

# ARTICLES

## THE PURPOSE OF THE FOURTH AMENDMENT AND CRAFTING RULES TO IMPLEMENT THAT PURPOSE

*Thomas K. Clancy* \*

### I. INTRODUCTION

What is the purpose of the Fourth Amendment?<sup>1</sup> How should rules—legal principles—be crafted to implement that purpose? This article addresses those questions. Nothing is more fundamental to the development of Fourth Amendment principles than the answers to those questions. Given the wide applicability of the Fourth Amendment to the countless intrusions by the government in daily life, how the Fourth Amendment is to be construed is itself of fundamental concern to all Americans. It is the foundation upon which other freedoms rest.<sup>2</sup>

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\* Director, National Center for Justice and the Rule of Law and Research Professor, University of Mississippi School of Law. J.D., Vermont Law School; B.A., University of Notre Dame. The development of this article benefitted significantly from a workshop with Professors Christopher Green, Matthew Hall, and Jack Nowlin.

1. 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.

2. [T]he Fourth Amendment may plausibly be viewed as the centerpiece of a free, democratic society. All the other freedoms presuppose that lawless police action have [sic] been restrained. What good is freedom of speech or freedom of religion or any other freedom if law enforcement officers have unfettered power to violate a person's privacy and liberty when he sits in his home or drives his car or walks the streets?

Yale Kamisar, *The Fourth Amendment and Its Exclusionary Rule*, THE CHAMPION, Sept.–Oct. 1991, at 21 (emphasis omitted).

In the end, the choices the Supreme Court must make are two: is the Fourth Amendment designed to regulate law enforcement practices or is it designed to protect individuals from overreaching governmental intrusions? Rules—legal principles—implement purpose. If the first view is correct, then the Court should create a rule book for the police to effectuate their intrusions. Chief Justice Rehnquist was a principal proponent of this view: “As Rehnquist [had] often insisted, the basic function of criminal procedure jurisprudence is to make ‘rules’ for police ‘in carrying out their work.’”<sup>3</sup> He had a “particular concern for providing guidance and flexibility to those who serve the public as law enforcement officers.”<sup>4</sup> If the second view prevails, then rules should be designed to promote individual security. Of course, the choice is not completely an either/or one—the Fourth Amendment itself makes a clear accommodation between liberty and order by prohibiting only unreasonable searches and seizures. Nonetheless, which view predominates is highly predictive of results and how the Court manages the accommodation of governmental interests and individual rights by drafting legal principles to regulate governmental intrusions.

Part II and Part III demonstrate that, both historically and currently, the Court has vacillated between the two choices and has, over time, created a series of mismatches of purposes and rules, often resulting in incoherent doctrine. Part IV answers the first question posed in this introduction—the Fourth Amendment’s fundamental purpose is to protect individuals. Accepting that premise as a given, Part V details the consequences of that purpose—legal principles should be constructed to protect the individual, including general rules and exceptions to those rules. Part VI illustrates that framework with a discussion of search in-

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3. Craig M. Bradley, *Rehnquist’s Fourth Amendment: Be Reasonable*, 82 MISS. L.J. 259, 294 (2013) (quoting *California v. Minjares*, 443 U.S. 916, 927 (1979) (Rehnquist, J., dissenting)).

4. Ann O’Connell, *Rehnquist’s Fourth Amendment: Protecting Those Who Serve*, 82 MISS. L.J. 297, 298 (2013). Chief Justice Rehnquist wrote more opinions on the Fourth Amendment than any other Justice in the history of the Court. See Thomas K. Clancy, *Foreword: William Rehnquist’s Fourth Amendment*, 82 MISS. L.J. i, ii–iii (2013). His opinions and legacy are examined in Symposium, *2012 Fourth Amendment*, 82 MISS. L.J. 259 (2013). Rehnquist’s “vision of the Fourth Amendment balance as less restrictive of official authority grew out of a belief that control over the forces of disorder is a critical predicate for the preservation of a genuinely free society.” James J. Tomkovicz, *Rehnquist’s Fourth: A Portrait of the Justice as a Law and Order Man*, 82 MISS. L.J. 359, 367 (2013).

cident to arrest principles. The final section offers some concluding thoughts.

## II. THE CONSEQUENCES OF CHOICE

The Fourth Amendment regulates searches and seizures. How should such intrusions be defined? Turning first to the concept of a seizure, how it is defined has important consequences for the interaction between citizens and the police. To illustrate, drug dealers or those illegally carrying weapons, when accosted, know that the object of a police order to halt is ultimately to recover the contraband the suspect possesses.<sup>5</sup> A common response to such a command, therefore, is to dispose of the evidence.<sup>6</sup> It is crucial to ascertain whether that disposal occurred prior to or after the seizure.<sup>7</sup> If before, then the object discarded can be used to justify the seizure; if after, then the discarded object cannot be used to justify that which has already occurred.<sup>8</sup> The observations of Judge Moylan, long a respected authority on the Fourth Amendment, highlight the importance of this point:

Although the difference may be measured in nanoseconds, there is a critical distinction, in terms of Fourth Amendment applicability, between the jettison of contraband that precedes a police tackle and the jettison that follows a tackle . . . . Indeed, even Super Bowl championships may turn on the small but critical difference between 1) fumbling the ball while being tackled and 2) getting rid of the ball a split-second before being tackled. In this case the appellant, foolishly perhaps, got rid of the ball before being tackled.<sup>9</sup>

When the Fourth Amendment declares that a person has a right to be secure from an unreasonable seizure, what is the nature of the interest being protected? That interest has been variously described as the right to be left alone,<sup>10</sup> individual freedom,<sup>11</sup>

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5. *See, e.g.*, *United States v. Wood*, 981 F.2d 536, 537 (D.C. Cir. 1992).

6. *See, e.g., id.* at 541 (holding that a defendant's dropping of firearm was the product of an illegal seizure); Edward G. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFF. L. REV. 399, 417 n.90 (1971) ("Undoubtedly, some individuals will opt in favor of discard, in the mistaken belief that they will not be prosecuted for a possessory offense if the goods are not discovered on their persons.").

7. *E.g.*, *United States v. Lewis*, 40 F.3d 1325, 1334 (1st Cir. 1994).

8. *See, e.g.*, *Brummell v. State*, 685 A.2d 835, 837–38 (Md. Ct. Spec. App. 1996); *see also California v. Hodari D.*, 499 U.S. 621, 623–24 (1991).

9. *Brummell*, 685 A.2d at 838–39.

10. *See, e.g.*, *Wilson v. Schnettler*, 365 U.S. 381, 394 (1961) (Douglas, J., dissenting)

the “inviolability of the person,”<sup>12</sup> and the right of free movement.<sup>13</sup> In *Terry v. Ohio*, which involved the stop and frisk of a person, the Court emphasized the words chosen by the framers to define the nature of the interest protected, asserting that the “inestimable right of personal *security* belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”<sup>14</sup> Indeed, the Court said: “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>15</sup>

In *California v. Hodari D.*, the defendant, a youth, was standing with others around a car in a known high-crime area.<sup>16</sup> When they observed an unmarked police car approaching, the youths ran.<sup>17</sup> The officers pursued.<sup>18</sup> Anticipating where Hodari would run, Officer Pertoso succeeded in getting ahead of him.<sup>19</sup> As Pertoso ran directly toward him, Hodari saw the officer and then

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(“Under the Fourth Amendment, the judiciary has a special duty of protecting the right of the people to be let alone . . .”). *But see* *Katz v. United States*, 389 U.S. 347, 350–51 (1967) (noting that the Fourth Amendment is not coextensive with any right to be left alone).

11. *See, e.g.*, *Ker v. California*, 374 U.S. 23, 32 (1963) (“Implicit in the Fourth Amendment’s protection from unreasonable searches and seizures is its recognition of individual freedom.”).

12. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (citing *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

13. *See, e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 412–13 (1997) (discussing drivers’ and passengers’ liberty interests when a police officer orders them out of a lawfully stopped car); *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)) (reaffirming that a seizure occurs when a reasonable person concludes he is not free to leave).

14. 392 U.S. 1, 8–9 (1968) (emphasis added).

15. *Id.* at 9 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)) (internal quotation marks omitted). The Court maintained:

Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

*Id.* at 15.

16. 499 U.S. 621, 622–23 (1991).

17. *Id.*

18. *Id.* at 623.

19. *See id.*

tossed away a rock of crack cocaine.<sup>20</sup> Seconds later, Pertoso tackled Hodari and handcuffed him.<sup>21</sup> At what point during that encounter should the officers' actions be labeled a seizure, requiring the officers to justify their conduct?

Viewing the Fourth Amendment as designed to regulate police actions, the Court in *California v. Hodari D.*, established the point at which a seizure of a person occurred. The Court asserted that a seizure occurs only when a suspect submits to a show of police authority or is physically touched by law enforcement officials, who do so with the intent to seize.<sup>22</sup> Hence, Hodari was not seized until he was tackled and everything that occurred before that tackling could be used to justify the seizure.<sup>23</sup> Explaining its reasoning, Justice Scalia for the *Hodari D.* majority candidly stated: "Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged."<sup>24</sup> Justifying its position, the *Hodari D.* majority added:

Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command "Stop!" expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.<sup>25</sup>

This view eliminates attempts to seize from the coverage of the Fourth Amendment.<sup>26</sup> As a consequence, coercion or intimidation short of a physical seizure or submission is not regulated by the Fourth Amendment, even when the words or actions are designed

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20. *Id.*

21. *Id.*

22. *Id.* at 626.

23. *See id.* at 629.

24. *Id.* at 627.

25. *Id.*

26. *Id.*; see *Brendlin v. California*, 551 U.S. 249, 254 (2007) ("A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission . . ."); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 n.7 (1998) (citing *Hodari D.*, 499 U.S. at 626) (asserting that *Hodari D.* foreclosed the view that the Fourth Amendment applied to attempted seizures such as chases).

to produce a seizure and “no matter how outrageous or unreasonable the officer’s conduct may be.”<sup>27</sup>

There are consequences to making choices. Police officers adapt to evolving legal principles and adopt tactics to exploit them. As a result of the *Hodari D.* definition, police know that, if the abandonment or suspicious behavior occurs before the seizure, even if prompted by an unjustified show of authority,<sup>28</sup> they can use the evidence abandoned or the behavior observed to justify a sei-

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27. *Hodari D.*, 499 U.S. at 646 (Stevens, J., dissenting). In other contexts, police officers have been prevented from profiting indirectly from that which they cannot do directly. For example, in *Payton v. New York*, the Court noted that a warrant must usually be obtained to effect an arrest in a person’s home. 445 U.S. 573, 602–03 (1980). The police cannot avoid that requirement by coercing the arrestee into leaving the house. *See, e.g.*, *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985) (citing *United States v. Johnson*, 626 F.2d 753, 755–56 (9th Cir. 1980)); *United States v. Morgan*, 743 F.2d 1158, 1166–67 (6th Cir. 1984). Similarly, where the protections of *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), prohibit interrogation by the police, the police cannot engage in the “functional equivalent” of interrogation, including “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980) (citations omitted). The Court in *Innis* stated: “To limit the ambit of *Miranda* to express questioning would ‘place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*.’” *Id.* at 299 n.3 (quoting *Commonwealth v. Hamilton*, 285 A.2d 172, 175 (Pa. 1971)); *cf.* *Kentucky v. King*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1849, 1854, 1858 (2011) (indicating repeatedly that police officers who banged on the door and announced their intent to make entry did not violate the Fourth Amendment).

