favor of allowing the police to search the passenger compartment, "as long as they possess an articulable and objec-

37. Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1044 (2001). Professor Klein defines a constitutional safe harbor as "a judicially created procedure that, if properly followed by the government actor, insulates the government from the argument that the constitutional clause at issue was violated." *Id.* at 1033. In so doing, "[i]t may allow conduct that violates the explicit constitutional rule to which it applies." *Id.*

38. Klein, *supra* note 37, at 1045. *See also* New York v. Belton, 453 U.S. 454, 458 (1981) ("In short, '[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" (modification in original) (quoting Dunaway v. New York, 442 U.S. 200, 213–14 (1979))).

39. 392 U.S. 1.

40. *Id.* at 20.

41. *Id.*

42. *Id.* at 22 n.18.

43. Michigan v. Long, 463 U.S. 1032, 1049 (1983).

tively reasonable belief that the suspect is potentially dangerous."[44]

The Court first extended the *Terry* reasoning to the home in *Chimel v. California*, but in a very limited context. *Chimel* held that in the absence of a search warrant, the permissible scope of a search incident to an in-home arrest could not extend beyond the area from within which the arrestee might obtain a weapon.[45] An officer was therefore permitted to search a defendant's physical person and the area under his immediate control, as measured by the "wingspan" test.[46] The rationale for *Chimel* rested on the recognition in *Terry* that officers must be allowed to take reasonable steps to protect their safety.[47]

The protective sweep authorized in *Buie* is distinct from the type of search allowed by *Chimel*. Whereas a *Chimel* top-to-bottom search of the arrestee and the space within his reach when taking him into custody will always be reasonable and permissible, the wider *Buie* sweep is decidedly not "automati[c]": police may conduct it "only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene."[48] *Buie* distinguished *Chimel* on two grounds: (1) *Chimel* held invalid "a full-blown search of the entire house for evidence of the crime for which the arrest was made, not the more limited intrusion contemplated by a protective sweep"; and (2) "the justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee, not the safety threat posed by the house, or more properly, by unseen third parties in the house."[49]

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44. *Id.* at 1051 ("[T]he balancing required by *Terry* clearly weighs in favor of allowing the police to conduct an area search of the passenger compartment to uncover weapons.").

45. Chimel v. California, 395 U.S. 752, 763 (1969).

46. *Id.* (permitting "a search of the arrestee's person and the area within his immediate control — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence" (internal quotation marks omitted)).

47. *Long*, 463 U.S. at 1052.

48. Maryland v. Buie, 494 U.S. 325, 336 (1990) (alteration in original).

49. *Id.* (internal citation omitted).

III. *MARYLAND V. BUIE:* THE LANDMARK CASE IN PROTECTIVE SWEEP JURISPRUDENCE

Maryland v. Buie shows the Court grappling with two conflicting values: the sanctity of the home[50] and the right of the police to protect themselves in dangerous situations.[51]

On February 3, 1986, two men, one of whom was said to be wearing a red running suit, committed an armed robbery of a pizza restaurant in Prince George's County, Maryland.[52] Later that same day, police obtained arrest warrants for two suspects, Jerome Buie and Lloyd Allen.[53] Buie's house was placed under surveillance.[54] Two days later, believing that Buie was inside his home, police attempted to execute the arrest warrant.[55] In an attempt to find Buie, one of the officers secured access to the basement and then shouted into it, ordering anyone who was inside to come out.[56] Eventually Buie came up the stairs and was arrested.[57] Thereafter, another officer entered the basement; at trial he explained that he did so "in case there was someone else down there."[58] While in the basement, the officer saw a red running suit in plain view, connecting Buie to the armed robbery.[59]

Buie moved to suppress evidence of the red running suit seized from his home. The trial court denied the motion on the grounds that Buie was charged with a serious offense and that the police did not know how many other people might have been in the basement.[60] The court admitted the red running suit at

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50. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."); Mincey v. Arizona, 437 U.S. 385, 393 (1978) ("[T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.").

51. Terry v. Ohio, 392 U.S. 1, 24 (1968) ("[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.").

52. *Buie*, 494 U.S. at 328.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* (internal quotation marks omitted).

59. *Id.*

60. Buie v. State, 531 A.2d 1290, 1292 (Md. Ct. Spec. App. 1987), *cert. granted*, 535 A.2d 921 (Md.), *rev'd*, 550 A.2d 79 (Md. 1988), *cert. granted*, 490 U.S. 1097 (1989), *vacated*, 494 U.S. 325 (1990).

trial and Buie was convicted; the intermediate appellate court upheld the trial court's ruling.[61] The Maryland Court of Appeals reversed the trial and appellate court's holding and ruled in favor of Buie,[62] holding that to justify a protective sweep of a home upon execution of an arrest warrant, the government must show that there is probable cause to believe that serious and demonstrable potential for danger exists.[63] The Court of Appeals found that although the police were aware that Buie had an accomplice in the robbery, they had no information indicating any likelihood that his accomplice was in the dwelling.[64]

The U.S. Supreme Court granted certiorari[65] and reversed. The Court emphasized that the arrest warrant authorized the police to enter Buie's residence to find and arrest him and to search the premises for him until he was found.[66] However, that authority typically terminates upon a suspect's arrest.[67] The Court rejected Buie's argument that probable cause was required for the police to then enter the basement. Drawing an analogy to *Terry* and *Long*, which likewise rejected a probable cause standard when there is a need for law enforcement officers "to protect themselves [against] violence in situations where they may lack probable cause for an arrest,"[68] the Court found a similar "interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested, is not harboring other persons who are dangerous and who could unexpectedly launch an attack."[69]

The Court found the limited search permissible without a warrant, creating two standards for search incident to an arrest. An officer may search without probable cause places "immediately adjoining" the arrest site from which an attack can be

61. 550 A.2d 79, 81 (Md. 1988).
62. Maryland v. Buie, 494 U.S. 325, 329 (1990).
63. Buie v. State, 550 A.2d 79, 83 (Md. 1988), *cert. granted*, 490 U.S. 1097 (1989), *vacated*, 494 U.S. 325 (1990).
64. *Id.* at 86.
65. Maryland v. Buie, 490 U.S. 1097 (1989).
66. *Buie*, 494 U.S. at 330 (citing Payton v. New York, 445 U.S. 573, 602–03 (1980)).
67. *Id.* at 333 ("Once he was found, however, the search for him was over, and there was no longer that particular justification for entering any rooms that had not yet been searched.")
68. Terry v. Ohio, 392 U.S. 1, 24 (1968).
69. *Buie*, 494 U.S. at 333.

launched.[70] However, in order to look further, an officer must observe "articulable facts" and make inferences that reasonably support the conclusion that the area may harbor someone.[71]

Unlike the standard in *Terry*, the *Buie* standard has both an objective and subjective requirement. The government not only must meet the burden of showing a reasonable belief[72] that a third party is present but also must satisfy the subjective requirement that the searching officer actually possessed that belief.[73] The *Buie* test therefore requires a reasonable suspicion that another person (1) is present and (2) poses a danger. This is distinct from at least one pre-*Buie* view: "it is sufficient [if] there was a reasonable suspicion that *if* anyone were there he could be a threat."[74]

The Maryland Court of Appeals held on remand that the officer's protective sweep of Buie's basement was justified by the reasonable belief that his known accomplice might also have been hiding in basement. Even after Buie had been arrested, his accomplice might have had access to the gun that had been used in the robbery but not yet found.[75]

In sum, the police had an arrest warrant and probable cause to believe that Buie was in his home, which allowed them to enter and search anywhere in the house where Buie might be found. Before *Buie*, once a search for a suspect was completed, there was no further justification to enter parts of the home that had not yet been searched.[76] The sweep allowed in *Buie* was meant to fill this void. In order to address the threat posed to officers, *Buie* allows police, in certain circumstances, to ensure that there are no unseen third parties in the home.

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70. "As an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be launched. Beyond that, however, just as in *Terry* and *Long*, there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger." *Id*. at 325–26.

71. *Id.*

72. *Id.* at 329.

73. *Id.* at 327.

74. LAFAVE, *supra* note 25, at § 6.4(c). A police officer must actually believe "that the area to be swept harbors an individual posing a danger to those in the arrest scene." *Buie*, 494 U.S. at 337.

75. Buie v. State, 580 A.2d 167 (Md. 1990).

76. *Buie*, 494 U.S. at 332–33.

Buie was analogous to *Terry* and *Long*, the Court reasoned, because it presented a strong government interest: protecting the safety of officers and others.[77] *Terry* and its progeny represent "an appreciation of a police officer's job and knowledge, and a desire to give him some degree of protection when he's doing that job."[78]

But *Buie* was also like *Terry* and *Long* in another important respect — while by no means de minimis, the intrusion allowed was fairly limited. The Court took pains to particularize the necessary limits within which a protective sweep would be permissible. By adopting the "reasonable and articulable suspicion" standard of *Terry* and *Long*, *Buie* imposed a circumstantial predicate on the authority law enforcement officers wield to conduct a protective sweep of a suspect's residence. To discharge their burden under *Buie*, the police must demonstrate particular circumstances indicating that their search was valid.[79] The "specific and articulable facts" standard further seeks to prevent the abuse of police power and the fabrication of pretextual reasoning. As in *Terry*, the Court made use of this standard to avoid allowing mere police hunches to justify searches.[80]

Justice Brennan's dissent in *Buie* articulated two main concerns. First, this extension of *Terry* encroached on the home as a core area of Fourth Amendment protection; and second, there was no limiting principle to the holding.[81] This latter concern has

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77. *Id.* at 333–34.

