

THE FOURTH AMENDMENT AS A COLLECTIVE RIGHT

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The Fourth Amendment speaks of “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”¹ The Amendment’s words are plural: the right of the “people” and “their.”² 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 seizures.³ An alternative view would treat the Amendment as requiring the government to keep us collectively secure in *our* persons, houses, papers, and effects.⁴

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1. U.S. CONST. amend. IV. 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.

Id.

2. *See id.*

3. *See infra* Part I.A.

4. *See* U.S. CONST. amend. IV; *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 G. 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

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 is rapidly gaining momentum—and not just in response to terrorist attacks on the United States. 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.⁵ 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.⁶ 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 I maintain that that approach is illusory and inimical to the fundamental premise—and promise—of the Amendment, which is 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.⁷ Historical analysis has long served as an important interpretative tool for those seeking to achieve an understanding of the Amendment.⁸ The historical record is complex, involving hundreds of years of evolution in the regulation of searches and seizures, with many contradictory developments.⁹ Importantly, however, much of that evolution did

B. Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493, 495-99 (1980) (applying Amsterdam’s framework to Supreme Court standing cases).

5. See *infra* Part II. 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.”).

6. See U.S. CONST. amend. IV; *infra* notes 11-19 and accompanying text.

7. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 13-78 (1937).

8. See generally WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602-1791 (2009) (providing a comprehensive treatment of history of search and seizure in England and its American colonies to adoption of the Fourth Amendment).

9. See David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1795 (2000). 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.” *Id.* 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.” *Id.* at 1795-96.

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.¹⁰

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, Parliament passed legislation that arguably permitted the use of suspicionless writs of assistance to enforce customs in the colonies.¹¹ Smuggling was a widespread practice in the American colonies, and writs of assistance were a principal means of combating the practice.¹² 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.¹³ Massachusetts bore the brunt of the customs writ use, with the Superior Court of Massachusetts granting writs beginning in the 1750s.¹⁴

In 1761, new writs of assistance were requested following the expiration of the previously-issued writs.¹⁵ A group of Boston merchants opposed the proposed writs, retaining James Otis to represent their cause.¹⁶ 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.¹⁷ Jeremiah Gridley, the attorney general of the Massachusetts Bay Colony, defended the general writs of assistance as necessary to enforce the customs laws.¹⁸ The writs, Gridley argued, were justified by the necessity of the case and the benefit of the

10. See, 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 . . ."); see also LASSON, *supra* note 7, at 13-78; TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS* 23-50 (1969).

11. 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. *Id.* at 438-55. Parliament thereafter passed the Townshend Act, providing a legal basis for the writs. *Id.*

12. JACOB B. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 30 (1966). See generally LASSON, *supra* note 7, at 51-78.

13. See LANDYNSKI, *supra* note 12, at 20.

14. See *id.* at 31; see also CUDDIHY, *supra* note 8, at 490-501 (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 CUDDIHY, *supra* note 8, at 501-03, 513-26; see also LASSON, *supra* note 7, at 73-76.

15. See generally JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772* at 401-11 (1865).

16. See *id.*

17. See *id.* at 531-32.

18. See *id.* at 476-82.

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.”¹⁹

In contrast to that appeal to collective security, James Otis, representing the merchants, attacked the writs as “‘against the fundamental principles of law.’”²⁰ 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.²¹

Although Otis lost his case, with the court continuing the previous practice, he gained a place in history.²² In that case, “the American tradition of constitutional hostility to general powers of search first found articulate expression.”²³ In the audience sat John Adams, who repeatedly viewed Otis’s oration as so moving that, then and there, the American Revolution was born.²⁴ Indeed, the use of the writs of assistance for customs searches and seizures “caused profound resentment” in the colonies,²⁵ and their use is considered to be “the first in the chain of events which led directly and irresistibly to revolution and independence.”²⁶ Article Fourteen of the Massachusetts

19. SMITH, *supra* note 11, at 281.

20. Taylor, *supra* note 10, at 36-37 (quoting 2 LEGAL PAPERS OF JOHN ADAMS 142-44 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

21. *Id.*

22. *See id.* Otis’s 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.”).

23. SMITH, *supra* note 11, at 7.

24. *See* Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. (forthcoming 2010). Adams’s point was not that the war began at that point but that the development of the conditions for separation from England began with the writs arguments of Otis. *See generally id.* (detailing Adams’s views on the importance of Otis’s arguments).

25. LANDYNSKI, *supra* note 12, at 31.

26. LASSON, *supra* note 7, at 51. *See also* Berger v. New York, 388 U.S. 41, 58 (1967) (Use of general warrants “was a motivating factor behind the Declaration of Independence.”); 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.”); Harris v. United States, 331 U.S. 145, 159 (1947) (Frankfurter,

Declaration of Rights of 1780, 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."²⁷ The Massachusetts article was drafted by John Adams, some nineteen years after hearing Otis's argument in the writs of assistance case.²⁸

A second important precedent of the founding era is *Entick v. Carrington*.²⁹ The case has been repeatedly described by the Supreme Court as a "monument of English freedom" . . . and considered to be "the true and ultimate expression of constitutional law."³⁰ 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.³¹ The warrant named Entick but was otherwise general as to the places to be searched and the papers to be seized.³² Entick sued the messengers in trespass, and the jury returned a verdict in his favor.³³

Upholding the jury's verdict in *Entick*, Lord Camden rejected the appeal of collective security—this was, after all, a case of sedition—in favor of individual liberty.³⁴ 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.³⁵ 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

J., dissenting) (The abuses surrounding searches and seizures "more than any one single factor gave rise to American independence.").

27. MASSACHUSETTS DECLARATION OF RIGHTS Art. 14 (Mass. 1780).

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

Id. (quoted in LASSON, *supra* note 7, at 82 n.15). *Cf. Harris*, 331 U.S. at 158 (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.").

28. *See* Clancy, *supra* note 24; *Harris*, 331 U.S. at 158.

29. *See*, *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.), 19 Howell's State Trials 1029.

30. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989) (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886)). *Entick* has often been cited by the Court. *See, e.g.*, *City of West Covina v. Perkins*, 525 U.S. 234, 247 (1999); *Payton v. New York*, 445 U.S. 573, 608 (1980); *Berger v. New York*, 388 U.S. 41, 49 (1967); *United States v. Lefkowitz*, 285 U.S. 452, 466 (1932).

31. *See Entick*, 95 Eng. Rep. at 807.

32. *See id.* at 811.

33. *See id.* at 809.

34. *See id.* at 813-14.

35. *See id.* at 818-19.

and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.”³⁶ 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.³⁷ Accordingly, anyone who entered the property of another without permission was liable for trespass, even if no damages occurred.³⁸

These and other foundational events 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.³⁹ 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.⁴⁰ 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.⁴¹ They favored liberty.⁴²

B. Supreme Court Characterization of Protected Individual Interests

By referring to protected personhood interests, the Court has variously stated that the Fourth Amendment protects liberty, reasonable expectations of privacy, individual freedom, personal dignity, bodily integrity, the “inviolability of the person,” the “sanctity of the person,” and the right of free movement.⁴³

36. (1765) 95 Eng. Rep. 807 (K.B.), 19 Howell’s State Trials 1029, 1066 (K.B. 1765).

37. *Id.*

38. *See id.*

39. *See, e.g.*, Wilkes v. Wood, (1763) 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”); (1763) 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 . . .”). *See generally* Clancy, *supra* note 24.

40. *See* Clancy, *supra* note 24.

41. *See id.*

42. *See id.*

43. *See, e.g.*, Maryland v. Wilson, 519 U.S. 408, 412-14 (1997) (discussing driver’s and passenger’s liberty interests when a police officer orders them out of a lawfully stopped car); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 672 (1995) (O’Connor, J., dissenting) (personal dignity); Soldal v. Cook Cnty., 506 U.S. 56, 64 n.8 (1992) (liberty); Skinner v. Ry. Labor Execs’ Ass’n, 489 U.S. 602, 613 (1989) (detention of individual for drug or alcohol testing is meaningful interference with individual’s freedom of movement); Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (seizure implicates person’s freedom to leave); Hayes v. Florida, 470 U.S. 811, 815-16 (1985) (freedom of movement); Winston v. Lee, 470 U.S. 753, 760 (1985) (personal dignity); Smith v. Maryland, 442 U.S. 735, 740 (1979) (privacy); Bell v. Wolfish, 441 U.S. 520, 576-77 (1979) (Marshall, J., dissenting) (personal dignity); United States v. Martinez-Fuerte, 428 U.S. 543, 557-58 (1976) (traffic stop intrudes on motorist’s right to uninterrupted free passage); United States v. Ortiz, 422 U.S. 891, 895 (1975) (liberty); Sibron v. New York, 392 U.S. 40, 65-66 (1968) (sanctity); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (privacy); Schmerber v. California, 384 U.S. 757, 767 (1966) (personal dignity and bodily integrity); Wong Sun v. United States, 371 U.S. 471, 484 (1963) (inviolability); Ker v. California, 374 U.S. 23, 32 (1963) (individual freedom); *see also* Cruzan v. Director,

Regardless of the formulation, each references an individual right, labeled more simply by the Amendment itself as the right to be “secure.”⁴⁴ 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.⁴⁵ The *Terry* Court emphasized the words chosen by the Framers, asserting that the “inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”⁴⁶ 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.”⁴⁷

In *Soldal v. Cook County*, Justice White, writing for a unanimous Supreme Court, catalogued the nature of the individual interests protected by the Amendment.⁴⁸ He proclaimed that “our cases unmistakably hold that the Amendment protects property as well as privacy.”⁴⁹ White explained that the Amendment protected two types of expectations in property—searches and seizures.⁵⁰ “A ‘search’ occurs when an expectation of privacy . . . is infringed and [a] ‘seizure’ occurs where there is some meaningful interference with an individual’s possessory interests.”⁵¹ The *Soldal* Court opined that, although the “‘principal’ object” of the Amendment was the protection of privacy, the shift in the emphasis to privacy that occurred in the latter part of the twentieth century had not “snuffed out the previously recognized protection for property under the Fourth Amendment.”⁵² *Soldal* observed that although the Fourth

Mo. Dep’t of Health, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring) (Fourth Amendment echoes same concern as the Due Process Clause—namely, that notions of freedom are “inextricably entwined with our idea of physical freedom and self-determination”).

