REDEFINING REASONABLE SEIZURES

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ABSTRACT

The government's power to seize individuals who are suspected of crimes—by arresting, stopping, or otherwise detaining them—has expanded significantly in the twenty-first century. The Supreme Court's gradual redefinition of what constitutes a reasonable Fourth Amendment seizure has occurred without meaningful evaluation of whether the government needs additional seizure or detention power.

There are key differences between search and seizure doctrine that make the development of a general and unifying explanatory theory of modern Fourth Amendment search and seizure trends difficult, if not impossible. These differences suggest that a focused, independent analysis of Fourth Amendment seizure developments (uncoupled from search- and privacy-focused analyses) is overdue.

This Article documents the expansion of seizure power across the spectrum over the last fifteen years. These cases reveal missed opportunities to provide greater protection to individuals, and they identify spaces where new technologies might justify revisiting settled rules. In addition, these decisions reveal how the Court's reluctance to probe government motivations and to consider less intrusive alternatives undermines its efforts to balance individual rights against government interests.

The Article then outlines the individual rights and collective interests that are implicated in seizure cases. Finally, the Article analyzes the problems presented by the Court's approach to calculating necessity in seizure cases. Proposals for reform are focused on four areas: requiring precise statements of government needs in seizure cases; looking to existing laws, guidelines, and police norms to support (or refute) necessity claims; requiring greater proof of a need to seize in cases involving more minor offenses; and considering alternative approaches, technological changes, and long-term costs in calculating necessity.

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INTRODUCTION

In its landmark 1968 decision in *Terry v. Ohio*,[1] the Supreme Court emphasized the importance of the individual rights that are infringed by unlawful seizures of people: "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."[2] Nearly fifty years later, this idea that the Fourth Amendment right to be free from unreasonable seizures is one that the Court has "carefully guarded" seems woefully out of date.

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1. 392 U.S. 1 (1968).
2. *Id.* at 9 (emphasis added) (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

Protests across the country during the past eighteen months against overly aggressive policing provide ready proof that the Court's potential as a meaningful constraint on the police has not been realized. The 2014 and 2015 protests were sparked by deaths during street encounters, stops, and arrests of unarmed black men at the hands of police officers, including Michael Brown in Ferguson, Missouri; Eric Garner in Staten Island, New York; Tamir Rice in Cleveland, Ohio; Walter Scott in North Charleston, South Carolina; Freddie Gray in Baltimore, Maryland; and Laquan McDonald in Chicago, Illinois.[3]

Brown and Garner were killed within weeks of each other during the summer of 2014.[4] Brown's death caused an immediate "eruption of protests and violence" in Ferguson;[5] those protests were reignited months later when the Ferguson grand jury announced its decision not to indict the officer who shot Brown.[6] When the Staten Island grand jury announced that it, too, was not indicting the officer who put Eric Garner in the chokehold that caused his death, New Yorkers angrily took to the streets.[7] People in cities across the country followed suit.[8] New protests

3. Editorial, *The Lessons of Baltimore, and Ferguson, and Too Many Places*, L.A. TIMES (Apr. 29, 2015, 5:00 AM), http://www.latimes.com/opinion/editorials/la-ed-baltimore-20150429-story.html (describing protests); Mark Berman, *How the Response to Protests over Police Force Changed Between Ferguson and Baltimore*, WASH. POST (May 1, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/05/01/from-ferguson-to-baltimore-how-the-response-to-protests-over-police-force-has-changed-nationwide/ (describing protests); Tony Briscoe, *Laquan McDonald Protestors Call for Special Prosecutor*, CHI. TRIB. (Dec. 6, 2015, 5:24 PM), http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-laquan-mcdonald-push-protest-met-20151206-story.html (describing protests).

4. *See* Nicole Crowder, *The Timeline of Events and Scenes in Ferguson, Mo., Since the Shooting of Michael Brown*, WASH. POST (Aug. 16, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/08/16/the-timeline-of-events-and-scenes-in-ferguson-mo-since-the-shooting-of-michael-brown/ (describing Michael Brown's death on August 9, 2014, and ensuing protests); *Staten Island Man Dies After Police Try to Arrest Him*, N.Y. TIMES (July 17, 2014), http://www.nytimes.com/2014/07/18/nyregion/staten-island-man-dies-after-police-try-to-arrest-him.html (announcing Eric Garner's death).

5. Elijah Anderson, *What Caused the Ferguson Riot Exists in So Many Other Cities, Too*, WASH. POST (Aug. 13, 2014), http://www.washingtonpost.com/posteverything/wp/2014/08/13/what-caused-the-ferguson-riot-exists-in-so-many-other-cities-too/; *see also* Mark Landler, *Obama Offers New Standards on Police Gear in Wake of Ferguson*, N.Y. TIMES (Dec. 1, 2014), http://www.nytimes.com/2014/12/02/us/politics/obama-to-toughen-standards-on-police-use-of-military-gear.html (describing a "wave of anger at law enforcement officials across the country").

6. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html.

7. J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html. In July 2015, four days before the anniversary of Garner's death, New York City announced that it had agreed to settle (for $5.9 million) the wrongful death claim brought by Garner's family. J. David Goodman, *Eric Garner Case Is Settled by New York City for $5.9 Million*, N.Y. TIMES (July 13, 2015), http://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html.