78. Richman, *supra* note 26, at 1047.

79. *Buie*, 580 A.2d at 173 ("The burden is on the State at the suppression hearing to establish that a protective sweep was warranted."); *see also* Scott v. State, 924 N.E.2d 169, 174 (Ind. Ct. App.), *transfer denied*, 929 N.E.2d 795 (Ind. 2010); United States v. Waldrop, 404 F.3d 365, 368 (5th Cir. 2005).

80. Terry v. Ohio, 392 U.S. 1 (1968); *see also* Albert W. Alschuler, *The Upside and Downside of Police Hunches and Expertise*, 4 J.L. ECON. & POL'Y 115, 119 (2007). Professor Alschuler offers five arguments in support of the requirement of specific and articulable facts:

> First, inarticulate hunches are likely to be wrong, and one cannot tell ex ante the good ones from the bad ones. Second, hunches about criminal activity are likely to be shaped by inaccurate racial stereotypes. Third, even accurate police hunches based in part on race distribute law enforcement burdens unfairly. Fourth, police officers lie. And fifth, hunches are unreviewable.

Id.; *see also* Judge Harold Baer, Jr., *Got a Bad Feeling? Is That Enough? The Irrationality of Police Hunches*, 4 J.L. ECON. & POL'Y 91, 95 (2007).

81. *Buie*, 494 U.S. 329, 340 (1990) (Brennan, J., dissenting). Justice Brennan criticizes the Court's continued expansion of *Terry* "from a narrow exception into one that 'swallow[s] the general rule that [searches] are "reasonable" only if based on probable cause.'"

proven to be prophetic: courts seem to have ignored the limiting principles and embraced an expansive understanding of when protective sweeps are permissible.

IV. WHAT'S HAPPENED TO *BUIE*? EXPANDING THE USE OF THE PROTECTIVE SWEEP

In the years since *Buie*, much of the case's limiting language has been read as dicta. Furthermore, the protective sweep analysis has become reliant on what this Note deems the "categorization" of cases. These trends undermine the *Buie* standard, particularly when police enter a home pursuant to consent. Categorization allows a court to uphold searches based on police observations that, if deemed sufficient to meet the standard for a protective sweep, would justify warrantless searches when police pursue suspects of certain crimes and not others.

The first major break from the *Buie* standard was the near-consensus that protective sweeps not incident to an arrest may be valid. In most jurisdictions, courts have expanded the *Buie* analysis to apply to situations where an arrest was not made or even attempted;[82] for example, while conducting diligence investigations or entering pursuant to exigent circumstances.[83] Only a few remaining states and circuits have held on to the limiting language of the decision, language the *Buie* Court seemed to consider significant.[84] These few courts underscore the "incident to an arrest" language, which the Court employed in its definition and

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Id. at 340 (alterations in original) (quoting United States v. Place, 462 U.S. 696, 714 (1983) (Brennan, J., concurring)).

82. Most federal circuit courts and state courts have indicated that protective sweeps may be valid even if not incident to an arrest. *See* Leslie A. O'Brien, Note, *Finding a Reasonable Approach to the Extension of the Protective Sweep Doctrine in Non-Arrest Situations*, 82 N.Y.U. L. REV. 1139, 1152 (2007).

83. United States v. Miller, 430 F.3d 93, 98–99 (2d Cir. 2005); Leaf v. Shelnutt, 400 F.3d 1070, 1087–88 (7th Cir. 2005).

84. For example, the Supreme Court asserts that a protective sweep "occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime." *Buie*, 494 U.S. at 333. "[A]rresting officers are permitted . . . to take reasonable steps to ensure their safety after, and while making, the arrest." *Id.* at 334. "We also hold that *as an incident to arrest* the officers could, as a precautionary matter . . . , look in closets and other spaces immediately adjoining the place of arrest . . . ." *Id.* (emphasis added).

throughout the decision.[85] Both the Ninth and Tenth Circuits have pointed to the specific definition of the protective sweep in *Buie*, asserting that protective sweeps are justified only when they are conducted incident to an arrest.[86] The Missouri and Kansas state courts have similarly read this language to limit a protective sweep to those instances where police are making arrests.[87]

Such opinions are the exception: the majority of the circuit[88] and the state courts[89] have applied the protective sweep doctrine to non-arrest situations, focusing on *Buie*'s underlying rationale — the particular risk to officers of an in-home arrest, "namely, the adversarial nature of the arrest and the risk of ambush"[90] — and ignoring its limiting principles. These courts embrace the theory that it is "dubious logic" to conclude that "an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it."[91] Courts have found that although the arrest in *Buie* was effectuated pursuant to an arrest warrant, the Court did not base its decision upon this fact.[92]

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85. *See* United States v. Davis, 290 F.3d 1239, 1243 n.4 (10th Cir. 2002) ("[T]he government's argument may be briskly disposed with the definition of 'protective sweep.' As it appears in the first sentence of *Buie*, '[a] "protective sweep" is a quick and limited search of premises, *incident to an arrest* and conducted to protect the safety of police officers or others.'" (quoting *Buie*, 494 U.S. at 327)); United States v. Reid, 226 F.3d 1020, 1027 (9th Cir. 2000).

86. O'Brien, *supra* note 82, at 1152; United States v. Torres-Castro, 470 F.3d 992, 996–97 (10th Cir. 2006).

87. State v. Cromer, 186 S.W.3d 333, 346 (Mo. Ct. App. 2005) (finding a protective sweep illegal if an arrest is not yet executed, unless officers enter home because of exigent circumstances). Missouri follows Tenth Circuit precedent in its protective sweep case law. Kansas has limited the application of a protective sweep to "an in-home arrest" and refused to apply the doctrine where the arrest takes place just outside the home. *See, e.g.*, State v. Saylor, 163 P.3d 385, at *3 (Kan. Ct. App. 2007) (mem.); State v. Lemons, 155 P.3d 732, 738 (Kan. Ct. App. 2007).

88. For a more in-depth look at federal circuit court cases, see O'Brien, *supra* note 82, at 1152.

89. Some state courts have looked to their federal circuit court counterparts in dropping the requirement of the arrest. *See, e.g.*, Nelson v. State, 610 S.E.2d 627, 629–30 (Ga. Ct. App. 2005) (following Fifth Circuit precedent in holding that a protective sweep not performed incident to an arrest may still satisfy Fourth Amendment).

90. O'Brien, *supra* note 82, at 1158 (citing United States v. Gould, 364 F.3d 578, 584 (5th Cir. 2004)).

91. United States v. Knights, 534 U.S. 112, 117 (2001) (holding that a warrantless search of a probationer can be reasonable under the Fourth Amendment even though not exactly analogous to previous Supreme Court decisions).

92. *See, e.g.*, State v. Spencer, 848 A.2d 1183, 1193 (Conn. 2004).

The "incident to arrest" language therefore no longer limits the occasions when a protective sweep may be deemed valid in most jurisdictions. Many courts have also found that a protective sweep of the home is valid when the arrest took place directly outside the home.[93] In a few instances, state courts have upheld protective sweeps to allow for a search for weapons rather than dangerous persons.[94] By allowing the search to extend to spaces too small to hold a person, the sweep inherently becomes less cursory and more extensive — contradicting what the Supreme Court called for in *Buie*. Such an extension essentially enables law enforcement officials to search any space in the home.

These three expansions constitute a significant infringement on the general Fourth Amendment protection of privacy. Why has this doctrine moved almost uniformly in one direction? One explanation is that judges are sympathetic to the police, both because they face potentially dangerous encounters and should be able to take steps to protect their safety[95] and because law enforcement officials have little guidance in deciding whether or not to conduct a sweep.[96] Consequently, courts are less likely to impose their own additional limits and more likely to find a border-

93. *See, e.g.*, United States v. Lemus, 582 F.3d 958 (9th Cir. 2009), *reh'g en banc denied*, 596 F.3d 512 (9th Cir.), *petition for cert. filed*, No. 09-10988 (May 19, 2010); State v. Spencer, 848 A.2d 1183, 1192 (Conn. 2004); State v. Grossi, 72 P.3d 686, 690 n.2 (Utah Ct. App. 2003) ("[C]ourts have recognized that the same exigent circumstances present in *Buie* can sometimes accompany an arrest just outside of a residence or other structure."); State v. Revenaugh, 992 P.2d 769, 778 (Idaho 1999) (holding protective sweep exception to warrant requirement applies when suspect is arrested or detained outside the residence, provided officers have requisite reasonable, articulable suspicion necessary to support sweep).