44. See U.S. CONST. amend. IV.

45. *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

46. *Id.* at 8-9.

47. *Id.* at 9 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

48. See *Soldal v. Cook Cnty.*, 506 U.S. 56, 61-64 (1992).

49. *Id.* at 62.

50. See *id.* at 63.

51. *Id.*; 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.”).

52. *Soldal v. Cook Cnty.*, 506 U.S. at 64. Consistently 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, 31 (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.’” (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))). The home is protected, the *Kyllo* majority asserted, “because the entire area is held safe from prying government eyes.” *Id.* at 37. Hence, the saying goes that “a man’s house [is] his castle.” *Weeks v. United States*, 232 U.S. 383, 390 (1914). In *Silverman v. United States*, 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.

Amendment protected individual privacy against certain kinds of governmental intrusion, its protections went further and often had nothing to do with privacy.⁵³ The *Soldal* Court concluded that what is protected and “[w]hat matters is the intrusion on the people’s security from governmental interference.”⁵⁴

In sum, the *Soldal* Court identified several distinct individual interests protected by the Fourth Amendment: property; privacy, which is its principal object; and liberty.⁵⁵ All of these interests fall within the broader inquiry of whether there has been an intrusion into a person’s “security from governmental interference.”⁵⁶ 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.⁵⁷ 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.⁵⁸ 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

Silverman v. United States, 365 U.S. 505, 511-12 n.4 (1961) (quoting Judge Jerome Frank in *United States v. On Lee*, 193 F.2d 306, 315-16 (1951) (Frank, C.J., dissenting)). 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 is 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. Mun. Ct.*, 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 Court described physical entry into the home as the “chief evil against which the wording of the Fourth Amendment is directed.” *United States v. U.S. Dist. Ct.*, 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).

53. See *Soldal v. Cook Cnty.*, 506 U.S. 56, 64 (1992).

54. *Id.* at 69.

55. See *id.* at 64.

56. See *id.* at 69.

57. *Id.* at 62. I have argued elsewhere:

This 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: protections against 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 the exercise of the right to exclude, but they are not synonymous with that right or with aspects of that right.

Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?* 33 WAKE FOREST L. REV. 307, 356 (1998) [hereinafter Clancy, *Property, Privacy, or Security*] (emphasis added).

58. See generally, Clancy, *Property, Privacy, or Security*, *supra* note 57, at 356-57.

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. . . . [I]t 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.⁵⁹

II. THE COLLECTIVE SECURITY MODEL

Despite the historical basics and impressive depth of precedent for the view that the Fourth Amendment protects individual rights, Supreme Court opinions have increasingly utilized language supporting a collective security model.⁶⁰ 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.⁶¹

A. Fourth Amendment Applicability

The Fourth Amendment regulates only two types of governmental activity: seizures and searches.⁶² 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 certain actions and they need not be justified as reasonable.

1. Seizure Analysis

The Amendment declares that a person has a right to be secure from an unreasonable seizure.⁶³ 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.⁶⁴ The

59. *Minnesota v. Carter*, 525 U.S. 83, 92 (1998) (Scalia, J., concurring).

60. *See generally Soldal v. Cook Cnty.*, 506 U.S. 56, 62-64 (1992) (describing the protection against search and seizure under a fairly broad definition of property).

61. *See supra* note 57 and accompanying text.

62. *See Soldal*, 506 U.S. at 63.

63. U.S. CONST. amend. IV.

64. *See Clancy, Property, Privacy, or Security, supra* note 57, at 355-65.

applicability point has changed over time.⁶⁵ Initially, only an arrest was considered a seizure.⁶⁶ 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.⁶⁷ In *Terry*, Officer McFadden was walking his beat when he observed three men whom he believed were planning to rob a store.⁶⁸ He approached them, identified himself as an officer, and asked their names.⁶⁹ 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.⁷⁰ 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.”⁷¹

This definition, which is used repeatedly in subsequent cases, involves two elements: accosting and restraint of freedom.⁷² 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.”⁷³ Thus, the Court recognized two ways in which an officer can seize a person: by physical force or by show of authority.⁷⁴ Adding precision to those two concepts has proven difficult and controversial.⁷⁵ After *Terry*, the Court eventually settled on the “reasonable 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 whether a reasonable person would feel free to leave.⁷⁶ That test was widely viewed as implicating the Fourth Amendment early in the encounter—focusing exclusively on the

65. See generally *Dunaway v. New York*, 442 U.S. 200, 208-11 (1972) (describing the narrow reach of the term seizure prior to *Terry*).

66. See *id.* at 208; Wayne R. LaFare, “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, 141-66 (2003) (discussing an arrest under case law from various time periods).

67. See *Terry v. Ohio*, 392 U.S. 1, 28-31 (1968).

68. See *id.* at 5-6.

69. *Id.* at 6-7.

70. *Id.* at 7.

71. *Id.* at 16.

72. See *id.*

73. *Id.* at 19 n.16.

74. *Id.*

75. See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 5.1.3-1.4. (2008) (tracing development of reasonable person test) [hereinafter CLANCY, *FOURTH AMENDMENT*].

76. See *id.* at § 5.1.4.1.

coercive nature of the police officer's words or conduct.⁷⁷ A citizen's reaction to that coercive activity was immaterial.⁷⁸

In 1991, in *California v. Hodari D.*, the Supreme Court rejected that view and redefined the concept of a seizure.⁷⁹ That case, which remains the Court's view, established 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.⁸⁰ Seizures from physical contact require two elements: touching and an intent to seize—with that intent measured objectively.⁸¹ Show of authority seizures also require two elements: a show of authority and submission.⁸² “The submission must be in response to a show of authority that a reasonable person would interpret as a demonstration of the officer's intent to seize.”⁸³

By moving the point at which a seizure occurs to later in an encounter, the Supreme Court advanced the goals of collective security by delaying when the police must justify their activity.⁸⁴ Indeed, the Court candidly acknowledged that purpose in *Hodari D.*: “Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged.”⁸⁵ Justifying its position, the *Hodari D.* majority stated:

Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those

77. *See id.* at § 5.1.4.1.1.

78. *See Michigan v. Chestnut*, 486 U.S. 567, 572 (1988) (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”).

79. *California v. Hodari D.*, 499 U.S. 621, 625-26 (1991).

80. *Id.* at 626; *see Scott v. Harris*, 550 U.S. 372, 381 (2007) (finding that ramming bumper of police car into fleeing suspect's vehicle is a seizure); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998) (reasoning that no seizure occurred after pursuit of passenger on motorcycle when passenger accidentally run over by the police car after motorcycle crashed because the passenger's freedom of movement was not stopped by means intentionally applied).

81. CLANCY, FOURTH AMENDMENT, *supra* note 75, at § 5.1.3 (collecting cases).

82. *Id.* at § 5.1.4. (collecting cases).

83. *Id.* The *Hodari D.* majority premised the applicability of the Fourth Amendment upon fortuitous responses by different individuals to official attempts to seize. *Hodari D.*, 499 U.S. at 628-29. For example, if a person submits to a show of authority, the Fourth Amendment becomes applicable; if the subject flees, the Amendment is inapplicable. *See id.* 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. *Cf. California v. Hodari D.*, 499 U.S. 621, 645 (1991) (Stevens, J., dissenting) (“[T]he character of the citizen's response should not govern the constitutionality of the officer's conduct.”); *Brower v. Inyo Cnty.*, 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.”).

84. *See Hodari D.*, 499 U.S. at 627.

85. *Id.*

of them that are *not* obeyed. Since policemen do not command “Stop!” expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.⁸⁶

This is to say that the main interest in *Hodari D.* is the protection of order in society; individual interests are subordinate and will be sacrificed to achieve order.⁸⁷ As a 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.”⁸⁸

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.⁸⁹ In contrast, a large number of state

86. *Id.*

87. *See id.*

88. *Id.* at 646 (Stevens, J., dissenting).