8. Justin Wm. Moyer et al., *Protests in Support of Eric Garner Erupt in New York and Elsewhere*, WASH. POST (Dec. 4, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/12/04/after-grand-jury-doesnt-indict-police-officer-who-choked-eric-garner-protests-erupt-in-new-york-and-elsewhere/ (noting that "[a] wave of protests erupted from Manhattan to

followed the deaths of Tamir Rice, Walter Scott, and Freddie Gray.[9] Most recently, in November 2015, protesters in Chicago took to the streets when officials (after delaying for more than a year) released video footage of the October 2014 police shooting of 17-year-old Laquan McDonald.[10]

These protests—while set in motion by specific incidents—were fueled by a broader set of concerns about the role and legitimacy of law enforcement in heavily policed communities.[11] Underlying these protests is a realization that police are increasingly using their power to stop or arrest individuals—not to investigate crimes, but as a means of regulating communities. Indeed, in New York, these protests flowed naturally from several years of debate and litigation to reform the city's aggressive stop-and-frisk policing program.[12]

In December 2014, with the objective of restoring community trust in the police, President Obama created a Task Force on 21st Century Policing.[13] FBI Director Jim Comey, in a February 2015 speech de-

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Oakland, Calif." including as examples, St. Louis, Philadelphia, Oakland, Washington, D.C., Seattle, Atlanta, and Baltimore, among many more). The anniversaries of the deaths of Garner and Brown led to more protests in the summer of 2015. Benjamin Mueller & Nate Schweber, *Eric Garner is Remembered One Year After His Death*, N.Y. TIMES (July 17, 2015), http://www.nytimes.com/2015/07/18/nyregion/eric-garner-death-anniversary.html; Wesley Lowery et al., *State of Emergency Declared in Ferguson After Police Shoot and Critically Injure Man During Protests*, WASH. POST (Aug. 10, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/08/10/shots-fired-during-protests-in-ferguson-mo-reports-say/.

9. Peter Hermann et al., *After Peaceful Start, Protest of Freddie Gray's Death in Baltimore Turns Violent*, WASH. POST (Apr. 25, 2015), https://www.washingtonpost.com/local/baltimore-readies-for-saturday-protest-of-freddie-grays-death/2015/04/25/8cf990f2-e9f8-11e4-aae1-d642717d8afa_story.html; Alan Blinder & Manny Fernandez, *North Charleston Prepares for Mourning and Protest in Walter Scott Death*, N.Y. TIMES (Apr. 10, 2015), http://www.nytimes.com/2015/04/11/us/north-charleston-prepares-for-weekend-of-mourning-and-protest-in-walter-scott-shooting.html; Mitch Smith, *Cleveland Officer Says He Shot Tamir Rice After Fake Gun Was Pulled*, N.Y. TIMES (Dec. 1, 2015), http://www.nytimes.com/2015/12/02/us/cleveland-officer-says-he-shot-tamir-rice-after-fake-gun-was-pulled.html (noting that the recent release of information surrounding the shooting has "prompted protests across the country and raised questions about how the police use force and interact with African-Americans").

10. Patrick M. O'Connell et al., *Laquan McDonald Shooting Protest Groups Plan Friday March*, CHI. TRIB. (Nov. 26, 2015, 4:54 PM), http://www.chicagotribune.com/news/ct-chicago-cop-shooting-laquan-mcdonald-protest-1127-met-20151126-story.html (last visited Dec. 22, 2015).

11. Anderson, *supra* note 5 (describing stop-and-frisk policies and the militarization of police as creating an atmosphere of "authoritarian oversight and normalized police harassment").

12. *See infra* Section III.A.1.

13. Press Release, Office of the Press Sec'y, The White House, Fact Sheet: Task Force on 21st Century Policing (Dec. 18, 2014) [hereinafter Fact Sheet], http://www.whitehouse.gov/the-press-office/2014/12/18/fact-sheet-task-force-21st-century-policing ("Recent events in Ferguson, Staten Island, Cleveland, and around the country have highlighted the importance of strong, collaborative relationships between local police and the communities they protect."); *see also* OFFICE OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (2015) [hereinafter TASK FORCE] (explaining that President Obama formed the task force to respond to "recent events that have exposed rifts in the relationships between local police and the communities they protect and serve"). The Task Force issued its final report in May 2015 and many of its recommendations are being implemented in jurisdictions around the country. *Id.*; *see also* President Obama, Weekly Address: Continuing Work to Improve Community Policing

scribed by commentators as unprecedented in its candor,[14] echoed the importance of this mission and directly addressed the "disconnect between police agencies and many citizens—predominantly in communities of color."[15]

While this executive branch attention to policing is much needed, the Court's role in authorizing greater police contact with civilians, and its potential as a source of restraint, requires scrutiny.[16] A close examination of seizure cases decided by the Court over the last fifteen years reveals that the government's power to seize individuals suspected of crimes—by arresting, stopping, or otherwise detaining them—has expanded significantly.

The *Terry* Court emphasized that the Fourth Amendment's "reasonableness" standard required "balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[17] Over time, and perhaps particularly in the twenty-first century, that balance has become skewed in the government's favor in seizure cases. Cases about arrests,[18] stops,[19] and search warrant seizures,[20] for example, illustrate that a gradual redefinition of what constitutes a reasonable seizure has occurred without meaningful evaluation of whether the government actually needed additional seizure or detention power.

(Aug. 15, 2015) (transcript available at https://www.whitehouse.gov/the-press-office/2015/08/15/weekly-address-continuing-work-improve-community-policing).

