The Fourth Amendment as a Collective Right

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by

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The Fourth Amendment speaks of the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Amendment’s words are plural: the right of the “people” and “their.” Yet, the Amendment has been traditionally interpreted to safeguard the rights of individuals in atomistic spheres of interests: it safeguards my person and your house and her papers and his effects against unreasonable searches and seizure. An alternative view would treat the Amendment as requiring the government to keep us collectively secure in our persons, houses, papers, and effects.

For most of the history of the United States, the view that the Fourth Amendment served to protect individual security—that it was an individual right—was so patently obvious that it needed no support. Yet, the collective security model has been rapidly gaining momentum—and not just in response to terrorist attacks on the United States.

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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.

2 See District of Columbia v. Heller, 128 S. Ct. 2783, 2790 (2008) (observing that the Fourth Amendment refers not to collective but to individual rights); Anthony Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 367-72 (1974) (outlining the “atomistic spheres of interest” and “regulatory canon” views and observing that the latter would require the “government to order its law enforcement procedures in a fashion that keeps us collectively secure”); Richard B. Kuhns, The Concept of Personal Aggrievement in Fourth Amendment Standing Cases, 65 IOWA L. REV. 493 (1979-80) (applying Amsterdam’s framework to Supreme Court standing cases).
Analytical support for it is now found in a broad swath of Supreme Court case law, permitting an increasing number of suspicionless governmental actions designed to further collective ends. In gravitating toward the collective security model, the Court has not cut back rhetorically on its long history of interpreting the prefatory words in the Amendment ("The right of the people to be secure") as an individual right; instead, the Court has construed other terms of the Amendment ("search," "seizure," and "unreasonable") in a manner to advance collective security concerns. This article examines the underpinnings and ramifications of the individual security and collective security models and the trend toward the latter approach. I argue here for rejecting the primacy of collective security as a main interpretative approach to the Amendment and maintain that that approach is illusory and inimical to the fundamental premise—and promise of the Amendment—the protection of individual security.

I. The Individual Rights Model

A. historical background

The choice between collective security and individual liberty was repeatedly presented in the events that profoundly influenced the decision to adopt the Fourth Amendment. Historical analysis has long served as an important interpretative tool for those seeking to achieve an understanding of the Amendment. The historical record is

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3 This trend toward collective security need not be driven by a desire for tyranny. See, e.g., Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.").

complex, involving hundreds of years of evolution in the regulation of searches and seizures, with many contradictory developments. Importantly, however, much of that evolution did not have a perceived influence on the creation of the Fourth Amendment nor have the broad historical trends proven to be significant in construing the Amendment. Rather than the broad currents of history, events in England and in the American colonies during the period immediately preceding the American Revolution directly served as a catalyst for the 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.

From studying those events, the conclusion that the Framers enshrined individual security as a centralizing principle appears unmistakable. Two of the most important events illustrate this fundamental conclusion. The first was in Massachusetts. In 1696, 389-91 (1914); Boyd v. United States, 116 U.S. 616, 623-30 (1886). See also Richard M. Leage, The Fourth Amendment and the Law of Arrest, 54 J. CRIM. L., CRIMINOLOGY & POL. SCI. 393, 396 (1963) (Judicial "opinions are replete with reliance upon history.").

5 See generally WILLIAM J. CUDDHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING (1990) (unpublished dissertation comprehensively treating history of search and seizure in England and its American colonies to adoption of the Fourth Amendment). Indeed, as Professor Sklansky has demonstrated, the common law—which was one source of search and seizure rules—was not a “unified, systematic body of rules, constant across space and time.” Search and seizure rules, he observed, “varied from colony to colony and from decade to decade” and, “in both England and America, theory and practice often diverged.” David A. Sklansky, The Fourth Amendment and the Common Law, 100 COLUM. L. REV. 1739, 1795 (2000).

6 E.g., Stanford v. Texas, 379 U.S. 476, 482 (1965) (“Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance”); CUDDHY, supra note 5, at cix (summarizing the available sources of search and seizure practices and observing that “[a]rests without warrants, ship-searches, and probable cause never became controversial and excited comparatively little discussion” in contrast to general search warrants and house searches).

Parliament passed legislation that arguably permitted the use of suspicionless writs of assistance to enforce customs in the colonies.\textsuperscript{8} Smuggling was a widespread practice in the American colonies and writs of assistance were a principal means of combating the practice.\textsuperscript{9} The writs were issued without any suspicion of illegal activity and permitted those holding a writ to go anywhere they chose and search any location. Massachusetts bore the brunt of the customs writ use,\textsuperscript{10} with the Superior Court of Massachusetts granting writs based on the 1696 Act beginning in the 1750s.\textsuperscript{11}

In 1761, new writs of assistance were requested following the expiration of the previously-issued writs. A group of Boston merchants opposed the proposed writs, retaining James Otis to represent their cause. The key issue was whether the Superior Court should continue to grant the writs in general and open-ended form or whether it should limit the writs to a single occasion based on particularized information given under oath.\textsuperscript{12} Jeremiah Gridley, the attorney general of the Massachusetts Bay Colony, defended the general writs of assistance as necessary to enforce the customs laws.\textsuperscript{13} The writs, Gridley argued, were justified by

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\textsuperscript{8} M. H. SMITH, THE WRITS OF ASSISTANCE CASE 117-18 (1978). It was recognized in England in 1766 that the writs were without legal authority. Parliament thereafter passed the Townshend Act, providing a legal basis for the writs. Id. at 438-55.
\textsuperscript{9} JACOB B. LANDYNISKI, SEARCH AND SEIZURE AND THE SUPREME COURT 30 (1966). See generally LASSON, supra note 7, at 51-78.
\textsuperscript{10} LANDYNISKI, supra note 9, at 31. See also CUDDEBY, supra note 5, at 747-56 (discussing the fact that Massachusetts had more intrusive search and seizure practices than other colonies). Attempts to obtain the writs in other colonies were generally unsuccessful. See id. at 500-11; LASSON, supra note 7, at 73-76.
\textsuperscript{11} See generally JOSIAH QUINCY, JR., REPORTS OF CASES, 401-11 (1865).
\textsuperscript{12} QUINCY, supra note 11, at 531-32.
\textsuperscript{13} Id. at 476-82.
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the 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.\textsuperscript{14}

In contrast to that appeal to collective security, James Otis, representing the merchants, attacked the writs as “against the fundamental principles of law.” Otis maintained:

Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and everything in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient . . . . Writs in their nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in law live forever, no one can be called to account. Thus reason and the constitution are both against this writ.\textsuperscript{15}

Although Otis lost his case, with the court continuing the previous practice, he gained a place in history.\textsuperscript{16} In that case, “the American tradition of constitutional hostility to general powers of search first found articulate expression.”\textsuperscript{17}

\textsuperscript{14} SMITH, supra note 8, at 281.

\textsuperscript{15} TAYLOR, supra note 7, at 37 (quoting 2 LEGAL PAPERS OF JOHN ADAMS 142-44 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)). Another version of Otis' argument reports that he said that a man who is quiet in his house "is as well guarded as a prince in his castle." Id. at 37; SMITH, supra note 8, at 344. The discrepancy results from the two sources of the speech; the first is from Adams' original notes and the second is from Adams' abstract made fifty years after the argument. See QUINCY, supra note 11, at 469 n.1.

\textsuperscript{16} Otis' argument in the writs of assistance case has often been cited by the Supreme Court. See, e.g., Payton v. New York, 445 U.S. 573, 583 n.21 (1980); Frank v. Maryland, 359 U.S. 360, 364 (1959); Boyd v. United States, 116 U.S. 616, 625 (1886) (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."). See also TAYLOR, supra note 7, at 38 ("The writs of assistance were anathema in the colonies, and Otis' argument against them was well known among the founding fathers.").

\textsuperscript{17} SMITH, supra note 8, at 7.

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Adams, who later recounted that Otis' oration was so moving that then and there the American Revolution was born.\textsuperscript{18} Although this was an overstatement,\textsuperscript{19} the use of the writs of assistance for customs searches and seizures "caused profound resentment" in the colonies,\textsuperscript{20} and their use is considered to be "the first in the chain of events which led directly and irresistibly to revolution and independence."\textsuperscript{21} Article Fourteen of the Massachusetts Declaration of Rights of 1780,\textsuperscript{22} which served as the model for the Fourth Amendment, provided in its first sentence for each person's "right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions." The Massachusetts article was drafted by John Adams, some nineteen


\textsuperscript{19} \textit{See Smith}, supra note 8, at 377 (documenting the litigation and recognizing that Adams' account was probably embellished).

\textsuperscript{20} \textit{Landynski}, supra note 9, at 31.

\textsuperscript{21} \textit{Lasson}, supra note 7, at 51. \textit{See also} \textit{Berger v. New York}, 388 U.S. 41, 58 (1967) (Use of general warrants "was a motivating factor behind the Declaration of Independence."); \textit{United States v. Rabinowitz}, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (The revulsion was so "deeply felt by the Colonies as to be one of the potent causes of the Revolution."); \textit{Harris v. United States}, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (The abuses surrounding searches and seizures "more than any one single factor gave rise to American independence.").

\textsuperscript{22} Article 14 of the Massachusetts Declaration of Rights of 1780 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.

\textit{Quoted in Lasson, supra note 7, at 82 n.15. Cf. Harris v. United States}, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting) (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.").
years after hearing Otis’ argument in the writs of assistance case.

A second important precedent of the founding era is *Entick v. Carrington*.23 The case has been repeatedly described by the Supreme Court as a “monument of English freedom’ which was ‘undoubtedly familiar’ to ‘every American statesman’ when the Constitution was adopted, and considered to be ‘the true and ultimate expression of constitutional law.’”24 Pursuant to a warrant based on a charge that Entick was the author or was responsible for the publication of several seditious papers, Entick’s house was searched and his private papers were seized by government messengers. The warrant named Entick but was otherwise general as to the places to be searched and the papers to be seized. Entick sued the messengers in trespass and the jury returned a verdict in his favor.

Upholding the verdict, Lord Camden in *Entick* rejected the appeal of collective security—this was after all a case of sedition—in favor of individual liberty. Camden discussed in detail the importance of individual property rights as limiting the government’s ability to search and seize and the court inextricably linked security with the ability of the individual to exclude the government from intruding. Camden also emphasized the fundamental role that property rights played in society: “The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged

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by some public law for the good of the whole.\textsuperscript{25} Evidencing the common law’s strong support for private property, Camden stated that “every invasion of private property, be it ever so minute,” was considered a trespass.\textsuperscript{26} Accordingly, anyone who entered the property of another without permission was liable for trespass, even if no damages occurred.\textsuperscript{27}

These and other foundational events\textsuperscript{28} strongly influenced the Framers of the Fourth Amendment, which enshrined their strong concern for the protection of the individual’s right to be free from arbitrary and general searches and seizures. Although reaction to the English and colonial search and seizure abuses often focused on correcting arbitrary search and seizure procedures, the practices were seen as offensive because they impinged upon things held dear, that is, each individual’s person, home, effects, or private papers. The founders were faced with two competing choices: collective security (such as the needs to combat smuggling, support the military, and suppress sedition) and individual liberty. They favored liberty.

B. Supreme Court characterization of protected individual interests

In referring to protected personhood interests, the Court has variously stated that the Fourth Amendment protects liberty,\textsuperscript{29} reasonable expectations of privacy,\textsuperscript{30} individual

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\item \textsuperscript{25} 19 Howell’s State Trials at 1066.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} See, e.g., Wilkes v. Wood, 98 Eng. Rep. 489, 498 (K.B. 1763) (opining that the power to issue general warrants might “affect the person and property of every man in this kingdom, and [would be] totally subversive of the liberty of the subject”); Huckle v. Money, 95 Eng. Rep. 768, 769 (K.B. 1763) (“To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour . . . .”).
\item \textsuperscript{29} E.g., Soldal v. Cook County, 506 U.S. 56, 64 n.8 (1992); United States v.
freedom, personal dignity, bodily integrity, the “inviolability of the person,” the “sanctity of the person,” and the right of free movement. Regardless of the formulation, each references an individual right, labeled more simply by the Amendment itself as the right to be “secure.” Thus, for example, in *Terry v. Ohio,* which involved the stop and frisk of a person, the Court asserted that the issue was whether the person’s “right to personal security was violated” by the on-the-street encounter. The *Terry* Court emphasized the words chosen by the Framers, asserting that the “inestimable right

Ortiz, 422 U.S. 891, 895 (1975).


37 392 U.S. 1 (1968).

38 *Id.* at 9.
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.\textsuperscript{39} 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.”\textsuperscript{40}

In \textit{Soldal v. Cook County},\textsuperscript{41} Justice White, writing for an unanimous Supreme Court, catalogued the nature of the individual interests protected by the Amendment. He proclaimed that “our cases unmistakably hold that the Amendment protects property as well as privacy.”\textsuperscript{42} White explained that the Amendment protected two types of expectations in property: one involving searches and the other involving seizures; a search occurs when a reasonable expectation of privacy is infringed and a seizure occurs when there is some meaningful interference with an individual’s possessory interest.\textsuperscript{43} The \textit{Soldal} Court opined that, although the “principal' object” of the Amendment was the protection of privacy, the shift in the emphasis to privacy that had occurred in the latter part of the twentieth century had not "snuffed out the previously recognized protection of

\textsuperscript{39} \textit{Id}. at 8-9.