28. *See Hodari D.*, 499 U.S. at 625–26. Courts permit the police to use events occurring after the show of authority but before submission to justify a stop, even if the initial order was unjustified. *See, e.g.*, *United States v. Muhammad*, 463 F.3d 115, 123 (2d Cir. 2006) (noting that the grounds for a stop can develop after an unjustified attempt to stop by turning on the police vehicle’s siren and overhead lights if defendant does not comply with that show of authority); *United States v. Valentine*, 232 F.3d 350, 357–59 (3d Cir. 2000) (finding erroneous the district court’s refusal to consider post-attempted seizure events in evaluating justification for stop); *United States v. Santamaria-Hernandez*, 968 F.2d 980, 982–83 (9th Cir. 1992) (citing *Hodari D.*, 499 U.S. at 626) (discussing how *Hodari D.* had moved the point of a seizure from the show of authority to the completed seizure and how all events to that point could be used in assessing justification for the seizure); *People v. Thomas*, 734 N.E.2d 1015, 1022 (Ill. App. Ct. 2000) (permitting evidence disclosed after an attempt to make illegal seizure). *Hodari D.* is also widely criticized by commentators and even by lower courts bound by it. *E.g.*, *United States v. Swindle*, 407 F.3d 562, 566–70 (2d Cir. 2005) (criticizing the definition of seizure); *State v. Young*, 717 N.W.2d 729, 754–56 (Wis. 2006) (Bradley, J., dissenting) (collecting authorities and summarizing criticisms of *Hodari D.*); Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 462 (2004) (noting that the effect of Supreme Court developments after *Terry* was “to eliminate very coercive police encounters from the scope of the Fourth Amendment guarantee of reasonableness, freeing the police on those occasions from all judicial oversight”); Kathryn R. Urbonya, “Accidental” Shootings as Fourth Amendment Seizures, 20 HASTINGS CONST. L.Q. 337, 380–81 (1993) (asserting that *Terry* is the proper standard by which to measure a seizure and that the other standards articulated by the Court are unsound).

zure.<sup>29</sup> They are thus encouraged to use tactics that provoke such a response.<sup>30</sup> Hence, jump-out squads use shows of authority to intimidate crowds congregating in known high-drug areas to provoke flight and abandonment.<sup>31</sup>

To detail one example, in *United States v. Flynn*, police officers set out signs on Interstate 40 in Oklahoma that read “Drug Checkpoint 1/3 mile ahead” and “Drug Dogs in Use.”<sup>32</sup> A marked police car was parked on the highway with its lights flashing.<sup>33</sup> Yet, there was no such checkpoint ahead, which would have violated the Fourth Amendment.<sup>34</sup> Instead, the supposed checkpoint was a ruse designed to prompt drivers to exit from the highway and disgorge contraband.<sup>35</sup> Waiting in the underbrush by the exit ramp were two police officers.<sup>36</sup> The officers observed a car stop on the ramp, an occupant dispose of a sack, and then drive down the ramp.<sup>37</sup> The sack was retrieved by the police and found to contain

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29. See, e.g., *People v. McClain*, 149 P.3d 787, 790 (Colo. 2007) (distinguishing between pre- and post-seizure discarding of drugs); *Clemons v. State*, 747 So. 2d 454, 455 (Fla. Dist. Ct. App. 1999) (discussing the difference between “drop then stop” cases and “stop then drop” cases).

30. See, e.g., *Hodari D.*, 499 U.S. at 645 (Stevens, J., dissenting) (“In an airport setting, may a drug enforcement agent now approach a group of passengers with his gun drawn, announce a ‘baggage search,’ and rely on the passengers’ reactions to justify his investigative stops?”); *State v. Young*, 717 N.W.2d 729, 740, 744 (Wis. 2006) (acknowledging “the potential that police officers may rely on *Hodari D.* to manufacture reasonable suspicion by attempting to seize individuals in expectation that they will flee” and adhering to *Hodari D.*’s definition for the purpose of construing the Wisconsin Constitution).

31. See, e.g., *Hollinger v. State*, 620 So. 2d 1242, 1242 (Fla. 1993) (discussing activity of police conducting a “drug sweep” who dressed in black masks and SWAT-team-type regalia and pulled into parking lot, exited their vehicle, announced “Orange County Sheriff’s Department,” and approached a group of people); *Augustin v. State*, 666 So. 2d 218, 221 (Fla. Dist. Ct. App. 1995) (Altenbernd, J., concurring in part and dissenting in part) (referring to “departmental policies encouraging officers to chase citizens” based on *Hodari D.*’s definition of a seizure); *State v. Tucker*, 626 So. 2d 707, 709 (La. 1993) (implicitly validating a drug sweep by twenty or thirty police officers and explicitly validating two of the officers who pulled up to a group of men and ordered them to “halt” and “prone out” which caused one to move several steps and then discard drugs); *Tucker*, 626 So. 2d at 719 (Dennis, J., dissenting) (observing that minorities bear the brunt of such tactics because they disproportionately live in “high crime” areas).

32. 309 F.3d 736, 737 (10th Cir. 2002).

33. *Id.*

34. Compare *Flynn*, 309 F.3d at 738–39 (noting that the posting of signs of a fictitious drug checkpoint did not constitute illegal police activity), with *Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (holding that the police checkpoints violated the Fourth Amendment because the primary purpose at the checkpoint was indistinguishable from the general interest in crime control).

35. *Flynn*, 309 F.3d at 739.

36. *Id.* at 737.

37. *Id.*

methamphetamine.<sup>38</sup> The car was thereafter stopped and Flynn arrested.<sup>39</sup> In response to Flynn's claim that the checkpoint was illegal, the Tenth Circuit merely had to note that Flynn never reached any checkpoint and he voluntarily disposed of the drugs before being stopped.<sup>40</sup> The court added: "The creation of a ruse to cause the defendant to abandon an item is not illegal."<sup>41</sup>

The alternative choice of protecting individual security earlier in the encounter would have yielded a much different framework. A large number of state courts reject *Hodari D.* on state constitutional grounds.<sup>42</sup> Those authorities recognize that intimidation or coercion designed to produce a stop by police officers implicates the individual's right to be secure and that neither physical contact nor submission are needed, drawing the line when a "seizure" occurs much earlier in the encounter.<sup>43</sup> Thus, for example, many

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38. *Id.*

39. *Id.*

40. *Id.* at 738.

41. *Id.* at 739. Such activities appear popular. See *United States v. Neff*, 681 F.3d 1134, 1139–43 (10th Cir. 2012) (collecting cases); *United States v. Wright*, 512 F.3d 466, 467–68 (8th Cir. 2008) (upholding stop of a car that committed traffic violation when exiting to avoid fake drug checkpoint set up on interstate); *United States v. Scheetz*, 293 F.3d 175, 182–83 (4th Cir. 2002) (upholding stop based on illegal u-turn prompted by drug checkpoint, which was set up as a ruse); *State v. Hedgcock*, 765 N.W.2d 469, 477 (Neb. 2009) (holding that a ruse checkpoint does not violate the Fourth Amendment). In *State v. Kelley*, the court held that the stop was constitutional partly because the defendant committed a traffic violation. 162 P.3d 832, 834 (Kan. Ct. App. 2007). The sheriff's deputies posted signs on the highway stating "Drug dog working ahead" and "Narcotics officers working ahead." *Id.* at 833. One officer sat in a lawn chair at the side of the road watching southbound motorists as they approached the signs. *Id.* Upon approaching the signs, the defendant leaned over toward the passenger's side of his car and began moving around frantically, resulting in the vehicle drifting left of the highway centerline. *Id.*

42. See *Joseph v. State*, 145 P.3d 595, 605 (Alaska Ct. App. 2006); *State v. Oquendo*, 613 A.2d 1300, 1310 (Conn. 1992); *Jones v. State*, 745 A.2d 856, 868 (Del. 1999); *State v. Quino*, 840 P.2d 358, 365 (Haw. 1992); *Commonwealth v. Stoute*, 665 N.E.2d 93, 94–97 (Mass. 1996); *In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993); *State v. Clayton*, 45 P.3d 30, 34 (Mont. 2002); *State v. Beauchesne*, 868 A.2d 972, 979 (N.H. 2005); *State v. Tucker*, 642 A.2d 401, 405 (N.J. 1994); *State v. Garcia*, 217 P.3d 1032, 1042 (N.M. 2009); *People v. Bora*, 634 N.E.2d 168, 169–70 (N.Y. 1994); *State v. Puffenbarger*, 998 P.2d 788, 792–93 (Or. Ct. App. 2000); *Commonwealth v. Matos*, 672 A.2d 769, 776 (Pa. 1996); *State v. Randolph*, 74 S.W.3d 330, 337 (Tenn. 2002); *State v. Young*, 957 P.2d 681, 686–87 (Wash. 1998).

43. See, e.g., *Oquendo*, 613 A.2d at 1310–11 (holding that a seizure occurs when a reasonable person would have believed he was not free to leave based on an officer's show of authority); *Beauchesne*, 868 A.2d at 977–78 (describing police actions that indicate a show of authority that can in some way restrain the liberty of the person). To discourage intimidation and harassment designed to result in a seizure and to require justification for such police actions, a test for a seizure protective of the individual should include *attempted* acquisitions of control over the individual. See THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 5.1.6., at 254–56 (2d ed. 2014) (propos-



courts would find that the actions of the police in *Hodari D.* of chasing a youth and ordering him to halt would be regulated under their state constitutions, meaning that the police have to justify their actions when their coercive activity began.<sup>44</sup>

The difference in choosing to construe the Fourth Amendment in favor of individual security is illustrated by *Boyd v. United States*.<sup>45</sup> At issue in *Boyd* was the constitutionality of a statute authorizing the compulsory production of a person's private papers to use as evidence against that person in a criminal case or forfeiture proceeding.<sup>46</sup> Rejecting the government's contention that the statute did "not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them," the Court observed that the act declared that if the documents were not produced, the allegations would be treated as proven.<sup>47</sup> The Court viewed this as "tantamount to compelling their production" and as "equivalent" to an "actual" search and seizure.<sup>48</sup> The Court observed:

It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching among his papers, are wanting . . . but [the statute] accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.<sup>49</sup>

The Court in *Boyd* examined the events leading up to the American Revolution, placing particular reliance on *Entick v. Carrington*, and set forth a sweeping view of the concepts of a search and a seizure:

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ing attempted acquisition of control as the definition of a seizure). Such a test would recognize that the applicability of the Fourth Amendment depends solely on the actions of the police. *Id.* at 280. Consequently, whether or when actual contact or control over the person is achieved is immaterial, thereby including shows of authority within the purview of the Fourth Amendment. *Id.*

44. See *California v. Hodari D.*, 499 U.S. 621, 622–23 (1991).

45. 116 U.S. 616, 630 (1886).

46. *Id.* at 618.

47. *Id.* at 621.

48. *Id.* at 621–22.

49. *Id.* at 622.

The principles laid down in [*Entick*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but . . . it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment.<sup>50</sup>

Thus, the *Boyd* Court created the concept of a "constructive" search and viewed such an action as indistinguishable from an "actual" search.<sup>51</sup> In discussing why it construed the concept of a search and seizure broadly, that majority opined:

Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet . . . it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis* ["withstand beginnings"].<sup>52</sup>

*Hodari D.* and *Boyd* illustrate different views regarding the purpose of the Fourth Amendment, with fundamentally different rules that stemmed from those views, causing very different results. But those choices and consequences are not merely historical.

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50. *Id.* at 630; see *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (K.B.); 2 Wils K.B. 275.

51. See *Boyd*, 116 U.S. at 621–22 (holding that compelling a person to produce documents equates to a seizure of the documents). The *Boyd* Court did not characterize the search as "constructive." That characterization is from a later case. See *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 202 (1946); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 651–52 (1950) (noting that the rights protected by the Fourth Amendment are "not confined literally to searches and seizures as such, but extend[] as well to the orderly taking under compulsion of process").

52. *Boyd*, 116 U.S. at 635.

### III. CONSTRUING THE FOURTH AMENDMENT: NO FOOLISH CONSISTENCIES BY THE CURRENT COURT

Emerson wrote: “A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.”<sup>53</sup> The Court throughout the course of its history of construing the Fourth Amendment cannot be accused of this. Although the previous section utilizes older cases to illustrate the choices the Court has made, one does not have to look back to find such divergent views. They remain at the heart of the analysis today.

In *Florida v. Jardines*, the Court was asked to determine if a sniff of a front door of a home by a trained police dog was a search.<sup>54</sup> While standing on the porch with his police handler, the dog sniffed and then alerted to the presence of drugs inside the house.<sup>55</sup> Justice Scalia, for the majority, concluded that the actions were a search, reasoning that the Fourth Amendment establishes a simple base line, one that for much of our history formed the exclusive basis for its protections: When “the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred.”<sup>56</sup>

To support that view, the majority examined the fundamental purpose of the Fourth Amendment:

[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment’s “very core” stands “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” This right would be of little practical value if the State’s agents could stand in a home’s porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man’s property to observe his repose from just outside the front window.<sup>57</sup>

Justice Alito, joined by the Chief Justice and Justices Kennedy and Breyer, dissented.<sup>58</sup> Justice Alito would have made a different

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53. RALPH WALDO EMERSON, *Self-Reliance*, in THE ESSAYS OF RALPH WALDO EMERSON 18, 24 (1934).