14. Michael S. Schmidt & Matt Apuzzo, *F.B.I. Chief Links Scrutiny of Police with Rise in Violent Crime*, N.Y. TIMES (Oct. 23, 2015), http://www.nytimes.com/2015/10/24/us/politics/fbi-chief-links-scrutiny-of-police-with-rise-in-violent-crime.html?_r=0 (describing it as an "unusually candid speech" and observing that "[m]ore than his predecessors, Mr. Comey has used his office as one of the nation's top law enforcement officials to bring attention to issues that state and local police departments are confronting").

15. James B. Comey, Dir., Fed. Bureau of Investigation, Address at Georgetown University (Feb. 12, 2015) (transcript available at http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race) ("Serious debates are taking place about how law enforcement personnel relate to the communities they serve, about the appropriate use of force, and about real and perceived biases, both within and outside of law enforcement."). More recently, Comey has sparked controversy by expressing concern that "increased attention on the police has made officers less aggressive and emboldened criminals." James B. Comey, Dir., Fed. Bureau of Investigation, Address at University of Chicago Law School (Oct. 23, 2015) (transcript available at https://www.fbi.gov/news/speeches/law-enforcement-and-the-communities-we-serve-bending-the-lines-toward-safety-and-justice) (recognizing that some behavior change is to be welcomed, but emphasizing the importance of "a strong police presence" to detect and deter violent crime); *see also* Schmidt & Apuzzo, *supra* note 14 (noting that Comey's opinions are not shared by top level Justice Department officials and outlining disagreement among law enforcement officials as to "whether there is any credence to the so-called Ferguson effect" (referring to the protests following the events in Ferguson, MO)).

16. See *infra* Part III for a discussion of the appropriate role of the Court in regulating police behavior.

17. Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (alterations in original) (quoting Camara v. Mun. Court of S.F., 387 U.S. 523, 536–37 (1967)).

18. *See, e.g.*, Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011); Virginia v. Moore, 553 U.S. 164 (2008); Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

19. *See, e.g.*, Heien v. North Carolina, 135 S. Ct. 530 (2014); Navarette v. California, 134 S. Ct. 1683 (2014); Illinois v. Wardlow, 528 U.S. 119 (2000).

20. *See, e.g.*, Muehler v. Mena, 544 U.S. 93 (2005).

While other scholars have focused generally on the Court's struggle to weigh government interests in Fourth Amendment cases, these analyses focus principally on cases and developments regarding searches and privacy, as opposed to seizures of people.[21] In recent years, this focus on privacy and searches has also been driven by technological changes in the way information is created, maintained, and retrieved. Corresponding adjustments in societal privacy expectations shift the doctrine governing searches, demanding attention from the Court and from scholars attempting to predict and to reconcile Court decisions.[22] These questions of modern surveillance and information gathering are irresistibly complex and undeniably urgent.

In outlining his "equilibrium-adjustment theory," for example, Orin Kerr ambitiously sought to find a unifying theory to make sense of the "byzantine patchwork" of Fourth Amendment cases.[23] In Kerr's view, the Supreme Court responds to "changing technology or social practice" by "adjust[ing] the level of Fourth Amendment protection to try to restore the prior equilibrium."[24] Kerr claims that his theory "explains what judges do when they apply the Fourth Amendment . . . and explains a great deal of how Fourth Amendment law came to look as it does."[25] Kerr's analysis, however, is primarily focused on searches; he spends little time trying to explain seizure doctrine, and close analysis of the

21. *See* STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 15–21 (2012) (including some discussion of seizures but principally focused on privacy, searches, and surveillance); CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 22, 38–39 (2007) (advocating a more nuanced and precise scale of suspicion to better calibrate and balance Fourth Amendment interests but acknowledging focus on "regulating physical and transaction surveillance"); Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 42 (2013) ("Most Fourth Amendment cases balance the need for effective law enforcement against an individual's . . . [right to] privacy."); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 506–07, 508 n.16, 528 n.123 (2007) (explaining that the article analyzes the four dominant models of defining what a "reasonable expectation of privacy" means in the context of Fourth Amendment searches and clarifying that seizures are beyond the scope of the article); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2040 (2011) ("The [Fourth] Amendment is primarily concerned with protecting individual privacy against arbitrary government intrusion."); *cf.* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104–05 (2008) (advocating focus on security instead of privacy, focusing on wiretapping and enemy combatant detentions).

22. *See, e.g.*, Riley v. California, 134 S. Ct. 2473, 2494–95 (2014) (warrantless search of cell phone incident to arrest held unconstitutional); Maryland v. King, 133 S. Ct. 1958, 1965–66 (2013) (DNA swabbing of arrestees held constitutional); United States v. Jones, 132 S. Ct. 945, 949 (2012) (warrantless GPS tracking held unconstitutional); Kyllo v. United States, 533 U.S. 27, 40 (2001) (warrantless use of thermal heat imager held unconstitutional).

23. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479–80 (2011) [hereinafter Kerr, *Equilibrium*] (describing the "dynamic" of "equilibrium adjustment" as means of reconciling conflicting Fourth Amendment cases); *see also* Orin S. Kerr, Response, *Defending Equilibrium-Adjustment*, 125 HARV. L. REV. F. 84, 90 (2011) [hereinafter Kerr, *Defending*] (explaining that one goal with the equilibrium theory "was to rescue Fourth Amendment law from this anarchic narrative").