94. *See, e.g.*, Commonwealth v. Bui, 645 N.E.2d 689, 692 (Mass. 1995). In *Bui*, the defendant was wanted for a double murder, and the police believed that a gun had been used in the course of the crime. The Supreme Judicial Court of Massachusetts found that although *Buie* expressly applied to people and not weapons, the concern for the officer's safety was analogous. 645 N.E.2d at 692. See also State v. Lacey, 468 S.E.2d 719, 730 (W. Va. 1996), where the Supreme Court of Appeals of West Virginia made the same expansion, allowing police to search for weapons after they had seen bullets on the dresser. A search for weapons on the premises is permissible even when an arrest is not being effectuated and a suspect is not present on the scene, provided officers have a *reasonable* belief that failure to secure a weapon will endanger themselves or private citizens. *Id.* at 730 n.14.

95. *See, e.g.*, State v. Guggenmos, 202 P.3d 892, 897 (Or. Ct. App.), *review allowed*, 218 P.3d 540 (Or. 2009) (mem.) ("[The officer's] decision to sweep the house himself . . . was the sort of judgment that we are reluctant to uncharitably second-guess." (internal quotation marks omitted)).

96. Paul R. Joseph, *The Protective Sweep Doctrine: Protecting Arresting Officers from Attack by Persons Other than the Arrestee*, 33 CATH. U. L. REV. 95, 141 (1983).

line search to be "reasonable" in the context of any given case. Another explanation is that, despite what the Court said in *Buie*, courts often conduct the protective sweep analysis by placing cases in categories that legitimize a search. When a violent or multiple-defendant crime has occurred, for example, courts are more likely to find that a sweep is valid.

A. CATEGORICAL JUDGMENTS REPLACING PARTICULARIZED SUSPICION

Buie used the "specific and articulable facts leading to a particularized suspicion" standard as a prerequisite to a protective sweep. Many state courts have lowered this bar by allowing categorical judgments to stand the stead of particularized suspicions. In *Buie*, the U.S. Supreme Court rejected the State of Maryland's proposal to make protective sweeps always permissible for "an in-home arrest for a violent crime."[97] The defendant rejected such a standard, arguing "[i]f something less than probable cause is sufficient . . . it is no less than individualized suspicion — specific, articulable facts."[98] As it embraced the articulable facts standard,[99] the Supreme Court rejected the State's proposal that a protective sweep always be allowed in the case of dangerous crimes.[100] The articulable facts requirement prevents police from viewing the sweep as an entitlement or from relying on the sweep as a default mode of investigation that permits a home search without a warrant. This suggests two important principles: first, the police have no automatic right to conduct a protective sweep upon entering a home; and, second, the nature of the crime alone is not enough to justify conducting a sweep. Nevertheless, many state court decisions do not pay heed to these principles.

One can draw a distinction between decisions that rely on "categorical facts" and those that require more "specific facts." This Note uses the term "categorical facts" to mean those facts that might be applied to a number of circumstances, such as the neighborhood in which a defendant lives, or the nature of the

97. Maryland v. Buie, 494 U.S. 325, 330 (1990).
98. *Id.* at 331.
99. *Id.* at 334.
100. *Id.* at 334 n.2.

crime to which the police are responding. These facts are usually, but not always, known before the police enter a home. "Specific facts," on the other hand, relate to the case at issue, such as when the police have seen a person enter the home who is unaccounted for at the time of the first arrest, or when the police have heard a noise coming from a back room. These facts help distinguish *this* home from another and ensure that police did not arrive at the home with the intent to perform a protective sweep. In those courts that rely on more "categorical" facts, the analysis bows away from the "articulable facts" requirement towards a more permissive standard, under which police may conduct a sweep based on general factors that indicate dangerousness.

It is difficult to determine whether such categorization drives trial court decisions, or whether this categorical analysis is prevalent only upon review at the appellate level. Trial court decisions on suppression motions are seldom issued in writing. However, it is likely that some amount of categorization takes place at the trial level because they rely upon appellate court decisions as precedent.[101]

The categorical approach ducks the proper *Buie* standard because the facts that the court takes as justifying the sweep are known before the police entered the home; this analysis therefore ignores the subjective element of the *Buie* standard, which requires that the "officer possesses" a reasonable belief that there is danger afoot.[102] Decisions based on categorization rather than particularized suspicion lead to so great an expansion of the use of the protective sweep as to swallow the general rule prohibiting warrantless searches. This is particularly troublesome in those cases where police enter in the non-arrest context. In such circumstances, police combine two exceptions to the Fourth Amendment in order to gain access to a home: consent and a protective sweep. Moreover, when police rely entirely on facts gained ex ante, or before they entered the home, they cannot meet the articulable facts standard that *Buie* requires.

This Note discusses four categories that state courts use to uphold the validity of protective sweeps: 1) likelihood that a dangerous third party is present; 2) commission of a dangerous

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101. *See infra* notes 186–200 and accompanying text.
102. *Buie*, 494 U.S. at 332.

crime; 3) multi-defendant crimes; and 4) drug crimes. This Note argues that an officer's belief that a dangerous third party is in the home is the touchstone of the *Buie* analysis: because it is imperative for a court to focus on the possible presence of a third party, more time is devoted to this discussion. This is distinct from the use of the other categories, which I argue are implicitly rejected by *Buie*.

1. *Belief that a Dangerous Third Party Is in the Home: Touchstone of the Proper* Buie *Analysis*

The distinction between a lack of information about the possible presence of a third party and affirmative evidence to suspect a third party's presence is the difference between an invalid and valid protective sweep. The Supreme Court of Connecticut has said that the "generalized possibility that an unknown, armed person may be lurking is not . . . an articulable fact sufficient to justify a protective sweep."[103] Instead, the Connecticut court, and others like it,[104] focuses its analysis on whether the prosecution can demonstrate the potential that a third party is present and dangerous.

The requirement of this affirmative showing ensures that a *lack of information* cannot suffice as a basis for a sweep that requires a circumstantial prerequisite.[105] Therefore, Connecticut has made the "possible presence of [a] third party in [the] arrestee's home" the "touchstone" of the protective sweep analysis.[106] In *State v. Williams*, the Appellate Court of Connecticut upheld the validity of a protective sweep pursuant to *Buie* "on the basis of the large amount and various types of ammunition that supported [the officer's] concern that other parties might be present

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103. State v. Spencer, 848 A.2d 1183, 1196 (Conn. 2004).

104. Both Ohio and Oregon take a similar approach, emphasizing the presence of a potentially dangerous third party as the touchstone of the exemption for a sweep and requiring specific articulable facts that suggest immediate danger. *See, e.g.*, State v. Guggenmos, 202 P.3d 892, 896 (Or. Ct. App.), *review allowed*, 218 P.3d 540 (Or. 2009) (mem.); State v. Sharpe, 882 N.E.2d 960, 969 (Ohio Ct. App. 2008).

105. *Spencer*, 848 A.2d at 1194–95.

106. *Id.* at 1194. *See also* State v. Sharpe, 882 N.E.2d 960, 970 (Ohio Ct. App. 2008) ("The protective-sweep exception to the warrant requirement in *Buie* . . . requires some positive indication that another person or persons remain in the residential premises where a subject is arrested and that they pose a threat to the safety of officers or others.").

in the apartment."[107] In contrast, in those cases where officers have only questions about whether anyone else may be inside the home, sweeps have not been upheld.[108]

However, while the possible presence of a third party is important, it is not enough to uphold the validity of the protective sweep. The *Buie* standard requires not only that the police believe a third party is in the home, but that a *dangerous* third party is in the home.[109] In *People v. Kveton*, the Appellate Court of Illinois found that the protective sweep was invalid where the "defendant disclosed that his sister was in the house, but nothing in the record suggest[ed] that the officers viewed her as a safety risk."[110] In that case, the defendant had been arrested for intent to sell marijuana, and the only fact that the officers could articulate was the physical capacity of the premises to harbor unseen persons.[111] The fact that a third person was known to be in the home did not satisfy the standard of reasonable suspicion needed to search the home. Similarly in *Valtierra v. State*, the Court of Appeals of Texas found that a police officer was not justified in conducting a protective sweep, even though he knew that there were multiple individuals in the home. The officer testified that "other than the mere number of individuals in the apartment, there was nothing about the individuals to make him believe that his 'safety was in jeopardy' or he 'may be in danger.'"[112]

Distinguishing parties that are suspected of posing a danger from those who do not is one of the more difficult aspects of the standard to apply. It is nevertheless important because it requires the officer to articulate not only why he believed another party to be in the home, but why the search was necessary for protection. By requiring that police reasonably suspect a third

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107. 954 A.2d 878, 885 (Conn. App. Ct. 2008).

108. *See, e.g.*, *Spencer*, 848 A.2d at 1196; Reasor v. State, 12 S.W.3d 813, 817 (Tex. Crim. App. 2000).

109. This is "clearly different from one pre-*Buie* view, that it is sufficient there was a reasonable suspicion that *if* anyone were there he could be a threat." LAFAVE, *supra* note 25, at § 6.4(c).

110. 840 N.E.2d 714, 731 (Ill. App. Ct. 2005). This sort of dangerousness analysis is subject to some generalizations and stereotypes about what persons might pose a danger. For example, a younger sister may seem less threatening to an officer than a grown man, merely because of the sister's size and relation to the principal suspect.

111. *Id.* at 731.