\textsuperscript{40} \textit{Id}. at 9.

\textsuperscript{41} 506 U.S. 56 (1992).

\textsuperscript{42} \textit{Id}. at 62.

\textsuperscript{43} \textit{Id}. at 63. \textit{See also} United States v. Padilla, 508 U.S. 77, 82 (1993) (“Expectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims.”); United States v. Jacobsen, 466 U.S. 109, 113 (1984) (“‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed,” whereas “‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property”).
property under the Fourth Amendment. Soldal observed that, although the Fourth Amendment protected individual privacy against certain kinds of governmental intrusion, its protections went further, and often had nothing to do with privacy. The Soldal Court concluded that what is protected and "[w]hat matters is the intrusion on the people's security from governmental interference."  

In sum, as Soldal observed, the Court has identified several distinct individual interests protected by the Fourth Amendment: property "as such", privacy, which is its "principal' object", and liberty—all of which are subsumed within the broader inquiry 

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44 506 U.S. at 64. Consistent with this view, a person's home retains its special status as a protected place. E.g., Kyllo v. United States, 533 U.S. 27 (2001) (stressing the "traditional importance of the home: 'At the very core' of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." The home is protected, the Kyllo majority asserted, "because the entire area is held safe from prying government eyes."). Hence, it has often been stated that "a man's house [is] his castle." Weeks v. United States, 232 U.S. 383, 390 (1914). In Silverman v. United States, 365 U.S. 505, 511 n.4 (1961), the Court explained: A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle. See also Osmond K. Fraenkel, Concerning Searches and Seizures, 34 HARV. L. REV. 361, 364-65 (1921) (opining that it was "apparent" that the Fourth Amendment embodied the principle in English liberty that found "expression in the maxim 'every man's home is his castle'"). The home has been described repeatedly as a sanctuary. E.g., Segura v. United States, 468 U.S. 796, 810 (1984) (opinion of Burger, C.J.); Welsh v. Wisconsin, 466 U.S. 740, 750 (1984); Payton v. New York, 445 U.S. 573, 588-89 (1980); Camara v. Municipal Court, 387 U.S. 523, 531 (1967); Wong Sun v. United States, 371 U.S. 471, 484 (1963); Weeks v. United States, 232 U.S. 383, 394 (1914); Adams v. New York, 192 U.S. 585, 598 (1904). Indeed, the physical entry into the home has been described as the "chief evil against which the wording of the Fourth Amendment is directed." United States v. United States Dist. Court, 407 U.S. 297, 313 (1972). Accord Welsh v. Wisconsin, 466 U.S. 740, 748 (1984); Payton v. New York, 445 U.S. 573, 585 (1980).

45 506 U.S. at 64.

46 Id. at 69.


48 Id. at 64.
of whether there has been an intrusion into a person's “security from governmental interference.”  

Security, liberty, privacy, and property rights stem from a common origin: the Framers' intent to give individuals the right to exclude the government from interfering with his or her person, house, papers, and effects. Indeed, because the view that the Amendment protects the individual right to be secure has so often appeared in the Court's opinions, it would seem to be an unshakable promise. Thus, Justice Scalia has confidently stated:

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .” It must be acknowledged that the phrase “their . . . houses” in this provision is, in isolation, ambiguous. It could mean “their respective houses,” so that the protection extends to each person only in his own house. But it could also mean “their respective and each other's houses,” so that each person would be protected even when visiting the house of someone else. . . . It is not linguistically possible to give the provision the latter, expansive interpretation with respect to “houses” without giving it the same interpretation with respect to the nouns that are parallel to “houses”—“persons, . . . papers, and effects”—which would give me a constitutional right not to have your person unreasonably searched. This is so absurd that it has to my knowledge never been contemplated. The obvious meaning of the provision is that each person has the right to be secure against unreasonable searches and seizures in his own person, house, papers, and effects.

II. The collective security model

50 Id. at 69.

51 I have argued elsewhere that the ability to exclude is so essential to the exercise of the right to be secure that it is proper to say that it is equivalent to that right—the right to be secure is the right to exclude. Without the ability to exclude, a person has no security. With the ability to exclude, a person has all that the Fourth Amendment promises: no unjustified intrusions by the government. In other words, the Fourth Amendment gives the right to say no to the government's attempts to search and seize. Privacy, human dignity, a dislike for the government, and other states of mind may motivate to exercise of the right to exclude but they are not synonymous with that right or with aspects of the right. See Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation Ch. 3 (2008).

Despite the historical basis and impressive depth of precedent for the view that the Fourth Amendment protects individual rights, language supporting a collective security model has been increasingly utilized in Supreme Court opinions. In doing so, as noted earlier, the Court has not cut back rhetorically on its long history of interpreting the prefatory words in the Amendment (“The right of the people to be secure”) as an individual right; instead, the Court has construed other terms of the Amendment (“search,” “seizure,” and “unreasonable”) in a manner to advance collective security concerns.

A. Fourth Amendment Applicability

The Fourth Amendment regulates only two types of governmental activity: seizures and searches. These are not self-defining concepts and, as discussed below, the Court has determined that certain governmental actions are not within the definition of a seizure or a search. This is to say that the Amendment does not apply to regulate such actions and they need not be justified as reasonable.53

i. seizure analysis

The Amendment declares that a person has a right to be secure from an unreasonable seizure. To protect that right, the Court has taken on the task of ascertaining the moment at which a seizure occurs, that is, determining when the Amendment becomes applicable to regulate governmental intrusions. The applicability point has changed over time. Initially, only an arrest was considered a seizure.54 Later,
in *Terry v. Ohio*, the Court recognized that temporary detentions at the scene of the initial encounter between the police and the suspect implicate the Amendment. In *Terry*, Officer McFadden was walking his beat when he observed three men whom he believed were planning to rob a store. He approached them, identified himself as a police officer, and asked their names. When one of the men, Terry, “mumbled something” in reply, the officer grabbed Terry and patted down the outside of his clothing, ultimately recovering a pistol. Recognizing that the Fourth Amendment applied to the encounter, the Court provided a broadly-stated view of a seizure: “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”

This definition, which is used repeatedly in subsequent cases, involves two elements: accosting and restraint of freedom. The *Terry* Court noted, however, that “[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” Thus, the Court recognized two ways in which an officer can seize a person: by physical force or by show of authority. Adding precision to those two concepts has proven to be difficult and controversial. After *Terry*, the Court eventually settled on the “reasonable

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LaFave, “Seizures” Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues, 17 U. Mich. J.L. Reform 417, 418 (1984) (“At one time all such seizures were treated as virtually indistinguishable; the seemingly all-encompassing term “arrest” was employed to describe any seizure of a person.”). The cases following that view involved prolonged detentions and transport of the suspect to the police station. See generally Thomas K. Clancy, *What Constitutes An “Arrest” Within The Meaning Of The Fourth Amendment?*, 48 Vill. L. Rev. 129 (2003).

56 *Id.* at 7.
57 *Id.* at 16.
58 *Id.* at 19 n.16.
person" test to define a seizure, which focused on the objective aspects of the encounter's effect on the mind of a reasonable person; the Court asked the question whether a reasonable person would feel free to leave.\(^{59}\) That test was widely viewed as implicating the Fourth Amendment early in the encounter, focusing exclusively on the coercive nature of the police officer's words or conduct. A citizen's reaction to that coercive activity was immaterial.\(^{60}\)

In 1991, in *California v. Hodari D.*,\(^{61}\) the Supreme Court rejected that view and redefined the concept of a seizure. That case, which remains the Court's view,\(^{62}\) establishes that a seizure occurs when a suspect submits to a show of authority or is physically touched by law enforcement officials, who do so with the intent to seize. Seizures from physical contact require two elements: touching and an intent to seize, with that intent measured objectively.\(^{63}\) Show of authority seizures also require two elements: a show of authority and submission.\(^{64}\) The submission must be in response to a show of

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\(^{60}\) *See* Michigan v. Chesternut, 486 U.S. 567, 572 (1988) (explicitly rejecting the idea that, until an individual stops in response to the police's show of authority, "a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual").


\(^{62}\) *See* Scott v. Harris, 550 U.S. __, 127 S. Ct. 1769 (2007) (ramming bumper of police car into fleeing suspect's vehicle is a seizure); County of Sacramento v. Lewis, 523 U.S. 833, 844 (1998) (no seizure occurred when passenger on motorcycle being pursued was accidentally run over by the police car after motorcycle crashed, with the Court reasoning that passenger's freedom of movement was not stopped by means intentionally applied).


\(^{64}\) *Id.* § 5.1.4. (collecting cases).
authority that a reasonable person would interpret as a demonstration of the officer's intent to seize.\textsuperscript{65}

By moving the point at which a seizure occurs to later in an encounter, the Supreme Court advances the goals of collective security by delaying when the police must justify their activity. Indeed, the Court candidly acknowledged that purpose in \textit{Hodari D.}: "Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged.\textsuperscript{66} Justifying its position, the \textit{Hodari D.} majority stated:

Only a few of those orders, we 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 \textit{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.\textsuperscript{67}

This is to say that the main interest in \textit{Hodari D.} is the protection of order in society; individual interests are subordinate and will be sacrificed to achieve order. As a

\textsuperscript{65} The \textit{Hodari D.} majority premised the applicability of the Fourth Amendment upon fortuitous responses by different individuals to official attempts to seize. For example, if a person submits to a show of authority, the Fourth Amendment becomes applicable; if the subject flees, the Amendment is inapplicable. There is a fundamental difficulty with that position: despite the fact that the Fourth Amendment only regulates government actors, its applicability becomes dependent on an individual's responses to those actions. \textit{Cf.} California v. Hodari D., 499 U.S. 621, 645 (1991) (Stevens, J., dissenting) ("the character of the citizen's response should not govern the constitutionality of the officer's conduct"); Brower v. Inyo County, 489 U.S. 593, 595 (1989) ("Brower's independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet.").

\textsuperscript{66} 499 U.S. at 627.

\textsuperscript{67} Id.
consequence, the *Hodari D.* majority rejected the idea that attempted seizures should be included within the protection of the Fourth Amendment, eliminating coercion or intimidation short of a physical seizure or submission as triggering Fourth Amendment applicability, even when the words or actions are designed to produce a seizure and “no matter how outrageous or unreasonable the officer’s conduct may be.”

A substantial body of case law and commentary addressing the implications of the *Hodari D.* definition has now developed. The case law demonstrates that the police have adapted their tactics to take advantage of that law–enforcement friendly definition. In

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68 Id. at 645 (Stevens, J., dissenting).

69 See, e.g., United States v. Wright, 512 F.3d 466 (8th Cir. 2008) (fake drug checkpoint set up on interstate; car that exited to avoid it stopped by police after committing traffic violation); 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 illegal and set up as ruse); State v. Kelley, 162 P.3d 832 (Kan. Ct. App. 2007) (after sheriff’s deputies posted signs on highway stating “Drug dog working ahead” and “Narcotics officers working ahead,” one officer sat in a lawn chair at the side of the road watching southbound motorists as they approached the signs; 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; held, traffic violation justified stop). 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, 123-24 (2d Cir. 2006) (grounds for stop can develop after unjustified attempt to stop by turning on 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 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) (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 attempt to seize illegal seizure). In *United States v. Swindle*, 407 F.3d 562 (2d Cir. 2005), the court permitted the use of evidence developed after the attempt to seize but before the completed seizure based on *Hodari D.* but criticized that rule: “Unreasonable stops and unreasonable orders to stop are both abuses of police power, and we see no principled basis for not excluding subsequent incriminating events in one instance but not the other. It added: “Requiring a police officer to have reasonable suspicion to order a stop would be truer to Fourth Amendment values than the current rule.” Cf. *Bella v. Chamberlain*, 24 F.3d 1251, 1255-56 (10th Cir. 1994) (in assessing the reasonableness of police conduct, action of police prior to seizure not considered); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (same). *But cf. United States v. Wadley*, 83 F.3d 108, 109-11 (5th Cir. 1996) (Weiner, J., dissenting from denial of en banc hearing) (where
contrast, a large number of state courts reject *Hodari D.* on independent state grounds.\(^{70}\) That decision is also widely criticized by commentators\(^ {71}\) and even by lower courts bound by it.\(^ {72}\) These authorities recognize that the invasion of the individual's right to be secure protected by the Fourth Amendment is no less real in the interim period between the show of authority and achieving physical contact or submission. Indeed, at the heart of the concept of a seizure designed to protect the individual should be the recognition that intimidation or coercion that is designed to produce a stop by police officers triggers the application of the Fourth Amendment.\(^ {73}\) Such a goal was recognized by the Court in

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\(^{71}\) See, e.g., Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 Miss. L.J. 423, 462 (2004) (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). *See also* State v. Young, 717 N.W.2d 729, 754-58 (Wis. 2006) (Bradley, J., dissenting) (collecting authorities and summarizing criticisms of *Hodari D.*); Tracey Maclin, The Decline of the Right of Locomotion: The Fourth Amendment on the Streets, 75 Cornell L. Rev. 1258, 1261, 1314 (1990) (adoption of the “no restraint, no seizure’ rule would fasten the final nail in the coffin for the right of locomotion”).

\(^{72}\) E.g., United States v. Swindle, 407 F.3d 562, 566-70 (2d Cir. 2005).