89. *See, e.g.,* United States v. Wright, 512 F.3d 466, 467 (8th Cir. 2008) (discussing fake drug checkpoint set up on interstate and the 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, 832-35 (Kan. Ct. App. 2007) (discussing what happened 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; thus, the court held that 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) (reasoning that grounds for stop can develop after an 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.* moved the point of a seizure from the show of authority to the completed seizure, and discussing 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 make illegal seizure). In *United States v. Swindle*, 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. *United States v. Swindle*, 407 F.3d 562, 568 (2d Cir. 2005). 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.” *Id.* at 570; *cf.* *Bella v. Chamberlain*, 24 F.3d 1251, 1255-56 (10th Cir. 1994) (assessing the reasonableness of police conduct without considering action of police prior to seizure); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (“Consequently, we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment.”). *But cf.* *United States v. Wadley*, 83 F.3d 108, 109-11 (5th Cir. 1996) (Weiner, J., dissenting from denial of *en banc* hearing) (asserting that provoked flight, caused by massive police street raid, should not be used to justify seizure).

courts reject *Hodari D.* on independent state grounds.⁹⁰ That decision is also widely criticized by commentators and even by lower courts bound by it.⁹¹ 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.⁹² Such a goal was recognized by the Court in *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.⁹³

90. See *Joseph v. State*, 145 P.3d 595, 605 (Alaska Ct. App. 2006); *State v. Oquendo*, 613 A.2d 1300, 1310 (Conn. 1992); *Jones v. State*, 745 A.2d 856, 866 (Del. 1999); *State v. Quino*, 840 P.2d 358, 362 (Haw. 1992); *Commonwealth v. Stoute*, 665 N.E.2d 93, 94-98 (Mass. 1996); *Welfare of E.D.J.*, 502 N.W.2d 779, 781-83 (Minn. 1993); *State v. Clayton*, 45 P.3d 30, 34 (Mont. 2002); *State v. Beauchesne*, 868 A.2d 972 (N.H. 2005); *State v. Tucker*, 642 A.2d 401, 405 (N.J. 1994); *People v. Bora*, 634 N.E.2d 168, 169-70 (N.Y. 1994); *State v. Puffenbarger*, 998 P.2d 788, 793 (Or. Ct. App. 2000); *Commonwealth v. Matos*, 672 A.2d 769, 776 (Pa. 1996); *State v. Randolph*, 74 S.W.3d 330, 337 (Tenn. 2002); *State v. Young*, 957 P.2d 681, 686-87 (Wash. 1998); see also *State v. Tucker*, 626 So. 2d 707, 712 (La. 1993) (rejecting *Hodari D.* as the sole standard to determine when a seizure occurs and adding, for the purpose of the Louisiana Constitution, the additional protection against "imminent actual stops").

91. See, e.g., *United States v. Swindle*, 407 F.3d 562, 566-70 (2d Cir. 2005); Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 462 (2004) (illustrating that 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) (explaining how adoption of the "'no restraint, no seizure' rule would fasten the final nail in the coffin for the right of locomotion").

92. See CLANCY, *FOURTH AMENDMENT*, *supra* note 75, at § 5.1.6.

93. *Terry v. Ohio*, 392 U.S. 1, 15 (1968); see also *Brendlin v. California*, 551 U.S. 249, 263 (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"); *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." (citation omitted)); *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) (reasoning that the question of when a seizure takes place turns on whether the officer's conduct "is objectively coercive or physically threatening"); *United States v.*

Two cases involving drug interdiction activities on buses also reflect the trend toward collective security.⁹⁴ In the *Hodari D.* situation, the person did not submit to the show of authority;⁹⁵ in the bus cases, the person accosted complied with the police inquiries.⁹⁶ 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.⁹⁷ 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.⁹⁸

In the first case, *Florida v. Bostick*, two officers wearing badges, insignia, and one holding a recognizable pouch containing a pistol, boarded an interstate bus during a stopover.⁹⁹ The officers picked out Bostick and asked to inspect his ticket and identification, which were returned to him after examination.¹⁰⁰ The officers explained that they were narcotics agents looking for illegal drugs and asked for consent to search Bostick's luggage.¹⁰¹ The police specifically advised Bostick that he had the right to refuse consent, and at no time did they threaten him with a gun.¹⁰² The *Bostick* majority declined to determine whether a seizure had occurred and remanded to the Florida Supreme Court.¹⁰³ 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, and requesting consent to search.¹⁰⁴ These police actions are permissible “as long as the police do not convey a message that compliance with their requests is required.”¹⁰⁵

Bostick, in isolation, merely sets out the view that not all police accostings are seizures.¹⁰⁶ It is the second bus case, *United States v. Drayton*, that makes explicit the implications of *Bostick*. In *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.¹⁰⁷ While en route to Detroit,

Ortiz, 422 U.S. 891, 895 (1975) (stating that reasonableness requirement of seizures under Fourth Amendment “may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation”); Marjorie E. Murphy, *Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification*, 1986 ARIZ. ST. L.J. 207, 211-15 (1986) (arguing that 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) (finding that purpose of exclusionary rule is to protect against “overreaching governmental conduct”).

94. See *United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991).

95. See *California v. Hodari D.*, 499 U.S. 621, 623 (1991).

96. E.g., *Drayton*, 536 U.S. at 199.

97. See *Drayton*, 536 U.S. at 200; *Bostick*, 501 U.S. at 433-34.

98. See *Drayton*, 536 U.S. at 203-04; *Bostick*, 501 U.S. at 437-38.

99. *Bostick*, 501 U.S. at 431.

100. *Id.*

101. *Id.* at 431-32.

102. *Id.* at 432.

103. *Id.* at 437.

104. *Id.* at 435-36.

105. *Id.* at 436.

106. See *id.*

107. *United States v. Drayton*, 536 U.S. 194, 200 (2002).

Michigan, a Greyhound bus made a stop in Tallahassee, Florida.¹⁰⁸ Three police officers dressed in plain clothes, with their weapons concealed, but displaying badges, boarded the bus.¹⁰⁹ One officer stationed himself at the front of the bus and a second stationed himself at the rear.¹¹⁰ A third officer worked his way toward the front, speaking with passengers along the way.¹¹¹ Drayton was traveling with Brown; they were both dressed in baggy pants and heavy jackets.¹¹² The officer displayed his badge to the men and informed them that the police were conducting drug and illegal weapon interdiction activities.¹¹³ He asked if they had a bag on the bus, and both men pointed to a green bag in the overhead luggage rack.¹¹⁴ Brown gave consent to search, and nothing was found in the bag.¹¹⁵ The officer then asked consent to search Brown, who agreed.¹¹⁶ 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.¹¹⁷ Similarly, Drayton consented to a search, and packages were found in his thigh areas.¹¹⁸ Drayton was then arrested.¹¹⁹ 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.¹²⁰

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 occurred.¹²¹ Similarly, the mere fact that officers carry firearms "is a fact well known to the public" and "a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."¹²² Nor did the location of the officer at the front of the bus persuade the majority that a seizure had occurred: the officer did

108. *Id.* at 197.

109. *Id.* at 197-98.

110. *Id.* at 198.

111. *Id.*

112. *Id.* at 199.

113. *Id.* at 198.

114. *Id.* at 198-99.

115. *Id.* at 199.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 204.

121. *Id.*

122. *Id.* at 205.

nothing to intimidate the passengers and said nothing to indicate that passengers could not exit the bus.¹²³ Finally, the mere fact that Brown was arrested did not change the analysis as to Drayton.¹²⁴

Taken together, *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.¹²⁵ By moving the point at which the Amendment becomes applicable to later in the encounter, collective security is enhanced.¹²⁶ *Hodari D.* accomplishes this by requiring submission, that is, compliance with police orders, to minimize risks to the public.¹²⁷ *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.¹²⁸ 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.¹²⁹ Individuals, in the Court's words, should be encouraged to comply with police orders to minimize the risks to the public.¹³⁰

2. Search Analysis

The word “search” is a term of art in Fourth Amendment jurisprudence and is not used in its ordinary sense.¹³¹ The Court has manipulated that concept to remove a variety of investigative techniques from the coverage of the Amendment.¹³² Types of government activity that are not considered a search include: sniffs of objects by trained dogs, chemical field testing, and the use of many technological enhancements to the senses, such as airplanes to put the police in position to observe the activity, binoculars, flashlights, and tracking devices that are in lieu of or supplemental to visual surveillance, so long as the tracking occurs outside of the home.¹³³ By removing the device or technique

123. *Id.*

124. *Id.* at 205-06.

125. *See id.*; *California v. Hodari D.*, 499 U.S. 621 (1991); *Florida v. Bostick*, 501 U.S. 429 (1991).

126. *See Drayton*, 536 U.S. at 194; *Hodari D.*, 499 U.S. at 621; *Bostick*, 501 U.S. at 429.

127. *See Hodari D.*, 499 U.S. at 627.

128. *See Drayton*, 536 U.S. at 204-05.

129. *See id.*

130. *See Hodari D.*, 499 U.S. at 627.

131. *See generally* CLANCY, *FOURTH AMENDMENT*, *supra* note 75, at Ch. 7; Thomas K. Clancy, *What Constitutes a Search within the Meaning of the Fourth Amendment*, 70 ALB. L. REV. 1 (2006) [hereinafter Clancy, *Meaning*].

132. *See, e.g.*, Clancy, *Meaning*, *supra* note 131, at 29.

133. *See Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (narcotics detection dog); *Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (narcotics detection dog); *United States v. Dunn*, 480 U.S. 294, 305 (1987) (illuminating a barn); *United States v. Jacobsen*, 466 U.S. 109, 122-26 (1984) (chemical field testing); *United States v. Karo*, 468 U.S. 705, 714-15, 719 (1984) (holding that mere transfer of a container with a tracking device inside is not a search nor is 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 inserted into a

from the definition of a search, the Court enhanced the ability of the government to gather information about the individual without implicating the Amendment.¹³⁴ Unlike the case law defining a seizure, the cases removing investigative techniques from the concept of a search rarely do so explicitly in the name of collective security.¹³⁵ Nonetheless, the government's capacity to gather information without implicating the Amendment—and hence without justification—often stands in opposition to individual interests.¹³⁶

Collectivism has also entered into the concept of a search in another, perhaps more significant, way.¹³⁷ The Court has sometimes concluded that the use of a device is or is not a search based on its availability to the public.¹³⁸ That is, the use of technology to intrude ceases to be a search once that

container that does not reveal information about the inside of a home is a mere substitute or supplement to visual surveillance that would reveal the same facts); *Texas v. Brown*, 460 U.S. 730, 740-41 (1983) (plurality opinion) (illuminating interior of car); *On Lee v. United States*, 343 U.S. 747, 754 (1952) (“[U]se 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) (“[U]se of a searchlight 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. LAFAYE, 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. See *id.*; see also *Lee*, 274 U.S. at 563 (holding that use of searchlight not prohibited by Fourth Amendment).