54. 569 U.S. \_\_\_, \_\_\_, 133 S. Ct. 1409, 1413 (2013).

55. *Id.* at \_\_\_, 133 S. Ct. at 1413.

56. *Id.* at \_\_\_, 133 S. Ct. at 1414 (quoting *United States v. Jones*, 565 U.S. \_\_\_, \_\_\_ n.3, 132 S. Ct. 945, 950–51 n.3 (2012)) (internal quotation marks omitted).

57. *Id.* at \_\_\_, 133 S. Ct. at 1414 (citations omitted).

58. *Id.* at \_\_\_, 133 S. Ct. at 1420.

rule.<sup>59</sup> For him, the purpose of the Fourth Amendment was to regulate police behavior.<sup>60</sup> Alito could “see no ground for hampering legitimate law enforcement” by labeling the actions in *Jardines* a search.<sup>61</sup> He believed that “when officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point.”<sup>62</sup>

Justice Kennedy, writing for the majority in *Bailey v. United States*, asserted that the general rule is that Fourth Amendment seizures required probable cause.<sup>63</sup> He cited authority for the view that that standard had “roots that are deep in our history” and that the standard “represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest reasonable under the Fourth Amendment.”<sup>64</sup> Such a standard implements the view that the fundamental purpose of the Fourth Amendment is designed to protect individuals from the government.

In *Bailey*, the Court was confronted with a situation where the police were about to execute a search warrant on a private residence.<sup>65</sup> A person—Bailey—was seen leaving the residence, but police waited to detain him until he had traveled about a mile away from the residence.<sup>66</sup> There was no evidence that Bailey was either “aware of the officers’ presence or had any knowledge of the impending search.”<sup>67</sup>

Patently, the general rule requiring probable cause to arrest did not apply to Bailey’s detention.<sup>68</sup> Justice Kennedy, for the majority, acknowledged that there were exceptions to that general

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59. *See id.* at \_\_\_, 133 S. Ct. at 1420–21 (Alito, J., dissenting).

60. *See id.* at \_\_\_, 133 S. Ct. at 1423.

61. *Id.* at \_\_\_, 133 S. Ct. at 1426.

62. *Id.* at \_\_\_, 133 S. Ct. at 1423 (citing *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

63. 568 U.S. \_\_\_, \_\_\_, 133 S. Ct. 1031, 1037 (2013) (citing *Dunaway v. New York*, 442 U.S. 200, 213 (1979)).

64. *Id.* at \_\_\_, 133 S. Ct. at 1037, (alteration in original) (quoting *Dunaway*, 442 U.S. at 208; *Henry v. United States*, 361 U.S. 98, 100 (1959)) (internal quotation marks omitted).

65. *Id.* at \_\_\_, 133 S. Ct. at 1036.

66. *Id.* at \_\_\_, 133 S. Ct. at 1036.

67. *Id.* at \_\_\_, 133 S. Ct. at 1036.

68. *See id.* at \_\_\_, 133 S. Ct. at 1035–37, 1042 (quoting *Michigan v. Summers*, 452 U.S. 692, 697–98, 705 (1982)).

rule.<sup>69</sup> One exception permits the suspicionless detentions of occupants on the premises when a search warrant is being executed, which was first approved by the Court in *Michigan v. Summers*.<sup>70</sup> Summers was detained as he left his residence.<sup>71</sup> So should the general rule or the exception be applied in *Bailey*? More broadly, how should exceptions to a general rule be constructed?

To protect the general rule, Justice Kennedy in *Bailey* observed: “An exception to the Fourth Amendment rule prohibiting detention absent probable cause must not diverge from its purpose and rationale.”<sup>72</sup> Thus, the majority in *Bailey* limited the officer’s authority to detain persons in light of the general rule’s purpose—only those occupants who are in the “immediate vicinity” of the premises where the warrant is being executed may be detained.<sup>73</sup> Kennedy asserted:

The risk that a departing occupant might notice the police surveillance and alert others still inside the residence is . . . an insufficient safety rationale to justify expanding the existing categorical authority to detain so that it extends beyond the immediate vicinity of the premises to be searched. If extended in this way the rationale would justify detaining anyone in the neighborhood who could alert occupants that the police are outside, all without individualized suspicion of criminal activity or connection to the residence to be searched. This possibility demonstrates why it is necessary to confine the *Summers* rule to those who are present when and where the search is being conducted.<sup>74</sup>

Justice Scalia, concurring in *Bailey*, emphasized the hierarchal nature of the inquiry: probable cause is the general rule for a detention; an exception to that rule, recognized by the Court in *Summers*, is when the police execute a search warrant and locate persons on the premises to be searched based on the necessities of the situation.<sup>75</sup> Hence, for him, the only question was whether *Bailey* was on the premises.<sup>76</sup> Because *Bailey* was stopped a mile away, Scalia opined, the exception “cannot sanction *Bailey*’s de-

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69. *Id.* at \_\_\_, 133 S. Ct. at 1037 (citing *Summers*, 452 U.S. at 697–98).

70. *Id.* at \_\_\_, 133 S. Ct. at 1041–42; see *Summers*, 452 U.S. at 704–05.

71. *Bailey*, 568 U.S. at \_\_\_, 133 S. Ct. at 1038; see *Summers*, 452 U.S. at 705.

72. *Bailey*, 568 U.S. at \_\_\_, 133 S. Ct. at 1038 (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)).

73. *Id.* at \_\_\_, 133 S. Ct. at 1042.

74. *Id.* at \_\_\_, 133 S. Ct. at 1039–40.

75. *Id.* at \_\_\_, 133 S. Ct. at 1044 (Scalia, J., concurring) (citing *Summers*, 452 U.S. at 704–05; *Dunaway v. New York*, 442 U.S. 200, 213 (1979)).

76. *Id.* at \_\_\_, 133 S. Ct. at 1043.

tention. It really is that simple.”<sup>77</sup> He rejected the lower court’s contrary view:

The Court of Appeals read *Summers*’ spatial constraint somewhat more promiscuously: In its view, it sufficed that police observed Bailey “in the process of leaving the premises” and detained him “as soon as practicable.” That has pragmatic appeal; police, the argument runs, should not be precluded from seizing the departing occupant at a distance from the premises if that would be safer than stopping him on the front steps. But it rests on the fallacy that each search warrant *entitles* the Government to a concomitant *Summers* detention. Conducting a *Summers* seizure incident to the execution of a warrant “is not the Government’s right; it is an exception—justified by necessity—to a rule that would otherwise render the [seizure] unlawful.”<sup>78</sup>

Scalia emphasized: “What the dissent misses is that a ‘categorical’ exception must be defined by categorical *limits*.”<sup>79</sup>

Justice Breyer, joined by Justices Thomas and Alito, dissented.<sup>80</sup> Nowhere in Breyer’s opinion is there an acknowledgement that the general rule is that a seizure be supported by probable cause. Why? Because he had a much different view of the goal to be achieved.<sup>81</sup> He observed that, in drafting a rule, the rule should take “more directly into account concerns related to safety, evidence, and flight, *i.e.*, the kinds of concerns more directly related to the Fourth Amendment’s ‘ultimate touchstone of . . . reasonableness.’”<sup>82</sup> Perhaps for emphasis, he repeated this point:

I believe that the majority has substituted a line based on indeterminate geography for a line based on realistic considerations related to basic Fourth Amendment concerns such as privacy, safety, evidence destruction, and flight. In my view, these latter considerations should govern the Fourth Amendment determination at issue here.<sup>83</sup>

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77. *Id.* at \_\_\_, 133 S. Ct. at 1043.

78. *Id.* at \_\_\_, 133 S. Ct. at 1044 (alteration in original) (emphasis omitted) (citations omitted) (quoting *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring); *United States v. Bailey*, 652 F.3d 197, 206 (2d Cir. 2011)).

79. *Id.* at \_\_\_ n.\*, 133 S. Ct. at 1044 n.\*.

80. *Id.* at \_\_\_, 133 S. Ct. at 1045 (Breyer, J., dissenting).

81. *See id.* at \_\_\_, 133 S. Ct. at 1046–47.

82. *Id.* at \_\_\_, 133 S. Ct. at 1048 (quoting *Kentucky v. King*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1849, 1856 (2011)).

83. *Id.* at \_\_\_, 133 S. Ct. at 1049.

Breyer maintained that a better rule to ascertain whether a detention away from the scene was permitted was whether the detention occurred as soon as reasonably practicable.<sup>84</sup>

The majorities in *Bailey* and *Jardines* offer a fairly straightforward explanation of the Fourth Amendment's purpose, which in turn should guide in the construction of Fourth Amendment principles. Read together, they perceive that the overriding purpose is to protect the individual. To effectuate that purpose, general rules are created: there is a need for individualized suspicion to detain a person, and a search occurs when the police physically invade the curtilage and use a tool to learn something about the interior of the home.<sup>85</sup> Once a general rule has been established that is protective of the individual, exceptions to that rule must be similarly drawn to reflect that purpose. Hence, for example, under the rule in *Bailey*, the police can only detain persons in the immediate vicinity of the premises when executing a warrant instead of further away from the scene.<sup>86</sup>

However, other current cases take a different approach. The dissents in *Bailey* and *Jardines* espoused such a view. But that rulebook approach to effectuate police intrusions is not confined to dissents. Two recent cases are illustrative. In *Florence v. Board of Chosen Freeholders*, the Court was asked to determine whether a visual inspection of the naked body of arrestees for minor offenses was permissible as an incident to incarceration.<sup>87</sup> The Court concluded that it was.<sup>88</sup> Justice Kennedy, writing for the majority, believed that a readily administered rule was needed.<sup>89</sup> He employed the balancing test, which assesses the relative strengths of the government and individual interests in a given search or seizure procedure.<sup>90</sup> Kennedy discussed at length the government's interests but never examined in any detail the individual's interests.<sup>91</sup> His opinion repeatedly emphasized that the

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84. *Id.* at \_\_\_, 133 S. Ct. at 1045 (citing *United States v. Bailey*, 652 F.3d 197, 208 (2d Cir. 2011)).

85. See *Florida v. Jardines*, 569 U.S. \_\_\_, \_\_\_, 133 S. Ct. 1409, 1415 (2013); *Bailey*, 568 U.S. at \_\_\_, 133 S. Ct. at 1037 (citing *Dunaway v. New York*, 442 U.S. 200, 213 (1979)).

86. *Bailey*, 568 U.S. at \_\_\_, 133 S. Ct. at 1041.

87. 566 U.S. \_\_\_, \_\_\_, 132 S. Ct. 1510, 1513 (2012).

88. *Id.* at \_\_\_, 132 S. Ct. at 1523.

89. *Id.* at \_\_\_, 132 S. Ct. at 1522 (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001)) (internal quotation marks omitted).

90. *Id.* at \_\_\_, 132 S. Ct. at 1523.

91. See *id.* at \_\_\_, 132 S. Ct. at 1518–22.

Court should defer to the expertise of the prison officials.<sup>92</sup> Most tellingly, Kennedy maintained that the burden of establishing the unconstitutionality of the practice was on those challenging it, rather than on the government, in seeking to depart from the individualized suspicion standard.<sup>93</sup>

If the purpose of the Fourth Amendment is to protect the individual, one would place the burden on the government to justify its actions. Hence, the dissent by Justice Breyer maintained that the government had the burden of establishing a “convincing reason indicating that, in the absence of reasonable suspicion, involuntary strip searches of those arrested for minor offenses are necessary.”<sup>94</sup> Breyer examined the purported governmental reasons at some length and concluded: “The majority is left with the word of prison officials in support of its contrary proposition. And though that word is important, it cannot be sufficient.”<sup>95</sup> Breyer argued that, for minor offenses that do not involve drugs or violence, the kind of search involved in *Florence* required a showing of “reasonable suspicion to believe that the individual possesses drugs or other contraband” in order to be reasonable.<sup>96</sup> He saw that standard as workable and consistent with the practices of many incarceration facilities.<sup>97</sup>

Similarly, in *Maryland v. King*, the Court approved the taking and examination of the DNA of arrestees, purportedly to help ascertain the identity of those persons.<sup>98</sup> Justice Kennedy, for the majority, balanced the governmental and individual interests.<sup>99</sup> The majority premised its decision on Maryland procedures that, in part, limited the use of the DNA and required that the sample only be processed after a judicial finding of probable cause that

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92. *Id.* at \_\_\_, 132 S. Ct. at 1513–14 (“In addressing this type of constitutional claim courts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security.”).