Terry v. Ohio:

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.74

Two cases involving drug interdiction activities on buses also reflect the trend toward collective security. In the Hodari D. situation, the person did not submit to the show of authority; in the bus cases, the person accosted complied with the police inquiries. The question before the Court in the bus cases was whether those inquiries constituted shows of authority sufficient enough to label the police actions a seizure. In neither case did the Court find that there was a show of authority that a reasonable person would interpret as requiring compliance with the police request.

In the first case, Florida v. Bostick,75 two officers, complete with badges, insignia

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74 Terry v. Ohio, 392 U.S. 1, 15 (1968). See also Brendlin v. California, 551 U.S. __, 127 S. Ct. 2400 (2007) (reasoning that the consequence of not finding a passenger in a vehicle seized during traffic stop would be to "invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal"); INS v. Delgado, 466 U.S. 210, 215 (1984) ("The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'"); Dunaway v. New York, 442 U.S. 200, 224 (1979) (Rehnquist, J., dissenting) (the question of when a seizure takes place turns on whether the officer's conduct "is objectively coercive or physically threatening"); United States v. Ortiz, 422 U.S. 891, 895 (1975) (reasonableness requirement of seizures under Fourth Amendment "may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation"); Majorie E. Murphy, Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification, 1986 ARIZ. STATE L.J. 207, 211-15 (arbitrariness, regardless of the intrusiveness of police action, should be protected by the Fourth Amendment). Cf. Davis v. Mississippi, 394 U.S. 721, 724 (1969) (purpose of exclusionary rule is to protect against "overreaching governmental conduct"); California v. Hodari D., 499 U.S. 621, 646 (1991) (Stevens, J., dissenting) ("The deterrent purposes of the exclusionary rule focus on the conduct of law enforcement officers, and on discouraging improper behavior on their part, and not on the reaction of the citizen to the show of force.").

and one of them holding a recognizable zipper pouch, containing a pistol, boarded an interstate bus during a stopover. The officers picked out Bostick and asked to inspect his ticket and identification, which was returned to him after examination. The officers explained that they were narcotics agents looking for illegal drugs and asked consent to search Bostick's luggage. The police specifically advised Bostick that he had the right to refuse consent and at no time did they threaten him with a gun. The Bostick majority declined to determine whether or not a seizure had occurred and remanded to the Florida Supreme Court.\footnote{Id. at 438.} The majority did, however, note a number of circumstances--repeated from prior cases--that would not be a seizure: merely asking questions; asking to examine the individual's identification; requesting consent to search.\footnote{Id. at 435-36.} Those police actions are permissible “as long as the police do not convey a message that compliance with their requests is required.”\footnote{Id. at 436.}

\textit{Bostick}, in isolation, merely sets out the view that not all police accostings are seizures. It is the second bus case, \textit{United States v. Drayton},\footnote{536 U.S. 194 (2002).} that makes explicit the implications of \textit{Bostick}. In \textit{Drayton}, Justice Kennedy, writing for himself and five other members of the Court, found that the police did not seize Drayton during their encounter on a bus. While en route to Detroit, Michigan, a Greyhound bus made a stop in Tallahassee, Florida. Three police officers dressed in plain clothes, with their weapons concealed, but displaying badges, boarded the bus. One officer stationed himself at the front of the bus and a second stationed himself at the rear. A third officer worked his
way toward the front, speaking with passengers along the way. Drayton was traveling with Brown and they were both dressed in baggie pants and heavy jackets. The officer displayed his badge to the men and informed them that the police were conducting drug and illegal weapon interdiction activities. He asked if they had a bag on the bus and both men pointed to a green bag in the overhead luggage rack. Brown gave consent to search and nothing was found in the bag. The officer then asked consent to search Brown, who agreed. During a patdown, the officer detected hard objects in both of Brown’s thigh areas; based on his knowledge and experience, the officer believed the packages contained drugs and arrested Brown. Similarly, Drayton consented to a search and packages were found in his thigh areas. Drayton was then arrested.

The *Drayton* majority found that no seizure occurred prior to each arrest:

It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure. Indeed, because many fellow passengers are present to witness officers’ conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances.\(^{80}\)

The Court found the officer’s display of a badge and the wearing of uniforms as the "cause for assurance, not discomfort" and therefore carried “little weight” in determining whether a seizure had occurred.\(^{81}\) Similarly, the mere fact that officers carry firearms “is a well known fact to the public” and “a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.”\(^{82}\) Nor did the location of the officer at the front of the bus persuade the majority that a seizure had

\(^{80}\) *Id.* at 204.

\(^{81}\) *Id.*

\(^{82}\) *Id.* at 205.
occurred: the officer did nothing to intimidate the passengers and said nothing to indicate that passengers could not exit the bus.\footnote{Id.} Finally, the mere fact that Brown had been arrested did not change the analysis as to Drayton.\footnote{Id. at 205-06.}

Taken together, \textit{Hodari D.} and the bus cases demonstrate the Court's willingness to redefine the concept of a seizure to further the ends of collective security. By moving the point at which the Amendment becomes applicable to later in the encounter, collective security is enhanced. \textit{Hodari D.} accomplishes this by requiring submission, that is, compliance with police orders to minimize risks to the public. \textit{Drayton} furthers the ends of collective security by defining reasonable people as being comforted by the presence of fellow passengers and by familiarity with the instruments of police authority, such as firearms, badges, uniforms, and questioning. Only when a person submits, when "reasonable" people are no longer comforted by the police presence, and when the coercive aspects of the encounter become undeniable does a seizure occur. Individuals, in the Court's words, should be encouraged to comply with police orders to minimize the risks to the public.

\textbf{ii. search analysis}

The word "search" is a term of art in Fourth Amendment jurisprudence and is not used in its ordinary sense.\footnote{This is a large topic, which I have discussed at length elsewhere. \textit{See generally} Thomas K. Clancy, \textit{The Fourth Amendment: Its History and Interpretation} Ch. 7 (2008); Thomas K. Clancy, \textit{What Constitutes a Search within the Meaning of the Fourth Amendment}, 70 ALBANY L. REV. 1 (2006).} The Court has manipulated that concept to remove a variety of investigative techniques from the coverage of the Amendment. Types of government

\begin{itemize}
\item \textit{Id.}
\item \textit{Id.} at 205-06.
\end{itemize}
activity that are not considered a search include sniffs of objects by trained dogs,\textsuperscript{86} chemical field testing,\textsuperscript{87} and the use of many technological enhancements to the senses, such as airplanes to put the police in position to observe the activity,\textsuperscript{88} binoculars,\textsuperscript{89} flashlights,\textsuperscript{90} and tracking devices that are in lieu of or supplemental to visual surveillance, so long as the tracking occurs outside of the home.\textsuperscript{91} By removing the device or technique from the definition of a search, the Court has enhanced the ability of


\textsuperscript{88} See note 92 infra.

\textsuperscript{89} See On Lee v. United States, 343 U.S. 747, 754 (1952) ("use of bifocals, field glasses or the telescope to magnify the object . . . even if they focus without [the target's] knowledge or consent upon what [the target] supposes to be private indiscretions"); United States v. Lee, 274 U.S. 559, 563 (1927) ("use of a search light is comparable to the use of a marine glass or a field glass" and is not prohibited by the Fourth Amendment). The use of binoculars is perhaps the most commonly litigated vision enhancement. See generally Kate Donovan Reynaga, Annotation, Observation Through Binoculars as Constituting Unreasonable Search, 59 A.L.R. 5th 615 (describing the arguments for whether the use of binoculars by the police constitutes a search). As Professor LaFave observes, such use is not considered a search if the police do no more than

(1) use binoculars to observe more clearly or carefully that which was in the open and thus subject to some scrutiny by the naked eye from the same location; or (2) use binoculars to view at a distance that which they could have lawfully observed from closer proximity but for their desire not to reveal the ongoing surveillance.

1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(c) (4th ed. 2004). LaFave notes that the more difficult situation is posed when law enforcement uses binoculars or similar equipment to look inside premises, which is a situation that the Supreme Court has not addressed.


\textsuperscript{91} United States v. Karo, 468 U.S. 705, 714-15, 719 (1984) (mere transfer of a container with a tracking device inside is not a search nor was monitoring it outside of a home; monitoring in a home, however, is a search); United States v. Knotts, 460 U.S. 276, 282-85 (1983) (monitoring of a tracking device that had been inserted into a container but did not reveal information about the inside of a home was a mere substitute or supplement to visual surveillance that would have revealed the same facts).
the government to gather information about the individual without implicating the Amendment. Unlike the case law defining a seizure, the cases removing investigative techniques from the concept of a search rarely have done so explicitly in the name of collective security. Nonetheless, the government’s capacity to gather information without implicating the Amendment—and hence without justification—often stands in opposition to individual interests.

Collectivism has also entered into the concept of a search in another, perhaps more significant, way. The Court has sometimes premised the conclusion that the use of a device is or is not a search based on its availability to the public. That is, the use of technology to intrude ceases to be a search once that technology becomes familiar or commonly used by the public. Indeed, at times, the Court has evidenced a “barely constrained enthusiasm for the emergence of new technologies and their inevitable use by law enforcers.” Thus, in Dow Chemical, in rejecting the claim that aerial photography

92 See, e.g., California v. Ciraolo, 476 U.S. 207, 215 (1986) (holding that police overflight of the curtilage of a house to observe a marijuana patch is not a search within the meaning of the Fourth Amendment, with the Court reasoning: “In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet”); Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986) (upholding overflight but conceding that the use of technology to observe private property “might” implicate the Fourth Amendment if “highly sophisticated surveillance equipment not generally available to the public” is used). The cases used somewhat different language regarding the public use or availability standard, which others have analyzed. See, e.g., James J. Tomkovicz, Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures, 72 Miss. L.J. 317, 403-20 (2002). See also Christopher Slobogin, Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo’s Rules Governing Technological Surveillance, 86 Minn. L. Rev. 1393, 1411 (2002) (demonstrating that “the general public use and the naked eye doctrines are virtually impossible to apply in a meaningful manner”). Nonetheless, any standard that excludes applicability of the Amendment based on actual or possible use by the public, regardless of the exact formulation of that standard, will serve to defeat individual security because the rapid adoption of technological devices in modern society will ultimately make any device to intrude ubiquitous.

93 Morgan Cloud, Rube Goldberg Meets the Constitution: The Supreme Court,
of an industrial complex was a search, the majority opined: "In common with much else, the technology of photography has changed in this century. These developments have enhanced industrial processes, and indeed all areas of life; they have also enhanced law enforcement techniques."\textsuperscript{94} Dow indicated that, as technology became more readily available to members of the public, its use by law enforcement would cease to be a search. Interpreting this limitation, Morgan Cloud believes that the Court "accepted the premise that technological progress would inevitably dictate that our privacy expectations must decrease as intrusive technologies become more widely dispersed and readily available."\textsuperscript{95} As another example, in finding that the use of a tracking device to monitor movements from place to place was not a search, the Court observed: "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."\textsuperscript{96} Commenting on that view, Tracey Maclin has observed that accepting that rationale—"equating electronic surveillance with what police might theoretically accomplish with naked eye monitoring—means that the Fourth Amendment will protect very little."\textsuperscript{97}

Most recently, the Court in \textit{Kyllo}, although acknowledging its prior cases,

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explicitly reserved deciding whether use by the general public of a device would serve as an exception to its definition of a search.\textsuperscript{98} Given the pace of technological change, exotic new technologies rapidly become used routinely by the public.\textsuperscript{99} Any attempt to draw lines on permissible use based on use by the public makes Fourth Amendment applicability, at best, a word game\textsuperscript{100} and, at worst, a prescription for gutting the promise of individual security that the Fourth Amendment makes.\textsuperscript{101} At bottom, however, is a trend line eliminating numerous governmental techniques and technological devices from the coverage of the Fourth Amendment. The rationale for each decision has varied but the result permits the government to learn more without justification.

**B. Fourth Amendment Satisfaction**

**i. Choosing reasonableness models**

The Amendment has vast applicability to law enforcement and other

\textsuperscript{98} Kyllo v. United States, 533 U.S. 27, 39-40 n.6 (2001).

\textsuperscript{99} See id. at 47 (Stevens, J., dissenting) (the general public use limitation "is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available"); Christopher Slobogin, Technologically-Assisted Physical Surveillance: The American Bar Association’s Tentative Draft Standards, 10 HARV. J. LAW & TECH. 383, 400 (1997) (rejecting the general public use standard because "so many highly intrusive devices . . . are readily 'available' to the public").

\textsuperscript{100} Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 768-69 (1994) (criticizing the Court’s "word games" in defining a "search"). Cf. Kathryn R. Urbonya, A Fourth Amendment ‘Search’ in the Age of Technology: Postmodern Perspectives, 72 MISL. L.J. 447, 513-14, 521 (2002) (offering an explanation of the definition of a search that "rejects the notion of a grand legal theory that acts as a restraint in decisionmaking" and observing that it is a legal construction "created by the justices in numerous cases, at times offering different paradigms for a Fourth Amendment 'search' and shifting constructions of what precedents mean in application").