134. See LAFAYE, *supra* note 133, at § 2.1(a).

135. See *On Lee*, 343 U.S. at 754; *Lee*, 274 U.S. at 563.

136. See CLANCY, FOURTH AMENDMENT, *supra* note 75, at § 12.

137. See *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986).

138. 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.*, 476 U.S. at 238 (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 Fourth 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. See Slobogin, *supra*, at 1411.

technology becomes familiar or commonly used by the public.¹³⁹ Indeed, at times, the Court has evidenced a “barely constrained enthusiasm for the emergence of new technologies and their inevitable use by law enforcers.”¹⁴⁰ Thus, in *Dow Chemical*, in rejecting the claim that aerial photography 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.”¹⁴¹ *Dow Chemical* indicates that, as technology became more readily available to members of the public, its use by law enforcement will cease to be a search.¹⁴² 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.”¹⁴³ As another example, in finding that the use of a tracking device to monitor movements from place to place is 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.”¹⁴⁴ Commenting on that view, Tracey Maclin 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.”¹⁴⁵

Most recently, the Court in *Kyllo*, although acknowledging its prior cases, explicitly reserved deciding whether use by the general public of a device would serve as an exception to its definition of a search.¹⁴⁶ Given the pace of technological change, exotic new technologies rapidly become used routinely by the public.¹⁴⁷ Any attempt to draw lines on permissible use based on use by

139. See *Dow Chem. Co.*, 476 U.S. at 238.

140. Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5, 38 (2002).

141. See *Dow Chem. Co.*, 476 U.S. at 231.

142. *Id.*

143. Cloud, *supra* note 140, at 39.

144. *Knotts v. United States*, 460 U.S. 276, 282 (1983); see also *United States v. Karo*, 468 U.S. 705, 713-14 (1984) (stating it is permissible to use beeper in container of goods sold to person to monitor its location so long as container is outside home).

145. Tracey Maclin, Katz, *Kyllo*, and *Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L.J. 51, 85 (2002) [hereinafter *Virtual Fourth Amendment*].

146. *Kyllo v. United States*, 533 U.S. 27, 39-40 n.6 (2001).

147. See *id.* at 47 (Stevens, J., dissenting) (discussing the general public use limitation as “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. L. & TECH. 383, 400 (1997) (rejecting the general public use standard because “so many highly intrusive devices . . . are readily ‘available’ to the public”).

the public makes Fourth Amendment applicability, at best, a word game,¹⁴⁸ and at worst, a prescription for gutting the promise of individual security that the Fourth Amendment makes.¹⁴⁹ At bottom, however, is a trend line eliminating numerous governmental techniques and technological devices from the coverage of the Fourth Amendment.¹⁵⁰ The rationale for each decision has varied, but the result permits the government to learn more without justification.¹⁵¹

B. Fourth Amendment Satisfaction

1. Choosing Reasonableness Models

The Amendment has vast applicability to law enforcement and other governmental activity.¹⁵² No other part of the Constitution is so often implicated or litigated.¹⁵³ To support such a claim, it suffices to cite the vast number of individuals subjected to airport and other entranceway screenings each year.¹⁵⁴

The Fourth Amendment has vast application to such activities as health and safety inspections, traditional law enforcement, 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

148. 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 MISS. 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").

149. 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").

150. See *Katz v. United States*, 389 U.S. 347, 522 (Black, J., dissenting).

151. See Tomkovicz, *supra* note 138, at 325-26.

152. See CLANCY, *FOURTH AMENDMENT*, *supra* note 75, at xix, 4-5.

153. See *id.* at xix.

154. "More than 700 million passengers board commercial aircraft in the United States each year." *United States v. Aukai*, 497 F.3d 955, 956 (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. See *id.*

information in a host of ways, ranging from hand-held detectors to systems that scan stadiums full of people.¹⁵⁵

Technology now exists that can support mass DNA testing, biometric scanning, and physical implants that can continuously monitor persons and objects.¹⁵⁶

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.¹⁵⁷ 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.¹⁵⁸ Another model, the balancing test, explicitly supports the collective security model.¹⁵⁹ Since its adoption in 1967, the balancing test is increasingly used by the Court.¹⁶⁰

The warrant preference model maintains that the specifications of the Warrant Clause define the concept of reasonableness; that is, a search or seizure is not “unreasonable,” and therefore not forbidden, when it is carried out with a warrant issued pursuant to the criteria set out in the Warrant Clause.¹⁶¹ This is to say that a search or seizure is unreasonable in the absence of a warrant made

155. CLANCY, FOURTH AMENDMENT, *supra* note 75, at 466-67. There were more than 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. New technology has long been the source of litigation and Supreme Court opinions have struggled to reconcile Fourth Amendment protections with it. See *Kyllo v. United States*, 533 U.S. 27 (2001) (thermal imaging device directed at a house); *Skinner v. Ry. Labor Execs' Union*, 489 U.S. 602 (1989) (drug testing of employees); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (surveillance from airplanes); *United States v. Jacobsen*, 466 U.S. 109 (1984) (chemical testing of substance); *United States v. Karo*, 468 U.S. 705 (1984) (electronic monitoring devices); *Smith v. Maryland*, 442 U.S. 735 (1979) (pen registers); *Katz v. United States*, 389 U.S. 347 (1967) (listening device); *Olmstead v. United States*, 277 U.S. 438 (1928) (listening device); *Carroll v. United States*, 267 U.S. 132 (1925) (motor vehicles). None of the Court's attempts produced a consensus that the Court found the correct analytical structure or the proper balance of governmental and individual interests. Moreover, a strong influence is 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).

156. See Symposium, *supra* note 155, at 3-4.

157. See generally CLANCY, FOURTH AMENDMENT, *supra* note 75, at Ch. 11; Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977 [hereinafter Clancy, *Reasonableness*].

158. See Clancy, *Reasonableness*, *supra* note 157, at 992-95.

159. See *supra* notes 91-127 and accompanying text.

160. See Clancy, *Reasonableness*, *supra* note 157, at 1005-07, 1011-13.

161. *Amos v. United States*, 255 U.S. 313 (1921). The Court's initial cases were notable for their premise that a warrant complying with the specifications of the Warrant Clause is required for all searches. See *id.*; *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.”); *Ex parte Jackson*, 96 U.S. 727 (1878) (asserting that warrant based on probable cause necessary to search letter in mail). It remains one of the Court's current models. E.g., *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

under oath or affirmation, which is based on probable cause and sets forth a particular description of the place to be searched and the persons or objects to be seized.¹⁶²

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.¹⁶³ Individualized suspicion serves to preclude arbitrary and general searches and seizures and mandates specific justification for each intrusion.¹⁶⁴ It places the focus of the inquiry concerning the permissibility of a search or seizure upon 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.¹⁶⁵ This is to say that the justification for the government's actions is not based upon circumstances within the control of the government.¹⁶⁶ The Supreme Court recognizes two forms of individualized suspicion: (1) articulable suspicion supports a stop or a frisk, and (2) probable cause justifies an arrest or a search.¹⁶⁷ Thus, for example, a person cannot be arrested absent probable cause to believe that the person is engaged in criminal activity.¹⁶⁸ To illustrate, in *Davis v. Mississippi*, 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.¹⁶⁹ 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."¹⁷⁰

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

162. See *supra* note 161 and accompanying text.

163. See generally Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 MEMPHIS L. REV. 483 (1995).

164. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974) (stating that 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).

165. See *id.* at 410-15.

166. See *id.* at 411-13.

167. 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).

168. See *Davis v. Mississippi*, 394 U.S. 721, 726-28 (1969).

169. See *id.*

170. *Id.* at 726.

probable cause to arrest or to search, and in the language of the Warrant Clause, which requires probable cause to search or seize.¹⁷¹ Indeed, the Court sometimes recognized that the probable cause requirement has “central importance” to the protection the individual is afforded by the Fourth Amendment:

“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.¹⁷²

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.¹⁷³ The models are, however, distinct.¹⁷⁴ Nonetheless, the two models clearly reinforce the view that the Amendment protects individual security.¹⁷⁵ This is because the police cannot search or seize unless they have the required individualized suspicion and, when needed, a warrant.¹⁷⁶

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

171. See generally CLANCY, FOURTH AMENDMENT, *supra* note 75, at § 2.2.1.

172. *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 *Pennsylvania v. Mims*, 434 U.S. 106, 121 (1977) (Stevens, J., dissenting) (discussing that seizures of persons usually require individualized suspicion); *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.”). 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 *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (The 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.”); *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.”).

173. See, e.g., *Torres v. Puerto Rico*, 442 U.S. 465 (1979) (striking down legislation that permitted search of luggage of any person arriving in Puerto Rico from United States as violations of Warrant Clause and individualized suspicion requirements).

174. See, e.g., *Ybarra*, 444 U.S. at 107 (Rehnquist, J., dissenting) (arguing that individualized suspicion to search persons on premises not necessary when police search pursuant to valid warrant); *Camara v. Mun. Ct.*, 387 U.S. 523 (1967) (holding that housing inspection warrants issued without individualized suspicion permissible).