112. Valtierra v. State, 293 S.W.3d 697, 704 (Tex. App. 2009), *rev'd*, 310 S.W.3d 442 (Tex. Crim. App. 2010).

party to be both present *and* dangerous, courts are able to ensure that protective sweeps are used only in response to potentially threatening situations. The possible presence of another person is not alone enough: courts have recognized that not all third parties should be immediately thought to present a danger.

2. *Dangerous Crimes*

While focusing on the danger of the crime committed may be initially appealing, the crime-based approach is alarming because it endorses what the Supreme Court in *Buie* explicitly declined to embrace: a per se rule allowing a protective sweep when police are responding to violent crimes.[113] In many cases, courts have presumed a danger to officers by characterizing as dangerous the criminal acts allegedly committed by defendants. The Appeals Court of Massachusetts stated this interpretation clearly:

> We do not read *Maryland v. Buie* to require necessarily that the findings of "articulable facts" justifying a protective sweep be separate from the violence implicit in the crime for which the defendant is sought and the violence implicit in his criminal history. A violent criminal record can, in our view, constitute the separate basis called for by *Maryland v. Buie* and result in a commonsense application of the overarching constitutional principle of reasonableness.[114]

Upon first glance, it seems fair to apply this analysis in the more extreme situations, such as when police are dealing with

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113. Maryland v. Buie, 494 U.S. 325, 334 n.2 (1990) (applying the *Terry* standard to the home and rejecting a bright line approach) ("[*T*]*erry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters. Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted.").

114. Commonwealth v. DeJesus, 872 N.E.2d 1178, 1182 (Mass. App. Ct. 2007). *DeJesus* held that the violence of the alleged crime, armed carjacking, for which the defendant's arrest was warranted, and his record of violent felonies and firearm possession charges constituted "articulable facts" justifying a sweep. *Id.* at 1182. In an earlier, unrelated case concerning a defendant with the same surname, the Supreme Judicial Court of Massachusetts rejected a "categorical assertion" that "substantial dealers of narcotics keep firearms on their premises as tools of the trade." Commonwealth v. DeJesus, 790 N.E.2d 231, 238 n.6 (Mass. 2003) (holding that without evidence supporting "an objectively reasonable belief that someone is inside," the police cannot go back in to secure the apartment).

persons suspected of murder or other crimes committed with a dangerous weapon. For example, in *State v. Davila*, officers were investigating two felony murders.[115] The suspects, believed to have used a firearm in both crimes, remained at large, and their weapons had not been recovered. Upon entry into the apartment, "it was clear that it was comprised of multiple rooms, the occupants of which could not be seen from the door."[116] At the suppression hearing, the police justified the protective sweep based on the information gained before entering the home about the alleged murders.[117]

Similarly, in *Maness v. State*, the Court of Appeals of Alaska confirmed the trial court's finding that the sweep was valid based on "information of an earlier shooting incident and a report of a crazy man with a shotgun."[118] The court found that this information gave the police reasonable cause to believe that their safety was in danger from additional suspects who might be within the apartments,[119] even though there was no evidence at the scene of any third parties.

This analysis is appealing because those who are known to have committed or suspected of committing the most dangerous crimes are also those most likely to pose a risk to police. The *Terry* line of cases, including the protective sweep cases, aim to allow officers to protect themselves in dangerous situations. One might therefore argue that protective sweeps are *most necessary* when police, pursuant to a warrant, enter the home of a murder suspect. Professor LaFave[120] argues that particularly where the arresting officers lack concrete information tending to show that other persons are presently in the premises entered, "the dominant consideration [for courts] is the seriousness of the criminal conduct for which the arrest was made, considering all the known

115. 2009 WL 1010931, at *3 (N.J. Supr. Ct. App. Div. Apr. 16, 2009) (per curiam), *cert. granted in part*, 982 A.2d 456 (2009), *rev'd*, 999 A.2d 1116 (N.J. 2010).

116. *Id.* at *5.

117. Upon appeal, the Supreme Court of New Jersey overturned the Appellate Court's ruling and invalidated the protective sweep. *See* State v. Davila, 999 A.2d 1116 (N.J. 2010).

118. 49 P.3d 1128, 1131 (Alaska Ct. App. 2002).

119. *Id.*

120. Professor LaFave is the author of a widely cited treatise on search and seizure law. *See* citation *supra* note 25.

circumstances,"[121] while still accounting for the fact that the Court rejected a crime-based bright-line approach in *Buie*.[122]

Although LaFave recognizes that this approach conflicts with the reasoning in *Buie*, the inconsistency cannot be overstated. Once the type of crime is allowed to be anything more than a factor among many, a suspect's Fourth Amendment rights will vary depending on the crime with which he or she is accused. To allow the crime alone, or the suspect's history of violence, to suffice as the predicate for the sweep, is to undermine the particularized analysis that *Buie* calls for.[123] As the Court pointed out, the existence of an arrest warrant implies nothing about whether dangerous third parties will be found in the arrestee's house.[124] The Court also noted that the reasonable suspicion standard was necessary in order to ensure "the proper balance between officer safety and citizen privacy."[125] Blanket rules for certain violent crimes would be unfaithful to this balancing requirement. Furthermore, as the Supreme Court of New Jersey pointed out in *Davila*, the violence of the crime alone, if enough to meet the *Buie* standard, would justify a warrantless search for practically any apartment in the city.[126]

3. *Multi-Defendant Crimes*

Buie itself was a case concerning a multi-defendant crime, in which two men were charged with robbing a pizza restaurant. The police obtained arrest warrants for both Buie and his accomplice.[127] On remand, the Maryland Court of Appeals upheld the protective sweep because (1) Buie was known to have an accomplice, and (2) the detective knew that Buie had used a gun, which had not yet been accounted for.[128]

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121. LAFAVE, *supra* note 25, at § 6.4(c).
122. See discussion *supra* Part III.
123. *See supra* text accompanying notes 105–08.
124. Maryland v. Buie, 494 U.S. 325, 334 n.2 (1990).
125. *Id.*
126. State v. Davila, 999 A.2d 1116, 1135 (N.J. 2009).
127. *Buie*, 494 U.S. at 328. Although no new information was gained once the police arrived on the scene, the search was conducted with a warrant and, thus, incident to arrest.
128. Buie v. State, 580 A.2d 167, 171 (Md. 1990).

The number of suspects has come into play in many cases analyzing the validity of a protective sweep.[129] In *State v. Davila*, the officers possessed information that two murders had been committed by a group of men. When one young man let them into the apartment, one officer took him into custody while the others searched the rest of the apartment for other suspects.[130] Where only a single perpetrator is suspected, courts are correct to call into question the validity of carrying out a sweep once he or she has been secured.[131]

It may be relevant that the nature of the criminal operation makes the arrestee unlikely to be a solo participant or that the police may know that the arrestee is known to act with confederates. But there is a distinction between information gained before arriving at the home and information that police may gain on the scene about how many people they can expect to be present within the home. The latter information, such as when persons are seen or heard running into other parts of the premises, is more consistent with the requirements of *Buie*, because this information is acquired after the police have arrived at the home.

In *Commonwealth v. Taylor*, the police followed two men into a convenience store but, once inside, could not find them.[132] In such a situation, the police were justified in conducting a protective sweep to ensure that these men had not positioned themselves to stage an attack. Similarly, in *State v. Horty*, a Washington appellate court upheld a protective sweep where the officers had arrested two of the three defendants, but one remained at large.[133] An officer reentered the garage after he "heard movements in the already sealed house."[134] The court found that "[t]his new information, obtained after the initial sweep, justified reen-

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129. *See, e.g.*, State v. Davila, 2009 WL 1010931, at *3 (N.J. Super. Ct. App. Div. Apr. 16, 2009) (per curiam) ("The murders were committed by several African-American males."), *cert. granted in part*, 982 A.2d 456 (2009), *rev'd*, 999 A.2d 1116 (N.J. 2010); State v. Lane, 922 A.2d 828, 832 (2007) ("[T]hree black men, wearing hoods and masks, emerged from a black Lexus and approached Strauss Auto on South Broad Street in Hamilton Township; a fourth occupant remained in the vehicle.").

130. *Davila*, 2009 WL 1010931, at *2.

131. State v. Sharpe, 882 N.E.2d 960, 970 (Ohio Ct. App. 2008). Sharpe was arrested at his home, and no other perpetrators were implicated in the offense. *Id.*

132. 771 A.2d 1261, 1268 (Pa. 2001).

133. 122 Wash. App. 1047 (2004).

134. *Id.* at *4.

try of the house for another protective sweep."[135] However, information suggesting the participation of multiple criminals in a crime does not necessarily suggest that those same individuals are all in a given location at the moment of the police's entry. Thus, this sort of information is less likely to meet the requirement of particularity that *Buie* calls for. Otherwise, merely knowing that many people participated in the crime would give the police free rein to enter any home and conduct a protective sweep.[136]

4. *Drug Crimes*

This Note analyzes drugs as a separate category from "dangerous crimes," because case law shows that courts often recognize drug encounters as unique. Though drug crimes themselves are rarely inherently dangerous, many courts are willing to associate drug crimes with firearms or to assume that a drug dealer would pose a danger to police because he or she is involved in a drug ring. The nature of the safety concern to police, therefore, requires an extra step of logic: without particular information that a drug dealer has a firearm, some courts find this assumption more acceptable than others.