\textsuperscript{101} See David A. Sklansky, Back to the Future: Kyllo, Katz, and Common Law, 72 MISS. L.J. 143, 184, 204-05 (2002) (collecting cases on the use of binoculars and telescopes and arguing that they should be considered a search because, if left unregulated by the Amendment, they "could do significant damage to the 'degree of privacy against the government that existed when the Fourth Amendment was adopted").
governmental activity. No other part of Constitution is so often implicated or litigated. To support such a claim, it suffices to cite the vast number of individuals subjected to airport and other entranceway screenings each year.\footnote{102}{More than 700 million passengers board commercial aircraft in the United States each year.” United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (citing Bureau of Transportation Statistics). Assuming that each one of those passengers is screened and that each has a carry-on or checked bag, the total number of airport searches must assuredly eclipse other types of searches.}

The Fourth Amendment also applies to such activities as health and safety inspections, traditional law enforcement,\footnote{103}{There were 14 million arrests in 2006. FBI, CRIME IN THE UNITED STATES, tbl. 29 (2006), available at http://www.fbi.gov/ucr/cius2006/data/table_29.html.} regulation of the international border, and drug testing of workers and students. It measures the reasonableness of governmental responses to terrorism, with the potential for the use of weapons of mass destruction, and the most mundane of searches, such as rummaging through a governmental workplace to find a misplaced file. Advanced technologies now permit the government to obtain information in a host of ways, ranging from hand-held detectors to systems that scan stadiums full of people.\footnote{104}{New technology has long been the source of litigation and Supreme Court opinions have struggled to reconcile Fourth Amendment protections with it. These cases have included such seminal cases as \textit{Olmstead v. United States}, 277 U.S. 438 (1928) (listening device); \textit{Carroll v. United States} 267 U.S. 132 (1925) (motor vehicles); \textit{Katz v. United States}, 389 U.S. 347 (1967) (listening device); \textit{Smith v. Maryland}, 442 U.S. 735 (1979) (pen registers); \textit{United States v. Karo}, 468 U.S. 705 (1984) (electronic monitoring devices); \textit{United States v. Jacobsen}, 466 U.S. 109 (1984) (chemical testing of substance); \textit{Dow Chemical Co. v. United States}, 476 U.S. 227 (1986) (surveillance from airplanes); \textit{Skinner v. Railway Labor Executives’ Union}, 489 U.S. 602 (1989) (drug testing of employees); \textit{Kyllo v. United States}, 533 U.S. 27 (2001) (thermal imaging device directed at a house). None of the Court’s attempts has produced a consensus that the Court has found the correct analytical structure or the proper balance of governmental and individual interests. Moreover, a strong influence has been the often unstated premise that, if a search and seizure was found to have occurred, it would have to be justified as reasonable. For commentary on the problems posed by modern technology, see generally Symposium, The Effect of Technological Change on Fourth Amendment Rights and Analysis, 72 Miss. L.J. 1 (2002).} Technology now exists that can support mass DNA testing, biometric scanning, and physical implants that can continuously monitor persons and objects.
In response to the vast number of diverse types of situations that must be analyzed for reasonableness, the Court has created a complex and ever changing reasonableness jurisprudence. It has many models to measure the propriety of a search or seizure.\textsuperscript{105} The choice between the individual rights and collective security approaches to the Amendment is nowhere as stark as determining whether a search or seizure is reasonable. Two of the traditional models, the warrant preference and individualized suspicion models, are grounded in the view that the Amendment protects individual rights. Another model, the balancing test, explicitly supports the collective security model. Since its adoption in 1967, the balancing test has been increasingly used by the Court.

The warrant preference model maintains that the specifications of the Warrant Clause define the concept of reasonableness,\textsuperscript{106} that is, a search or seizure is not "unreasonable," and therefore not forbidden, when it is carried out with a warrant issued...


\textsuperscript{106} The Court's initial cases were notable for their premise that a warrant complying with the specifications of the Warrant Clause was required for all searches. See In re Jackson, 96 U.S. 727 (1878) (asserting that warrant based on probable cause necessary to search letter in mail); Weeks v. United States, 232 U.S. 383, 393 (1914) ("The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution."); Amos v. United States, 255 U.S. 313 (1921) (cannot search house without warrant); Agnello v. United States, 269 U.S. 20, 29 (1925) ("While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant"); Taylor v. United States, 286 U.S. 1, 6 (1932) (failure to obtain warrant before searching garage, when there was "abundant opportunity" to do so, necessitated suppression of evidence); Grau v. United States, 287 U.S. 124, 128-29 (1932) (affidavit contained insufficient statement of probable cause). Over the years, the Court has stated that preference in many different forms. E.g., Illinois v. McArthur, 531 U.S. 326, 330 (2001) (although asserting that seizures are unreasonable unless pursuant to a warrant, there are exceptions for "special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like"); Arkansas v. Sanders, 442 U.S. 753, 758 (1979) ("In the ordinary case, . . . a search of private property must both be reasonable and pursuant to a properly issued search warrant. The mere reasonableness of a search, assessed in light of the surrounding circumstances, is not a substitute for a judicial warrant required under the Fourth Amendment.").
pursuant to the criteria set out in the Warrant Clause. This is to say that a search or seizure is unreasonable, absent a warrant made under oath or affirmation, based on probable cause, and setting forth a particular description of the place to be searched and the persons or objects to be seized.

A second traditional model, the requirement of a specified level of individualized suspicion, operates to limit the government's discretionary authority to search and seize by employing objective criteria outside the government's control to measure the propriety of the intrusion. Individualized suspicion serves to preclude arbitrary and general searches and seizures and mandates specific justification for each intrusion. It places the focus of the inquiry concerning the permissibility of a search or seizure upon

107 JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 43 (1966). See also Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring) ("But it is by now axiomatic that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause.'"); Wong Sun v. United States, 371 U.S. 471, 479 (1963) (The requirements of the first and second clauses are equivalent and it should be at least as difficult for a police officer to act without a warrant as it is for him to obtain a warrant in the first instance: "[w]hether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained."); BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 11-12 (1986) ("Although it is not obvious from the language alone, the antecedent history of the amendment makes clear that the second clause was intended by the framers to provide a standard, though not necessarily an exhaustive one, of what constitutes a reasonable or an unreasonable search or seizure."); Richard M. Leagre, The Fourth Amendment and the Law of Arrest, 54 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 393, 401 (1963) ("[I]n order for a search to be reasonable within the first clause of the amendment, it must comply with the requirements of a search conducted pursuant to a warrant insofar as they are applicable.").


109 See Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 411 (1974) (suspicionless searches and seizures are unjustified because "every citizen is entitled to security of his person and property unless and until an adequate justification for disturbing that security is shown" and arbitrary because they permitted the "despotic and capricious exercise of the power to search and seize by executive officials").
the circumstances presented by the private party or object of the search or seizure; if and only if the individual or object provides a reason for governmental inquiry may the government intrude. This is to say that the justification for the government's actions is not based upon circumstances within the control of the government. The Supreme Court recognizes two forms of individualized suspicion: articulable suspicion supports a stop or a frisk; and probable cause justifies an arrest or a search.\(^{110}\) Thus, for example, a person cannot be arrested absent probable cause to believe that the person is engaged in criminal activity. To illustrate, in Davis v. Mississippi,\(^ {111}\) police investigating a rape could not permissibly seize young African-American men and take them to police headquarters for questioning and fingerprinting simply because the victim described her assailant as a Negro youth. That investigatory procedure was condemned in Davis as violating the Fourth Amendment because such “seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry.”\(^ {112}\)

The warrant preference and individualized suspicion models have significant historical grounding in the complaints of the colonists against suspicionless searches and seizures, in the common law requirement of probable cause to arrest or to search,\(^ {113}\) and

\(^{110}\) *E.g.*, United States v. Montoya De Hernandez, 473 U.S. 531, 541 (1985) (rejecting third standard in addition to reasonable suspicion and probable cause because “subtle verbal gradations may obscure rather than elucidate the meaning” of reasonableness).


\(^{112}\) *Id.* at 726-27.

in the language of the Warrant Clause, which requires probable cause to search or seize. Indeed, the Court has sometimes recognized that the probable cause requirement has "central importance" to the protection the individual is afforded by the Fourth Amendment:114

"The requirement of probable cause has roots that are deep in our history." Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest." The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the "reasonableness" requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule.115

The individualized suspicion model has a legal pedigree and existence independent of the Warrant Clause preference, although the two models often act in tandem to limit the ability of the government to search or seize.116 The models are,

114 Dunaway v. New York, 442 U.S. 200, 213 (1979). Accord Henry v. United States, 361 U.S. 98, 100 (1959) ("The requirement of probable cause has roots that are deep in our history."). See also Terry v. Ohio, 392 U.S. 1, 21 n.18 (1968) ("This demand for specificity . . . upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."); Pennsylvania v. Mimms, 434 U.S. 106, 121 (1977) (Stevens, J., dissenting) (seizures of persons usually require individualized suspicion). The centrality of the role played by individualized suspicion as a prerequisite for an intrusion may find its strongest expression in cases rejecting mere association as a basis for a search or seizure. See United States v. Di Re, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."); Ybarra v. Illinois, 444 U.S. 85, 93 n.5 (1979) (requirement of probable cause particularized to each person "cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be").


however, distinct. Nonetheless, the two models clearly reinforce the view that the Amendment protects individual security. This is because the police cannot search or seize unless they have the required individualized suspicion and, when needed, a warrant.

In stark contrast to those models, the Court has increasingly employed a balancing test as the measure of reasonableness. In *Camara v. Municipal Court*, which was the first case employing that model in a Fourth Amendment case—*Camara*, the Supreme Court validated the issuance of search warrants to inspect residences for health, fire, and housing code violations on an area-wide basis, rejecting any requirement of individualized suspicion for believing that violations existed at a particular building. The Court asserted: “Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.” *Camara* was explicitly premised on collective security concerns: the potential for mass harm caused by fires and epidemics.

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118 387 U.S. 523 (1967).

119 *Id.* at 536-37. The balancing test does not assign weight to the warrant preference rule but instead views a warrant as a mere procedure that may be dispensed with when the balance favors the government. See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987) (utilizing balancing to dispense with warrant requirement); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (same); *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1976) (warrant not required to search motor vehicles due, in part, to lesser expectation of privacy in vehicles). Further, the fact that the probable cause standard appears in the Warrant Clause sometimes serves as a rationale to dispense with a warrant once the Court determines that probable cause is not needed. See, e.g., *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995); *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976) (due to noncriminal context of inventory searches of vehicles, probable cause inapplicable; given that inapplicability, warrant not required due to link of the warrant requirement textually to the probable cause requirement).
Currently, the balancing test usually involves a simple assessment of the relative strength of the governmental and individual interests, with the Court’s thumb pressing heavily on the government’s side of the scale. Indeed, the Court has candidly acknowledged that the “practical realities” of the balancing test “militate in favor of the needs of law enforcement, and against a personal-privacy interest that is ordinarily weak.” Importantly, the balancing of factors is “done on a categorical basis—not in an ad hoc, case-by-case fashion.” It is also decidedly non-historical in the nature of its analysis: the factors used in the balancing test are contemporary interests. If the Court balances, the result is not hard to predict. On the government’s side of the scale, the

120 In the wake of Camara, the balancing test initially appeared to have four distinct factors: the individual’s interests; the government’s interests; the necessity for the intrusion; and the procedures utilized by the authorities in executing the search or seizure. Most of those factors have now eroded. Importantly, the element of necessity has been completely repudiated and the analysis of the procedures utilized in effectuating the search or seizure has often taken on—at best—a secondary role in the balancing test. See generally Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation § 11.3.4.4.3. (2008).


122 United States v. Montoya De Hernandez, 473 U.S. 531, 558 (1985) (Brennan, J., dissenting) (criticizing balancing as process “in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales”).


125 See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (in applying the balancing test to searches of school children, stating: “Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.”).
governmental interests are aggregated: it is not the interest involved in the specific case before the Court; instead, it is the totality of the harm to be combated that is placed on the government’s side of the scale.\textsuperscript{126} In contrast, on the other side of the scale, are solely the interests of the one person who was seized or searched in the case before the Court, with the Court often viewing those individual interests as diminished.\textsuperscript{127}

The balancing test has been used to justify broad categories of governmental intrusions, including searches of prison inmates and detainees and their cells,\textsuperscript{128} orders

\textsuperscript{126} For example, in \textit{Sitz}, which addressed the permissibility of checkpoints set up to address the pervasive problem of drunk driving, the government’s interests were listed as the 25,000 deaths each year from drunk drivers, the nearly one million injuries, and the more than five billion dollars in property damage. Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 451 (1990). \textit{See also id.} at 455-56 (Blackmun, J., concurring in the judgment) (citing the tragedy of the immense slaughter on the highways). Those numbers represented the total of thousands of accidents. Each accident results in a few deaths and injuries and some property damage. In contrast, the total number of murders in society is not aggregated to justify suspending the principle of individualized suspicion to investigate murderers. \textit{Cf.} Arizona v. Hicks, 480 U.S. 321 (1987) (rejecting argument that murder scenes should be exempt from the warrant requirement). Similarly, one could argue, the drunk driving problem is also composed of individual cases that belie reliance on the total numbers. \textit{Cf.} \textsc{5 Wayne R. LaFave, Search and Seizure § 10.1(b) (4th ed. 2004).} Furthermore, \[\textit{Id.}\] one might as cogently argue that there is a need for universal compliance with the criminal law and that the public interest demands that all dangerous offenders be convicted and punished. It is certainly not a novel observation that in the field of criminal law this argument has not prevailed, and that instead we are committed to a philosophy tolerating a certain level of undetected crime as preferable to an oppressive police state.