175. See *Camara*, 387 U.S. at 528.

176. See *id.* at 528-29.

case, 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 exist at a particular building.¹⁷⁷ 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.”¹⁷⁸ The Court premised its decision on collective security concerns: the potential for mass harm caused by fires and epidemics.¹⁷⁹

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.¹⁸⁰ 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.”¹⁸¹ Importantly, the balancing of factors is “done on a categorical basis—not in an *ad hoc*, case-by-case fashion.”¹⁸² It is also decidedly non-historical in the nature of its analysis: the factors used in the balancing test are contemporary interests.¹⁸³ If the Court

177. *See id.* at 523-29.

178. *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) (utilizing balancing to dispense with warrant requirement); *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1976) (holding that 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 Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *Opperman*, 428 U.S. at 370 n.5 (holding that 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).

179. *See Camara*, 387 U.S. at 535.

180. *See 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”); *see, e.g.*, *United States v. Knights*, 534 U.S. 112 (2001) (balancing governmental and individual interests). 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. *See Montoya De Hernandez*, 473 U.S. at 558. 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* CLANCY, *FOURTH AMENDMENT*, *supra* note 75, at § 11.3.4.4.3.

181. *Wyoming v. Houghton*, 526 U.S. 295, 306 (1999).

182. *Michigan v. Summers*, 452 U.S. 692, 705 n.19 (1981); *Dunaway v. New York*, 442 U.S. 200, 219-20 (1979) (White, J., concurring); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 321 (2001) (conceding that—if the Court balanced the competing interests based on the facts of the case—petitioner might win, but asserting 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”); *Houghton*, 526 U.S. at 305 (“[T]he balancing of interests must be conducted with an eye to the generality of cases.”).

183. *See, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (applying the balancing test to searches of school children and stating: “Maintaining order in the classroom has never been easy, but in recent years,

balances, the result is not hard to predict. On the government's side of the scale, the 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.¹⁸⁴ In contrast, on the other side of the scale are solely the interests of the one person seized or searched in the case before the Court, with the Court often viewing those individual interests as diminished.¹⁸⁵

The balancing test is sometimes used to justify broad categories of governmental intrusions, including searches of prison inmates and detainees and their cells, orders designed to protect police officers during stops, detentions of persons during the execution of search warrants, entries onto property to combat and investigate fires, and inventory searches of possessions validly in police custody.¹⁸⁶ One broad category is administrative inspections.¹⁸⁷ Permissible targets of such inspections include private

school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.”).

184. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). For example, in *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. See *id.*; 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. See *id.* at 451. Each accident results in a few deaths and injuries and some property damage. See *id.* In contrast, the total number of murders in society is not aggregated to justify suspending the principle of individualized suspicion to investigate murders. 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. Cf. 1 LAFAYETTE, *supra* note 133, at § 10.1(b). Furthermore:

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.

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 *State v. Tourtellott*, 618 P.2d 423, 441-42 (Or. 1980) (Linde, J., dissenting); James B. Jacobs & Nadine Strossen, *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).

185. See CLANCY, FOURTH AMENDMENT, *supra* note 75, at § 3.3.3. For searches, the Supreme Court focuses on the person's privacy expectations. See *id.* To support its inquiry, the Court 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. See *id.*

186. See, e.g., *Maryland v. Wilson*, 519 U.S. 408 (1997) (police protection); *Michigan v. Clifford*, 464 U.S. 287 (1984) (fighting fires); *Hudson v. Palmer*, 468 U.S. 517 (1984) (prisoners' cells); *Michigan v. Summers*, 452 U.S. 692 (1981) (detention during warrant execution); *Bell v. Wolfish*, 441 U.S. 520 (1979) (prisoners' cells); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory searches).

187. 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 sometimes continued to enforce the warrant preference rule in inspection

residences, commercial buildings, and ground and surface mines; the Occupational Safety and Health Administration can also inspect places of employment for safety and regulatory violations.¹⁸⁸ Other permissible searches have included searches of highly regulated businesses, work-related searches of employee areas of governmental workplaces, searches of public school students, searches of parolees, searches of probationers' homes, and drug testing of various categories of people.¹⁸⁹

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.¹⁹⁰ 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.”¹⁹¹ Through the decades, the Court has created a list of permissible roadblocks including driver's license checkpoints, sobriety checkpoints, immigration checkpoints away from the international border, and informational checkpoints.¹⁹² In dicta, the Court and individual justices have

cases, albeit one lacking individualized probable cause to search. The Court 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).

188. *See, e.g.*, *Donovan v. Dewey*, 452 U.S. 594 (1981) (mines); *Marshall*, 436 U.S. at 320-21 (inspection of employment premises); *Camara v. Mun. Ct.*, 387 U.S. 523 (1967) (private residences); *See v. City of Seattle*, 387 U.S. 541, 542 (1967) (commercial buildings).

189. *See, e.g.*, *Samson v. California*, 547 U.S. 843 (2006) (parolees); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (public school students and student drug testing); *United States v. Knights*, 534 U.S. 112 (2001) (upholding warrantless search, based on reasonable suspicion of criminal activity, of probationer's home); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (public school students and student drug testing); *Skinner v. Ry. Labor Excs' Ass'n*, 489 U.S. 602, 619 (1989) (railway employees involved in certain train accidents or who violate certain safety rules); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (United States Customs Service employees seeking transfer or promotions to positions engaged directly in drug interdiction or who were required to carry firearms); *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.”); *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality opinion) (governmental workplaces); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (public school students). *But see* *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001) (rejecting drug-testing of pregnant patients as “indistinguishable from the general interest in crime control” and not a special need); *Chandler v. Miller*, 520 U.S. 305 (1997) (no special need justified drug testing of political candidates).

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

191. *Delaware v. Prouse*, 440 U.S. 648, 657 (1979).

192. *See* *Illinois v. Lidster*, 540 U.S. 419 (2004) (informational checkpoints); *Mich. Dep't. of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints); *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 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

observed that other types of checkpoints are permissible: roadside truck weigh-stations and inspection checkpoints;¹⁹³ agricultural inspection checkpoints;¹⁹⁴ and roadblocks to apprehend fleeing fugitives or to thwart “an imminent terrorist attack.”¹⁹⁵ Although the rationale for such seizures has evolved over time, all of them are essentially designed to further the goals of collective security: removing drunks from the road, checking for unsafe drivers or vehicles, and apprehending bad guys.¹⁹⁶

The balancing test is also used to regulate the most common of all searches—entranceway searches.¹⁹⁷ 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.¹⁹⁸ After the

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.

Martinez-Fuerte, 428 U.S. at 560-61 n.14; *see also* Clark v. State, 153 P.3d 77, 80-81 (Okla. Civ. App. 2007) (upholding validity of license and vehicle registration checkpoints); Galberth v. United States, 590 A.2d 990, 1000-01 (D.C. 1991) (recognizing that lower courts have generally upheld roadblocks to check licenses and registration).

193. Sitz, 496 U.S. at 454 (truck checkpoints); Prouse, 440 U.S. at 663 n.26 (asserting that largely random examinations by game wardens permissible).

194. United States v. Brignoni-Ponce, 422 U.S. 873, 888 (1975) (agricultural checkpoints) (Rehnquist, J., concurring).

195. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (fleeing fugitives); *cf.* Brower v. Cnty. 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).

196. *Cf.* United States v. O'Mara, 963 F.2d 1288, 1291-92 (9th Cir. 1992) (finding that 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 *City of Indianapolis v. Edmond*, 531 U.S. 32, 44-46 (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. *See id.* 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.” *Id.* 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.” *Id.*; *see also* Illinois v. Lidster, 540 U.S. 419, 424-25 (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 to the government.

197. *See* People v. Dukes, 580 N.Y.S.2d 850, 852 (N.Y. Crim. Ct. 1992).

198. 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:

terrorist attacks on September 11, 2001, entranceway screening has become more ubiquitous and intrusive.¹⁹⁹ These screening procedures have expanded to a variety of other circumstances, including stadiums,²⁰⁰ subways, ferries, and other public gathering places.²⁰¹

Although the Supreme Court has never had a case involving entranceway searches or seizures, it has approvingly commented on the practice.²⁰² For example, in *National Treasury Employees Union v. Von Raab*, which upheld the suspicionless urinalysis testing of certain customs service employees, the

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. Sitz, 496 U.S. at 473-74 (Stevens, J., dissenting); see, e.g., *United States v. Aukai*, 497 F.3d 955, 961-62 (9th Cir. 2007) (commercial airplanes); *United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006) (commercial airplanes); *United States v. Bulacan*, 156 F.3d 963, 973 (9th Cir. 1998) (public buildings); *Minich v. Cnty. of Jefferson*, 919 A.2d 356, 361 (Pa. Commw. Ct. 2007) (public courthouses); *Commonwealth v. Roland R.*, 860 N.E.2d 659, 662 (Mass. 2007) (public courthouses); *Dukes*, 580 N.Y.S.2d 852-53 (schools); *Davis v. United States*, 532 A.2d 656 (D.C. 1987) (public buildings); *People v. Turnbeaugh*, 451 N.E.2d 1016, 1020 (Ill. Ct. App. 1983) (prisons); see also M. Reed Martz, Comment, *A Constitutional Analysis of Random Vehicle Searches at Airports*, 73 MISS. L.J. 263 (2003) (concluding that random vehicle searches in the context of airports violate the reasonableness requirement as articulated by the Court).