93. *Id.* at \_\_\_, 132 S. Ct. at 1518 (citing *Block v. Rutherford*, 468 U.S. 576, 584–85 (1984)).

94. *Id.* at \_\_\_, 132 S. Ct. 1528 (Breyer, J., dissenting). Breyer’s dissent was joined by Justices Ginsburg, Sotomayor, and Kagan. *Id.* at \_\_\_, 132 S. Ct. at 1525.

95. *Id.* at \_\_\_, 132 S. Ct. at 1531.

96. *Id.* at \_\_\_, 132 S. Ct. at 1525.

97. *See id.* at \_\_\_, 132 S. Ct. at 1528–30.

98. 569 U.S. \_\_\_, \_\_\_, 133 S. Ct. 1958, 1980 (2013).

99. *Id.* at \_\_\_, 133 S. Ct. at 1970 (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).



the arrestee had committed the offense.<sup>100</sup> In rejecting individualized suspicion as a criterion for the DNA search, the majority reasoned, in part, that the procedures governing the obtaining of the DNA were so standardized that a warrant was not needed.<sup>101</sup> Kennedy concluded:

In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure.<sup>102</sup>

Justice Scalia, dissenting, took a much different view, based on a much different premise. He maintained:

The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment. Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.<sup>103</sup>

Scalia grounded that framework in the historical context of the Fourth Amendment: "At the time of the Founding, Americans despised the British use of so-called 'general warrants'—warrants not grounded upon a sworn oath of a specific infraction by a particular individual, and thus not limited in scope and application."<sup>104</sup> He detailed the evolution of search and seizure provisions at that time and drew this lesson:

As ratified, the Fourth Amendment's Warrant Clause forbids a warrant to "issue" except "upon probable cause," and requires that it be "particula[r]" (which is to say, *individualized*) to "the place to be searched, and the persons or things to be seized." And we have held that, even when a warrant is not constitutionally necessary, the

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100. *Id.* at \_\_\_, 133 S. Ct. at 1970.

101. *Id.* at \_\_\_, 133 S. Ct. at 1970 (citing *Samson v. California*, 547 U.S. 843, 855 n.4 (2006); *Skinner v. Ry. Labor Execs. Assoc.*, 489 U.S. 602, 622 (1989)).

102. *Id.* at \_\_\_, 133 S. Ct. at 1980.

103. *Id.* at \_\_\_, 133 S. Ct. at 1980 (Scalia, J., dissenting). Justices Ginsburg, Sotomayor, and Kagan joined in his dissent. *Id.*

104. *Id.* at \_\_\_, 133 S. Ct. at 1980–81.

Fourth Amendment's general prohibition of "unreasonable" searches imports the same requirement of individualized suspicion.<sup>105</sup>

Scalia acknowledged that the Court had created exceptions to that rule but that those exceptions applied "only when a governmental purpose aside from crime-solving is at stake."<sup>106</sup> He put it another way: "No matter the degree of invasiveness, suspicionless searches are *never* allowed if their principal end is ordinary crime-solving."<sup>107</sup> He criticized the majority for failing to offer any framework to explain how its decision squared with Fourth Amendment principles:

Why not just come out and say that any suspicionless search of an arrestee is allowed if it will be useful to solve crimes? The Court does not say that because most Members of the Court do not believe it. So whatever the Court's major premise—the opinion does not really contain what you would call a rule of decision—the *minor* premise is "this search was used to identify King." The incorrectness of that minor premise will therefore suffice to demonstrate the error in the Court's result.<sup>108</sup>

Scalia proceeded to explain why, in his view, the DNA sampling was used not to identify who the police had detained but to establish what else the arrestee may have done.<sup>109</sup> He then observed:

Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail.

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Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the "identity" of the flying public), applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt

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105. *Id.* at \_\_\_, 133 S. Ct. at 1981 (alteration in original) (citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997)).

106. *Id.* at \_\_\_, 133 S. Ct. at 1982.

107. *Id.* at \_\_\_, 133 S. Ct. at 1982.

108. *Id.* at \_\_\_, 133 S. Ct. at 1982 n.1.

109. *Id.* at \_\_\_, 133 S. Ct. at 1985.

that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.<sup>110</sup>

Collectively, the four cases just examined—*Jardines*, *Bailey*, *Florence*, and *King*—are remarkable for shifting majorities that are grounded in two fundamentally different views of the Fourth Amendment. *King* and *Florence* are so divorced from the premise that the purpose of the Fourth Amendment is designed to protect individuals, that the reasoning of the majority opinions in each case focus almost exclusively on societal interests in collecting DNA or examining the naked bodies of arrestees, with hardly a word about the interests of the individual.<sup>111</sup> *Bailey* and *Jardines* are in stark contrast, offering protection to individuals against unjustified intrusions, grounded in the historical purposes of the Fourth Amendment.<sup>112</sup>

#### IV. THE PURPOSE OF THE FOURTH AMENDMENT: PROTECTING THE INDIVIDUAL

This part assumes as a premise something that the Fourth Amendment explicitly promises—security to individuals. The Fourth Amendment informs us that it is a “right.”<sup>113</sup> It is no great leap to say that it should therefore be interpreted in a manner favorable to the enhancement of individual liberty. Nor is it a big step to conclude that the Fourth Amendment, at its most fundamental level, is designed to protect people from the government. The inquiry in each case should examine the essence of what the Fourth Amendment seeks to protect: the individual’s right to be secure.

The validity of that premise seems hard to question and it is not examined in detail here. Much ink—and blood—has been spilled to establish its validity. History has long played a very important role in the Court’s interpretation of the Fourth Amendment. The details of the historical record will not be re-

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110. *Id.* at \_\_\_, 133 S. Ct. at 1989.

111. *See supra* notes 91–93, 100–02 and accompanying text.

112. *See supra* notes 56–57, 63–64 and accompanying text.

113. U.S. CONST. amend. IV.

counted here.<sup>114</sup> Instead, the emphasis is on the lessons that should be drawn from that record.

No historical event is more important than the *Writs of Assistance* case in 1761.<sup>115</sup> It is emblematic of the era.<sup>116</sup> The *Writs* case and the competing views articulated by its advocates continue to serve as a template in the never-ending struggle to accommodate individual security and governmental needs.<sup>117</sup> In that case, James Otis challenged British search and seizure practices and offered an alternative vision of proper search and seizure princi-

114. The historical record is complex, involving hundreds of years of evolution in the regulation of searches and seizures, with many contradictory developments. For the authoritative treatment on the history of search and seizure in England and its American colonies from 602 to the adoption of the Fourth Amendment in 1791, see WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791 (2009). A shorter summary may be found in CLANCY, *supra* note 43, ch. 2, at 39–74. Rather than the broad currents of history, the events in England and in the American colonies during the period immediately preceding the American Revolution directly served as a catalyst for the Fourth Amendment’s adoption; it is also the portion of the historical record that is most often recalled in Supreme Court opinions and by leading commentators in interpreting the Fourth Amendment. For treatment of the crucial era between 1761 and 1791, see Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 *IND. L.J.* 979 (2011).

115. JOSIAH QUINCY, JR., *Paxton’s Case of the Writ of Assistance*, in *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1762*, at 51 (1865) [hereinafter *Writs of Assistance Case*]; see e.g., *Stanford v. Texas*, 379 U.S. 476, 482 (1965) (“[T]he Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance . . .”); JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 19 (1966) (noting that the Fourth Amendment was “the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England”); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS* 38 (1969) (“The writs of assistance were anathema in the colonies, and Otis’ argument against them was well known among the founding fathers.”). Numerous cases quote James Otis’ arguments or generally recognize the importance of the *Writs* case. See e.g., *Payton v. New York*, 445 U.S. 573, 608–09 (1980) (White, J., dissenting); *Gerstein v. Pugh*, 420 U.S. 103, 116 n.17 (1975); *Berger v. New York*, 388 U.S. 41, 58 (1967) (noting that the use of general warrants “was a motivating factor behind the Declaration of Independence”); *Frank v. Maryland*, 359 U.S. 360, 364 (1959); *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (stating that the revulsion was “so deeply felt by the Colonies as to be one of the potent causes of the Revolution”); *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (stating that the abuses surrounding searches and seizures “more than any one single factor gave rise to American independence”); *Boyd v. United States*, 116 U.S. 616, 625 (1886) (stating that the debate over the issuance of the writs of assistance in Massachusetts in 1761 “was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country”).

116. M.H. SMITH, *THE WRITS OF ASSISTANCE CASE 3* (1978) (demonstrating the widespread dissatisfaction with writs of assistance in the American colonies at the time).

117. *Writs of Assistance Case*, *supra* note 115, at 51–57.

ples.<sup>118</sup> No authority preceding Otis had articulated so completely the framework for the search and seizure requirements that were ultimately embodied in the Fourth Amendment.<sup>119</sup> However, Otis' importance then and now stems not just from the particulars of his argument; instead, he played and should continue to play an inspirational role for those seeking to find the proper accommodation between individual security and governmental needs.<sup>120</sup>

Smuggling was a widespread practice in the American colonies and writs of assistance were a principal means of combating the practice, particularly in Massachusetts.<sup>121</sup> Writs were not issued as a result of any information that contraband was stored at a specified place; instead, the customs officials could search wherever they chose.<sup>122</sup> "The discretion delegated to the official was therefore practically absolute and unlimited."<sup>123</sup> The use of the writs of assistance for customs searches and seizures "caused profound resentment" in the colonies<sup>124</sup> and their use is considered to be "the first in the chain of events which led directly and irresistibly to revolution and independence."<sup>125</sup> In 1760, new writs of assistance were needed and a group of Boston merchants opposed the proposed writs, retaining James Otis to represent their cause.<sup>126</sup> The question upon which the case ultimately turned was whether the superior court should continue to grant the writs in general and open-ended form—as a species of "general warrants"<sup>127</sup>—or whether it should limit the writs to a single occasion based on particularized information given under oath.<sup>128</sup>

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118. See SMITH, *supra* note 116, at 7 ("[T]he American tradition of constitutional hostility to general powers of search first found articulate expression.").

119. LANDYNSKI, *supra* note 115, at 35.

120. See generally Thomas K. Clancy, *The Importance of James Otis*, 82 MISS. L.J. 487 (2013).

121. *E.g.*, LANDYNSKI, *supra* note 115, at 30.

122. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 54 (1937).

123. *Id.*

124. LANDYNSKI, *supra* note 115, at 31.

125. AMERICAN HISTORY LEAFLETS: COLONIAL AND CONSTITUTIONAL, NO. 33, JAMES OTIS'S SPEECH ON THE WRITS OF ASSISTANCE 1761 (Albert Bushnell Hart & Edward Channing eds. 1906).

126. THOMAS HUTCHINSON, *THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY: FROM 1749 TO 1774*, at 89 (John Hutchinson ed. 1828).

127. *Id.* at 93–94.

128. JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY* app. I, at 531–32 (1865).

Significant aspects of Otis' arguments became elements of Fourth Amendment structure and jurisprudence.<sup>129</sup> They include:

Identifying the right to be "secure" as the interest implicated by a search or seizure; listing the home as a protected place; utilizing the common law search warrant as a model for when warrants can issue; defining unjustified intrusions as "unreasonable"; and indicating that probable-cause based searches and seizures are proper.<sup>130</sup>

Within that list, there are two important themes—an identification of the nature of the individual interest implicated by a search or seizure and the requirement of objective standards by which to measure the propriety of a search or seizure.

#### A. *The Nature of the Individual Interest*

Otis characterized the nature of the individual interest that was implicated when the government searches, that is, the person's security.<sup>131</sup> He spoke about the "fundamental [p]rinciple[]" of the law that was "[t]he Priviledge of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle . . . ."<sup>132</sup> What was protected was a fundamental, indefensible right.<sup>133</sup> Otis' efforts encouraged those in opposition to the government and "taught" the people that the practices were "incompatible with English liberties."<sup>134</sup> Recalling Otis' argument many years later, John Adams wrote that Otis examined the acts of trade and demonstrated that "they destroyed all our security of property, liberty, and life."<sup>135</sup>

Another famous champion of liberty, well known to the colonists, was John Wilkes.<sup>136</sup> After complaining of the seizure of all

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129. See generally Clancy, *The Framers' Intent*, *supra* note 114, at 908–81 (discussing Otis' arguments and their influence on John Adams, the primary architect of the Fourth Amendment).