\textit{Id.} If the collective societal interest in performing the suspicionless intrusions is the proper measure of the government’s interest, some have asserted that the totality of all persons whose interests are invaded by the search or seizure technique should be the proper measure of the individual interest at stake. See \textit{State v. Tourtillott}, 618 P.2d 423, 441-42 (Or. 1980) (Linde, J., dissenting); James B. Jacobs & Nadine Strossen, \textit{Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks}, 18 U.C. DAVIS L. REV. 595, 626 n.136 (1985).

\textsuperscript{127} For searches, the Supreme Court has focused on the person’s privacy expectations. To support its inquiry, the Court has created a hierarchy of privacy interests: reasonable expectations of privacy that society is prepared to recognize as legitimate have, at least in theory, the greatest protection; diminished expectations of privacy are more easily invaded; and subjective expectations of privacy that society is not prepared to recognize as legitimate have no protection. \textit{See} Thomas K. Clancy, \textit{The Fourth Amendment: Its History and Interpretation} § 3.3.3. (2008).

designed to protect police officers during stops,\textsuperscript{129} detentions of persons during the execution of search warrants,\textsuperscript{130} entries onto property to combat and investigate fires,\textsuperscript{131} and inventory searches of possessions validly in police custody.\textsuperscript{132} One broad category is administrative inspections.\textsuperscript{133} Permissible targets of such inspections include private residences,\textsuperscript{134} commercial buildings,\textsuperscript{135} and ground and surface mines;\textsuperscript{136} the Occupational Safety and Health Administration can also inspect places of employment for safety and regulatory violations.\textsuperscript{137} Other permissible searches have included searches of highly regulated businesses,\textsuperscript{138} work-related searches of employee areas of

\textsuperscript{129}See, e.g., Maryland v. Wilson, 519 U.S. 408 (1997).
\textsuperscript{133}See, e.g., Jack M. Kress & Carole D. Iannelli, Administrative Search and Seizure, Whither The Warrant?, 31 VILL. L. REV. 705, 796-800 (1986) (reporting results of a survey of administrative agencies demonstrating that over seven million inspections were conducted in 1977, 1980, and 1982). After balancing the competing interests, the Court has sometimes continued to enforce the warrant preference rule in inspection cases, albeit one lacking individualized probable cause to search. The Court has asserted that, even if no probable cause is needed, a warrant still provides assurances from a neutral official that the inspection is reasonable, that it is authorized by statute, that it is pursuant to an administrative plan containing specific neutral criteria, and that the owner is advised of the scope and objects of the search. See Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978). See also Almeida-Sanchez, 413 U.S. 266, 282-84 (1973) (Powell, J., concurring) (arguing that a Camara-style probable cause standard could be used as basis for area warrants to detect illegal aliens).
\textsuperscript{134}Camara v. Municipal Court, 387 U.S. 523 (1967).
\textsuperscript{135}See v. City of Seattle, 387 U.S. 541, 542 (1967).
\textsuperscript{138}E.g., New York v. Burger, 482 U.S. 691, 702 (1987) (An owner or operator of commercial premises in a closely regulated industry has a reduced expectation of privacy, so that both the "warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness, . . . have lessened application.").
governmental workplaces, searches of public school students, searches of parolees, searches of probationers' homes, and drug testing of various categories of people.

Suspicionless checkpoints such as roadblocks have long been considered the hallmark of regimes whose primary concerns—to put it mildly—were not protecting individual liberty. Roadblocks are “where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community.” Through the decades, the Court has created a list of permissible roadblocks, including driver's license checkpoints, sobriety checkpoints, immigration checkpoints away from the

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144 See, e.g., United States v. Martinez-Fuerte, 428 U.S. 543, 571 (1976) (Brennan, J., dissenting) (roadblocks are "a dragnet-like procedure offensive to the sensibilities of free citizens").


146 Texas v. Brown, 460 U.S. 730, 739-40 (1983) (plurality opinion) (approving of routine driver's license checkpoint). The Court has broadly opined about the use of roadblocks:

Stops for questioning . . . are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters. The fact that the purpose of such laws is said to be administrative is of
international border,\textsuperscript{148} and informational checkpoints.\textsuperscript{149} In dicta, the Court and individual justices have observed that other types of checkpoints are permissible: roadside truck weigh-stations and inspection checkpoints;\textsuperscript{150} agricultural inspection checkpoints;\textsuperscript{151} and roadblocks to apprehend fleeing fugitives\textsuperscript{152} or to thwart “an imminent terrorist attack.”\textsuperscript{153} Although the rationale for such seizures has evolved over time, all of them are essentially designed to further the goals of collective security, such as removing drunks from the road; checking for unsafe drivers or vehicles; or apprehending bad limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendants' position, if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use.


\textsuperscript{148} \textit{E.g.}, United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976).

\textsuperscript{149} Illinois v. Lidster, 540 U.S. 419 (2004).


\textsuperscript{152} \textit{See} Indianapolis v. Edmond, 531 U.S. 32, 44 (2000); United States v. Brignoni-Ponce, 422 U.S. 873, 888 (1975) (Rehnquist, J., concurring). \textit{Cf.} Brower v. County of Inyo, 489 U.S. 593 (1989) (concluding that seizure occurred when driver of stolen automobile slammed into roadblock set up to stop him and remanding to determine if manner in which it was set up reasonable).

\textsuperscript{153} Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).
guys. The balancing test is also used to regulate the most common of all searches—entranceway searches. Searches of persons and their effects as a requirement to enter public courthouses, schools, prisons, and other public buildings, or to board commercial airplanes are widely used. After the terrorist attacks on

154 Cf. United States v. O'Mara, 963 F.2d 1288, 1291-92 (9th Cir. 1992) (after reports of illegal firearms discharges in Joshua Tree National Monument, permissible to set up roadblock on only exit road to stop and question all campers because “public interest in apprehending persons who randomly shoot dangerous weapons in a public campground is [] weighty”). Most recently, to distinguish permissible from impermissible roadblocks, the Court in Indianapolis v. Edmond 531 U.S. 32 (2000), created the “programmatic purpose” test, which seeks to establish when the Court will dispense with the individualized suspicion standard and, instead, apply a balancing test to measure the propriety of the initial stop at a checkpoint. The Edmond Court was confronted with the constitutionality of a highway checkpoint program designed to discover and interdict illegal narcotics. Because the primary purpose of the Indianapolis checkpoints was “to advance ‘the general interest in crime control,’” the Court declined “to suspend the usual requirement of individualized suspicion.” The Court emphasized that the purpose inquiry “is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene.” See also Illinois v. Lidster, 540 U.S. 419 (2004) (finding primary purpose of roadblock was informational and not investigatory and therefore permissible); Ferguson v. City of Charleston, 532 U.S. 67, 82-83 (2001) (finding primary purpose of drug testing program of pregnant women was to prosecute and not to promote health, with the Court distinguishing between an ultimate (permissible) goal of getting the women into drug treatment and the (impermissible) “immediate objective” of generating evidence “for law enforcement purposes”). For criticism of this approach, see, e.g., Brooks Holland, The Road 'Round Edmond: Steering Through the Primary Purposes and Crime Control Agendas, 111 PENN. ST. L. REV. 293 (2006). Indeed, such an approach is particularly ironic in light of the search and seizure practices that motivated the Framers: suspicionless intrusions approved of at the “programmatic level,” that is, writs of assistance and general warrants issued by executive officials to find illegally imported goods and authors and publications critical of the government.


158 E.g., United States v. Bulacan, 156 F.3d 963 (9th Cir. 1998); Davis v. United States, 532 A.2d 656 (D.C. 1987).

159 E.g., United States v. Aukai, 497 F.3d 955 (9th Cir. 2007); United States v. Hartwell, 436 F.3d 174 (3d Cir. 2006). See also M. Reed Martz, Comment, A Constitutional Analysis of Random Vehicle Searches at Airports, 73 MISS. L.J. 263
September 11, 2001, entranceway screening has become more ubiquitous and intrusive. These screening procedures have expanded to a variety of other circumstances, including stadiums, subways, ferries, and other public gathering places.

160 Even Justice Stevens, who is perceived as a liberal justice, seemed at one point prepared to expand significantly the circumstances where such intrusions are permissible:

It is . . . common practice to require every prospective airline passenger, or every visitor to a public building, to pass through a metal detector that will reveal the presence of a firearm or an explosive. Permanent, nondiscretionary checkpoints could be used to control serious dangers at other publicly operated facilities. Because concealed weapons obviously represent one such substantial threat to public safety, I would suppose that all subway passengers could be required to pass through metal detectors, so long as the detectors were permanent and every passenger was subjected to the same search. Likewise, I would suppose that a State could condition access to its toll roads upon not only paying the toll but also taking a uniformly administered breathalyzer test.  


163 Cassidy v. Chertoff, 471 F.3d 67 (2d Cir. 2006).

164 E.g., Bourgeois v. Peters, 387 F.3d 1303 (11th Cir. 2004) (striking down city policy requiring protestors to submit to metal detector search). Cf. Terry v. Ohio, 392 U.S. 1, 31-32 (1968) (Harlan, J., concurring) (states have power to permit police officers to forcibly frisk and disarm persons suspected of concealing weapons based upon articulable suspicion but that power “might not warrant routine general weapons checks”).
Although the Supreme Court has never had a case involving entranceway searches or seizures, it has approvingly commented on the practice.\textsuperscript{165} For example, in \textit{National Treasury Employees Union v. Von Raab},\textsuperscript{166} which upheld the suspicionless urinalysis testing of certain customs service employees, the Court maintained that, where “the possible harm against which the Government seeks to guard is substantial,” the government interest in preventing its occurrence alone furnishes “ample justification for reasonable searches” designed to further that goal.\textsuperscript{167} The majority illustrated its position by reference to the practice of searching all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, which was in response to “an observable national and international hijacking crisis.”\textsuperscript{168} The \textit{Von Raab} majority believed that “[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness,” so long as the procedures utilized in executing the search are also reasonable.\textsuperscript{169} It posited: “It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading

\textsuperscript{165} See Indianapolis v. Edmond, 531 U.S. 32, 47-48 (2000) (“Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute. Nor does our opinion speak to other intrusions aimed primarily at purposes beyond the general interest in crime control.”); Chandler v. Miller, 520 U.S. 305, 323 (1997) (“where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’--for example, searches now routine at airports and at entrances to courts and other official buildings”).

\textsuperscript{166} 489 U.S. 656 (1989).

\textsuperscript{167} \textit{Id.} at 674-75.

\textsuperscript{168} \textit{Id.} at 675 n.3.

\textsuperscript{169} \textit{Id.}
to a particular context." Thus, the Court believed, the validity of the searches is not impugned for a particular airport or airline, even though there is no demonstrated danger at the airport or for the airline. Nor does the validity of the screening program depend upon whether significant numbers of offenders are discovered. The Court opined that, when deterrence is the goal, a low incidence of the conduct sought to be prevented is a "hallmark of success." Consistent with Von Raab, courts analyzing entranceway searches usually apply the balancing test to determine their permissibility. Although the results of the cases

170 Id.

171 Id. at 676 n.3.

172 E.g., United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc) (airport); United States v. Hartwell, 436 F.3d 174 (3d Cir. 2006) (airport). In the context of entranceway screening, courts have often found a reduced expectation of privacy on the part of the individual who seeks entry, e.g., United States v. Pulido-Baquerizo, 800 F.2d 899, 900-02 (9th Cir. 1986), and sometimes no legitimate expectation that the individual will not be searched. See, e.g., Wells v. State, 402 So. 2d 402, 404-05 (Fla. 1981) (stating that it "is doubtful that most visitors to a prison have any subjective expectation of privacy that they will not be searched for weapons or other contraband" and holding that any subjective expectation is not one that society is prepared to recognize as reasonable); Williams v. State, 400 So. 2d 988, 989 (Fla. Ct. App. 1981). Cf. Sheehan v. San Francisco 49ers, 62 Cal. Rptr. 3d 803 (Cal. Ct. App. 2007) (in claim under California law, ticket holder had no reasonable expectation of privacy as to football team's patdown policy, which had been instituted by the league due to the fear that NFL games were "attractive terrorist targets based on the publicity that would be generated by an attack," because ticket holder had notice of the policy and the requirement of consenting to a patdown prior to purchasing tickets), pet. review granted, 169 P.3d 883 (Cal. 2007). However, the existence of a reduced privacy interest is not necessary to uphold an entranceway screening program. E.g., MacWade v. Kelly, 460 F.3d 260, 270 (2d Cir. 2006) (Upholding random bag searches of subway passengers and stating: "the special needs doctrine does not require, as a threshold matter, that the subject of the search possess a reduced privacy interest. Instead, once the government establishes a special need, the nature of the privacy interest is a factor to be weighed in the balance.").