199. See *Aukai*, 497 F.3d at 961-66.

200. Compare *Johnston v. Tampa Bay Sports Auth.*, 490 F.3d 820, 825-26 (11th Cir. 2007) (per curiam) (permitting all attendees of National Football League games to be frisked as condition of entrance based on consent), with *Sheehan v. San Francisco 49ers*, 62 Cal. Rptr. 3d 803, 808-09 (Cal. Ct. App. 2007) (holding that holders had no protected interest under privacy provision of California constitution against patdown search by private security guards), *pet. review granted*, 169 P.3d 883 (Cal. 2007). But see *State v. Seglen*, 700 N.W.2d 702, 708 (N.D. 2005) (striking down patdown searches by police officers of persons entering arena for college hockey game); *Jacobsen v. City of Seattle*, 658 P.2d 653, 654-57 (Wash. 1983) (holding warrantless searches of patrons attending rock concerts illegal). See also Benjamin T. Clark, *Why the Airport and Courthouse Exceptions to the Search Warrant Requirement Should be Extended to Sporting Events*, 40 VAL. U. L. REV. 707 (2006) (collecting pre- and post-9/11 cases and arguing that the risk of terrorist attack justifies entranceway searches at sporting events).

201. See, e.g., *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006) (ferries); *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006) (stadiums); *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004) (striking down city policy requiring protestors to submit to metal detector search); see also Charles J. Keeley, Note, *Subway Searches: Which Exception to the Warrant and Probable Cause Requirements Applies to Suspicionless Searches of Mass Transit Passengers to Prevent Terrorism?*, 74 FORDHAM L. REV. 3231 (2006); Bryan S. Conley, Note, *Terror and the T: A Constitutional Analysis of the MBTA's Stop-and-Search Policy*, 39 SUFF. U. L. REV. 1001 (2006); cf. *Terry v. Ohio*, 392 U.S. 1, 31-32 (1968) (Harlan, J., concurring) (holding that 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").

202. 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) ("[W]here 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.").

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.²⁰³ 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.”²⁰⁴ The *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.²⁰⁵ It posited: “It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.”²⁰⁶ 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.²⁰⁷ Nor does the validity of the screening program depend upon whether significant numbers of offenders are discovered.²⁰⁸ The Court opined that, when deterrence is the goal, a low incidence of the conduct sought to be prevented is a “hallmark of success.”²⁰⁹

Consistent with *Von Raab*, courts analyzing entranceway searches usually apply the balancing test to determine their permissibility.²¹⁰ Although the results of the cases in the lower courts were more mixed prior to the events of September 11, 2001, the case law now appears quite deferential to both the

203. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 674-75 (1989).

204. *Id.* at 675 n.3.

205. *Id.*

206. *Id.*

207. *See id.*

208. *See id.*

209. *Id.*

210. *See, e.g.,* United States v. Aukai, 497 F.3d 955, 962-63 (9th Cir. 2007) (en banc) (airport); United States v. Hartwell, 436 F.3d 174, 178-81 (3d Cir. 2006) (airport). In the context of entranceway screening, courts often find 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, 988-89 (Fla. Ct. App. 1981). The existence of a reduced privacy interest, however, 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 holding: “[T]he 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.”).

need to intrude and the permissible scope of the intrusion.²¹¹ 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 the subways constitutes a special need that is distinct from ordinary post hoc criminal investigation.²¹²

Although the scale of the potential harm is generally less, public safety concerns also underlie entranceway screening procedures at courthouses and other locations.²¹³ In that regard, one court 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

211. See generally LAFAVE, *supra* note 133, at §§ 10.6–10.7 (discussing case law that addressed airport searches and inspections). But see, e.g., *Aukai*, 497 F.3d at 960 n.6 (discussing the need to intrude and the scope of such intrusion). The court stated the following:

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).

Id. at 960-61 n.6.

212. *MacWade v. Kelly*, 460 F.3d 260, 270-71 (2d Cir. 2006). 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) ("[T]he 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.").

213. See *Gibson v. State*, 921 S.W.2d 747, 765 (Tex. Ct. App. 1996).

the press, or an individual merely in the building to transact business before we sanction the use of reasonable security measures.²¹⁴

The need to intrude focuses on the substantiality and immediacy of the government's interest.²¹⁵ The Second Circuit, in the context of a subway case, accurately 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.²¹⁶

Some courts believe that the individual must be given the right to leave²¹⁷ while other courts maintain that individuals do not retain the right to leave once they reach the checkpoint.²¹⁸ 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.²¹⁹ Hence, in *United States v. Aukai*, overruling Ninth Circuit precedent that premised the validity of airport screening searches upon

214. *Id.* Other courts also took notice of threats of violent acts directed at courthouses. *See, e.g.,* *McMorris v. Alioto*, 567 F.2d 897, 898-901 (9th Cir. 1978); *Minich v. Cnty. of Jefferson*, 919 A.2d 356, 359-60 (Pa. Commw. Ct. 2007); *State v. Plante*, 594 A.2d 165, 167 (N.H. 1991).

215. *See MacWade*, 460 F.3d at 271-72.

216. *See id.* at 272.

217. *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) (holding that 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"); *People v. Hyde*, 524 P.2d 830, 834-37 (Cal. 1974) (finding that 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) (explaining that air passenger must be given option to depart rather than submit to search).

218. *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, 47-48 (4th Cir. 1978) (airport); *Commonwealth v. Roland R.*, 860 N.E.2d 659, 661-62 (Mass. 2007) (courthouse); *People v. Heimel*, 812 P.2d 1177, 1181-82 (Colo. 1991) (airport); *State v. Plante*, 594 A.2d 165, 167 (N.H. 1991) (courthouse); *People v. Turnbeaugh*, 451 N.E.2d 1016, 1019 (Ill. Ct. App. 1983) (canine checkpoint at prison); *United States v. Mathews*, 431 F. Supp. 70, 71-73 (W.D. Okla. 1976) (military base).

219. *See Albarado*, 495 F.2d at 807-08 (considering the privacy interest inherent in the protections of the Fourth Amendment to allow an individual to refuse to submit to a search); *see also DeAngelo*, 584 F.2d at 47-48 (holding that once an individual has entered a security screening process, he or she has submitted to the full scope of the screening process).

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."²²⁰ 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.²²¹

The Supreme Court, when balancing, has sometimes 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."²²²

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.²²³ It found that the objective intrusion, measured by the duration of the seizure and the intensity of the investigation, was minimal.²²⁴ The Court viewed the subjective intrusion on motorists as appreciably less at checkpoints, as compared to roving patrols, because the

220. *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) (en banc).

221. *Id.* at 960-62.

222. Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1183 (1988).

223. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 452-55 (1990).

224. *Id.*

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.²²⁵ This idea that, the more systematic and open the intrusion, the more acceptable it is, has become a common theme in case law.²²⁶ 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."²²⁷

Many of the cases dispensing with warrants or individualized suspicion found the prevention or detection of activities or conditions that could affect a large number of persons to be important. The cases have addressed the following concerns: mass harm from epidemics or from fires sweeping across urban areas; nuclear power plants; intoxicated train operators; and explosive devices in commercial airplanes.²²⁸ 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 is a more important governmental goal.²²⁹ 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.²³⁰ 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."²³¹

Rather than total deference to executive authority, reasonableness analysis can be reframed to accommodate competing individual and collective

225. *Id.*; *cf.* *Illinois v. Lidster*, 540 U.S. 419, 427-28 (2004) (discussing briefly the objective and subjective impact on individuals of roadblock); *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (distinguishing various methods of searching 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").

226. *See, e.g.*, *Lidster*, 540 U.S. at 428 (viewing roadblock as acceptable in part because "police stopped all vehicles systematically"); *Delaware v. Prouse*, 440 U.S. 648, 663-64 (1979) (Blackmun, J., concurring) (The Court found that roadblocks where every driver or every tenth driver was stopped to check licenses and registrations were subjectively less intrusive than random stops.); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-59 (1976) (The Court found that 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.").

227. *Prouse*, 440 U.S. at 664-65 (Rehnquist, J., dissenting). *But cf.* *Strossen*, *supra* note 222, at 1197 ("[S]ome individuals might well be more upset by massive intrusions than by individualized ones.").

228. *See Skinner v. Ry. Labor Execs' Ass'n*, 489 U.S. 602, 608 (1989) (nuclear power plants and intoxicated train operators); *Camara v. Mun. Ct.*, 387 U.S. 523 (1967) (fires); *United States v. Aukai*, 497 F.3d 955, 958-63 (9th Cir. 2007) (dangerous devices on commercial airplanes).

229. *See Aukai*, 497 F.3d at 955.

230. *See MacWade v. Kelly*, 460 F.3d 260, 272 (2d Cir. 2006).

231. *Id.* at 274.

interests.²³² 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.²³³ In such circumstances, unless the government intervenes before individualized suspicion has arisen, the government interest will be frustrated.²³⁴ One example is fire inspections of buildings in urban areas.²³⁵ Absent an inspection, the dangerous conditions existing in such structures cannot be identified before the dangers have been realized.²³⁶ 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.²³⁷ 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 unreasonable.²³⁸ This suspicionless search contrasts with a reliable report

232. See *id.* at 268-69.

233. See *Camara v. Mun. Ct.*, 387 U.S. 523, 537 (1967) (viewing as reasonable area-wide health and safety code enforcement inspections designed to combat the dangers that fires and epidemics pose to large urban areas because other canvassing techniques would not achieve acceptable results); see also 1 LAFAYETTE, *supra* note 133, § 10.2(d) (The *Camara* Court's analysis included the determination "that 'acceptable results' in code enforcement could not be accomplished if it were necessary to establish in advance the probability that a particular violation was present in a particular building.").

234. See *Camara*, 387 U.S. at 533.

235. See *id.*

236. See *id.* at 537.

237. See *id.*

238. See *id.* Such concerns stand in stark contrast to searches for beer bottles at athletic events or food in a courthouse. *E.g.*, *State v. Seglen*, 700 N.W.2d 702 (N.D. 2005) (striking down patdown searches to prevent, *inter alia*, alcoholic beverages and bottles from being carried into arena during college hockey game); see also Benjamin T. Clark, *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 other explosive devices").