130. See *id.* at 1006.

131. *Id.* at 1059.

132. John Adams, No. 44 Petition of Lechmere 1761, in 2 LEGAL PAPERS OF JOHN ADAMS 106, 125 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

133. See generally QUINCY, *supra* note 128, app. I, at 483–85 (containing quotes of Lord Coke that Otis used to argue the right could not be waived).

134. HUTCHINSON, *supra* note 126, at 94–95.

135. Letter from John Adams to William Tudor (June 1, 1818), in 10 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 314, 316 (Charles Francis Adams ed., 1856).

136. See generally Clancy, *The Framers' Intent*, *supra* note 114, at 1006–12 (describing the general warrants case *Wilkes v. Wood*).

his papers under a general warrant and receiving the reply from the authorities that such papers that did not prove his guilt for seditious libel would be returned, Wilkes countered: “I fear neither your prosecution nor your persecution, and I will assert the security of my own house, the liberty of my person, and every right of the people, not so much for my own sake, as for the sake of every one of my English fellow subjects.”<sup>137</sup> That same concept—the *right* to be secure—was utilized by Adams in Article 14 of the Massachusetts Declaration of Rights and is replicated in the Fourth Amendment.<sup>138</sup> More broadly, the identification of an individual right of security was repeatedly referenced in the framing era as justification for the Fourth Amendment in a Bill of Rights.<sup>139</sup> It follows that the Fourth Amendment was designed to protect the individual right to be secure.

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137. PETER D. G. THOMAS, JOHN WILKES: A FRIEND TO LIBERTY 32 (1996) (footnote omitted) (internal quotation marks omitted).

138. Clancy, *The Framers' Intent*, *supra* note 114, at 1027–29. Adams, as a young attorney, was in the room when Otis made his famous argument. *Id.* at 981. In 1779, John Adams drafted Article 14 of the Massachusetts Declaration of Rights, which became the model for the Fourth Amendment. *Id.* at 1027, 1029. Article 14 provided:

Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

*Id.* at 1028 (quoting MASS. DECLARATION OF RIGHTS of 1780 art. XIV, *reprinted in* LASSON, *supra* note 122, at 82 n.15). The sole change made to Adams' draft was to substitute the word “subject” for “man.” 8 PAPERS OF JOHN ADAMS 1263 n.24 (Gregg L. Lint et al. eds., 1989); *cf.* Harris v. United States, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting) (arguing that because the Fourth Amendment was based on the Massachusetts model, “[t]his is clear proof that Congress meant to give wide, and not limited, scope to [the] protection against police intrusion”).

139. See CLANCY, *supra* note 43 § 3.2.1., at 79–83 (discussing the origin and meaning of the word “secure”); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 350–51 (1998). The right to be secure was closely associated with property and recent Supreme Court cases, including *Jardines*, have returned to this view. See *Florida v. Jardines*, 569 U.S. \_\_\_, \_\_\_, 133 S. Ct., 1409, 1414–15 (2013); Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, *supra* at 309–10; see also *United States v. Jones*, 565 U.S. \_\_\_, \_\_\_, 133 S. Ct. 945, 949 (2012) (“The text of the Fourth Amendment reflects its close connections to property, since otherwise it would have referred simply to ‘the right of the people to be secure against unreasonable searches and seizures’; the phrase ‘in their persons, houses, papers, and effects’ would have been superfluous.”). A person’s private papers were seen as almost sacred. See CLANCY, *supra* note 43 § 3.2.1., at 84–85.

B. *Objective Criteria to Regulate Governmental Searches and Seizures*

There is an intimate connection between a person's right to be secure and the procedures utilized by the government to search and seize. Unless rules are crafted to protect that individual right, it becomes meaningless. Otis recognized this. The writs procedure, he maintained, made each person subject to "*petty tyrants*."<sup>140</sup> Otis discussed the uncontrolled discretion of the customs officials: "[C]an a community be safe with an uncontrold power lodg'd in the hands of *such* officers, some of whom have given abundant proofs of the danger there is in trusting them with ANY?"<sup>141</sup> The writs of assistance were also viewed as deficient because, inter alia, they existed for an unlimited length of time, they were not returnable, no oath was required for one to issue, and no grounds were needed to justify the request.<sup>142</sup> Moreover, Otis criticized the manner in which the customs searches occurred: "Houses were to be broken open, and if a piece of Dutch linen could be found, from the cellar to the cock-loft, it was to be seized and become the prey of governors, informers, and majesty."<sup>143</sup> The writ, he concluded, "is a power, that places the liberty of every man in the hands of every petty officer."<sup>144</sup>

Importantly, Otis offered an alternative procedure to search—warrants for stolen goods, which he called "special" warrants.<sup>145</sup> He believed that process was protective of individual liberties—so did the framers.<sup>146</sup> The framework that Otis advocated ultimately became embodied in the warrant clause of the Fourth Amendment, including the requirement of probable cause as a justification for a warrant to issue.<sup>147</sup> Warrants for stolen goods, Otis stated, are "directed to special officers," are limited "to search certain houses . . . specially set forth in the writ," and issued based upon

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140. QUINCY, *supra* note 128, app. I, at 490.

141. *Id.* at 494.

142. 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 132, at 114.

143. Letter from John Adams to William Tudor, *supra* note 135, at 319.

144. 2 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, app. A, at 520, 524 (Charles Francis Adams ed., 1850) [hereinafter 2 THE WORKS OF JOHN ADAMS].

145. *Id.*

146. *See id.*

147. *E.g.*, CUDDIHY, *supra* note 114, at 382 (noting that Otis' "proclamation that only specific writs were legal was the first recorded declaration of the central idea to the specific warrant clause").



the oath of the person who asked for the warrant “that he suspects such goods to be concealed in those very places he desires to search.”<sup>148</sup> Otis argued that the need for the invasion “always ought to be determin’d by *adequate* and *proper* judges.”<sup>149</sup> Hence, Otis detailed the criteria that should be utilized for a warrant to issue:

[S]pecial writs may be granted *on oath and probable suspicion*. . . .  
[A]n officer should show probable ground; should take his oath of it; should do this before a magistrate; and that such magistrate, if he think proper, should issue a special warrant to a constable to search the places.<sup>150</sup>

Consistent with the historical record and often inspired by it, Supreme Court opinions periodically recognize that the Fourth Amendment was designed by the framers to protect individuals from unreasonable governmental intrusion and that rules should be crafted to reflect that purpose. *Boyd*, as discussed in Part II, and *Jardines* and *Bailey*, discussed in Part III, are examples of this viewpoint.<sup>151</sup> There are many others.<sup>152</sup> The next part discusses how rules should be crafted to further that purpose.

## V. CRAFTING RULES TO IMPLEMENT PURPOSE

The Court uses a variety of interpretative tools as aids in formulating legal principles to implement Fourth Amendment com-

148. 2 THE WORKS OF JOHN ADAMS, *supra* note 144, app. A, at 524.

149. QUINCY, *supra* note 128, app. I, at 490.

150. 2 THE WORKS OF JOHN ADAMS, *supra* note 144, app. A, at 525. Similar concerns about general warrants arose in England shortly after the *Writs* case. See *Money v. Leach*, (1765) 97 Eng. Rep. 1075 (K.B.); 3 Burr. 1741; *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.); 2 Wils. K.B. 275; *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.); *Lofft 1*; *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (K.B.); 2 Wils. K.B. 206. The cases are traditionally viewed as having had a significant influence on American thought about search and seizure practices in the era leading up to the adoption of the Fourth Amendment. CLANCY, *supra* note 43 § 2.2.3.2., at 51–56.

151. See *supra* notes 45–52, 54–84 and accompanying text.

152. *E.g.*, *Payton v. New York*, 445 U.S. 573, 602 (1980) (stating that it would reject inquiry into the practical consequences of a rule requiring warrant for in-home arrests because, *inter alia*, “such arguments of policy must give way to a constitutional command that we consider to be unequivocal”); *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (“What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.”); *United States v. U.S. Dist. Court (Keith)* 407 U.S. 297, 313 (1972) (“Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.”).

mands. Depending on the era and whether a conservative or liberal majority holds sway on the Court, different tools have been utilized.<sup>153</sup> However, tools implement a purpose. They are not the fundamental considerations. They are not the fundamental premise.

Professor Morgan Cloud, after analyzing the pragmatic basis that had come to dominate the Court's opinions in the latter part of the twentieth century, concluded: "The Court's opinions demonstrate that if the fourth amendment is to function as a device that protects individual autonomy by limiting government power, its interpretation must rest upon a theory that emphasizes strong rules, yet is sufficiently flexible to cope with the diverse problems arising under the fourth amendment."<sup>154</sup> He argued for a rule-based interpretive theory of the Fourth Amendment, with the rules derived "from normative claims justified by the history and text of the amendment, but ultimately grounded in a value-based claim about the nature of the amendment."<sup>155</sup> Cloud claimed: "Simply put, if liberty is the goal, rules are needed."<sup>156</sup> He ultimately concluded that "the fourth amendment example teaches us that without some coherent system of rules designed to limit [the power of the government], solitary individuals who claim the right to be free from government intrusions will lose, and the principle of liberty embodied in the amendment gradually will disappear."<sup>157</sup>

If the Fourth Amendment's fundamental purpose is to protect an individual right, then rules should start with that premise and further that goal. This part examines two legal frameworks that the Court has employed to illustrate how rules could be construed to further that goal.<sup>158</sup> First, this part discusses the role of bright

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153. CLANCY, *supra* note 43 § 1.3., at 14.

154. Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 286 (1993).

155. *Id.* at 293–94.

156. *Id.* at 297.

157. *Id.* at 302.

158. I have offered a framework that addresses the major Fourth Amendment concepts, including what the Fourth Amendment protects and how to measure the reasonableness of an intrusion in my prior writing. See CLANCY, *supra* note 43 § 11.5., at 620. For example, I have proposed

a hierarchical structure to the analysis of reasonableness that employs objective criteria, is grounded in the Framers' values, is informed by the course of Supreme Court jurisprudence, and accommodates contemporary needs. At the summit of that hierarchy is individualized suspicion, which is fundamen-

lines in creating rules of general applicability, then it discusses the role of necessity in creating exceptions to general rules.

### A. *Bright-Line Rules*

The Fourth Amendment's commands are said to be "practical and not abstract"<sup>159</sup> and that there is perceived to be a consequent need for a workable rule for law enforcement officials to follow:<sup>160</sup>

Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.<sup>161</sup>

Thus, in some situations, "[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."<sup>162</sup>

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tal to principled analysis of reasonableness questions. Next in order is the warrant preference rule. That rule should not have general applicability; it should be limited instead to intrusions into buildings, a person's body, and speech-related concerns. Individualized suspicion and the warrant preference rule are the preferred models of reasonableness. Departures from those models can only be justified if necessary to effectuate a strong governmental interest. In those extraordinary circumstances, neutral and objective criteria must be utilized to regulate the permissibility of governmental intrusions. Finally, because of the wide applicability of the Amendment, there are unusual situations where those three models do not coherently address the question of reasonableness. Under such circumstances, a case-by-case analysis may have to be used. But to do so, the Court must first demonstrate the inapplicability of the two preferred models and the neutral criteria model.

*Id.* (footnote omitted).

159. *United States v. Harris*, 403 U.S. 573, 577 (1971) (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)) (internal quotation marks omitted).

160. *See, e.g., Illinois v. Andreas*, 463 U.S. 765, 772 (1983).

161. *New York v. Belton*, 453 U.S. 454, 458 (quoting Wayne R. LaFare, "Case-By-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1975 SUP. CT. REV. 127, 141) (internal quotation marks omitted).

162. *Id.* (alteration in original) (quoting *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979)).

Accordingly, the Court sometimes utilizes bright-line rules to guide the police in executing searches and seizures,<sup>163</sup> which do not require case-by-case justification and provide “clear legal boundaries to police conduct.”<sup>164</sup> Such rules are said to be premised on the recognition that the protections of the Fourth Amendment “can only be realized if the police are acting under 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.”<sup>165</sup>

Many bright-line rules address recurring situations to clarify what police can or cannot do. For example, for searches incident to arrest, the police can *always* search the person and the grab area around that person, so long as the person arrested is not in an automobile.<sup>166</sup> During a traffic stop, the officer can *always* order the driver and all passengers out of the vehicle.<sup>167</sup> In *Florence*, as discussed, the Court recently created the bright-line rule permitting the authorities to visually scan the naked body of all persons to be incarcerated after arrest.<sup>168</sup> Although each of these rules clarify law enforcement authority, each also undeniably invades the privacy and security of many persons who are not dangerous or who do not harbor evidence.