173 Some courts continue to use an "implied consent" rationale. E.g., Commonwealth v. Roland R., 860 N.E.2d 659 (Mass. 2007) (courthouse screening); Johnston v. Tampa Bay Sports Authority, 490 F.3d 820 (11th Cir. 2007) (per curiam) (in case not involving government actors, all attendees of National Football League games permissibly frisked as condition of entrance based on consent). The Ninth Circuit, in an en banc decision, recently reconsidered its reliance on an implied consent rationale and explicitly rejected it. In the panel decision that
in the lower courts were more mixed prior to the events of September 11, 2001,\textsuperscript{174} the case law now appears quite deferential to both the need to intrude and the permissible scope of the intrusion.\textsuperscript{175} Thus, in the context of deterring terrorism on subways, one court recently observed:

As a legal matter, courts traditionally have considered special the government's need to "prevent" and "discover . . . latent or hidden" hazards in order to ensure the safety of mass transportation mediums, such as trains, airplanes, and highways. We have no doubt that concealed explosives are a hidden hazard, that the Program's purpose is prophylactic, and that the nation's busiest subway system implicates the public's safety. Accordingly, preventing a terrorist from bombing

preceded the en banc opinion, the panel strained to use "implied consent" to establish that a prospective airline passenger, who had not presented identification at check-in and had voluntarily walked through a metal detector without setting off the alarm, could not prevent a secondary screening by stating that he had decided not to fly and expressing a desire to leave the terminal. The panel reasoned in part that the "potential passenger had impliedly consented to the secondary screening" and could not revoke that consent. United States v. Aukai, 440 F.3d 1168, 1179 (9th Cir. 2006). The panel stated that "implied consent" in the context presented was not like in the criminal context, "where a court infers the scope of implied consent from the particular details surrounding an individual's exchange with an officer"; instead, the relevant "test systematizes the inquiry according to society's privacy expectations in light of airport searches' broad regulatory policy of preventing terrorism." \textit{Id.} at 1179 n.10. The en banc court rejected such a view, observing: "the Supreme Court has held that the constitutionality of administrative searches is not dependent upon consent." United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc). Overruling Ninth Circuit precedent grounding airport screening searches "upon consent, either ongoing or irrevocable implied consent," the en banc court stated that allowing a potential passenger to be allowed to revoke consent "makes little sense in a post-9/11 world. Such a rule would afford terrorists multiple opportunities to attempt to penetrate airport security by 'electing not to fly' on the cusp of detection until a vulnerable portal is found." \textit{Id.} at 960-61.

\textsuperscript{174} See generally \textsc{Wayne R. LaFave, Search and Seizure §§ 10.6–10.7} (4th ed. 2004).

\textsuperscript{175} \textit{E.g.,} United States v. Aukai, 497 F.3d 955, 960 n.6 (9th Cir. 2007) (en banc):

The concurrence fears that references to 9/11 and terrorists are irrelevant and will invite future litigants to challenge our holding if and when the threat of organized terrorist activity at our airports recedes. But the present threat of organized terrorists using the 9/11 tactic of hijacking commercial aircraft, intending to use the aircraft as a weapon, is relevant to the reasonableness of the search procedures employed. . . . What search procedures will be "reasonable" when terrorists are no longer threatening us, or when technology is developed that eliminates the present threat, should be decided when, if ever, that happy day dawns. We should also be wary to eliminate historical facts such as 9/11. Orwell warned us: "Who controls the present controls the past. . . ." George Orwell, 1984, Book Three, Chapter II (1949).
the subways constitutes a special need that is distinct from ordinary post hoc criminal investigation.\footnote{MacWade v. Kelly, 460 F.3d 260, 270-71 (2d Cir. 2006). \textit{See also} United States v. Marquez, 410 F.3d 612, 618 (9th Cir. 2005) ("It is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft. As illustrated over the last three decades, the potential damage and destruction from air terrorism is horrifically enormous."); United States v. Yang, 286 F.3d 940, 944 n.1 (7th Cir. 2002) ("the events of September 11, 2001, only emphasize the heightened need to conduct searches at this nation's international airports"); Singleton v. Comm'r of Internal Revenue, 606 F.2d 50, 52 (3d Cir. 1979) ("The government unquestionably has the most compelling reasons[=]the safety of hundreds of lives and millions of dollars worth of private property[=]for subjecting airline passengers to a search for weapons or explosives that could be used to hijack an airplane.").} Although the scale of the potential harm is generally less, public safety concerns also underlie entranceway screening procedures at courthouses and other locations. In that regard, one court has observed:

If we demand that the public at large come onto the courthouse premises to participate in the administration of justice, we have a duty to ensure minimal levels of protection during their participation. And . . . [justice] cannot be blind to the reality of potential violence. We recognize that individuals accused of crimes, some heinous, are brought into the courts to attend trial. Gang-related criminal proceedings bring spectators who mingle with jurors in the halls, elevators, and cafeteria, in some instances in a threatening manner. Divorce brings out the worst in every individual; anxiety, emotion, anger, and revenge run rampant. Domestic violence is a recurring theme in criminal and family law cases. . . . We decline to wait until the tragic death of a litigant, witness, juror, attorney, courthouse employee, judge, spectator, member of the press, or an individual merely in the building to transact business before we sanction the use of reasonable security measures.\footnote{E.g., Gibson v. State, 921 S.W.2d 747, 765 (Tex. Ct. App. 1996). Other courts have also taken notice of threats of violent acts directed at courthouses. \textit{E.g.}, McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978); Minich v. County of Jefferson, 919 A.2d 356 (Pa. Commonwealth Ct. 2007); State v. Plante, 594 A.2d 165 (N.H. 1991).}

The need to intrude focuses on the substantiality and immediacy of the government's interest. The Second Circuit, in the context of a subway case, well-summarized current judicial thinking regarding this factor:

The Supreme Court . . . noted that no express threat or special imminence is required before we may accord great weight to the government's interest in
staving off considerable harm. All that is required is that the "risk to public safety [be] substantial and real" instead of merely "symbolic."

Pursuant to this standard, the threat in this case is sufficiently immediate. In light of the thwarted plots to bomb New York City’s subway system, its continued desirability as a target, and the recent bombings of public transportation systems in Madrid, Moscow, and London, the risk to public safety is substantial and real.\footnote{MacWade v. Kelly, 460 F.3d 260, 272 (2d Cir. 2006).}

Some courts believe that the individual must be given the right to leave\footnote{See, e.g., Spear v. Sowders, 71 F.3d 626, 630-32 (6th Cir. 1995) (en banc) (concluding that prison visitor must have option to leave before a strip and cavity search may be performed); United States v. Albarado, 495 F.2d 799, 807-08 (2d Cir. 1974) (even after activating the magnetometer at an airport, the "prospective passenger may refuse to submit to a frisk and instead forfeit his ability to travel by air, because this serves the purpose of the whole search procedure, which is not to catch criminals, but rather to keep armed hijackers from getting on airplanes"); Gadson v. State, 668 A.2d 22 (Md. 1995) (prospective prison visitor must be allowed to leave rather than submit to dog sniff); People v. Hyde, 524 P.2d 830, 834, 837 (Cal. 1974) (airport checkpoints are designed to prevent hijackings and not to ferret out contraband or evidence of criminal activity; individual may elect not to be searched by not boarding plane); State v. Miller, 520 P.2d 1115, 1117-18 (Ariz. 1974) (air passenger must be given option to depart rather than submit to search).} while other courts maintain that individuals do not retain the right to leave once they reach the checkpoint.\footnote{See, e.g., United States v. Hartwell, 436 F.3d 174, 181 n.12 (3d Cir. 2006) (airport); United States v. Herzbrun, 723 F.2d 773, 776 (11th Cir. 1984) (airport); United States v. Haynie, 637 F.2d 227, 230-31 (4th Cir. 1980) (airport); United States v. DeAngelo, 584 F.2d 46, 48 (4th Cir. 1978) (airport); United States v. Mathews, 431 F. Supp. 70, 71-73 (W.D. Okl. 1976) (military base); People v. Heimel, 812 P.2d 1177, 1181-82 (Colo. 1991) (airport); People v. Turnbeaugh, 451 N.E.2d 1016, 1019 (Ill. Ct. App. 1983) (canine checkpoint at prison); Commonwealth v. Roland R., 860 N.E.2d 659 (Mass. 2007) (courthouse); State v. Plante, 594 A.2d 165, 167 (N.H. 1991) (courthouse).} The first view arguably stems from the belief that the Fourth Amendment protects individual rights and the latter is grounded in a collective security model. Hence, in United States v. Aukai,\footnote{497 F.3d 955 (9th Cir. 2007) (en banc).} overruling Ninth Circuit precedent that had premised the validity of airport screening searches upon the potential passenger’s election to leave instead of undergoing the screening, the en banc court stated that allowing a potential passenger to leave once the screening has commenced “makes little sense in a post-9/11
world. The court reasoned:

Such a rule would afford terrorists multiple opportunities to attempt to penetrate airport security by "electing not to fly" on the cusp of detection until a vulnerable portal is found. This rule would also allow terrorists a low-cost method of detecting systematic vulnerabilities in airport security, knowledge that could be extremely valuable in planning future attacks. Likewise, given that consent is not required, it makes little sense to predicate the reasonableness of an administrative airport screening search on an irrevocable implied consent theory. Rather, where an airport screening search is otherwise reasonable and conducted pursuant to statutory authority, all that is required is the passenger's election to attempt entry into the secured area of an airport. Under current [Transportation Security Administration] regulations and procedures, that election occurs when a prospective passenger walks through the magnetometer or places items on the conveyor belt of the x-ray machine. The record establishes that Aukai elected to attempt entry into the posted secured area of Honolulu International Airport when he walked through the magnetometer, thereby subjecting himself to the airport screening process.  

The Court, when balancing, has at times examined the objective and subjective impacts of the intrusion upon the individual's privacy interests:

The degree of objective intrusiveness of a particular search or seizure depends upon its nature, duration, and scope. The degree of subjective intrusiveness turns upon a hypothetical individual's perception of and reaction to a particular search or seizure. The Court inquires whether a person undergoing the search or seizure would be likely to experience "concern," "fright," "surprise," "embarrassment," "anxiety," or "awe."

Illustrative is Sitz, where the Court examined the objective and subjective aspects of the intrusion on motorists stopped briefly at sobriety checkpoints and concluded that the intrusion was slight. It found that the objective intrusion, measured by

182 Id. at 960.

183 Id. at 960-61.


the duration of the seizure and the intensity of the investigation, was minimal. The Court viewed the subjective intrusion on motorists as appreciably less at checkpoints, as compared to roving patrols, because the occupant could see other vehicles being stopped and visible signs of the officers’ authority, making it much less likely that the motorist would be frightened or annoyed by the intrusion.\textsuperscript{186} This idea that, the more systematic and open the intrusion, the more acceptable it is, has become a common theme in the case law.\textsuperscript{187} Justice Rehnquist at one point criticized that view as resting on the assumption that “motorists, apparently like sheep, are much less likely to be ‘frightened’ or ‘annoyed’ when stopped en masse . . . . The Court thus elevates the adage ‘misery loves company’ to a novel role in Fourth Amendment jurisprudence.”\textsuperscript{188}

Many of the cases dispensing with warrants or individualized suspicion have found the prevention or detection of activities or conditions that could affect a large number of persons to be important: mass harm from epidemics or from fires sweeping

\textsuperscript{186} Cf. Illinois v. Lidster, 540 U.S. 419, 427-28 (2004) (briefly discussing the objective and subjective impact on individuals of roadblock); Wyoming v. Houghton, 526 U.S. 295, 303 (1999) (distinguishing searches of a person and asserting that "traumatic consequences are not to be expected when the police examine an item of personal property found in a car").

\textsuperscript{187} See, e.g., Illinois v. Lidster, 540 U.S. 419, 428 (2004) (viewing roadblock as acceptable in part because “all vehicles systematically” stopped); Delaware v. Prouse, 440 U.S. 648, 663-64 (1979) (Blackmun, J., concurring) (Roadblocks where every driver or every tenth driver was stopped to check licenses and registrations would be subjectively less intrusive than random stops.); United States v. Martinez-Fuerte, 428 U.S. 543, 558-59 (1976) (checkpoint stops subjectively less intrusive than roving patrol stops); United States v. Ortiz, 422 U.S. 891, 894-95 (1975) (The circumstances of a checkpoint stop, at which motorists can observe other vehicles being stopped, are “far less intrusive” than those attending a roving patrol stop.).


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across urban areas;\textsuperscript{189} nuclear power plants;\textsuperscript{190} intoxicated train operators;\textsuperscript{191} and explosive devices in commercial airplanes. These scenarios have in common the potential for a single source to affect large numbers of people at the same time. This is to say that, in today's world, collective security has become a more important governmental goal. If individual rights were the focus of reasonableness analysis, the potential for mass harm would not be sufficient in and of itself to justify a search or seizure; that merely describes the government interest. It should not be enough to say, as one court recently observed: "Counter-terrorism experts and politically accountable officials have undertaken the delicate and esoteric task of deciding how best to marshal their available resources in light of the conditions prevailing on any given day. We will not—and may not—second-guess the minutiae of their considered decisions."\textsuperscript{192} Rather than total deference to executive authority, reasonableness analysis can be reframed to accommodate competing individual and collective interests.