In *Commonwealth v. Roland R.*, 860 N.E.2d 659, 664 (Mass. 2007), the court observed that the courthouse prohibited weapons, drugs, and food. Although deciding the validity of the search based on a policy designed primarily to prevent weapons from entering the courthouse, the court asserted:

Even were it established (it is not) that the security officers at the court house had been instructed, pursuant to court house policy, to look for contraband such as drugs and food, with the purpose of preventing its importation into the court house, such a policy would not automatically render the search unreasonable. The proposition that there exists a strong public interest in keeping the public buildings that house our court rooms free from illegal drug trafficking or ingestion requires no discussion. Items of food, presumably, also may be banned from a court house, for reasons of cleanliness and sanitation as well as to minimize distracting behavior during court proceedings. (The possession of food, of course, is not a criminal offense, so no recrimination can occur when it is found in a bag or closed container.) That security personnel may discover and seize illegal drugs and food items while engaging in a search primarily aimed at preventing the importation of weapons and other dangerous substances would not, by itself, contaminate with illegality an otherwise permissible administrative search. To argue otherwise is a false tautology.

Id. 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) (holding that it is 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) (holding that the secondary motive of searching persons who

that a man possesses heroin at a specified location, and when the police arrive at that location, a crowd is present.²³⁹ In such circumstances, the potential for mass harm is absent and the police would not be justified in searching each member of the crowd.²⁴⁰ In this latter situation, where an individual crime is committed, traditional police investigatory techniques are sufficient to achieve an acceptable level of enforcement.²⁴¹

Thus, one aspect of reasonableness is a realistic appraisal of the nature of the government's interest.²⁴² 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.²⁴³ As I will discuss elsewhere, there is need for objective criteria to measure reasonableness.²⁴⁴ Absent objective criteria, progressively intrusive actions have been and will be allowed.²⁴⁵ This 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.”²⁴⁶

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

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,” 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. *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000).

239. See *Edmond*, 531 U.S. at 40-41.

240. See *id.* at 42-43.

241. See, e.g., *United States v. Di Re*, 332 U.S. 581, 595 (1948) (observing that “the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a 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”); see also *Arizona v. Hicks*, 480 U.S. 321, 327-28 (1987) (rejecting argument that murder scenes should be exempt from warrant requirement). *But see Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 451-52 (1990) (aggregating individual cases causing death, injuries, and property damage from drunk driving to justify DWI checkpoints).

242. See *Sitz*, 496 U.S. at 457.

243. See *id.*

244. See *infra* note 253 and accompanying text.

245. 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: Undoing the Mischief of Camara and Terry*, 72 *MINN. L. REV.* 383, 384-85 (1988) (recognizing the need to define reasonableness “to reflect the amendment’s underlying values and purposes” and that a reasonableness concept without definitional restraints “can allow the range of acceptable government intrusions to expand and overwhelm the privacy interests at stake”); see also *Skinner v. Ry. Labor Execs’ Ass’n*, 489 U.S. 602, 637 (1989) (Marshall, J., dissenting) (Absent the warrant and probable cause standards, the concept of reasonableness is “virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give that supple term.”).

246. *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting).

constitutional principles.²⁴⁷ On the other hand, dispositive reliance on the common law as defining reasonableness offers surface appeal as the needed objective criteria.²⁴⁸ The Fourth Amendment, however, was a reaction to then contemporary *abuses* and was not merely a codification of the common law.²⁴⁹ 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.²⁵⁰

These historical changes do not mean that we can learn nothing from history. Historical analysis teaches that the Amendment was designed to protect individuals from unreasonable governmental intrusion.²⁵¹ 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.²⁵² Any measure of reasonableness

247. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 38, 49 (2000).

248. See *Devenpeck v. Alford*, 543 U.S. 146, 152-53 (2004) (At common law, a search is reasonable if “the circumstances, viewed objectively, justify that action.”).

249. See *Wyoming v. Houghton*, 526 U.S. 295, 312 (1999) (Looking at the common law is just one way to analyze the Fourth Amendment.).

250. See, e.g., *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); *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.”); *Payton v. New York*, 445 U.S. 573, 600 (1980) (stating that “custom and contemporary norms necessarily play . . . a large role” in assessing reasonableness); cf. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830-44 (1994) (discussing the rise of modern police forces and the increase in racial divisions as factors influencing the concept of reasonableness); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 290-94 (1984) (discussing the legal changes affecting law enforcement).

251. See, e.g., *United States v. Ross*, 456 U.S. 798, 811 (1982) (“What we do know is that the Framers were men who focused on that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.”); *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.”); *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 [F]ourth [A]mendment in particular are profoundly anti-government documents.”).

252. See JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1-2 (1980) (“[T]he 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 found 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.”); 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 purpose” given its use of the term “unreasonable.”); James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1137 (1992) (“[T]he document was meant to be more than a mere catalogue of forbidden actions” and the Framers intended that the “underlying values” be honored.).

must be premised on those values; otherwise, reasonableness analysis is subject to deprecation by interpretation favoring governmental needs.²⁵³ Moreover, the Framers were concerned with the need for objective criteria—that was, after all, the whole purpose of the Warrant Clause.²⁵⁴ 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.²⁵⁵ 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 security concerns.

2. 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.”²⁵⁶ 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

253. See Cloud, *supra* note 245, at 286 (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 [F]ourth [A]mendment 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 [F]ourth [A]mendment.”); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 981-82 (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).

254. See *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

255. See Clancy, *Reasonableness*, *supra* note 157, at 1036-43; see also CLANCY, FOURTH AMENDMENT, *supra* note 75, at § 11.5. At the summit of that hierarchy is individualized suspicion, which is fundamental to principled analysis of reasonableness questions. *Id.* Next in order is the warrant preference rule. *Id.* That rule should not have general applicability; it should be limited instead to intrusions into buildings, a person's body, and speech-related concerns. *Id.* 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. *Id.* In those extraordinary circumstances, neutral and objective criteria must be utilized to regulate the permissibility of governmental intrusions. *Id.* 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. *Id.* Under such circumstances, a case-by-case analysis may have to be used. *Id.* But to do so, the Court must first demonstrate the inapplicability of the two preferred models and the neutral criteria model. See *id.*

256. David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 37 (1994).

determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.²⁵⁷ 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.’²⁵⁸

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 confront.”²⁵⁹

Many of the bright-line rules are created for recurring situations to clarify for the police what they can or cannot do.²⁶⁰ Hence, for example, for searches incident to arrest, the police can always search the person and the area of immediate control around that person.²⁶¹ During a traffic stop, the officer can always order the driver and all passengers out of the vehicle.²⁶² 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

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

258. *Id.* (quoting LaFave, *supra* note 257, at 141).

259. *Id.* (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

260. *See Harris*, *supra* note 256, at 37.

261. *See e.g.*, *Thornton v. United States*, 541 U.S. 615, 623-24 (2004); *Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979) (“The fact of a lawful arrest, standing alone, authorizes a search [of the person arrested].” (citing *United States v. Robinson*, 414 U.S. 260, 265 (1973))); *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.); *United States v. Robinson*, 414 U.S. 218, 225 (1973) (adopting a “categorical” search incident to arrest rule: it applied to all arrests, regardless of the underlying factual circumstances).

Until recently, if the person arrested was in a vehicle, the police could always search the entire passenger compartment incident to the arrest. *See Thornton v. United States*, 541 U.S. 615, 623-24 (2004) (holding that *Belton* applied to situations where the suspect gets out of a car before the officer has made contact with the suspect); *New York v. Belton*, 453 U.S. 454, 462-63 (1981) (holding that, as an incident to arrest of an automobile occupant, the police may search the entire passenger compartment of the car, including any open or closed containers, but not the trunk). The Court in *Arizona v. Gant* reconsidered that view and held that, for an automobile search to be justified incident to arrest, the arrestee must be within reaching distance of the passenger compartment at the time of the search or that it is reasonable to believe that the vehicle contains evidence of the offense for which the person was arrested. *Arizona v. Gant*, 129 S. Ct. 1710, 1723-24 (2009).

262. *See e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

warrant.²⁶³ Similarly, the police may always detain occupants of a home while the residence is searched pursuant to a search warrant.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶ 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.²⁶⁷

In *Atwater v. City of Lago Vista*, 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.²⁶⁸ *Atwater* has proven controversial.²⁶⁹ The Court applied what it considered to be the

263. See, e.g., *Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (per curiam) (“[U]nder 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.”); see also William J. Stuntz, *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. See, 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).

264. *Michigan v. Summers*, 452 U.S. 692, 703-04 (1981); see also *Muehler v. Mena*, 544 U.S. 93, 98 (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’”). *But cf.* *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979) (prohibiting suspicionless patdown of patrons who happened to be present during the execution of a search warrant for narcotics at a tavern).

265. See *Ybarra*, 444 U.S. at 93-94.

266. See, e.g., *Summers*, 452 U.S. at 702-03.

267. 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] *per se* rules . . . does not mean that we have always done so”). See generally Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court’s Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1429-36 (2003) (analyzing the Court’s choices between bright-line rules and case-by-case analysis and observing that “no coherent theory undergirds” it).

268. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

269. See *id.* at 360-62 (O’Connor, J., dissenting). 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.* 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. See e.g., *State v. Bricker*, 134 P.3d 800, 805 (N.M. Ct. App. 2006) (collecting cases); *People v. Moorman*, 859 N.E.2d 1105, 1116-17 (Ill. Ct. App. 2006). The *Atwater* majority opinion has also been criticized by many commentators. See, 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 unblinded 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

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.”²⁷⁰

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 committed a crime; only when probable cause is present can a prolonged seizure occur.²⁷¹ 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.²⁷² The majority spoke at one point of the “categorical treatment of Fourth Amendment claims” as opposed to “individualized review” as the general mode of analysis.²⁷³ 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.²⁷⁴

“Iron Triangle” of cases that permit the police to “have general search power over anyone traveling by automobile”).

270. *Atwater*, 532 U.S. at 345-46.

271. *See id.*

272. *See id.* at 321.

273. *Id.*

274. *Id.* at 346-47.

Yet, by their nature, probable cause determinations are highly fact specific; indeed, the probable cause standard defies precise definition.²⁷⁵ This is to say that the *Atwater* majority's comments equally serve as a vehicle to attack the probable cause standard and to promote the "categorical" measurement of reasonableness.²⁷⁶ In other cases, the Court has viewed bright lines as the exception and not the rule.²⁷⁷ 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."²⁷⁸ 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.²⁷⁹ 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.²⁸⁰ If the Amendment protects group rights, then the measure of 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

275. See generally Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279 (2004) (discussing the diversity of probable cause determinations).

276. See *Atwater*, 532 U.S. at 347.

277. E.g., *Ohio v. Robinette*, 519 U.S. 33 (1996).

278. *Terry v. Ohio*, 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 very 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.").

279. See Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 709-10 (1998). Professor Donald Dripps has observed: "The Fourth Amendment cases are difficult because both determinacy and legitimacy are important values." Dripps, *supra* note 269, at 407. 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. See *id.* at 409-17. More generally, he maintains, there is an inherent tension between the two values: "[L]egitimate Fourth Amendment doctrine is prone to indeterminacy, and determinate doctrine is prone to illegitimacy." *Id.* at 342-43.

280. Cf. *Wilson v. Arkansas*, 514 U.S. 927, 927 (1995) (requiring case-by-case adjudication of exceptions to the knock-and-announce requirement); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding generally a person subject to warrantless arrest must be presented to a magistrate for a probable cause determination within forty-eight hours); *Payton v. New York*, 445 U.S. 573, 602 (1980) (rejecting 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").

as to further collective security or is it designed to protect individuals from overreaching governmental intrusions?²⁸¹ Those seeking to preserve traditional notions that the Fourth Amendment protects individual rights appear to be fighting a rear-guard action against a vastly superior enemy that is bound to overwhelm.²⁸² That enemy has many battalions.²⁸³ They include: a large and still growing population; societal trends that diminish the worth of the 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.²⁸⁴

Technology itself may prove the most significant force toward collectivism due to the ubiquity and vast utility of digital devices.²⁸⁵

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 newborn 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.²⁸⁶ Think of the benefits! For example, because there is an implanted chip that can transfer data remotely, there is the promise of dramatic reductions in crime: less ID theft, less undocumented illegal immigrants, fewer false

281. 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) (discussing the purpose of the Fourth Amendment and what exactly the Amendment is meant to protect). 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 *id.* A few voices have advocated that approach. See, e.g., *Alderman v. United States*, 394 U.S. 165, 205-09 (1969) (Fortas, J., concurring and dissenting); *Goldstein v. United States*, 316 U.S. 114, 127-28 (1942) (Murphy, C.J., dissenting). This view, however, 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, 150 (1978) (holding that passengers in vehicle have no standing to object to its search); *California Bankers Ass’n v. Schultz*, 416 U.S. 21, 54 (1974) (holding that bank depositor has no reasonable expectation of privacy in bank records); *Combs v. United States*, 408 U.S. 224, 228 (1972) (remanding 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).

282. See Doernberg, *supra* note 281, at 285.

283. See generally Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 8-16 (2008) (discussing the various methods by which Americans are put under surveillance and the dangers of this system).

284. See *id.*

285. See *id.*

286. See Timothy Casey, *Electronic Surveillance and the Right to Be Secure*, 41 U.C. DAVIS L. REV. 977, 1008 (2008).

arrests, fewer stolen cars, fewer lost and stolen children, fewer lost dogs, fewer old people who wander off and get lost, and fewer false convictions.²⁸⁷

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.²⁸⁸ We are not far from that point of view.²⁸⁹ 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.²⁹⁰ Got a problem with potential terrorists using the Internet to communicate with each other: create a vast electronic surveillance network to monitor communications.²⁹¹ Got a problem with drugs: develop a detection system that can be used anywhere to detect drugs but just don’t call the “techniques” searches.²⁹² What reasonable expectation of privacy does a person have in concealing illegal drugs on his person or in his effects?²⁹³

There are many other situations where suspicionless mass detection would be helpful: suspicionless sweeps of public housing for illegal occupants, weapons, and drugs; searches of students’ clothing, purses, and lockers to locate another student’s missing property; roadblocks to check for auto larceny; or blocking off an entire area and detaining everyone long enough to check for outstanding warrants.²⁹⁴ In cities, large and small, there are neighborhoods that

287. See *id.* at 1005-10.

288. See Doernberg, *supra* note 281, at 282-89.

289. See *id.* at 282-98.

290. See, e.g., Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 236 n.106 (2002) (listing cases holding that video surveillance by public cameras is not a search because there is no reasonable expectation of privacy); cf. Richard H. McAdams, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297, 317-35 (1985) (arguing that, under a collective rights approach, beeper monitoring of movement in public spaces violates the Fourth Amendment).

291. Tracey Maclin, *Virtual Fourth Amendment*, *supra* note 145, at 124-27 (detailing the FBI’s Carnivor program).

292. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (holding that a dog sniff is not a search).

293. See *United States v. Jacobsen*, 466 U.S. 109, 123-26 (1984) (indicating that there is no reasonable expectation of privacy in contraband).

294. See *People v. Cascarano*, 587 N.Y.S.2d 529, 531-32 (N.Y. Crim. Ct. 1992) (holding that suspicionless checkpoint permissible to determine if vehicles passing through it are stolen); Steven Yarosh, Comment, *Operation Clean Sweep: Is the Chicago Housing Authority “Sweeping” Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103, 1122 (1992) (arguing that suspicionless searches of public housing apartments for drugs, weapons, and illegal occupants may be permissible under the “special needs” test); cf. *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). *But see Parrish v. Civil Serv. Comm’n of Alameda Cnty.*, 425 P.2d 223, 225-32 (Cal. 1967) (ruling that random, unannounced, early morning searches of the homes of welfare recipients to detect presence of unauthorized males violates Fourth Amendment). *But cf. Cmty. for Creative Non-Violence v. Unknown Agents of U.S. Marshals Serv.*, 797 F. Supp. 7, 13-14 (D.D.C. 1992) (holding that although marshals validly entered homeless shelter pursuant to arrest warrant for suspect

are characterized by a high incidence of drug trafficking.²⁹⁵ Brief stops of everyone in such zones to learn the person's identification and perform a dog sniff would be a fruitful investigative tool.²⁹⁶ Street prostitution is often characterized by women and men congregating in a known area and soliciting customers.²⁹⁷ A city park might be the object of a wave of vandalism.²⁹⁸ An apartment complex may suffer a rash of automobile thefts.²⁹⁹ A sparsely populated area with vacant summer homes could be targeted for burglaries.³⁰⁰ Why not stop and question everyone in the area?

What do we lose by permitting such intrusions? Is it just some old-fashioned, outmoded notions that each individual is unique, has worth, has a *right* to bar the government from intruding unless the government has a good reason to suspect *that* person? Unless we as a society recommit to that view and closely examine 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

reasonably believed to be there, it was impermissible to detain two hundred other persons in shelter and require them to identify themselves before they could leave or return in the hope of finding other fugitives).

295. See *infra* note 296.

296. Cf. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-43 (2000) (striking down vehicle checkpoints that have the primary purpose of interdicting unlawful drugs); *Wirin v. Horrall*, 193 P.2d 470, 474 (Cal. Ct. App. 1948) (ruling that it was impermissible to blockade high-crime area of city and search all cars leaving area).

297. See *State v. Maxie*, 230 P.3d 69, 71 (Or. Ct. App. 2010) (holding that a police officer who questioned a woman in an area known for prostitutions did not restrain her liberty).

298. See *State v. Hilleshiem*, 291 N.W.2d 314, 318-19 (Iowa 1980) (holding that it is illegal to stop all vehicles entering park after dark to combat wave of vandalism because two patrol officers formulated the plan instead of policy makers).

299. See *People v. Meitz*, 420 N.E.2d 1119, 1123-24 (Ill. App. Ct. 1981) (finding that police staked out apartment complex and properly stopped all vehicles to determine if driver was or knew registered owner).

300. See *People v. John B.B.*, 438 N.E.2d 864, 867 (N.Y. 1982) (upholding stop of defendant's car with intent to stop all vehicles when forty burglaries had occurred in vacant summer homes in sparsely populated lake area); see generally Lawrence D. Kerr & Steven W. Feldman, *Roving Roadblocks and the Fourth Amendment: People v. John B.B.*, 20 No. 1 CRIM. L. BULL. 124 (1984) (concluding that the New York court's upholding of the constitutionality of roving roadblocks was an unwarranted extension of the Court's precedent).

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.³⁰¹ Yet, if the protection is an individual one, the burden should be on the government to justify intrusions upon that right in each case.³⁰² In *Boyd v. United States*, the Court long ago observed: “It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”³⁰³ 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.

301. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). Reasonableness is the “fundamental command” of the Amendment. See *id.* 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).

302. See *Boyd v. United States*, 116 U.S. 616, 635 (1886).

303. *Id.*