The association between drugs and violence has led many courts to allow police officers more deference when they are responding to drug complaints.[137] The North Carolina Court of Appeals took this approach in *State v. Bullin*,[138] where the facts known to the officers at the time of defendant's arrest included that "(1) defendant had a history of drug dealing; (2) officers had received information that defendant was currently involved in drug trafficking; (3) defendant was a current suspect in a drug trafficking investigation involving numerous individuals; and (4) defendant resisted arrest when informed of the warrant."[139] Drawing from defendant's actions and his previous involvement

135. *Id.*
136. *See* State v. Davila, 999 A.2d 1116, 1135 (N.J. 2010).
137. *See, e.g.*, United States v. Maldonado, 472 F.3d 388, 394–95 (5th Cir. 2006) (finding a protective sweep valid even when officers had "no certain knowledge that other individuals [we]re in the house," given the "reasonable expectation that weapons are present during drug transactions").
138. 564 S.E.2d 576 (N.C. Ct. App. 2002).
139. *Id.* at 583.

with drugs, as well as the "dangerous and unpredictable nature of drug trafficking,"[140] the court found that an officer could reasonably believe that under these facts, a protective sweep of defendant's home was necessary to make certain that no one else dangerous was hiding.[141]

Similarly, in *Celestin v. State*, the Court of Appeals of Georgia upheld a protective sweep of the defendant's motel room, although nothing other than drug possession was offered as to why the officer had feared for his safety.[142] The officer had been informed that the defendant was carrying a large amount of crack cocaine but did not possess a warrant when he knocked on the defendant's door.[143] When the defendant opened the door smoking a marijuana blunt, the officer handcuffed him and then "cleared the room, checking for weapons and potential suspects."[144] The search turned up drug paraphernalia, which was then used as the basis for a search warrant.[145]

The connection between drugs and danger may seem reasonable given the facts that drugs are contraband and that drug dealers often rely on weapons for protection.[146] However, some courts have recognized the danger of such categorization and explicitly rejected making this automatic connection between drugs and guns that justifies a protective sweep.[147] The Supreme Court of Connecticut has warned that upholding a sweep just because the defendants were involved in drugs would lead to a huge extension of the doctrine, as "nearly every arrest involving a large quantity

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140. *Id.* The officers involved in the protective sweep testified repeatedly that they searched the premises because they wanted to make sure no one was there that could hurt them, but they offered no facts as to why someone else might have been present. *Id.*

141. *Id.* at 583.

142. 675 S.E.2d 480 (Ga. Ct. App. 2009).

143. *Id.* at 483.

144. *Id.* at 483 (internal quotation marks omitted).

145. *Id.* at 483, 487

146. David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 1003–04 (1998). Professor Harris is a law professor at the University of Pittsburgh School of Law and writes on police behavior and regulation.

147. Commonwealth v. Jimenez, 780 N.E.2d 2, 7 (Mass. 2002) ("While it may be true . . . that it is common today for drug dealers to be in possession of firearms, and that firearms are commonly confiscated in the execution of searches for drugs, these categorical assertions do not justify dispensing with a review of the specific circumstances present in each case."(internal quotation marks omitted)).

of drugs, in or just outside a home, carries the same possibility."[148] Furthermore, the distinction between large and small quantities presents a line-drawing problem. Professor David A. Harris argues that, in the *Terry* context, courts have "gradually widened the category of drug offenses for which police could automatically frisk,"[149] eroding the need for particular suspicion.

In *Richards v. Wisconsin*,[150] the U.S. Supreme Court identified two concerns associated with categorized judgments based on the "'culture' surrounding a general category of criminal behavior,"[151] such as narcotics. First, the exception contains considerable overgeneralization, and such a blanket rule insulates cases from judicial review so long as certain elements are present.[152] The second problem is that "the reasons for creating an exception in one category can, relatively easily, be applied to others."[153] *Richards* made clear that categorical assertions "do not provide the grounding in reasonableness that the Court seeks"[154] for Fourth Amendment analysis.

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148. State v. Spencer, 848 A.2d 1183, 1196 (Conn. 2004). *See also* United States v. Colbert, 76 F.3d 773, 778 n.2 (6th Cir. 1996) ("[J]ustifying a search because drug related arrests are dangerous would permit wholesale abrogation of the Fourth Amendment reasonableness requirement . . . ." (internal quotation marks omitted)).

149. Harris, *supra* note 146, at 1004. *But see* LAFAVE, *supra* note 25, at § 6.4(c) (arguing that there may be some space for distinction within this category, e.g., between a place believed to be a major narcotics distribution point and a place where only a small amount of marijuana is contained or used).

150. 520 U.S. 385 (1997) (rejecting Wisconsin's proposed blanket rule dispensing with requirement that police knock and announce their presence when executing a search warrant in a felony drug investigation).

151. *Id.* at 392. There is a distinction to be made between the execution of a search warrant, where the defendant would not be able to deny the police entry, and the execution of a protective sweep. When analyzing a protective sweep, the officers are already presumed to have entered lawfully. Furthermore, states attempt to categorize drug felonies as dangerous because they are concerned that, when dealing with drug felonies, police officers will usually be confronted with some form of threat. Finally, such an entry normally requires the same standard of "reasonable suspicion" used in *Buie* in order to justify a "no knock" entry. The police must have "reasonable suspicion" that knocking and announcing their presence under the circumstances would be dangerous or futile. *Id.* at 394.

152. *Id.* at 393–94.

153. *Id.* at 393–94. *Richards* recognized that cultures can change over time and that it is therefore "dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment." *Id.* at 392 n.4.

154. Harris, *supra* note 146, at 1021. It is suspect for the Fourth Amendment protections to "shift with the latest fashions in criminal conduct." *Id.* at 1016.

B. WHAT'S WRONG WITH CATEGORICAL JUDGMENTS?

Why must courts avoid categorical judgments when conducting a *Buie* analysis? These categories allow courts to meaningfully use precedent and analogize to similar case law. There is a good argument that categorization is an inevitable consequence of the *Buie* standard and the appellate process. To be certain, a court can and should consider all of these factors as part of its analysis. But no single factor should be seen as determinative. Categorization poses three major problems: first, categorical determinations inevitably displace particularized suspicion rather than supplement it; second, categorization presents potential for abusing the protective sweep as a means of gathering evidence rather than ensuring police safety; and third, categorization undermines the subjective element of the *Buie* standard. I deal with each of these problems in turn.

First, courts that make generalizations based on certain factors inevitably relax their demand for specific, articulable facts. *Celestin v. State*[155] illustrates what happens when courts allow generalizations to suffice for articulable facts. As described earlier,[156] in that case a narcotics investigator went to a motel room on a tip from a confidential informant, and when the defendant came to the door he was smoking a marijuana blunt.[157] After handcuffing the defendant, the investigator "cleared the room, checking for weapons and potential suspects."[158] The court found that "where the officer testified that he wanted to ensure that no one was in the bathroom, a limited sweep was authorized to secure the room while a search warrant was obtained."[159] However, the court failed to require "articulable facts" in order to justify such a sweep. No facts were presented as to *why* the officer suspected that someone was in the bathroom. Where a general statement by a police officer that he feared someone to be in the other room will suffice, a prosecutor can easily manipulate ex post police testimony to fit the judicial standard.[160]

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155. 675 S.E.2d 480 (Ga. Ct. App. 2009).
156. See text accompanying footnotes 142–45.
157. *Id.* at 483.
158. *Id.* (internal quotation marks omitted).
159. *Id.* at 487.
160. *See* Richman, *supra* note 26, at 1046.

Professor Harris argues that the same phenomenon is present in *Terry* case law.[161] Harris argues that as a result of such categorization, courts have permitted frisks "automatically, as a matter of course, every time police stop someone, even though the suspected offense does not involve violence and the suspect shows no outward sign that he or she might be armed and dangerous."[162] These cases can be generalized as "types of offenses always considered dangerous . . . regardless of the absence of any facts that actually indicate dangerousness."[163]

Second, categorization can lead to the use of the protective sweep as a means of gathering evidence rather than ensuring police safety. Categorization is therefore even more disconcerting in the *Buie* context than in the *Terry* or *Richards* context, because *Buie* authorizes an expanded search of the home, which has traditionally received heightened Fourth Amendment protection.[164]

Therefore, when courts focus on categorization rather than specific facts, there is danger that the protective sweep will be used as an offensive tool to discover evidence, rather than as a protective shield. This is particularly dangerous when the categorization — such as the commission of a dangerous crime or multi-defendant crime — is based entirely on information gathered before the police enter the home. Where courts uphold a search based only on information gathered before entry, the protective sweep becomes a default mode for police, so long as certain factors are present.

State v. Davila highlights the potential for abuse when a court allows a search based on such ex ante information: the police can make the decision to conduct the sweep before they knock on the door. In *Davila*, officers were looking for a group of men who had committed two murders. They traced the suspects to a certain apartment based on calls made to a stolen cell phone, which gave them "substantial reason to believe that the occupants of the

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161. As discussed in Section II, *Buie* borrows its "articulable facts" standard from the *Terry* line of cases. It is therefore not surprising that both *Buie* and *Terry* case law have similarly been subject to categorization.