24. Kerr, *Equilibrium*, *supra* note 23, at 480.

25. Kerr, *Defending*, *supra* note 23, at 90.

Court's recent seizure cases does not reveal any pattern of equilibrium.[26] The Court's seizure cases over the last fifteen years instead demonstrate a relatively consistent expansion of government seizure authority.[27]

So the protection against unreasonable seizures, although clearly understood by the Court to be a fundamental liberty protection, continues to be a neglected sibling.[28] In this way, little has changed since 1982, when Richard Williamson described the Court as "preoccupied with the task of defining the nature and scope of the individual privacy right secured by the amendment."[29] Scholars have also given the interests in liberty, freedom of movement, and autonomy—which are implicated by unlawful seizures—too little attention.[30]

This emphasis on searches by courts and scholars is only problematic if searches and seizures are different from each other in meaningful ways. They are. Seizures always involve restraining the movement of the person being seized.[31] Whether briefly at a checkpoint or, at the other end of the spectrum, as the function of a formal custodial arrest, seizures implicate fundamental liberty interests in bodily integrity and freedom of movement.[32] The government's corresponding interest in seizure cases always includes, but is not limited to, the need to restrain the movement of the person being seized for some period of time.[33]

Part I of this Article documents how Court decisions in the last fifteen years have expanded the definition of a "reasonable seizure." This has occurred for every category of seizures of people: arrests, stops,

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26. *See* Kerr, *Equilibrium*, *supra* note 23, at 481, 521–22 (describing Fourth Amendment events that can be explained by equilibrium-adjustment, asserting that the law of arrests has not changed, and asserting how the Court's automobile cases (including traffic stop decisions) reflect acclimation to automobile as new technology).

27. *See infra* Part I. Although Kerr views technology as a force driving his perceived equilibrium, it operates differently in the seizure context. As outlined below, changes in technology have a greater potential to weaken government claims of need in the seizure context. *See infra* Section III.D.

28. Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771, 771 (1982) (describing "the law governing seizures of people" as the "stepchild of fourth amendment jurisprudence").

29. *Id.*

30. Williamson's article is a notable exception. *See id.* Tracey Maclin's work includes others. *See, e.g.*, Tracey Maclin, *"Black and Blue Encounters" - Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 249–50 (1991) [hereinafter Maclin, *Encounters*]; Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1328–30 (1990) [hereinafter Maclin, *Locomotion*] (describing the Court's shift away from recognition of fundamental Fourth Amendment "rights of personal security and locomotion"). There are, of course, other thorough analyses of specific types of seizures that are discussed throughout this Article and particularly in Part I. The literature, however, has too few analyses of seizures collectively.

31. *See* Terry v. Ohio, 392 U.S. 1, 16 (1968) ("[T]he Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

32. *See infra* Part II.

33. *See infra* Section III.A.

search warrant seizures, checkpoints, encounters, and police use-of-force cases.

Part II focuses on the first part of the Fourth Amendment balance: the individual interests that are implicated by a seizure. This part details both the nature of the interests that are implicated and the costs (both to individuals and to the community) of unlawful seizures. This part also highlights why an analysis of seizures (uncoupled from search doctrine) is necessary.

The counterweight in the Fourth Amendment reasonableness balance—the government's need to seize—is the focus of Part III. There, I analyze four categories of problems with the Court's evaluation and calculation of necessity in seizure cases: (i) the Court's failure to press the government to articulate the need for a particular seizure; (ii) the Court's unwillingness to use existing laws, guidelines, or norms to evaluate claims of necessity; (iii) the Court's silence about the impact of overcriminalization on the government's seizure power; and (iv) the Court's reluctance to consider alternative approaches, developing technologies, and long-term impacts in calculating necessity.

In making this critique—that the Court must play a more assertive role in evaluating the strength of the government's asserted interests or needs—I join a chorus of other scholars who have made that point about the Fourth Amendment generally.[34] My contribution to this discussion is to focus on and isolate the seizure-specific aspects of this problem and to begin to identify proposals that would ensure a more robust necessity inquiry in cases involving seizures of people.

I. SEIZURES OF PEOPLE: AN OVERVIEW OF AN EXPANDING POWER

The law governing when and how the government can "seize" individuals who are suspected of committing crimes is rooted in the Constitution. Stripped of those passages that focus on searches, the Fourth Amendment provides "the people" with "[t]he right . . . to be secure in

34. *See*, *e.g.*, SCHULHOFER, *supra* note 21, at 44 (asserting that—at least in cases "outside the home"—justices have "abandoned" their Fourth Amendment obligations and, instead, prioritize "police convenience"); SLOBOGIN, *supra* note 21, at 21, 42–43 (advocating more rigorous Fourth Amendment balancing according to the "proportionality principle"); Baradaran, *supra* note 21, at 7 (proposing a new Fourth Amendment model of "informed balancing" to address the court's problematic reliance on "blind balancing"); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness*,*"* 98 COLUM. L. REV. 1642, 1686–87 (1998) (describing the Court's approach to reasonableness balancing as "relaxed and deferential"); Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1137 (2012) (advocating for "more stringent" reasonableness balancing in Fourth Amendment cases); 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, 1176 (1988) ("[The Court] regularly undervalues the fourth amendment interests jeopardized by every search and seizure, while overvaluing the countervailing law enforcement interests.").

their persons . . . against unreasonable . . . seizures."[35] The word "seizure" in the Amendment includes two very different concepts: the seizure of people, which is the focus of this Article, and the seizure of "houses, papers, and effects," which is not.[36] A broad spectrum of police conduct—ranging from full-blown custodial arrests to street stops to brief detentions at checkpoints—will meet the Court's definition of a seizure of a person.[37]

Although scholars like Orin Kerr describe the Supreme Court's Fourth Amendment jurisprudence as maintaining a steady balance of power between the state and the individual,[38] the Court's seizure cases—and, in particular, its twenty-first century seizure cases—do not fit that model. Decisions issued by the Supreme Court since 2000 have broadly expanded the government's power to seize people. The Court decided twenty-eight cases that relate to the seizure of a person during that fifteen-year window.[39] In twenty-two of those twenty-eight cases, the Court ruled in favor of the government, solidifying existing seizure authority and expanding the government's ability to arrest, stop, or otherwise detain individuals.[40] The government's overall success is probably understated by these numbers. As explained in more detail below, two of the decisions against the government, *Florida v. J.L.*[41] and *City of Indianap-*

35. U.S. CONST. amend. IV ("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.").

36. *See* Payton v. New York, 445 U.S. 573, 584–85 (1980) ("The simple language of the Amendment applies equally to seizures of persons and to seizures of property."). This Article will often refer to "seizures of people" simply as "seizures." References to seizures of property or evidence will be explicitly identified.