Underlying many bright-line rules is a legitimate concern for the safety of the police officer in confronting persons suspected of a crime.<sup>169</sup> Beyond that admittedly important interest, few guidelines exist to predict when the Court will adopt a bright-line rule or elect case-by-case adjudication.<sup>170</sup> More fundamentally, howev-

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163. See, e.g., *Maryland v. Wilson*, 519 U.S. 408, 410, 412 (1997) (permitting police officers to order all passengers to exit a vehicle as an incident of a stop of any vehicle).

164. David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 37 (1994). Yet, at other times, the Court has rejected such analysis, viewing bright lines as having utility only in exceptional situations. E.g., *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

165. *Belton*, 453 U.S. at 458 (quoting LaFave, *supra* note 161, at 142). *Belton* is perhaps the Court's most notable defense of bright-line rules, where the Court applied such a rule to searches of motor vehicles incident to arrest. That result has now been rejected in *Arizona v. Gant*, 556 U.S. 332 (2009), but the methodology persists.

166. See discussion *infra* Part VI.A.

167. See *Wilson*, 519 U.S. at 412, 415.

168. *Florence v. Bd. of Chosen Freeholders*, 566 U.S. \_\_\_, \_\_\_, 132 S. Ct. 1510, 1513–14 (2012).

169. Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1436 (2003).

170. See generally *id.* at 1429–36 (analyzing the Court's choices between bright-line rules and case-by-case analysis and observing that “no coherent theory undergirds” it).

er, is the distinction between a rule that is clear in its application and the substance of the rule: a clear rule is desirable but says nothing about the choice between two equally clear rules, one of which furthers the individual's protections afforded by the Fourth Amendment and the other that diminishes those protections.<sup>171</sup> Often, as the above illustrations demonstrate, the Court creates rules that favor police interventions. Thus, the Court has stated: "Courts attempting to strike a reasonable Fourth Amendment balance . . . credit the government's side with an essential interest in readily administrable rules."<sup>172</sup> However, the use of per se rules to allow governmental intrusions is at least arguably inimical to much of the underlying purpose of the Fourth Amendment, if its purpose is to protect individual rights. Instead, bright-line rules that favor individual rights by being over-inclusive of those deserving protection should be treated more favorably than per se rules that permit intrusions.<sup>173</sup> For example, to arrest a person in that person's home, the Court requires that, with the exception of exigent circumstances, the police must first obtain an arrest warrant.<sup>174</sup>

If the Fourth Amendment protected group rights, bright-line rules that favor police intrusions would make more sense. The *people's* right to be secure—as a group—would arguably be advanced by screening techniques that involve large numbers of individuals with the purpose to weed out individual criminals. That view of the Fourth Amendment should not prevail. The Fourth Amendment is designed to protect *individuals* from governmental intrusions.<sup>175</sup> Hence, logically, bright-line rules that routinely allow certain intrusions should be rejected or restricted in applica-

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171. See Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 709–10 (1998). Professor Donald Dripps has observed: "The Fourth Amendment cases are difficult because both determinacy and legitimacy are important values." Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 407 (2004). He believes that the Court has erred in emphasizing determinacy over legitimacy. *Id.* at 342. More generally, he maintains, there is an inherent tension between the two values: "[L]egitimate Fourth Amendment doctrine is prone to indeterminacy, and determinate doctrine is prone to illegitimacy." *Id.* at 342–43.

172. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

173. *Cf. Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (stating that generally a person subject to warrantless arrest must be presented to a magistrate for a probable cause determination within forty-eight hours).

174. *Payton v. New York*, 445 U.S. 573, 588–89 (1980).

175. U.S. CONST. amend. IV; see *supra* Part IV.A.

tion. *Bailey* reflects this view, which confined detentions of persons during the execution of search warrants to those in the “immediate vicinity” of the location searched.<sup>176</sup> *King*, however, reflects the opposing view, opening the door to mass, suspicionless DNA testing.<sup>177</sup>

B. *Constructing Exceptions in Light of the Purpose of the General Rule: The Role of Necessity*

Jeremiah Gridley, the attorney general of the Massachusetts Bay Colony, defended the general writs of assistance in the *Writs* case.<sup>178</sup> Although Gridley conceded that the “common privileges of Englishmen” were taken away,<sup>179</sup> he argued that the writs were necessary to enforce the customs laws:

[T]he necessity of the Case and the benefit of the Revenue . . . [T]he Revenue [was] the sole support of Fleets & Armies abroad, & Ministers at home[,] without which the Nation could neither be preserved from the Invasions of her foes, nor the Tumults of her own Subjects. Is not this I say infinitely more important, than the imprisonment of Thieves, or even Murderers? yet in these Cases 'tis agreed Houses may be broke open. . . . So it is established, and the necessity of having public taxes effectually and speedily collected is of infinitely greater moment to the whole, than the Liberty of any Individual.<sup>180</sup>

No record indicates whether Otis addressed Gridley’s admittedly strong governmental interests. Instead, Otis outlined circumstances when the individual’s interest could be legally invaded: a person’s security in his home is “forfeited” only “in cases of the most urgent necessity and importance.”<sup>181</sup> Otis characterized the need as: “For flagrant Crimes, and in Cases of great public Necessity,” a person’s house may be invaded.<sup>182</sup>

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176. *Bailey v. United States*, 568 U.S. \_\_\_, \_\_\_, 133 S. Ct. 1031, 1042 (2013).

177. *See Maryland v. King*, 569 U.S. \_\_\_, \_\_\_, 133 S. Ct. 1958, 1980 (2013) (“DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure.”).

178. SMITH, *supra* note 116, at 548; *see* QUINCY, *supra* note 128, at 476–81.

179. SMITH, *supra* note 116, at 281.

180. *Id.* at 281; *see generally* QUINCY, *supra* note 128, at 476–82 (outlining Gridley’s argument).

181. QUINCY, *supra* note 128, at 490.

182. *Id.* at 471.

From Gridley to the present, claims of necessity have often been invoked in justifying searches.<sup>183</sup> Indeed, in *King*, Justice Scalia criticized the majority for departing from the probable cause standard in the absence of any showing of necessity.<sup>184</sup> What Gridley failed to do, and what Otis and Scalia did do, was distinguish between a strong governmental need and how to effectuate that interest through the creation of rules protective of the individual.<sup>185</sup> A pamphleteer in England, a short time after the *Writs* case, commenting on the use of general warrants to pursue persons suspected of seditious libel, captured the essence of this point: “No necessities of state can ever be a reason for quitting the road of law in the pursuit of a libeller.”<sup>186</sup> In other words, merely because the government has a strong interest does not mean that it can use any or all means to effectuate that interest.<sup>187</sup> That confusion of ends and means has surfaced repeatedly in contemporary Fourth Amendment analysis.<sup>188</sup> Many cases fail to distinguish between the strength of the government interest involved and the methods needed to effectuate that interest.<sup>189</sup>

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183. See, e.g., SMITH, *supra* note 116, at 281; QUINCY, *supra* note 128, at 471, 490.

184. 569 U.S. \_\_\_, \_\_\_, 133 S. Ct. 1958, 1981–82 (2013) (Scalia, J., dissenting).

185. See, e.g., *id.* at 1989–90; QUINCY, *supra* note 128, at 471, 490.

186. FATHER OF CANDOR, LETTER CONCERNING LIBELS, WARRANTS, THE SEIZURE OF PAPERS 32 (3d ed. 1765). Referring to times of rebellion as illustrating an argument for true necessity for the use of general warrants, the writer observed that, in such situations, men may “wink at all irregularities.” *Id.* at 49. He added: “And yet, bad men . . . will be apt to lay stress upon such acts of necessity, as precedents for their doing the like in ordinary cases, and to gratify personal pique, and therefore such excesses of power are dangerous in example, and should never be excused . . .” *Id.* He concluded that, even in cases of high treason where persons could not be named, the use of general warrants would be “applied to his pardon, and not to his justification.” *Id.* at 50.

187. E.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 42–43 (2000) (rejecting the “severe and intractable nature of the drug problem” as insufficient to depart from individualized suspicion); *Torres v. Puerto Rico*, 442 U.S. 465, 472–74 (1979) (citing *Almedia-Sanchez v. United States*, 413 U.S. 266, 273–75 (1973); *United States v. Di Re*, 332 U.S. 581, 595 (1948)) (rejecting suspicionless searches of luggage, despite recognition that Puerto Rico had serious problem with an “influx of weapons and narcotics” and stating that “we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement”); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 317 (1984) (“The ‘general searches’ which the framers sought to outlaw when they enacted the fourth amendment may well have been ‘cost-justified,’ and were defended on precisely this basis.”).

188. See, e.g., *Edmond*, 531 U.S. at 42; *Torres*, 442 U.S. at 472–74.

189. See, e.g., *Edmond*, 531 U.S. at 44–47 (utilizing a programmatic purpose analysis to distinguish between permissible and impermissible suspicionless intrusions); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 453–54 (1990) (stating that it was up to politically accountable officials to choose among reasonable alternative law enforcement tech-

“Necessity” should mean that it must be shown that utilizing a model of reasonableness that has been developed to protect the individual’s right to be secure, if employed in the case before the court, will not safeguard an overriding governmental interest.<sup>190</sup> This conception of necessity is reflected in the Court’s initial departures from the individualized suspicion model.<sup>191</sup> A similarly strong conception of exigency traditionally permeated the question whether the police could search without a warrant.<sup>192</sup> Necessity has several interrelated facets, which are discussed elsewhere,<sup>193</sup> but at its most fundamental level, it requires the government to show a very strong interest which can only be

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niques); *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 631 (1989) (permitting substance abuse testing of all crew members of trains involved in an accident or in a rule violation because serious train accident scenes frequently are chaotic, making it “impractical” for investigators to determine which crew members contributed to the accident).

190. See, e.g., *Sitz*, 496 U.S. at 459 (Brennan, J., dissenting) (“Without proof that the police cannot develop individualized suspicion that a person is driving while impaired by alcohol, I believe the constitutional balance must be struck in favor of protecting the public against even the ‘minimally intrusive’ seizures involved in this case.”); *United States v. Martinez-Fuerte*, 428 U.S. 543, 575 (1976) (Brennan, J., dissenting) (“There is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied.”); *Reid v. Covert*, 354 U.S. 1, 14 (1957) (Black, J., plurality opinion) (espousing the concept that constitutional provisions against arbitrary governmental actions are “inoperative when they become inconvenient or when expediency dictates otherwise . . . if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government”).

191. See *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 537–38 (1967) (viewing as reasonable area-wide health and safety code enforcement inspections designed to combat the dangers that fires and epidemics pose to large urban areas because other canvassing techniques would not achieve acceptable results); see also 5 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 10.2(d), at 59 (4th ed. 2004) (noting that the *Camara* court’s analysis included the determination “that ‘acceptable results’ in code enforcement could not be accomplished if it were necessary to establish in advance the probability that a particular violation was present in a particular building”); Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 91–92 (stating that *Camara* reflected the widely shared opinion that alternative procedures to area-wide inspections were unworkable).

192. See, e.g., *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967) (holding that no warrant is required to enter a house when police are in hot pursuit of a fleeing felon, with the Court noting: “Speed here was essential”); see also Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 32 (1991) (arguing for view of exigency that defines “imminence” narrowly to prevent the exception from swallowing the warrant requirement).