162. Harris, *supra* note 146, at 1001.

163. *Id.* at 1002.

164. *See supra* Part I; *see also* Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) ("[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.").

apartment were somehow connected with the murderers."[165] The officers knocked on the apartment door and entered pursuant to consent.[166] Once inside, the officers conducted a sweep of the apartment, which revealed drugs and the missing cell phone, tying the suspects to the murder.[167]

Finally, categorization erodes the *Buie* standard because it undermines the standard's subjective element.[168] Most Fourth Amendment jurisprudence, including *Terry*, holds that subjectivity in using pretext should not matter, so long as the objective standard is met.[169] *Buie* characterized the standard of reasonable suspicion needed to conduct a protective sweep as requiring that "the searching officer *possesses* a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger."[170] *Buie* thus contains a subjective requirement — not only that the officer's suspicion be reasonably grounded, but also that the officer conducting the search actually and reasonably feel threatened.[171] Therefore, when an officer does not actually possess a reasonable belief, the search must fail under the *Buie* standard. Categorical line drawing based on types of criminal activity should also fail the *Buie* standard, because categorization sidesteps the subjective part of the *Buie* test.

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165. State v. Davila, 2009 WL 1010931, at *5 (N.J. Supr. Ct. App. Div. Apr. 16, 2009) (per curiam), *cert. granted in part*, 982 A.2d 456 (N.J. 2009), *rev'd*, 999 A.2d 1116 (N.J. 2010).

166. *Id.* at *1–2.

167. *Id.* at *2.

168. On remand, the Maryland Supreme Court considered the objective and subjective elements of the new standard and concluded that an objective standard was to be used because of the Court's language, which drew upon *Terry* and *Long*. Buie v. State, 580 A.2d 167, 169–70 (Md. 1990) ("The experience and training of the particular police officers involved will form a part of the matrix of facts that define the circumstances which must be considered, but the test is whether a reasonably prudent police officer, under those circumstances, is justified in forming a reasonable suspicion that the house is harboring a person posing danger to those on the arrest scene." *Id.* at 170).

169. *See, e.g.*, Whren v. United States, 517 U.S. 806, 812 (1996) (holding that Fourth Amendment's concern with reasonableness permits certain law enforcement actions regardless of the subjective intent of the police officers). For a discussion of *Terry's* subjective standard, see Richman, *supra* note 26, at 1047.

170. Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 772 (2010) (quoting Maryland v. Buie, 494 U.S. 325, 337 (1990)). The *Buie* standard can be distinguished from the *Terry* standard, which asked, "[W]hether a *reasonably prudent man* in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry v. Ohio, 392 U.S. 1 27 (1968) (emphasis added).

171. Kinports, *supra* note 170, at 771–74.

Though the subjective-objective standard is in line with the purpose of the *Buie* rationale, it is worth highlighting two concerns regarding the requirement of a subjective standard. The first concern is that such inquiries can be "timeconsuming [sic] and further would seldom produce accurate results."[172] Courts are not particularly good at discerning the true motives of an officer, and a subjective approach allows officers to give testimony that diverges from what they felt at the time. In doing so, it leaves room for prosecutors to help an officer shape his or her testimony to recreate — accurately or not — the danger he or she felt at the time.

The second concern relates to the previously discussed categorization. When a court relies on an officer's experience and knowledge as aspects of a subjective standard,[173] the court is bound to deal with categorizations which those officers have made. Officers make generalizations about when they might be in danger, whether it is in drug cases, or areas known to be associated with crime,[174] and courts are likely to give weight to an officer's experience.[175] As a result, an officer who is always frightened in certain circumstances may lead a court to deem protective sweeps to be proper in certain types of cases more so than others. However, categorization does not become any more legally legitimate under *Buie* just because police officers may classify cases in their own minds. Deference to the police in this area may threaten the right to privacy because the Fourth Amendment was intended as a *check* on police.

Despite these concerns, a subjective inquiry is necessary in assessing a protective sweep. At its core, the protective sweep doctrine acknowledges that officers enter dangerous situations and need to protect themselves. Professor Richman argues that, in

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172. George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 472 (2006).

173. Kinports, *supra* note 170, at 753 ("Allowing probable cause to turn on what a particular police officer knew, based on her training and on-the-job experience, injects a subjective inquiry into the analysis."). *See also id.* at 764.

174. *Id.* at 752.

175. In fact, the Court has instructed lower courts quite directly to defer to the judgment of police in determining the appropriateness of *Terry* stops. *See* United States v. Cortez, 449 U.S. 411, 418 (1981) ("[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.").

the *Terry* context, "[t]he use of an objective approach . . . flies in the face of this rationale"[176] because "the *Terry* inquiry takes place in the context of retrospective litigation about hypothetical motivations."[177] The "articulable facts" standard inherently requires judges to approach cases from the perspective of law enforcement officers.[178] While both objective and subjective standards enable a prosecutor to help the police officer tighten up his or her narrative of what occurred in order to fit legal doctrine,[179] the subjective standard insists that police act in ways that can be independently judged as reasonable. Without a subjective approach, Richman argues we protect after the fact justifications in the form of "creative litigation" rather than "good police work."[180]

Furthermore, the reasonable suspicion standard required in *Buie* is more amenable to a subjective standard than those searches requiring probable cause.[181] While probable cause is equated with some amount of evidence, reasonable suspicion is "an apparently mixed criterion requiring a subjective belief that is objectively reasonable."[182] The nature of the reasonable suspicion standard is such that "[a]n officer cannot have a *reasonable* suspicion that a person is armed and dangerous when he in fact has *no* such suspicion."[183] So long as this purpose drives the doctrine, both the objective and the subjective criteria must be met.[184]

By acknowledging that this subjective inquiry can be very hard to perform ex post and that police often act on hunches based on their experience, one can become comfortable with the idea that the *Buie* standard is imperfect. Even with both an objective and subjective element, it will not be accurate one hundred percent of the time: some searches will be upheld because

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176. Richman, *supra* note 26, at 1047. Professor Richman is a professor at Columbia Law School and a recognized scholar in criminal law and procedure.

177. *Id.*

178. *Id.* (citing Steven A. Saltzburg, Terry v. Ohio: *A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911 (1998)).

179. *Id.* at 1045 (asserting that because the *Terry* standard is objective, there is nothing wrong with prosecutors helping police articulate an ex post justification).

180. *Id.* at 1048.

181. Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 364 (2006).

182. *Id.*

183. United States v. Lott, 870 F.2d 778, 784 (1st Cir. 1989) (emphasis original).

184. *See* Kinports, *supra* note 170 (arguing that the *Terry* standard should have an objective element where officers' experience and knowledge can be taken into account when evaluating the permissibility of a frisk under the reasonable suspicion standard).

the prosecutor can articulate enough facts known to the officer, even if those facts were not the basis for the officer's decision to perform the sweep. Conversely, some searches will be invalidated because the prosecutor does not have enough articulable facts to point to, even though the police really did fear for their safety and acted without pretext. This disconnect can be explained in part by the fact that the guidance given to law enforcement and the law commanding suppression of evidence are not coterminous.[185] Requiring prosecutors to show articulable facts remains the critical part of this standard that prevents arbitrary police action.[186] Allowing the State to rest on the mere categorization of cases negates this subjective inquiry. Where police do not enter incident to arrest, courts must be careful to ensure that police have not arrived with the intent to perform a protective sweep, but rather that some intervening factor has allowed them to meet the articulable facts standard.

C. CATEGORICAL JUDGMENTS AS PRODUCTS OF THE PROCESS

While categorization weakens the standard set out in *Buie*, it may be itself a product of the fact-specific nature of the reasonable suspicion standard and the appellate review process. The reasonable suspicion standard requires the trial court, in a suppression motion, to delve into the facts of the particular case and make a determination whether the protective sweep is reasonable.[187] When these decisions are appealed, appellate courts do not parse the facts in the same way: they deal only with the record and whatever findings the trial court has made.

Richman argues in the *Terry* context that categories are therefore not coincidental but rather a "virtually inevitable product of a system in which after-the-fact objective justifications are informed by appellate decisions that are at least one step removed

185. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626 (1984). Professor Dan-Cohen expounds upon the idea of "acoustic separation," in which a law defining an offense and the law commanding a punishment to be administered are distinct. *Id.* at 630–36.

186. Richman, *supra* note 26, at 1050.

187. If a defendant loses the suppression motion and is convicted, he may, on appeal, allege that the trial court's evidentiary ruling was erroneous. *See* Brent E. Kidwell, *A Nation Divided: By What Standard Should Fourth Amendment Seizure Findings Be Reviewed on Appeal?*, 26 IND. L. REV. 117, 118 (1992).

from the particular facts and circumstances of a case."[188] The nature of the appellate process compels trial courts to focus on "salient factors" that help explain its decision.[189] The prosecutor will then use these same salient features in subsequent cases to convince the appellate court.[190] Therefore, decisions at the appellate levels may be more categorical versions of the decisions that the trial courts have made on a more nuanced level. Because state trial courts rarely publish decisions on motions to suppress, it is difficult to compare their analysis to that of appellate courts. Richman's analysis suggests that the categorization occurring in the appellate courts impacts trial court determinations, even if the facts are more finely parsed at the trial level.