37. *See infra* Sections I.A–I.F.

38. *See, e.g.*, Kerr, *Equilibrium*, *supra* note 23, at 480 (explaining equilibrium-adjustment theory).

39. This volume of seizure cases is, by itself, remarkable. In the ten years preceding (1990–99), the Court heard only eight cases involving seizures of people. All of these cases (the cases decided since 2000 and those decided from 1990–99) were located by running Westlaw searches for the terms "Fourth Amendment" and "seizure." (Other more targeted searches were also run.) The cases that were a "hit" for those search terms were reviewed by the author and by two research assistants before being counted in these numbers.

40. The twenty-two seizure cases decided in the government's favor include: Heien v. North Carolina, 135 S. Ct. 530 (2014); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014); Navarette v. California, 134 S. Ct. 1683 (2014); Ashcroft v. al-Kidd, 563 U.S. 731 (2011); Arizona v. Johnson, 555 U.S. 323 (2009); Virginia v. Moore, 553 U.S. 164 (2008); L.A. Cty. v. Rettele, 550 U.S. 609 (2007); Scott v. Harris, 550 U.S. 372 (2007); Muehler v. Mena, 544 U.S. 93 (2005); Illinois v. Caballes, 543 U.S. 405 (2005); Brosseau v. Haugen, 543 U.S. 194 (2004); Devenpeck v. Alford, 543 U.S. 146 (2004); Hiibel v. Sixth Judicial Dist. Court of Nevada, 542 U.S. 177 (2004); Illinois v. Lidster, 540 U.S. 419 (2004); Maryland v. Pringle, 540 U.S. 366 (2003); United States v. Drayton, 536 U.S. 194 (2002); Saucier v. Katz, 533 U.S. 194 (2001), *receded from by* Pearson v. Callahan, 555 U.S. 223 (2009); Arkansas v. Sullivan, 532 U.S. 769 (2001); Atwater v. City of Lago Vista, 532 U.S. 318 (2001); Illinois v. McArthur, 531 U.S. 326 (2001); and Illinois v. Wardlow, 528 U.S. 119 (2000). Six seizure cases were decided against the government during this period. They include: Rodriguez v. United States, 135 S. Ct. 1609 (2015); Bailey v. United States, 133 S. Ct. 1031 (2013); Brendlin v. California, 551 U.S. 249 (2007); Kaupp v. Texas, 538 U.S. 626 (2003); City of Indianapolis v. Edmond, 531 U.S. 32 (2000); and Florida v. J.L., 529 U.S. 266 (2000).

41. 529 U.S. 266 (2000).

olis v. Edmond,[42] were significantly scaled back by later Court decisions (*Navarette v. California*[43] and *Illinois v. Lidster*,[44] respectively) during the same time period. The government's "loss" in *Bailey v. United States*[45] is similarly offset by the Court's earlier decision in *Muehler v. Mena*.[46]

In the search context, by contrast, there are several recent cases where the Court has notably restrained the government's power. *Riley v. California*,[47] *Florida v. Jardines*,[48] *United States v. Jones*,[49] and *Arizona v. Gant*[50] are ready examples.

The following sections provide a brief outline of the law in each of these seizure categories: arrests, stops, search warrant seizures, checkpoints, "consensual" seizures, and police use of force. The focus is, in particular, on Supreme Court decisions and other developments since the turn of the century that illustrate this expansion of the government's power.

A. Police Power to Arrest

1. Background: Endorsing Warrantless Arrests

The Framers clearly understood seizures of persons to include formal, custodial arrests.[51] The requirement that police must have probable cause to arrest criminal suspects is perhaps the hardest and fastest Fourth

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42. 531 U.S. 32 (2000).

43. 134 S. Ct. 1683 (2014).

44. 540 U.S. 419 (2004).

45. 133 S. Ct. 1031, 1042–43 (2013) (holding that *Michigan v. Summers*, 452 U.S. 692 (1981), did not justify the detention of occupants beyond the immediate vicinity of the premises covered by the search warrant). On remand, the Second Circuit upheld Bailey's conviction finding that the officers had reasonable suspicion to stop Bailey and that statements and evidence obtained during the initial part of the stop were properly introduced against him at trial. *See* United States v. Bailey, 743 F.3d 322, 345–46 (2d Cir. 2014) (finding Fourth Amendment violation only when officers handcuffed Bailey and that introduction of his subsequent statements was improper but resulted only in harmless error).

46. 544 U.S. 93, 102 (2005) (finding plaintiff's detention in handcuffs during execution of search warrant for two to three hours was reasonable in light of government interests; plaintiff was not a suspect and was not the target of the search).

47. 134 S. Ct. 2473, 2495 (2014) (holding warrantless search of arrestee's cell phone was unconstitutional).

48. 133 S. Ct. 1409, 1417–18 (2013) (bringing drug dog to suspect's porch to sniff front door was a Fourth Amendment "search").

