FOREWORD

The Tools to Interpret the Fourth Amendment

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The National Center for Justice and the Rule of Law,[1] a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. The concept of "justice" appeals to basic notions of equality, equity and fairness, often with an emotive component. In contrast, the phrase "rule of law" refers to the requirement that certain procedures and principles must be followed in each case to reach a correct result. Neither concept is sufficient; rather, both must be utilized to ensure that the criminal justice system fulfills its function in society. The Center implements its mission through projects, conferences, educational programs, and publications that examine important criminal law and procedure issues.

In furtherance of that mission, the Center has established the *Fourth Amendment Initiative*. Perhaps no other Amendment has such broad applicability to every day life as does the Fourth Amendment. The Fourth Amendment is also a very complicated area of jurisprudence and the legal landscape is

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constantly changing as a result of new technology and court decisions. The purpose of the Center's initiative is to promote awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

On April 2, 2004, the Center held its third annual conference, entitled: *The Tools to Interpret the Fourth Amendment.* Scholars presenting papers were Professor Ronald Bacigal, of the University of Richmond School of Law, Professor Donald Dripps, then at the University of Minnesota Law School and now at the University of San Diego School of Law, Professor Lewis Katz, of Case Western Reserve University School of Law, Professor Scott Sundby, of Washington & Lee University School of Law, and Professor Daniel Yeager, of California Western School of Law. In the audience that day were thirty-six state appellate judges from twenty-one states, whose presence at the symposium represented the third day of an appellate conference on Fourth Amendment principles sponsored by the Center in cooperation with the National Judicial College.

The Center believes that the conference—and the insightful articles published in this special edition of the *Mississippi Law Journal* that stemmed from the presentations at the conference—significantly further the Center's mission and, more importantly, make significant contributions to the understanding of Fourth Amendment principles. The Center, and I personally, wish to thank the leading legal scholars who participated in the symposium.

The symposium was designed to examine some of the methods that these distinguished scholars believe *should* be employed by the Supreme Court to provide a framework by which cases can be decided on a principled—or at least consistent—basis. This is a broad question and I want to take a few moments to explain why the question was so framed. "Tools" are devices, instruments, or methods that are used to help shape the content of the terms of the Fourth Amendment.

Just as a plow is a tool that helps prepare a field for planting, the Supreme Court uses tools to help it in its interpretative task of giving meaning to the various terms of the amendment.

The Court has used a variety of interpretative tools as aids in formulating principles to implement Fourth Amendment commands. Depending on the era and whether a conservative or liberal majority holds sway on the Court, different tools have been utilized. Looking at the cases collectively, they are irreconcilable as to which tools are proper. To take just a few examples of the Court's inconsistencies, longstanding practices,[2] including authorization by Congress[3]—particularly by the first Congress[4]—has sometimes influenced the Court's decisions but at other times has not.[5] Similarly, an historical

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[2] *See, e.g.*, Boyd v. United States, 116 U.S. 616, 622-23 (1886). The Court has often relied on the historical acceptance of the actions challenged to support its conclusion that they are reasonable. *See, e.g.*, United States v. Robinson, 414 U.S. 218, 230-35 (1973). *Cf.* Carroll v. United States, 267 U.S. 132, 149 (1925) ("The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.").

[3] Indeed, the Court has gone so far as to say that, when Congress has authorized a particular type of search, there is a "strong presumption of constitutionality . . . especially when it turns on what is 'reasonable.'" United States v. Di Re, 332 U.S. 581, 585 (1948). *Accord* United States v. Watson, 423 U.S. 411, 416 (1976).

[4] *See, e.g., Boyd*, 116 U.S. at 623. *Cf.* Davis v. United States, 328 U.S. 582, 605-06 (1946) (Frankfurter, J., dissenting) (examining "contemporaneous" authorizations to search by the first Congress and by subsequent Congresses as demonstrating need for a warrant and illuminating intent to restrict ability to search unless authorized); *Carroll*, 267 U.S. at 151 (examining actions of the first, second, fourth, and subsequent Congresses as evidence of reasonableness).