First, there should be a critical assessment of the nature, source, and scope of the potential danger. Many of the situations presenting the potential for mass harm have in common the inability to identify the source of the problem utilizing particularized suspicion in advance of the harm occurring.\textsuperscript{193} In such circumstances, unless the

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\textsuperscript{189} Camara v. Municipal Court, 387 U.S. 523 (1967).
\textsuperscript{192} E.g., MacWade v. Kelly, 460 F.3d 260, 273-74 (2d Cir. 2006).
\textsuperscript{193} See Camara v. Municipal Court, 387 U.S. 523, 537 (1967) (viewing as reasonable area-wide health and safety code enforcement inspections designed to combat the dangers fires and epidemics pose to large urban areas because other canvassing techniques would not achieve acceptable results). \textit{See also} 5 \textsc{Wayne R. LaFave, Search and Seizure} § 10.2(d) (4th ed. 2004) (The \textit{Camara} Court's analysis included the determination 'that 'acceptable results' in code enforcement could not be
government intervenes before individualized suspicion has arisen, the government interest will be frustrated. One example is fire inspections of buildings in urban areas. Absent an inspection, the dangerous conditions existing in such structures cannot be identified before the dangers have been realized. Another example would be a reliable report that a nuclear device has been placed in a neighborhood but that it is unknown exactly where the terrorists have placed it. The gravity of the harm in such a situation would be so great that a house-to-house warrantless search without suspicion falling on any one house would be reasonable.\footnote{Such concerns stand in stark contrast to searches for beer bottles at athletic events or food in a courthouse. \textit{E.g.}, State v. Seglen, 700 N.W.2d 702 (N.D. 2005) (striking down patdown searches to prevent, \textit{inter alia}, alcoholic beverages and bottles from being carried into arena during college hockey game). \textit{See also} Benjamin T. Clark, \textit{Why the Airport and Courthouse Exceptions to the Search Warrant Requirement Should be Extended to Sporting Events}, 40 VAL. U. L. REV. 707, 734 (2006) (collecting pre- and post-9/11 cases, arguing that the risk of terrorist attack justifies entranceway searches at sporting events, and observing that most of the stadium searches pre-9/11 were designed to "eradicate alcohol or drugs, not bombs or explosive devices").}

\footnote{Stephen J. Schulhofer, \textit{On the Fourth Amendment Rights of the Law Abiding Public}, 1989 SUP. CT. REV. 87, 91-92 (stating \textit{Camara} reflected the widely shared sense that alternative procedures to area-wide inspections were unworkable). \textit{Cf.} United States v. Robinson, 414 U.S. 218, 232-36 (1973) (search incident to arrest is premised on the recognition that, to protect the arresting officer and effectuate the arrest, the suspect must be disarmed).}

This contrasts with a reliable report that a man
possesses heroin at a specified location and, when the police arrive at that location, a crowd is present. In such circumstances, the potential for mass harm is absent, and the police would not be justified in searching each member of the crowd. In this latter situation, where an individual crime is committed, traditional police investigatory techniques are sufficient to achieve an acceptable level of enforcement. ¹⁹⁵

Thus, one aspect of reasonableness is a realistic appraisal of the nature of the government’s interest. Then, rather than employing the deferential balancing test, courts should structure reasonableness analysis to more properly reflect the fundamental promise of the Amendment—the protection of individual security. As I have discussed elsewhere,¹⁹⁶ there is need for objective criteria to measure reasonableness. Absent objective criteria, progressively intrusive actions have been and will be allowed.¹⁹⁷ This permissible administrative search. To argue otherwise is a false tautology.

As to illegal drugs, the courts appear to be split on searches targeting illegal drugs from entering courthouses and other public buildings. Compare State v. Book, 847 N.E.2d 52 (Ohio Ct. App. 2006) (permissible to search for illegal drugs to prevent entry into courthouse) with United States v. Bulacan, 156 F.3d 963, 973-74 (9th Cir. 1998) (secondary motive of searching persons who enter government buildings for drugs is "not permissible . . . because the intrusiveness of the search outweighs the Government's need to conduct such a search"). If, as the Court currently asserts, the balancing test is only appropriate when the intrusion is "aimed primarily at purposes beyond the general interest in crime control," Indianapolis v. Edmond, 531 U.S. 32, 47-48 (2000), suspicionless entranceway searches targeting the possession of illegal drugs seem questionable—except in situations such as prisons and other high security buildings where members of the general public do not have a right of access.

¹⁹⁵ See, e.g., United States v. Di Re, 332 U.S. 581 (1948) (observing that "the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment"). Cf. Arizona v. Hicks, 480 U.S. 321 (1987) (rejecting argument that murder scenes should be exempt from warrant requirement). But see Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (aggregating individual cases causing death, injuries, and property damage from drunk driving to justify DWI checkpoints).

¹⁹⁶ See note 204 infra.

¹⁹⁷ See Morgan Cloud, Pragmatism, Positivism, and Principles in Fourth Amendment Theory, 41 UCLA L. REV. 199, 297 (1993) ("Simply put, if liberty is the goal, rules are needed."); Scott E. Sundby, A Return to Fourth Amendment Basics:
is to say that Justice Frankfurter was correct when he observed: “To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an ‘unreasonable search’ is forbidden—that the search must be reasonable.”

The recognition of the need for objective rules does not inform us what those criteria are. To identify those criteria, one must look elsewhere. The balancing approach illuminates the dangers of elevating contemporary needs to constitutional principles. On the other hand, dispositive reliance on the common law as defining reasonableness offers surface appeal as the needed objective criteria. However, the Fourth Amendment was a reaction to then contemporary abuses and was not a codification of the common law, with the exception of the requirements specified in the Warrant Clause for warrants to issue. Finally, the world has changed dramatically since 1791 and it is foolish to put the reasonableness inquiry into the straightjacket of those law enforcement rules that were in place at that time, even if they could be ascertained with certainty.

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200 See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (interpreting the Amendment’s prohibition against unreasonable searches and seizures “in light of...
This does not mean that we can learn nothing from history. Historical analysis teaches that the Amendment was designed to protect individuals from unreasonable governmental intrusion.201 The Framers intended not only to prohibit the specific evils of which they were aware, but also, based on the general terms used, to give the Constitution enduring significance beyond their own lifetimes.202 Any measure of contemporary norms and conditions"; Payton v. New York, 445 U.S. 573, 600 (1980) (stating that "contemporary customs and norms necessarily play" a "large role" in assessing reasonableness); Steagald v. United States, 451 U.S. 204, 217 (1981) ("Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we as a society, now regard as proper."); Tennessee v. Garner, 471 U.S. 1, 12-15 (1985) (changing the common law rule that had permitted the police to shoot at fleeing suspects in part because modern felonies differ significantly from common law felonies and because of technological changes in weaponry). But cf. Richards v. Wisconsin, 520 U.S. 385, 392 n.4 (1997) (cautioning that "[i]t is always dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment," given the Fourth Amendment's purpose of preserving that degree of privacy that was afforded at the time it was adopted).

201 See, e.g., Chadwick v. United States, 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."); abrogated by California v. Acevedo, 500 U.S. 565 (1991); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) ("If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important."); United States v. Lefkowitz, 285 U.S. 452, 467 (1932) (rejecting literal construction of words in favor of Amendment's purpose); Boyd v. United States, 116 U.S. 616 (1886) (Fourth Amendment should be interpreted liberally in favor of the security of the person); Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 353 (1974) ("The Bill of Rights in general and the Fourth Amendment in particular are profoundly anti-government documents.").

202 See JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1-2 (1980) ("The Constitution proceeds by briefly indicating certain fundamental principles whose specific implications for each age must be determined in contemporary context . . . . That the complete inference will not be there—because the situation is not likely to have been foreseen—is generally common ground."); Joseph D. Grano, Rethinking the Fourth Amendment Warrant Requirement, 19 AM. CRIM. L. REV. 603, 620 (1982) ("The underlying grievances are certainly relevant to the interpretative task, but constitutional provisions cannot be properly viewed simply as shorthand statements for the specific grievances that gave rise to them."); James J. Tomkovicz, California v. Acevedo: The Walls Close in on the Warrant Requirement, 29 AM. CRIM. L. REV. 1103, 1137 (1992) ("the document was meant to be more than a mere catalogue of forbidden actions" and the Framers intended that the "underlying values" be honored); Carol S. Steiker, Second Thoughts About First Principles, 107 HARV. L. REV. 820, 824 (1994) (the Fourth Amendment "appears to require a fairly high level of abstraction of
reasonableness must be premised on those values; otherwise, reasonableness analysis is subject to deprecation by interpretation favoring governmental needs.\textsuperscript{203} Moreover, they were concerned with the need for objective criteria—that was, after all, the whole purpose of the Warrant Clause. Hence, I have elsewhere 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.\textsuperscript{204} Putting aside the details of that proposal, it is clear that measurable objective criteria, outside of the control of the government, are needed to measure reasonableness. Otherwise, individual liberty will be overwhelmed by collective

\textsuperscript{203} See Morgan Cloud, \textit{Pragmatism, Positivism, and Principles in Fourth Amendment Theory}, 41 UCL\textsc{a} L. Rev. 199, 286 (1993) (arguing that there is a need for normative-based principles to guide Fourth Amendment analysis and concluding: "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."); T. Alexander Aleinikoff, \textit{Constitutional Law in the Age of Balancing}, 96 YALE L.J. 943, 981 (1987) (comparing balancing analysis with other modes of constitutional adjudication and maintaining that constitutional law, contrary to the view of balancers, provides a set of peremptory norms that are basic to the American notion of limited powers, as well as a validating function, which serves as a forum for the affirmation of background principles and for ratification of changes in those principles).

\textsuperscript{204} At the summit of that hierarchy is individualized suspicion, which is fundamental 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 should 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. This structure was originally proposed in Thomas K. Clancy, \textit{The Fourth Amendment's Concept of Reasonableness}, 2004 UTAH L. Rev. 1. It is also set forth in Thomas K. Clancy, \textit{The Fourth Amendment: Its History and Interpretation} § 11.5. (2008).
security concerns.

ii. Bright line rules

The Supreme Court has increasingly utilized bright line rules to measure the reasonableness of searches and seizures. Bright line rules do not require case-by-case justification of the police procedure and provide “clear legal boundaries to police conduct.” As the Court's opinion in *New York v. Belton* recognized, such rules are 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.”

Thus *Belton* stated:

> 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.”

Accordingly, the Court concluded, in some instances, “[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

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207 453 U.S. at 458.
Many of the bright-line rules are created for recurring situations to clarify for the police what they can or cannot do. Hence, for example, for searches incident to arrest, the police can always search the person and the area of immediate control around that person.209 If that person is in a vehicle, the police can always search the entire passenger compartment incident to the arrest.210 During a traffic stop, the officer can always order

208 Id.

209 E.g., Thornton v. United States, 541 U.S. 615 (2004); Michigan v. DeFillippo, 443 U.S. 31, 39 (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) ("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.); Robinson v. United States, 414 U.S. 218 (1973) (adopting a "categorical" search incident to arrest rule: it applied to all arrests, regardless of the underlying factual circumstances).

The Court may be reconsidering that view. On February 25, 2008, the Supreme Court granted a petition for writ of certiorari, limited to the following question: Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety and a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle’s recent occupants have been arrested and secured? Arizona v. Gant, ___ U.S. __, 2008 WL 482034 (Feb. 28, 2008).

the driver and all passengers out of the vehicle.\footnote{\ref{fn:211}} For motor vehicles, there is no need to show exigency in any given case; the fact that the place searched is a motorized vehicle supplies the need to search without a warrant.\footnote{\ref{fn:212}} Similarly, the police may always detain occupants of a home while the residence is searched pursuant to a search warrant.\footnote{\ref{fn:213}} Each of these rules clarify the police officer’s authority but each of them undeniably invade the security of many persons who are not dangerous or who do not harbor evidence. Underlying many of the bright-line rules is a legitimate concern for the safety of the police officer in confronting persons suspected of a crime. Beyond that concern, there are few guidelines to predict when the Court will adopt a bright-line rule in lieu of case-by-case adjudication.\footnote{\ref{fn:214}}

\footnote{\ref{fn:211}} See, e.g., Maryland v. Wilson, 519 U.S. 408 (1997).

\footnote{\ref{fn:212}} See, e.g., Maryland v. Dyson, 527 U.S. 465, 467 (1999) (per curiam) ("under our established precedent, the 'automobile exception' has no separate exigency requirement"); California v. Acevedo, 500 U.S. 565, 580 (1991) ("We . . . interpret Carroll as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."). \textit{See also} William J. Stuntz, \textit{Warrants and Fourth Amendment Remedies}, 77 Va. L. Rev. 881, 921-22 (1991) (discussing the Supreme Court’s decisions in the 1970s and early 1980s that "obliterated [the] exigency principle" for automobile searches). State decisions have sometimes departed from this view on independent state grounds, with the courts requiring a showing of exigency in the facts of the case. \textit{E.g.}, State v. Elison, 14 P.3d 456, 467-72 (Mont. 2000); State v. Cooke, 751 A.2d 92, 96-99 (N.J. 2000).

\footnote{\ref{fn:213}} Michigan v. Summers, 452 U.S. 692 (1981). \textit{See also} Muehler v. Mena, 544 U.S. 93 (2005) (clarifying that the authority to detain an occupant during the execution of a search warrant was "categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure'"). \textit{But cf.} Ybarra v. Illinois, 444 U.S. 85 (1979) (prohibiting suspicionless patdown of patrons who happened to be present during the execution of a search warrant for narcotics at a tavern).