49. 132 S. Ct. 945, 949 (2012) (holding installation of GPS tracker onto suspect's car was a Fourth Amendment "search").

50. 556 U.S. 332, 335 (2009) (narrowing circumstances justifying search incident to arrest of automobile).

51. *See* Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 69 (1996) (explaining that the Fourth Amendment (and its sister provision in the Massachusetts state constitution) specified seizures of "persons" to highlight the "heightened sensitivity government should show" when "bodily arrests" were involved and citing Wilkes and Entick as "paradigm cases" that influenced the framers and noting that both involved "bodily arrests").

Amendment rule.[52] Until relatively recently, it was a rule without any real exception.[53]

Arrest warrants, however, are not usually required. The Supreme Court's 1976 decision in *United States v. Watson*[54] endorsed the "ancient common-law" rule that a warrant is not required for any felony arrest that occurs in public and which is supported by probable cause.[55] Warrantless arrests for misdemeanors committed in the officer's presence are also permitted.[56]

The Court recognized in *Watson* and in *Gerstein v. Pugh*[57] "that maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest."[58] The cost of requiring arrest warrants, however, was viewed by both the *Watson* and *Gerstein* Courts as "an intolerable handicap for legitimate law enforcement."[59] Although the *Watson* Court counseled that seeking an arrest warrant would be, where "practicable," the "wise" course, in prac-

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52. Dunaway v. New York, 442 U.S. 200, 208 (1979) (holding that the probable cause standard applies to all arrests). As the Court explained in *Kaupp v. Texas*, 538 U.S. 626, 629 (2003), as of 2003, the Court "[had] never sustained against a Fourth Amendment challenge the involuntary removal of a suspect from his home . . . absent probable cause." (quoting Hayes v. Florida, 470 U.S. 811, 815 (1985)).

The difficulty of quantifying probable cause, of course, means that even this core component of the rule is hardly fixed. *Compare* Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*, 73 L. & CONTEMP. PROBS. 69, 71 (2010) ("We do not know exactly what the phrase 'probable cause' means, in strict numerical terms."), *with* Andrew E. Taslitz, Foreword, *The Death of Probable Cause*, 73 L. & CONTEMP. PROBS. i, ii (2010) (explaining that "for several decades, most judges understood probable cause's quantitative requirement to hover around a preponderance of the evidence," but asserting that the Court's recent decisions reflected a lower probability).

53. *See* discussion of material witness arrests *infra* Section I.A.3. It is perhaps more accurate to state that the rule has not had any lawful exception. For details about a long-term, unlawful practice in Detroit of arresting and detaining for "hours or even days" witnesses to homicides, see Pam Belluck, *Detroit Police Case Wide Net Over Homicide 'Witnesses,'* N.Y. TIMES (Apr. 11, 2001), http://www.nytimes.com/2001/04/11/us/detroit-police-cast-wide-net-over-homicide-witnesses.html?pagewanted=all (explaining that "[t]he law is clear" that "police cannot arrest" witnesses, but documenting dozens of reports (and eventual lawsuits) for witnesses detained by Detroit police).

54. 423 U.S. 411 (1976).

55. *Id.* at 418, 421, 422–23 (observing that the common-law rule had "survived substantially intact" at both the state and national level). According to Wayne LaFave, by 1965 (a decade before *Watson*), it was "routine [for officers] to make arrests without [a] warrant," and even when warrants were sought, "judicial participation . . . [was] infrequent and . . . perfunctory." WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 15–16 (Frank J. Remington ed., 1965).

56. *See Watson*, 423 U.S. at 422–23.

57. 420 U.S. 103 (1975) (preceding *United States v. Watson* by one year).

58. *Watson*, 423 U.S. at 417; Gerstein v. Pugh, 420 U.S. 103, 113 (1975).

59. *Watson*, 423 U.S. at 417, 423–24 (quoting *Gerstein*, 420 U.S. at 113–14) (stating that even if the Court might prefer that officers obtain warrants, "we decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like").

tice this is rarely done.[60] For arrests inside a suspect's home, however, the Court has required that the government obtain a warrant.[61]

2. Permitting Custodial Arrests for Minor Offenses

In the decades following *Watson*, the government's power to arrest criminal suspects otherwise remained relatively stable.[62] Since the turn of the century, however, the Court has decided several important cases—including *Atwater v. City of Lago Vista*,[63] *Virginia v. Moore*,[64] and *Ashcroft v. al-Kidd*[65]—that have effectively expanded the power of the police to arrest criminal suspects.

Twenty-five years after *Watson*, in *Atwater v. City of Lago Vista*, the Supreme Court turned its attention to the question of the reasonableness of arrests for "very minor" offenses.[66] In *Atwater*, the majority held that a police officer's decision to take the plaintiff into custody for a seat belt violation (her children were not properly seat belted) was constitutional.[67] This was true even where (i) the violation was punishable only by a fine and (ii) the record indicated that the officer's subjective intention was "gratuitous humiliation[]" of the arrestee.[68]

The *Atwater* Court purported to weigh the government's interest but without real scrutiny of the need to take low-level offenders like Atwater into custody. In fact, the Court ultimately rejected the idea that the government should have to make any specific showing:

> [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. . . . Courts attempt-

60. *Id.* at 423–24 (noting that officers' "judgments about probable cause [to arrest] may be more readily accepted where backed by a warrant").

61. Payton v. New York, 445 U.S. 573, 586 (1980) (holding that warrantless arrests in the home are "presumptively unreasonable").