193. See generally CLANCY, *supra* note 43 § 11.3.4.4.3., at 603–06 (discussing the role of necessity in measuring reasonableness in Supreme Court opinions); *id.* § 11.5.3.2., at 628–33 (discussing the role that necessity should have).



effectuated by departing from a general rule of the Fourth Amendment that favors the individual.<sup>194</sup>

Once a general rule has been established that is protective of the individual, exceptions to that rule must be similarly drawn to reflect that purpose. For example, as the *Bailey* Court acknowledged, the general rule is a person may only be detained by the police based on probable cause to believe that person is involved in criminal activity.<sup>195</sup> There are recognized exceptions to that rule, including detentions of occupants without suspicion during the execution of a search warrant for a residence.<sup>196</sup> How should the scope of such an exception be measured? To protect the general rule, the majority in *Bailey* acknowledged: “An exception to the Fourth Amendment rule prohibiting detention absent probable cause must not diverge from its purpose and rationale.”<sup>197</sup> The danger of departures without this guide was candidly admitted by the Court, which included the possibility of detaining other persons who happened to be in the neighborhood.<sup>198</sup> Hence, in *Bailey*, the Court created the rule that, when executing a warrant, the police can only detain occupants who are in the immediate vicinity of the premises.<sup>199</sup> Justice Scalia, concurring in *Bailey*, emphasized the hierarchal nature of the inquiry with clarity: Probable cause is the general rule for a detention; an exception to that rule applies when the police execute a search warrant and locate persons on the premises to be searched.<sup>200</sup> Thus, for him, the only question was whether *Bailey* was on the premises.<sup>201</sup> Because *Bailey* was stopped a mile away, the exception “cannot sanction *Bailey*’s detention. It really is that simple.”<sup>202</sup>

What should also be simple is the requirement of putting the burden on the government to justify departures from general rules. For example, the Court has repeatedly stated that warrants are a preferred mode of searching and the government has

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194. *See id.* § 11.3.4.4.3., at 606–07.

195. 568 U.S. \_\_\_, \_\_\_, 133 S. Ct. 1031, 1037 (2013) (quoting *Dunaway v. New York*, 442 U.S. 200, 213 (1979)).

196. *Id.* at \_\_\_, 133 S. Ct. at 1037–38 (quoting *Michigan v. Summers*, 452 U.S. 692, 704–05 (1981)).

197. *Id.* at \_\_\_, 133 S. Ct. 1038.

198. *Id.* at \_\_\_, 133 S. Ct. at 1039–40.

199. *Id.* at \_\_\_, 133 S. Ct. at 1041.

200. *Id.* at \_\_\_, 133 S. Ct. at 1044 (Scalia, J., concurring).

201. *Id.* at 1043.

202. *Id.*

the burden of showing a need to search without one.<sup>203</sup> That burden has traditionally been a high one—a showing of necessity.<sup>204</sup> In contrast, the Court in *King* put the burden on the persons challenging the suspicionless DNA testing.<sup>205</sup> Such a burden is inconsistent with the vast bulk of Fourth Amendment jurisprudence. In sum, a structure of Fourth Amendment analysis should look like this: An acknowledgement that the purpose of the Fourth Amendment is to protect individuals from governmental intrusions; general rules are created to further that purpose; and exceptions to those general rules must be based on a strong showing of need, with the government bearing the burden of proof. To paraphrase Justice Scalia, it really should be that simple.<sup>206</sup>

## VI. SEARCHES INCIDENT TO ARREST AS ILLUSTRATING THE CREATION OF RULES BASED ON PURPOSE

Searches incident to arrest are commonly utilized and, given the development of modern police forces and the statutory expansion of the number of crimes, such searches now apply to large numbers of criminal suspects. Moreover, given the ubiquity of cell phones and other digital devices on and about persons in today's world, those devices are increasingly searched incident to arrest.<sup>207</sup> The development of principles governing search incident to arrest illustrates how general rules should inform the nature of exceptions to a general rule and the scope of such exceptions.

### A. *Nature of the Rule: Per Se Versus Case-by-Case*

Search incident to arrest principles have undergone significant evolution since the imposition of the exclusionary rule on federal authorities in 1914.<sup>208</sup> First, the nature of the justification for searches incident to arrest has had several iterations. Many cases

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203. CLANCY, *supra* note 43 § 11.3.1., at 571–73.

204. *See id.* § 11.3.4.4.3., at 603–09.

205. 569 U.S. at \_\_\_, \_\_\_, 133 S. Ct. 1958, 1977–80 (2013).

206. *See Bailey*, 568 U.S. at \_\_\_, 133 S. Ct. at 1043 (Scalia, J., concurring).

207. *See, e.g., United States v. Finley*, 477 F.3d 250, 259–60 (5th Cir. 2007) (upholding search of cell phone found in arrestee's pocket); *see also* CLANCY, *supra* note 43 § 8.7., at 443–46.

208. *See Weeks v. United States*, 232 U.S. 383, 392 (1914) (recognizing the well-established “right on the part of the Government . . . to search the person of the accused when legally arrested”).

prior to *Robinson v. United States* viewed searches incident to arrest in terms of an exception to the warrant requirement, which intimated an exigent circumstances rationale and, perhaps, a need to justify the search in each case.<sup>209</sup> Although not all of the Supreme Court's cases reflected that view,<sup>210</sup> a dispositive doctrinal shift in the underlying justification for searches incident to arrest occurred in *Robinson*.<sup>211</sup> That majority opinion, written by Justice Rehnquist, stated:

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.<sup>212</sup>

The Court's statement in the second sentence of this quotation deserves emphasis: searches incident to arrests were viewed in *Robinson* not only as an exception to the general rule that warrants are required but as a rule unto themselves—their own general rule.<sup>213</sup> This allowed the Court to create a structure for searches incident to arrest without regard to any other Fourth Amendment satisfaction doctrines.<sup>214</sup> Thus, in *Robinson*, which involved the arrest of a person driving on a suspended license, the Court adopted a "categorical" search incident to arrest rule: it applied to all arrests, regardless of the underlying factual circumstances.<sup>215</sup> In so ruling, the Court rejected a case-by-case inquiry and any analogy to a protective frisk for weapons, which must be justified in each case by examining whether there are circumstances giving rise to the reasonable belief that the person accost-

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209. *Robinson v. United States*, 414 U.S. 218 (1973); *see, e.g.*, *Chimel v. California*, 395 U.S. 752, 762–63 (1969); *Trupiano v. United States*, 334 U.S. 699, 708 (1948). There was at least some common law authority that a search incident to arrest was based on the circumstances of each case. *See* David E. Aaronson & Rangeley Wallace, *A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest*, 64 *GEO. L.J.* 53, 55–56 (1975) (citing *Leigh v. Cole*, 6 *COX CRIM. L. CASES* 329, 332 (Oxford Cir. 1853)).

210. *E.g.*, *United States v. Rabinowitz*, 339 U.S. 56, 61 (1950).

211. *Robinson*, 414 U.S. at 234–35.

212. *Id.* at 235.

213. *See id.*

214. *See id.*

215. *See id.* at 220–21, 236.

ed is armed and dangerous.<sup>216</sup> The significance of *Robinson* was to distinguish the search incident to arrest principle from other situations where the Court has found an exception to the warrant preference rule.<sup>217</sup> For searches incident to arrest, permissibility is not determined by applying the case-by-case exigency analysis used to justify exceptions to the warrant preference rule.<sup>218</sup>

*Robinson*'s view prevailed in subsequent decades<sup>219</sup> until the recent decision in *Arizona v. Gant*, which changed the rule for searches of vehicles incident to arrest.<sup>220</sup> *Gant*, rhetorically, represented a return to a case-by-case exigency approach, viewing searches incident to arrest as an exception to the warrant preference rule.<sup>221</sup> Under prior precedent, the police could search the entire passenger compartment incident to the arrest of an occupant of the vehicle.<sup>222</sup> The Court in *Gant* rejected that principle and created two new rules for searches incident to arrest of persons who are in vehicles.<sup>223</sup> They were: (1) a vehicle search is not permitted incident to a recent occupant's arrest after the arrestee is secured and cannot access the interior of the vehicle; and (2) a vehicle search is permissible if the police have a reasonable belief that evidence of the offense of arrest might be found in the vehicle.<sup>224</sup>

Explaining the first rule, Justice Stevens, writing for a majority of five, stated that a search of a vehicle incident to arrest is permissible "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."<sup>225</sup> Explaining the second rule, Stevens asserted "that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of

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216. *Id.* at 227–28 (citing *Terry v. Ohio*, 392 U.S. 1, 21–25 (1968)).

217. *See, e.g.*, *Missouri v. McNeely*, 569 U.S. \_\_\_, \_\_\_, 133 S. Ct. 1552, 1559 n.3 (2013).

218. *Id.*; *see Robinson*, 414 U.S. at 235.

219. *E.g.*, *Virginia v. Moore*, 553 U.S. 164, 176–77 (2008) ("The interests justifying search are present whenever an officer makes an arrest."); *Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979) ("The fact of a lawful arrest, standing alone, authorizes a search [of the person arrested]."); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (noting that "since it is the fact of custodial arrest which gives rise to the authority to search," the lack of a subjective belief by the officer that the person arrested is armed and dangerous is irrelevant).

220. 556 U.S. 332, 351 (2009).

221. *Id.* at 338.

222. *Id.* at 341 (citing *New York v. Belton* 453 U.S. 454, 460 (1981)).

223. *Id.* at 350–51.

224. *Id.* at 335.

225. *Id.* at 343.

the offense of arrest might be found in the vehicle.”<sup>226</sup> Justice Stevens viewed the primary rationale of the new rules as protecting privacy interests.<sup>227</sup> He saw the prior doctrine, which authorized police officers to search not just the passenger compartment but “every purse, briefcase, or other container within that space,” as creating “a serious and recurring threat to the privacy of countless individuals.”<sup>228</sup> He also maintained that the prior rule was unnecessary to protect legitimate law enforcement interests.<sup>229</sup>

The majority in *Gant* explicitly limited the new rules to motor vehicle searches.<sup>230</sup> As dissenting Justice Alito maintained in *Gant*, however, the new rules have no rational limitation to vehicle searches.<sup>231</sup> His argument posed the question: Why does the rule not apply to all arrestees?<sup>232</sup> The majority’s opinion failed to adequately answer that question. *Gant* creates the bizarre situation where an individual is more protected in an automobile than in his own home, which is fundamentally inconsistent with other aspects of Supreme Court doctrine.

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226. *Id.* at 335.

227. *Id.* at 344–45.

228. *Id.* at 345.

229. *Id.* at 346. Justice Scalia, in a concurring opinion, said that he did not like the majority’s new rules but liked the dissent’s view even less; he did not want to create a 4-1-4 situation and, therefore, joined the majority opinion, although acknowledging that it was an “artificial narrowing” of prior cases. *Id.* at 354 (Scalia, J., concurring). Scalia stated that the rule he wanted was that the police could only search a vehicle incident to arrest if the object of the search was evidence of the crime for which the arrest was made. *Id.* at 353; *see also* *Thornton v. United States*, 541 U.S. 615, 627–32 (2004) (Scalia, J., concurring) (viewing searches incident to arrest as an “exception” and engaging in fact sensitive analysis of whether the search incident to arrest is justified in the case).

230. *Gant*, 556 U.S. at 351.

231. *Id.* at 363–64 (Alito, J., dissenting).

232. *Id.* Several courts have rejected a broad application of *Gant*. *E.g.*, *United States v. Perdoma*, 621 F.3d 745, 751–52 (8th Cir. 2010); *State v. Ellis*, 355 S.W.3d 522, 525 (Mo. Ct. App. 2011). But others have extended *Gant* beyond the automobile context. *See United States v. Shakir*, 616 F.3d 315, 317, 321 (3d Cir. 2010) (holding the search of the gym bag carried by the arrestee was permissible under the following rule: “[W]e hold that a search is permissible incident to a suspect’s arrest when, under all the circumstances, there remains a reasonable possibility that the arrestee could access a weapon or destructible evidence in the container or area being searched. Although this standard requires something more than the mere theoretical possibility that a suspect might access a weapon or evidence, it remains a lenient standard.”); Angad Singh, Comment, *Stepping Out of the Vehicle: The Potential of Arizona v. Gant to End Automatic Searches Incident to Arrest Beyond the Vehicular Context*, 59 AM. U. L. REV. 1759, 1762 (2010) (seeking to apply *Gant* to searches incident to arrest of persons and in home); Jackie L. Starbuck, Comment, *Redefining Searches Incident to Arrest: Gant’s Effect on Chimel*, 116 PENN. ST. L. REV. 1253, 1280 (2012) (concluding that “[t]he Supreme Court should abolish any distinction between vehicle searches and home searches by making *Gant*’s explication of *Chimel* and the ‘area of immediate control’ the controlling authority for all searches incident to arrest”).