Because of the effect of appellate review on the trial court's decision, it is worth thinking briefly about the standard of review in such cases. In *Ornelas v. United States*, the U.S. Supreme Court held that questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed de novo[191] and that reviewing courts should "take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[192] This standard is only binding on the federal courts.[193] In large part, state appellate courts review motions to suppress on the facts for clear error and review de novo questions of law,[194] recognizing that the review of a protective

188. Richman, *supra* note 26, at 1046.

189. *Id.*

190. *Id.* at 1045–46.

191. 517 U.S. 690, 699 (1996).

192. *Id.* Reasonable suspicion is different from reasonable doubt or of proof by a preponderance of the evidence, as it acquires "content only through application." *Id.* at 697. This de novo standard is less deferential than the great deference proffered when reviewing a decision to issue a warrant, reflecting the strong preference for warranted searches. *Id.* at 698–99.

193. *See, e.g.*, State v. Brockman, 528 S.E.2d 661, 664 (S.C. 2000) ("There is nothing in the language of *Ornelas* suggesting that the Fourth Amendment mandates de novo review of ultimate determinations of reasonable suspicion or probable cause for warrantless searches."); State v. Jackson, 918 P.2d 945 (Wash. Ct. App. 1996). Many state courts have nonetheless adopted the *Ornelas* de novo standard of review for warrantless searches and seizures. *See, e.g.*, State v. Lee, 585 N.W.2d 378 (Minn. 1998); *In re* J.A., 962 P.2d 173 (Alaska 1998); Matthews v. Blue Cross & Blue Shield of Mich., 572 N.W.2d 603 (Mich. 1998); State v. Chitty, 571 N.W.2d 794 (Neb. 1998); State v. Rogers, 924 P.2d 1027 (Ariz. 1996) (en banc).

194. *See, e.g.*, Valtierra v. State, 310 S.W.3d 442, 447–48 (Tex. Crim. App. 2010) (affording almost total deference to a trial court's determination of historical facts and re-

sweep is a mixed question of law and fact.[195] Those courts that diverge from this standard use other standards that similarly grant the trial courts great deference on the facts.[196]

Because appellate courts are removed from the particular facts and circumstances of a case, and because their opinions must serve only to justify or overturn the decision below, appellate opinions become more generalized, with certain salient factors serving as a foundation for the decision. The Court in *Ornelas* recognized that "because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multi-faceted, 'one determination will seldom be a useful "precedent" for another.'"[197] Categorization based on the nature of the crime is perhaps an unintentional attempt to counteract this problem.

As Richman argues in the *Terry* context, prosecutors will look to emphasize these "salient factors" when preparing their next case.[198] Similarly, this allows appellate courts to develop a sort of template to rule on these decisions without completely swallowing Fourth Amendment protections. The result is the creation of carve-outs, whereby searches with certain attributes will consistently get less Fourth Amendment protection. The judicial process thus generalizes and expands[199] to the detriment of de-

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viewing de novo the application of law); State v. Barlow, 152 Wash. App. 1027, at *2 (2009) ("We review a trial court's conclusions of law at a suppression hearing de novo. And we treat unchallenged findings as verities on appeal." (internal citations omitted)), *review denied*, 227 P.3d 295 (Wash. 2010); State v. Guggenmos, 202 P.3d 892, 894 (Or. Ct. App.) ("We review the trial court's legal conclusions for errors of law, accepting the facts on which those legal conclusions are based if they are supported by any evidence."), *review granted*, 218 P.3d 540 (Or. 2009) (mem.); State v. Pando, 643 S.E.2d 342, 344 (Ga. Ct. App. 2007) ("[D]eterminations of fact and credibility must be accepted unless clearly erroneous."). Because the trial court is able to call witnesses, analyze the demeanor of the parties, and judge their credibility, there is a strong argument that trial court judges are in the best position to make decisions on the facts.

195. *Ornelas*, 517 U.S. at 696–97 ("The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: '[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.'" (modifications in original) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289, n.19 (1982))).

196. Montana courts review evidentiary rulings for abuse of discretion. State v. Whisler, 190 P.3d 1098 (Mont. 2008).

197. *Ornelas*, 517 U.S. at 698 (quoting Illinois v. Gates, 462 U.S. 213, 239 n.11 (1983)).

198. Richman, *supra* note 26, at 1045–46.

199. *Id.* at 1046.

fendants' rights; there are no counteracting forces working to ensure that *Buie* remains limited.

The nature of the *Buie* standard itself also influences the role of the appellate courts. The *Buie* doctrine stands somewhere between a totality of the circumstances "reasonableness" test and a multi-factor test. Where the *Buie* test is seen as "multi-factor," appellate courts are more likely to instruct trial courts that they have incorrectly weighted factors or incorrectly used the standard. In contrast, a "totality of the circumstances" test leaves more discretion to the trial courts to judge reasonableness.[200] While the multi-factor test makes the trial court decision more reviewable by enumerating the basis for the decision,[201] it is also more difficult for police to use on the job, where they have to make decisions in seconds. When the decision rests on an overall determination of reasonableness that looks to the totality of the circumstances, it lends itself to categorizations.

These features of the *Buie* standard and the appellate process — the fact-specific nature of the inquiry, the need for ex post justification of officer action, the deference given to the trial court, and the multi-faceted nature of the reasonable suspicion inquiry — both individually and in concert help to explain courts' tendency towards categorization. Having identified these features as sources of the problem, I turn now to suggestions of how to remedy the situation and reaffirm the *Buie* foundation.

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200. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) (asserting that totality of circumstances test is "ungoverned by rule, and hence ungoverned by law").

201. In *State v. Lane*, a panel of the New Jersey Appellate Division laid out factors for the trial court to consider on remand in determining the legality of a protective sweep, including consideration of whether the sweep occurred in a home; the lawfulness of the officers' presence; whether the police had a reasonable, articulable suspicion that the area to be swept harbored individuals posing a danger to them; whether it was likely that another suspect might have been in the area and therefore whether it was reasonable for the police to assume that the space to be swept harbored someone who posed a danger; whether officer acted in good faith; and whether the sweep was cursory and brief. 922 A.2d 828, 841–42 (N.Y. Super. Ct. App. Div. 2007). This instruction to the trial court resembles a multi-factor test more than some other courts' instructions, allowing a reasonableness inquiry to guide, and therefore leaning more towards a totality of the circumstances approach.

V. GETTING BACK TO *BUIE*: REDRAWING THE BOUNDARIES OF A LIMITED SEARCH

In the course of inconsistencies across courtrooms and jurisdictions, the *Buie* doctrine has been whittled down to a shell of its original form. This Note is based on an assumption that the standard for the validity of protective sweeps, as set forth in *Maryland v. Buie*, is a desirable one. The challenge in Fourth Amendment jurisprudence is "to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made."[202] The goal is therefore "a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[203]

In delineating a successful standard for a protective sweep, one must navigate cautiously between the Scylla of protecting the home from warrantless entry and the Charybdis of tying the hands of law enforcement who must often, by necessity, enter dangerous situations without a search warrant.[204] Without "incident to arrest," only "specific and articulable facts" and "limited in scope and duration" continue to limit the actions of law enforcement. Therefore, even if courts drop the "incident to arrest" requirement, three robust requirements remain: 1) a cursory search must be limited to spaces large enough to hold a person, based on 2) specific and articulable facts suggesting 3) that the space harbors an individual who poses a danger. Without "incident to arrest," i.e., when police enter pursuant to consent, courts

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202. Atwater v. City of Lagos Vista, 532 U.S. 318, 347 (2001); *cf. id.* ("[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.").

203. New York v. Belton, 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 142).

204. It might be argued that in some of the cases discussed here, the police should have secured a warrant before going to the home. Though this may be true in some cases, the protective sweep inherently acknowledges the space between probable cause for a search warrant and the suspicion police have when they conduct a "knock and talk." For a full discussion on knock and talks and their implication for Fourth Amendment protection, see *Knock and Talk*, *supra* note 32.

must also be convinced that officers have not entered with the intention to conduct a protective sweep. For this reason, courts must look for articulable facts that arise after the officers arrived on the scene. To be certain, this Note does not endorse a bright-line rule, which would hamper or even endanger police;[205] however, law enforcement officers "cannot have created the danger to which they became exposed by entering the premises, and thereby bootstrap into an entitlement to perform a protective sweep."[206] Nor can they arrive with the intent of using the protective sweep. The protective sweep is a defensive shield with a circumstantial predicate, rather than a sword to be used offensively.

In order to ensure proper analysis, it is also important to move away from allowing categorizations to dictate the propriety of the sweep. The distinction between articulable facts and categorization is the difference between knowing that a firearm has been used and is still missing, and knowing that a dangerous crime has been perpetrated. But that alone is not enough. There must still be other "articulable facts" to entitle the police to conduct a search for *third persons* believed to pose a danger. *Buie* suggests that the protective sweep was to be used after the arrest had been executed, only to ensure that the police are safe from persons *other than the defendant* who might be present in the home.[207] *Buie* was therefore meant to compliment a *Chimel* search, which protects the police from the arrestee herself.[208] For the police to use the protective sweep as a means of searching for the suspect seems to turn this doctrine on its head.