62. *Cf.* Kerr, *Equilibrium*, *supra* note 23, at 521–22 (following discussion of *Watson*, Kerr notes that "[t]he basic facts of an arrest by a government agent for a felony are the same today as they were at common law," and accordingly "the law of arrests has remained the same"). *But cf.* Thomas K. Clancy, *What Constitutes an "Arrest" Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129, 157–66 (2003) (describing confusion resulting from the Court's shifting approach to defining the line between a stop and an arrest).

63. 532 U.S. 318, 340, 354–55 (2001) (holding that the Fourth Amendment does not prohibit warrantless custodial arrests for minor offenses).

64. 553 U.S. 164, 176 (2008) (establishing "that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution" even where state law prohibited arrest for that offense).

65. 131 S. Ct. 2074, 2084–85 (2011) (finding no Fourth Amendment violation for the plaintiff's arrest and two-week detention under the Material Witness statute).

66. *Atwater*, 532 U.S. at 354.

67. *Id.* ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

68. *Id.* at 346–47 ("[T]he physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment.").

> ing to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.[69]

The *Atwater* Court was reluctant to impose on officers in the field a new judicially drawn line between fine-only offenses and those punishable by any term of imprisonment.[70] This suggested a possible exception to the new *Atwater* rule. What if the rule forbidding arrests for fine-only offenses was a legislative directive? Several years later, in *Virginia v. Moore*, the Court held that there was no Fourth Amendment violation even when the decision to effect a custodial arrest directly contravened a state law requiring police to issue a summons for the particular infraction.[71]

The *Atwater* Court expressed doubt that there was any meaningful proliferation of custodial arrests for minor offenses.[72] In fact, however, misdemeanor arrests and prosecutions around the country were rapidly climbing.[73] Recent data from New York City document high numbers of arrests and prosecutions for "quality-of-life" offenses (including, e.g., gambling, loitering, making graffiti, disorderly conduct, and riding a bike on the sidewalk).[74] Even before *Atwater* was decided, scholars observed this phenomenon.[75] In the wake of Eric Garner's 2014 death, critics have asked why police would use force to subdue a person suspected of selling untaxed cigarettes.[76] Evidence of so much aggressive policing of misde-

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69. *Id.* at 347 (citation omitted) (first citing United States v. Robinson, 414 U.S. 218, 234–35 (1973); then citing New York v. Belton, 453 U.S. 454, 458 (1981)).

70. *Id.*

71. Virginia v. Moore, 553 U.S. 164, 176 (2008).

72. *Atwater*, 532 U.S. at 353 (acknowledging that there were likely other examples of "comparably foolish, warrantless misdemeanor arrests" but expressing confidence that "the country is not confronting anything like an epidemic of unnecessary minor-offense arrests").

73. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 630 (2014) ("Between 1993 and 2010 the number of misdemeanor arrests [in New York City] almost doubled."); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 (2012) (highlighting a 2009 report from the National Association of Criminal Defense Lawyers "estimating that approximately 10.5 million nontraffic misdemeanor prosecutions occur nationally per year based on the extrapolation of caseload statistics collected from twelve states in 2006" compared to the "1.1 million persons convicted of a state felony and approximately 58,000 federal felony cases filed in the nation's largest urban counties" during the same year).

74. N.Y. STATE OFFICE OF THE ATTORNEY GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 2, app. J-1 fig.20 (2013) [hereinafter OAG ARREST REPORT], http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf (documenting high rates of quality-of-life arrests in NYC from January 2009–December 2012).

75. *See, e.g.*, Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry*, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 462, 476 (2000) (documenting an increase in the number of people arrested for low-level offenses as well as an increase in the numbers of those cases that were dismissed (i.e., a decrease in the quality of the arrests)); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 590 (1997) (noting that in New York City, "quality-of-life enforcement has been aggressively pursued by police executives invoking the Broken Windows idea" and predicting eventual community alienation).

76. *See supra* notes 4–7 and accompanying text; *see also* John Marzulli et al., *NYPD No. 3's Order to Crack Down on Selling Loose Cigarettes Led to Chokehold Death of Eric Garner*, N.Y.

meanors and quality-of-life offenses suggests that the Court's assumptions in *Atwater* about the lack of abuses ought to be revisited.

3. Arresting Criminal Suspects as Material Witnesses

The traditional arrests described above require that police have probable cause to believe that the arrestee committed a crime.[77] What ability do law enforcement officers have to arrest criminal suspects if their suspicion does not rise to the level of probable cause? The answer traditionally found in criminal procedure treatises and law school casebooks would have been none. But in most criminal procedure casebooks now, that black letter proposition is accompanied by an asterisk or qualified by a note about the federal Material Witness Statute[78]: explaining how it operates, documenting its use to arrest and detain terrorism suspects, and citing the Supreme Court's 2011 decision in *Ashcroft v. al-Kidd*.[79]

Ashcroft v. al-Kidd was the first and only Supreme Court case challenging the government's post-9/11 use of the Material Witness Statute.[80] The statute permits the arrest of individuals who have information that is "material in a criminal proceeding . . . if it is shown that it may become impracticable to secure [their] presence . . . by subpoena."[81] The statute has been interpreted broadly, allowing the arrest of witnesses to ongoing grand jury investigations as well as trial witnesses.[82] The heart of Abdullah al-Kidd's claim was that former Attorney General John Ashcroft had instituted a department-wide policy to use the federal Material Witness Statute pretextually to detain criminal suspects on less than probable

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DAILY NEWS (Aug. 7, 2014, 2:30 AM), http://www.nydailynews.com/new-york/nyc-crime/wife-man-filmed-chokehold-arrested-article-1.1893790; George F. Will, Editorial, *Eric Garner, Criminalized to Death*, WASH. POST, Dec. 11, 2014, at A21 ("Garner died at the dangerous intersection of something wise, known as 'broken windows' policing, and something worse than foolish: decades of overcriminalization."). In his editorial, Will quotes Professor Stephen Carter who observed that:

> It's unlikely that the New York Legislature, in creating the crime of selling untaxed cigarettes, imagined that anyone would die for violating it. But a wise legislator would give the matter some thought before creating a crime. Officials who fail to take into account the obvious fact that the laws they're so eager to pass will be enforced at the point of a gun cannot fairly be described as public servants.