\footnote{\ref{fn:214}} \textit{E.g.}, Maryland v. Wilson, 519 U.S. 408, 413 n.1 (1997) (establishing the bright line rule that the police can order a passenger out of a legally stopped vehicle incident to that stop and explaining that, although it "typically avoid[ed] \textit{per se} rules . . . does not mean that we have always done so"). \textit{See generally} Kathryn R. Urbonya, \textit{Rhetorically Reasonable Police Practices: Viewing the Supreme Court’s Multiple Discourse Paths}, 40 Am. Crim. L. Rev. 1387, 1429-36 (2004) (analyzing the Court's choices between bright line rules and case-by-case analysis and observing that "no
In *Atwater v. City of Lago Vista*,\(^215\) which held that the arrest of a woman for a seat belt violation was proper, the majority found that the reasonableness inquiry provides no substantive limitation on the ability of the police to arrest for minor offenses that are based on probable cause to arrest. *Atwater* has proven controversial.\(^216\) The Court applied what it considered to be the traditional standard for constitutional reasonableness—probable cause to arrest—rather than trying to “mint a new rule of constitutional law on the understanding that when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness.”\(^217\)

In one sense, *Atwater* is not particularly problematic in that it upheld the probable cause standard, which requires individualized suspicion that a particular person has coherent theory undergirds’ it).


\(^{216}\) In *Atwater*, Justice O’Connor dissented, disagreeing that the constitutional propriety of the custodial arrest should be limited to whether probable cause existed. See *id.* at 360-62 (O’Connor, J., dissenting). In her view, the reasonableness inquiry required not only a determination of the existence of probable cause, but also an assessment of the intrusion upon individual privacy against the need to promote legitimate governmental interests. *Id.* at 361. Justice O’Connor’s view has been followed on independent state grounds by several courts. *E.g.*, State v. Bricker, 134 P.3d 800 (N.M. Ct. App. 2006) (collecting cases); People v. Moorman, 859 N.E.2d 1105 (Ill. Ct. App. 2006). The *Atwater* majority opinion has also been criticized by many commentators. *E.g.*, John M. Burkoff, *A Flame of Fire*: The Fourth Amendment in Perilous Times, 74 Miss. L.J. 631, 654-56, 660-61, 674 (2004) (criticizing the methodology and the result in *Atwater* and observing that the Amendment “does and must apply . . . in a way that includes unblindered sensitivity to and awareness of the context in which the law enforcement activities in question arise”); Donald Dripps, The Fourth Amendment and the Fallacy of Composition: Determinacy versus Legitimacy in a Regime of Bright-Line Rules, 74 Miss. L.J. 341, 393 (2004) (viewing *Atwater* as part of an “Iron Triangle” of cases that permit the police to “have general search power over anyone traveling by automobile”).

\(^{217}\) 532 U.S. at 326.
committed a crime; only when probable cause is present can a prolonged seizure occur. What is more troubling than the adherence to probable cause as the measure of reasonableness are some of the Atwater majority's comments on the nature of reasonableness. It spoke at one point of the “categorical treatment of Fourth Amendment claims” as opposed to “individualized review” as being the general mode of analysis.\(^{218}\)

The majority added:

If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.

But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.\(^{219}\)

Yet, by their nature, probable cause determinations are highly fact specific; indeed, the probable cause standard defies precise definition.\(^{220}\) This is to say that the Atwater majority's comments equally serve as a vehicle to attack the probable cause

\(^{218}\) Id. at 325-26.

\(^{219}\) Id. at 326.

standard and to promote the “categorical” measurement of reasonableness. In other cases, the Court has viewed bright-lines as the exception and not the rule.221 Thus, for example, in Terry v. Ohio, the Court stated that the limitations imposed by the Fourth Amendment “will have to be developed in the concrete factual circumstances of individual cases.”222 Moreover, one must distinguish 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.223 Arguably, the use of per se rules to allow police or other governmental intrusions is inimical to much of the underlying purpose of the Fourth Amendment—if it is designed to protect individual rights. Under this view, bright-line rules that favor individual rights by being over-inclusive of those deserving protection should be treated differently than per se rules that permit intrusions.224 If the Amendment protects group rights, then the measure of

221 E.g., Ohio v. Robinette, 519 U.S. 33 (1996).
222 392 U.S. 1, 29 (1968). See also Brinegar v. United States, 338 U.S. 160, 175 (1949) (“In dealing with probable cause . . ., as the name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”).
223 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 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 traces the evolution of the Court’s treatment of bright-line rules and believes that the Court has erred in emphasizing determinacy over legitimacy. 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.
reasonableness should be designed to protect the people’s right to be secure and bright-line rules that regulate the permissibility of intrusions would make more sense.

III. Implications of a Collective Security Model: Choices

The Court—and society—is faced with a fundamental choice: is the Amendment designed to regulate law enforcement practices in such a manner as to further collective security or is it designed to protect individuals from overreaching governmental intrusions? Those seeking to preserve traditional notions that the Fourth Amendment protects individual rights may be fighting a rear-guard action against a vastly superior enemy that is bound to overwhelm. That enemy has many battalions. They include: a large and still growing population; societal trends that diminish the worth of the claim concerned with the practical consequences of warrant as condition of routine felony arrest in home in absence of any evidence that effective law enforcement had suffered and opining that “such arguments of policy must give way to a constitutional command that we consider to be unequivocal”).

If the Amendment is viewed as protecting collective security, arguably anyone affected by an illegal search or seizure would be able to challenge the use of that illegally obtained evidence against her. See generally Arnold H. Loewy, Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence, 87 Mich. L. Rev. 907, 912 (1989). A few voices have advocated that approach. E.g., Goldstein v. United States, 316 U.S. 114, 127-28 (1942) (Stone, C.J., dissenting); Alderman v. United States, 394 U.S. 165, 205-09 (1969) (Fortas, J., concurring and dissenting). However, this view has never commanded a majority of the Court. Instead, the Court has consistently established in recent decades that only persons whose personal rights have been implicated are “victims” and can challenge the admission of evidence that was the product of an arguably illegal search or seizure. E.g., Rakas v. Illinois, 439 U.S. 128 (1978) (passengers in vehicle has no standing to object to its search); California Bankers Association v. Schultz, 416 U.S. 21, 54 (1974) (bank depositor has no reasonable expectation of privacy in bank records); Combs v. United States, 408 U.S. 224 (1972) (remand to determine if adult son had reasonable expectation of privacy in father’s premises when son did not live on the property and was not present when search made). Moreover, standing analysis and exclusionary rule theory are “fundamentally at war with each other,” given that modern exclusionary rule jurisprudence is not seen as an individual remedy but is designed to protect us collectively from future police misconduct. Donald L. Doernberg, The Right of the People?: Reconciling Collective and Individual Interests under the Fourth Amendment, 58 N.Y.U. L. Rev. 259, 285 (1983).

individual; media that seek to root out all vestiges of privacy; a fame-hungry population that relishes the exposure of private facts; foreign and domestic terrorists; a persistently high level of crime; local, state, and national law enforcement and national security agencies that have vast numbers of foot soldiers; and corporate interests that exploit technology to gather information. Technology itself may be the most significant force toward collectivism due to the ubiquity and vast utility of digital devices.

Perhaps it is time to surrender. Give in to total surveillance, from birth to death, all the time, everywhere. Biometric registration at birth. Implant computer chips that can locate persons through GPS into all the new borne children, all visitors to the United States, all suspected and convicted criminals—and soon, everyone. All goods, pets, and vehicles could have locational devices embedded in them, similar to what is now occurring with cell phones. Think of the benefits! For example, because there is an implanted chip that can be read remotely, there is the promise of dramatic reductions in crime: less ID theft; less undocumented illegal immigrants; fewer false arrests; fewer stolen cars; fewer lost and stolen children; fewer lost dogs; fewer old people who wander off and get lost; few false convictions.

The Fourth Amendment does not have to be repealed—just rethought. The “right of the people to be secure” is a collective right, not an individual one. We are not far from that point of view. Got a problem with airplane hijacking: create a system that permits very intrusive searches and seizures of hundreds of million of people each year to keep us collectively secure. Got a problem with people shooting in a public building or two each year: create entranceway screening that permits the authorities to search the person and effects of all seeking entry into the building. Got a problem with public
crime: create ubiquitous video surveillance systems.\textsuperscript{227} Got a problem with potential terrorists using the Internet to communicate with each other: create a vast electronic surveillance network to monitor communications. Got a problem with drugs: develop a detection system to examine all effects that can be used anywhere to detect drugs (but just don't call the "techniques" searches\textsuperscript{228}) or test everyone for substance abuse. What reasonable expectation of privacy does a person have in concealing illegal drugs on his person or in his effects?\textsuperscript{229}

There are many other situations where suspicionless mass detection would be helpful: suspicionless sweeps of public housing for illegal occupants, weapons, and drugs;\textsuperscript{230} searches of students' clothing, purses, and lockers to locate another student's missing property;\textsuperscript{231} roadblocks to check for auto larceny;\textsuperscript{232} or blocking off an entire

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\textsuperscript{228} See, e.g., Illinois v. Caballes, 543 U.S. 405 (2005) (dog sniff is not a search).


\textsuperscript{231} Cf. People v. William G. (In re William G.), 709 P.2d 1287, 1299-1300 (Cal. 1985) (Bird, C.J., concurring and dissenting) (recounting incident in high school where school officials searched lockers, purses, and bodies of twenty students in attempt to locate watch and ring of another student).

\textsuperscript{232} See People v. Cascarano, 587 N.Y.S.2d 529, 531-32 (N.Y. Crim. Ct. 1992)
area and detaining everyone long enough to check for outstanding warrants.\textsuperscript{233} In cities, large and small, there are neighborhoods that are characterized by a high incidence of drug trafficking. Brief stops of everyone in such zones to learn the person's identification and perform a dog sniff would be a fruitful investigative tool.\textsuperscript{234} Street prostitution is often characterized by women and men congregating in a known area and soliciting customers. A city park might be the object of a wave of vandalism.\textsuperscript{235} An apartment complex may suffer a rash of automobile thefts.\textsuperscript{236} A sparsely populated area with vacant summer homes could be targeted for burglaries.\textsuperscript{237} Why not stop and question everyone in the area?

What do we loose by permitting such intrusions? Is it just some old fashioned, outmoded notions that each individual is unique–has worth–has a \textit{right} to bar the

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\textsuperscript{233} But cf. Cnty. for Creative Non-Violence v. Unknown Agents of United States Marshals Serv., 797 F. Supp. 7, 13-14 (D.D.C. 1992) (although marshals validly entered homeless shelter pursuant to arrest warrant for suspect reasonably believed to be there, it was impermissible to detain 200 other persons in shelter and require them to identify themselves before they could leave or return to sleep in the hope of finding other fugitives).

\textsuperscript{234} Cf. Indianapolis v. Edmond, 531 U.S. 32 (2000) (striking down vehicle checkpoints that have primary purpose to interdict unlawful drugs); Wirin v. Horrell, 193 P.2d 470 (Cal. Ct. App. 1948) (ruling that it was impermissible to blockade high-crime area of city and search all cars leaving area).

\textsuperscript{235} See State v. Hillesheim, 291 N.W.2d 314 (Iowa 1980) (illegal to stop all vehicles entering park after dark to combat wave of vandalism because the plan was formulated by two patrol officers and not at the policy-making level).

\textsuperscript{236} See People v. Meitz, 420 N.E.2d 1119 (Ill. App. Ct. 1981) (police staked out apartment complex and properly stopped all vehicles to determine if driver was or knew registered owner).

government from intruding unless that the government has a good reason to suspect that person? Unless we as a society re-commit to that view, and examine closely many of the trends of the recent past, the Fourth Amendment as an individual right will disappear.

IV. Conclusion

It seems to me completely patent that the Fourth Amendment, at its most fundamental level, is designed to protect people from the government. It is no great leap to say that it should therefore be interpreted in a manner favorable to the enhancement of individual liberty. The inquiry in each case must examine the essence of what the Amendment seeks to protect: the individual right to be secure. Of course, the right to be secure is not absolutely protected against governmental intrusions. The language of the Amendment teaches us that we are protected only against unreasonable searches and seizures. There is a difficult and delicate relationship between collective and individual security. If the emphasis on the collective becomes dominant, there is no individual security. Totalitarian regimes of many stripes illustrate that point. At the other extreme, if individual interests are the sole focus of the inquiry, collective security collapses, bringing an end to individual liberty. The Fourth Amendment seeks a middle ground: individuals have the right to be secure but only against unreasonable searches and seizures.238 Yet, if the protection is an individual one, the burden should be on the government to justify intrusions upon that right in each case. In Boyd v. United States,239 the Court long ago observed: “It is the duty of courts to be watchful for the constitutional

238 Reasonableness is the “fundamental command” of the Amendment. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). That “imprecise and flexible term" reflects the Framers' recognition “that searches and seizures were too valuable to law enforcement to prohibit them entirely” but that “they should be slowed down.” Berger v. New York, 388 U.S. 41, 75 (1967) (Black, J., dissenting).

239 116 U.S. 616 (1886).
rights of the citizen, and against any stealthy encroachments thereon." That duty remains. History teaches lessons and, unless we seek to repeat the mistakes of the past, we must learn from them. Our history teaches that the Framers valued individual liberty and, unless we continue to do so, we will lose it.