The *Buie* standard does not dictate that an officer obtain the "articulable facts" necessary to conduct the protective sweep either before or after the police enter the home. But in the case of consent entries, there is reason to require that the articulable facts must be acquired after the police arrive on the scene and before they decide to start a sweep; otherwise, officers are able to

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205. State v. Davila, 999 A.2d 1116, 1132 (N.J. 2010).

206. *Id.* The New Jersey Supreme Court has best articulated a full protective sweep standard.

207. Maryland v. Buie, 494 U.S. 325, 333 (1990) ("A *Terry* or *Long* frisk occurs before a police-citizen confrontation has escalated to the point of arrest. A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime.").

208. Sarah E. Rosenberg, Buie *Signals: Has an Arrest Warrant Become a License to Fish in Private Waters?*, 41 EMORY L.J. 321, 333 (1992).

take advantage of the protective sweep to move about the home and look for evidence or people without having obtained a warrant.[209] While it may often be difficult for the court to retrospectively determine police intent, it is worth noting that consent entries carry a greater potential for Fourth Amendment abuse. When police are not required to enter the home to execute a warrant, but do so as part of an investigation, they have created the danger that they then need to dispel by conducting a protective sweep.[210]

Where the police are operating with a warrant, there is a somewhat different calculation. Some courts have already made this a part of their analysis, by considering factors such as "the lawfulness of the police's presence."[211] This takes into account how reasonable it is that the police have entered the home to begin with. Leslie O'Brien[212] argues that courts should "incorporate a proper inquiry into the 'need to search' into their reasonableness analysis" and "require a compelling need for officers' initial lawful entry into a home for protective sweeps to be valid."[213] O'Brien advocates that courts draw a bright line according to the type of entry involved and not allow protective sweeps where officers enter pursuant to consent. [214] Such a bright line fails to account for situations where entry pursuant to consent and a subsequent protective sweep may be valid.[215] However, courts should consider the type of entry as relevant to the validity of the protective sweep.

This Note argues that where a protective sweep follows a consent entry, there is more danger for abuse of the protective sweep doctrine. Such a sequence compounds the unreasonableness of

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209. United States v. Hassock, 676 F. Supp. 2d 154 (S.D.N.Y. 2009); O'Brien, *supra* note 82, at 1139.

210. *See, e.g.*, *id.*; United States v. Gandia, 424 F.3d 255, 262 (2d Cir. 2005) (expressing "concern that generously construing *Buie* will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home").

211. The New Jersey Supreme Court has recently adopted the standard suggested in *State v. Lane*, 922 A.2d 828, 841 (N.J. Super. Ct. App. Div. 2007). *See* State v. Davila, 999 A.2d 1116, 1132 ("[T]he legitimacy of the police presence must be probed.").

212. Leslie O'Brien's student note focuses on the similar problem of extending the protective sweep doctrine beyond the arrest context. *See* note cited *supra* note 82.

213. O'Brien, *supra* note 82, at 1139.

214. *Id.*

215. *See, e.g.*, State v. Guggenmos, 202 P.3d 892 (Or. Ct. App.), *review granted*, 218 P.3d 540 (Or. 2009) (mem.).

the search. Courts should therefore require that officers gain some new information after entering the home pursuant to consent. Courts will thus be able to serve as a check on the pretextual use of protective sweeps and prevent the use of protective sweeps as an offensive weapon to look for evidence. This standard will also discourage the use of consent entries, encourage police to obtain warrants whenever possible, or require them to make a showing of exigent circumstances and probable cause.[216]

This approach does not restrict police in those circumstances where they fear for their safety and feel the need to conduct a protective sweep. It is helpful here to think of protective sweeps as having two aspects: what the police feel they need to do in order to ensure their own safety, and whether the evidence they find while doing so will be admissible in the case of prosecution. Though the exclusionary rule has been recognized as "a principal mode of discouraging lawless police conduct,"[217] police can still conduct a protective sweep for their own safety, leaving the consequences to the prosecutors.

Where no evidence is discovered in the course of the sweep, there will be no consequences for any "invalid" sweep.[218] When prosecutors do seek to introduce evidence discovered in the course of the sweep, one of two possibilities will occur: first, the sweep

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216. An exception to the search warrant requirement of the Fourth Amendment pertains to cases in which police officers have probable cause for the search or seizure, and exigent circumstances make it impracticable to obtain a warrant. Warden v. Hayden, 387 U.S. 294 (1967); 68 AM. JUR. 2D *Searches and Seizures* § 121 (2010).

217. Terry v. Ohio, 392 U.S. 1, 12 (1968).

218. One exception to this rule arises if the complainant brings a 42 U.S.C. § 1983 claim for damages. In order to recover against a state actor in a section 1983 action, the plaintiff must show that "(1) the defendant deprived the plaintiff of a right secured by the Constitution and laws of the United States, and (2) the defendant acted under color of state law." J.H. *ex rel.* Higgin v. Johnson, 346 F.3d 788, 791 (7th Cir. 2003). Government officials performing discretionary functions are entitled to qualified immunity if their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known about. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Some section 1983 claims have been brought, with little success. *See, e.g.*, Palmieri v. Kammerer, 690 F. Supp. 2d 34, 48 (D. Conn. 2010) ("[B]ecause the defendants have not provided sufficient evidence demonstrating that an objectively reasonable officer would have conducted a protective sweep, qualified immunity is not available on this basis."); *compare* Bonilla v. United States, 357 Fed. App'x. 334, 335 (2d Cir. 2009) ("[D]efendants are entitled to qualified immunity because there is no holding in the applicable jurisprudence dictating that their sweep violated clearly established law governing the permissible scope of such a search."); Wilson v. Morgan, 477 F.3d 326, 339 (6th Cir. 2007) (reversing the jury's finding in favor of complainant on a section 1983 claim).

may be deemed invalid and the evidence excluded. Alternatively, the evidence may be admissible through one of several evidentiary doctrines that serve as escape routes from the exclusionary rule, such as the plain view doctrine[219] or the inevitable discovery doctrine.[220]

VI. CONCLUSION

As the facts of *U.S. v. Lemus*[221] suggest, the protective sweep doctrine is subject to expansion in multiple directions, especially when coupled with other Fourth Amendment doctrines favorable to the police. Courts must help ensure that the protective sweep remains an exception to the general presumption against warrantless searches.

Following *Terry* and *Long* before it, *Buie* reflects the fact that police officers must often enter dangerous situations and require some degree of protection while carrying out their duties. When the *Terry* doctrine moved into the home, the Court acknowledged the need to protect Fourth Amendment privacy rights and delineated the boundaries of a valid search. Even once the police could conduct a search, the scope of the search was to be limited. The purpose was to allow police to ensure that no one who posed a threat to them was hiding in the confines of the home, not to assay how much evidence they could collect while in the home.

The nature of the *Buie* standard and the appellate process both lend themselves to generalization and expansion. There are a few cases where protective sweeps have grown to include spaces too small to hold a person,[222] even though *Buie* clearly states that

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219. With respect to traditional physical evidence, "[t]he rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy." Minnesota v. Dickerson, 508 U.S. 366, 375 (1993).

220. *See* Nix v. Williams, 467 U.S. 431 (1984) (recognizing the inevitable discovery doctrine as an exception to the fruit of the poisonous tree doctrine). When the challenged evidence would ultimately have been found absent the constitutional violation, the evidence will be admitted. *See generally* Stephen E. Hessler, *Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 MICH. L. REV. 238 (2000).

221. 596 F.3d 512 (9th Cir.), *petition for cert. filed*, No. 09-10988 (May 19, 2010). This case is discussed in this Note's opening paragraph.

222. *See supra* note 94 and accompanying text.

this is a limiting factor.[223] Likewise, courts have upheld sweeps based on the violent nature of the crime alone, though *Buie* clearly forbids such generalizations. This is part of a broader trend, whereby courts uphold sweeps because certain circumstances generally seem to pose danger to officers.

This Note has argued that in order to ensure that the protective sweep remains an exception to the rule, courts must emphasize the circumstantial predicate of the standard. The prosecution must be forced to show "articulable facts" specific to the case at issue: courts should not uphold protective sweeps based on categorizations alone. In order to ensure that the articulable facts requirement remains robust, and to truly confine protective sweeps to the proper situations, courts need to be more demanding about the nature of the articulable facts they will allow to suffice. Where police enter pursuant to consent, courts should be suspicious if police then conduct protective sweeps based on information gained ex ante — before the police arrived at the scene. When police enter pursuant to a warrant, ex ante information should be similarly suspect, because when police rely on this information alone, it leads to generalizations of a sort explicitly rejected in the *Buie* decision itself. The analysis suggested here will encourage the use of protective sweeps where police truly feel that they are in danger, while helping to counter those situations where police might abuse sweeps as pretext in order to search a suspect's home.

223. Maryland v. Buie, 494 U.S. 325, 326 (1990).