The *Robinson* line of authority offered a view of search incident to arrest doctrine that was categorical: such searches were per se reasonable.<sup>233</sup> Taken to its logical conclusion, what should flow from such a view is a simple series of rules, permitting detailed searches of persons and the property they possess in all cases as an incident to arrest. Such a bright-line rule avoids, or should avoid, inconsistent decisions based on similar facts and gives the police a workable rule to apply in each case. That rule is, however, a very blunt instrument. Frankly, it is an evidence-gathering technique. It has little relationship to the protective justification for searches incident to arrest in the many cases where there is no factual basis for believing that the suspect could obtain evidence or a weapon.<sup>234</sup>

*Gant* is fundamentally inconsistent with *Robinson*, based on its view that searches incident to arrest are an exception to the warrant requirement and in requiring justification for searches beyond the fact of an arrest.<sup>235</sup> One view should ultimately prevail. Either *Robinson* or *Gant* has to be overruled. Which should prevail? Looking broadly at search incident to arrest doctrine, the Court has rejected two separate analyses that would reflect the application of two independent legal questions: (1) whether an arrest has occurred; and (2) whether a search incident to arrest should be permitted.<sup>236</sup> Those are two separate intrusions. The first is based on probable cause that the person is involved in criminal activity and is not of concern.<sup>237</sup> The second intrusion raises the concern whether the search incident to arrest rule should have per se applicability once it is determined that the encounter constitutes an arrest or whether search incident to arrest principles should be modified to apply to only some arrests.<sup>238</sup> If the purpose of the Fourth Amendment is to protect the individual, it would seem that the government should have to justify each intrusion separately. Although the goal here is not to create a series of search incident to arrest rules, abandonment of the per se

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233. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

234. See Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 695 (2002) (quoting *United States v. McLaughlin*, 170 F.3d 889, 895 (9th Cir. 1990)).

235. *Gant*, 556 U.S. at 351.

236. See Thomas K. Clancy, *What Constitutes an "Arrest" Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129, 177 (2003).

237. *Id.* at 178.

238. *Id.* at 178–79.

rule would seem to necessarily follow from the premise. More nuanced rules protective of the individual might include limiting permissible search incident to arrest based on categories of crime for which the arrest is being made<sup>239</sup> or premised on a factual inquiry<sup>240</sup> to establish whether one of the two justifications for the search incident to arrest rule is actually present in each case.<sup>241</sup> *Gant*'s second rule—requiring that the police have reason to believe that evidence of the offense might be in the area searched<sup>242</sup>—should be viewed in this light.

### B. *The Scope of the Rule*

Once a general rule is established, the scope of that rule and exceptions to it must be crafted in light of that rule's purpose. In the context of searches incident to arrest, the Court struggled throughout much of the twentieth century to establish the proper scope of the area around the arrestee that may be searched.<sup>243</sup> This is not surprising given its inability to settle on a general rule that was protective of the individual. The cases are informative because they represent the first attempts by the Court to denote the proper scope of an intrusion in non-warrant situations. The debate concerning the scope of a search incident to arrest also

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239. *Cf.* *Thomas v. State*, 614 So. 2d 468, 471 (Fla. 1993) (finding that issuing a traffic citation was a form of arrest but rejecting permissibility of a custodial arrest and "body search" for person who was riding bicycle without a bell); *State v. Paul T.*, 993 P.2d 74, 77–79 (N.M. 1999) (observing the ambiguity as to whether the search incident to arrest principle applied to situations other than "custodial" arrests and holding, under the New Mexico Constitution, that the police could not conduct a full search of a juvenile who violated curfew law that provided for release to parent or guardian). Similarly, prior to its constitutional changes, California courts differentiated between types of crimes when applying the search incident to arrest principle. *See, e.g.*, *People v. Maher*, 550 P.2d 1044, 1047 (Cal. 1976); *People v. Brisendine*, 531 P.2d 1099, 1106 (Cal. 1975). Such a rule would remove much of the incentive to arrest for a minor crime in order to conduct an evidentiary search for other crimes.

240. *E.g.*, *State v. Bauder*, 924 A.2d 38, 50 (Vt. 2007) (requiring, for search incident to arrest in the vehicle context, a showing that either of the two traditional justifications are actually present under the state constitution).

241. *Cf.* *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (holding that police officers cannot search incident to traffic citations and discussing why the traditional rationales of the search incident to arrest rule did not apply).

242. *Arizona v. Gant*, 556 U.S. 332, 335 (2009).

243. *See, e.g.*, *Chimel v. California*, 395 U.S. 752, 770–72 (1969) (White, J., dissenting) (tracing the "modern odyssey" of the Court's treatment of the search incident to arrest rule throughout the twentieth century and observing that there had been at least five significant shifts in emphasis).

capsulizes the core problem of measuring the reasonableness of the scope of an intrusion:

If upon arrest you may search beyond the immediate person and the very restricted area that may fairly be deemed part of the person, what rational line can be drawn short of searching as many rooms as arresting officers may deem appropriate for finding “the fruits of the crime”? Is search to be restricted to the room in which the person is arrested but not to another open room into which it leads? Or, take a house or an apartment consisting largely of one big room serving as dining room, living room and bedroom. May search be made in a small room but not in such a large room? If you may search the bedroom part of a large room, why not a bedroom separated from the dining room by a partition? These are not silly hard cases. They put the principle to a test.<sup>244</sup>

The Court’s cases on the permissible scope of a search incident to arrest are grounded in inconsistent models to measure reasonableness.<sup>245</sup> One view of reasonableness, the case-by-case model, has no criteria that persists from case to case.<sup>246</sup> Perhaps the most notable case espousing this case-by-case analysis is *United States v. Rabinowitz*, wherein the Court upheld the warrantless search of a one-room office as incident to a valid arrest:

What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are “unreasonable” searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.<sup>247</sup>

When that case-by-case analysis was applied, with its lack of objective criteria, the scope of the search was invariably broad, extending to all items within the suspect’s “control.”<sup>248</sup> What was in a person’s “control” could prove to be elusive. Illustrative is *Harris v. United States*, where the Court reasoned that the scope of the search incident to arrest could extend to all of the rooms of Harris’ four-room apartment because he was in “effective control” of the apartment and the evidence sought could have been con-

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244. *United States v. Rabinowitz*, 339 U.S. 56, 79 (1950) (Frankfurter, J., dissenting).

245. See CLANCY, *supra* note 43 § 8.8., at 446–48.

246. *Id.* § 11.3.3., at 586 (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)) (“There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.”).

247. *Rabinowitz*, 339 U.S. at 63.

248. See, e.g., *Chimel*, 395 U.S. at 770–71 (White, J., dissenting) (discussing how prior case law had grounded the scope of permissible search incident to arrest procedures based on what was in “control” of arrestee).



cealed anywhere in the apartment.<sup>249</sup> Dissenting in that case, Justice Murphy argued:

The result is that a warrant for arrest is the equivalent of a general search warrant or writ of assistance; as an “incident” to the arrest, the arresting officers can search the surrounding premises without limitation for the fruits, instrumentalities and anything else connected with the crime charged or with any other possible crime. They may disregard with impunity all the historic principles underlying the Fourth Amendment relative to indiscriminate searches of a man’s home when he is placed under arrest. They may disregard the fact that the Fourth Amendment was designed in part, indeed perhaps primarily, to outlaw such general warrants, that there is no exception in favor of general searches in the course of executing a lawful warrant for arrest. As to those placed under arrest, the restrictions of the Fourth Amendment on searches are now words without meaning or effect.<sup>250</sup>

The warrant preference model maintains that a search or seizure is per se unreasonable subject to exceptions based on a strong showing of need.<sup>251</sup> When the warrant preference model was applied, searches incident to arrest were of limited scope, influenced heavily by the warrant clause requirement of particularity.<sup>252</sup> In *Chimel*, the warrant preference model emerged as the clear winner to measure scope issues, with the Court rejecting both the methodology and the results in *Rabinowitz* and *Harris*.<sup>253</sup> In *Chimel*, the Court found the scope of the search unreasonable when the police searched the arrestee’s entire three-bedroom house as incident to his arrest, looking for evidence implicating him in the burglary of a coin shop.<sup>254</sup> A significant portion of the

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249. 331 U.S. 145, 152 (1947).

250. *Id.* at 191 (Murphy, J., dissenting) (citations omitted).

251. See CLANCY, *supra* note 43 § 11.3.1., at 571–73.

252. See *Trupiano v. United States*, 334 U.S. 699, 710 (1948) (“It is a mistake to assume that a search warrant in these circumstances would contribute nothing to the preservation of the rights protected by the Fourth Amendment. A search warrant must describe with particularity the place to be searched and the things to be seized. Without such a warrant, however, officers are free to determine for themselves the extent of their search and the precise objects to be seized. This is no small difference. It is a difference upon which depends much of the potency of the right of privacy. And it is a difference that must be preserved even where contraband articles are seized in connection with a valid arrest.”); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (“The authority of officers to search one’s house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained.”).

253. *Chimel*, 395 U.S. at 768.

254. *Id.* at 753–54, 768.

Court's analysis focused on the standard justification for the warrant preference rule, that is, the interjection of a magistrate between the citizen and the police and the central role that probable cause played.<sup>255</sup> Importantly, however, the Court also relied on the rejection of general warrants embodied in the warrant clause and the requirement that the scope of a "search must be strictly tied to and justified by the circumstances which rendered its initiation permissible."<sup>256</sup> In applying those principles to a search incident to arrest, the Court observed:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for 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.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less.<sup>257</sup>

In limiting the scope of the intrusion, the *Chimel* Court emphasized:

It is argued in the present case that it is "reasonable" to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is

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255. *Id.* at 758–59, 761 (citing *Trupiano*, 334 U.S. at 705).

256. *Id.* at 761–62 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)) (internal quotation marks omitted).

257. *Id.* at 762–63 (footnote omitted).

less subjectively “reasonable” to search a man’s house when he is arrested on his front lawn—or just down the street<sup>258</sup>—than it is when he happens to be in the house at the time of arrest.

Since *Chimel*, the scope of the search incident to arrest rule’s application to areas beyond the arrestee’s person has been settled—at least rhetorically.<sup>259</sup> That scope as defined by *Chimel* includes only those areas within the arrestee’s “immediate control,” which is in turn defined as those areas where the arrestee “might reach in order to grab a weapon or evidentiary items.”<sup>260</sup> The area to be searched (with the exception of vehicle searches), is a fact-based inquiry in each case.<sup>261</sup>

In sum, search incident to arrest principles demonstrate the incoherence of Fourth Amendment doctrine when the Court loses sight of the fundamental purpose of the Fourth Amendment. There is a fundamental disconnect in *Robinson* on one side and *Gant* and *Chimel* on the other. *Robinson*’s general rule is that a search incident to arrest produces its own general rule.<sup>262</sup> But *Gant* and *Chimel* viewed such searches as an exception to the warrant preference rule.<sup>263</sup> If the purpose of the Fourth Amendment is to protect the individual, then the structure of search incident to arrest principles would be much different. As to the nature of the rule, it would be viewed as an exception to a general rule of reasonableness, grounded in necessity. From that view would flow a series of rules based on a showing of exigency, which is traditionally viewed as case specific. As to the scope of the permissible search, the *Chimel* framework would then reinforce the general rule by limiting the area searched to protect the validity of the general rule.

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258. *Id.* at 764–65 (footnote omitted).

259. *See, e.g.*, *Thornton v. United States*, 541 U.S. 615, 620 (2004) (“Although easily stated, the *Chimel* principle had proved difficult to apply in specific cases.”); *Mincey v. Arizona*, 437 U.S. 385, 391–92 (1978) (rejecting an exception to warrant requirement for search of residence after entering house to arrest); *Vale v. Louisiana*, 399 U.S. 30, 33–34 (1970) (suggesting that officers cannot use arrestee as a “walking search warrant” by moving him into house and from room to room to conduct warrantless search of house).

260. *Chimel*, 395 U.S. at 763. This grab area has often been referred to as the “wing-span” or “lunge area.” THOMAS K. CLANCY, *CYBER CRIME AND DIGITAL EVIDENCE: MATERIALS AND CASES* 178–79 (2011) (internal quotation marks omitted); Moskowitz, *supra* note 234, at 661 (internal quotation marks omitted).

261. CLANCY, *CYBER CRIME AND DIGITAL EVIDENCE*, *supra* note 260, at 179.

262. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

263. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); *Chimel*, 395 U.S. at 763.

## VII. CONCLUSION

The Court has a difficult task: construing the broad terms of a very old document that now regulates modern, diverse intrusions by the government. That task should start with a point of view. The Fourth Amendment was designed by the framers to protect individuals from the government; its fundamental goal was not to help facilitate governmental intrusions. General rules should effectuate that purpose. Exceptions to general rules should be based on a strong showing by the government of a need to depart from the general rule and any exception should be designed to protect the general rule.