[5] *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) ("It is clear, of course, that no Act of Congress can authorize a violation of the Constitution."). Mere historical acceptance has sometimes not been enough to make a practice reasonable. *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 240 (1970) (stating the "need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution"). *See generally* Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM CRIM. L. REV. 1387, 1397-1417 (2003) (observing that the Court's use of history is one type of rhetorical argument that the Court has selectively used in its decisions).

analysis of the state of the common law at the time of the framing has been viewed as dispositive,[6] at other times as persuasive,[7] or occasionally rejected as a basis to interpret the Amendment.[8] In contrast, the Court at times has employed a nonhistorical analysis to interpret the commands of the Fourth Amendment, asserting that law enforcement practices are not "frozen" by those in place at the time the Fourth Amendment was adopted[9] and that the Amendment must be interpreted in light of contemporary norms and conditions.[10]

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[6] Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) (creating a two-step model for measuring reasonableness: first, the Court inquires "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed" and, second, if "that inquiry yields no answer," the search or seizure is evaluated "under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests"). *Cf. id.* at 307 (Breyer, J., concurring) ("I join the Court's opinion with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question."); *id.* at 311 n.3 (Stevens, J., dissenting) ("To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law 'yields no answer.'"). *See generally* Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. Rev. 895 (2002) (discussing *Houghton* and the Court's inconsistent and selective use of history).

[7] *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 326 (2001) (noting that Court is "guided" by common law in ascertaining meaning of reasonableness); Oliver v. United States, 466 U.S. 170, 183-84 (1984) (stating that while "[t]he common law may guide consideration of what areas are protected by the Fourth Amendment," common law rights are not co-incident with the Fourth Amendment.); Payton v. New York, 445 U.S. 573, 591 (1980) (utilizing common law view to shed light on Framers' intent); Gerstein v. Pugh, 420 U.S. 103, 114 (1974) (stating that the common law acts as a guide to interpret Fourth Amendment). *See also* David A. Sklansky, *The Fourth Amendment and the Common Law*, 100 COLUM. L. REV. 1739, 1764-66 (2000) (tracing Supreme Court treatment of the common law as an interpretative tool).

[8] *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 12-15 (1985) (changing the common law rule permitting police to shoot at fleeing suspects in part because modern felonies differ significantly from common law felonies and because of technological changes in weaponry).

[9] Steagald v. United States, 451 U.S. 204, 217 n.10 (1981); *Payton*, 445 U.S. at 591 n.33.

[10] *See Payton*, 445 U.S. at 600 (stating that "custom and contemporary norms necessarily play" a "large role" in assessing reasonableness); Steagald v. United

Inconsistently, it has also rejected contemporary needs as a tool.[11] The necessity for a workable rule for the police officer on the street to follow has been repeatedly emphasized by the Court.[12] Thus, the Supreme Court has sometimes utilized bright-line rules to guide the police in executing searches and seizures,[13] which do not require case-by-case justification and provide "clear legal boundaries to police conduct."[14] Yet, at other times, it has rejected such analysis, viewing bright lines as exceptional situations[15] and maintaining that the limitations imposed by the Fourth Amendment must "be developed in the concrete factual circumstances of individual cases."[16]

States, 451 U.S. at 217 n.10 ("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."); *Garner*, 471 U.S. at 12-15 (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).

[11] *See, e.g.*, Richards v. Wisconsin, 520 U.S. 385, 392 n.4 (1997) (cautioning that "[i]t is always somewhat 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).

[12] *See, e.g.*, Illinois v. Andreas, 463 U.S. 765, 772 (1983); New York v. Belton, 453 U.S. 454, 459-60 (1981) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.").

[13] *See, e.g.*, Maryland v. Wilson, 519 U.S. 408 (1997) (permitting police officers to order all passengers to exit a vehicle as an incident of a stop of that vehicle); *Belton*, 453 U.S. at 458 ("'[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'") (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)).

[14] David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 37 (1994). 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.'" *Belton*, 453 U.S. at 458 (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. CT. REV. 127, 142).

[15] *See, e.g.*, Ohio v. Robinette, 519 U.S. 33, 39 (1996).

[16] Terry v. Ohio, 392 U.S. 1, 29 (1968).

This is to say that we are often at a loss to predict how the Court will decide cases or at least what "tools" the Court will use to support its decision. This symposium will not end the debate on how the Amendment should be interpreted. Indeed, I suspect that some will even dispute what I mean by "tools" and characterize the methods and goals of the Supreme Court's interpretative function much differently. Nonetheless, the purpose of the symposium is to examine some of the methods that these distinguished scholars believe should be employed by the Court to provide a framework by which cases can be decided on a principled and consistent basis. While this conference will not end the debate, hopefully it will contribute insights to facilitate knowledge of Fourth Amendment principles.