Will, *supra*.

77. *See* Dunaway v. New York, 442 U.S. 200, 208 (1979).

78. 18 U.S.C. § 3144 (2012) ("Release or detention of a material witness.").

79. 131 S. Ct. 2074 (2011); *see, e.g.*, RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 134 (3d ed. Supp. 2014) (citing *al-Kidd*, 131 S. Ct. 2074, and noting the case presented "an unusual context in which the arrest power may exist even *without* probable cause to believe the arrestee has committed an infraction, much less a crime"); YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 352–53 (13th ed. 2012) (citing *al-Kidd*, 131 S. Ct. 2074; United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003)).

80. *al-Kidd*, 131 S. Ct. at 2079.

81. 18 U.S.C. § 3144 ("Release or detention of a material witness").

82. *See Awadallah*, 349 F.3d at 49–62 (providing detailed analysis of legislative history to support determination that 18 U.S.C. § 3144 applies to grand jury witnesses); *see also* Lauryn P. Gouldin, *When Deference is Dangerous: The Judicial Role in Material-Witness Detentions*, 49 AM. CRIM. L. REV. 1333, 1346–47 (2012) (analyzing legislative history and scholarly critiques of application of statute to material witnesses).

cause.[83] Al-Kidd's journey to the Supreme Court focused public attention on the government's novel and highly controversial use of the Material Witness Statute as an investigative detention tool.[84] In the years following September 11, scores of material witnesses were detained in maximum-security facilities for extended periods while their alleged connections to various terrorist plots were investigated.[85] Many were never called to testify before the grand jury (or in any other criminal proceeding).[86]

In media reports and in amicus briefs, government officials emphasized that the power to detain suspects as material witnesses was an essential counterterrorism tool.[87] This claim of necessity was not tested by the *al-Kidd* Court, however. Reversing the Ninth Circuit, the Court unanimously held that Ashcroft was entitled to qualified immunity because he had not violated a clearly established law.[88] A majority of five Justices also rejected al-Kidd's claim against Ashcroft on the merits, refusing to invalidate the warrant solely on al-Kidd's assertion of prosecutorial pretext.[89] In other words, when provided with an opportunity to prohibit the government from using the Material Witness Statute to detain criminal suspects, the Court declined to do so. Although the Court did not explicitly authorize the use of the Material Witness Statute as an investigative detention tool, the decision in *al-Kidd* implicitly facilitated the continued

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83. *al-Kidd*, 131 S. Ct. at 2079.

84. Gouldin, *supra* note 82, at 1336–37.

85. HUMAN RIGHTS WATCH, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11, at 1–3 (2005), http://www.hrw.org/sites/default/files/reports/us0605_0.pdf. In a September 2014 Report, the Department of Justice Office of the Inspector General (OIG) suggested that the statute had been used to detain fewer than 100 material witnesses in international terrorism cases since September 2001. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE DEPARTMENT'S USE OF THE MATERIAL WITNESS STATUTE WITH A FOCUS ON SELECT NATIONAL SECURITY MATTERS 14 (2014) [hereinafter OIG REPORT], https://oig.justice.gov/reports/2014/s1409r.pdf. OIG noted that this "represented a tiny fraction of [its] . . . overall use." *Id.* at v. The statute is used regularly in immigration and human trafficking cases and, from 2000 to 2012, over 58,000 material witnesses were arrested by the federal government. *Id.* at 1, 13.

86. *See* HUMAN RIGHTS WATCH, *supra* note 85, at 2.

87. Gouldin, *supra* note 82, at 1335–36, 1345 (collecting statements made by former Attorneys General, former White House Counsel and former United States Attorney for the Southern District of New York in support of the use of the statute to detain terrorism suspects).

88. The Court explained that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 131 S. Ct. at 2085. Qualified immunity for Ashcroft was appropriate because "[a]t the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional.". *Id.* at 2083. Justice Ginsburg concurred in the judgment stating that "no 'clearly established law' renders Ashcroft answerable in damages." *Id.* at 2087 (Ginsburg, J., concurring). Justice Sotomayor also concurred "that Ashcroft did not violate clearly established law." *Id.* at 2089 (Sotomayor, J., concurring). Justice Kagan recused herself. *Id.* at 2085 (majority opinion).

89. *See id.* at 2085 ("[A]n objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive."). Whether al-Kidd had "concede[d]" the validity of the warrant for purposes of his suit against Ashcroft (or more broadly) was the subject of disagreement among the Justices and prompted several concurrences. *See id.* at 2083 & n.3.

use of the statute in this way, effectively broadening the government's seizure power.[90]

To be fair, the questions presented to the *al-Kidd* Court were limited in scope, and as Justice Kennedy explained in his concurrence, the Court's decision left "unresolved whether the Government's use of the Material Witness Statute in this case was lawful."[91] That issue continued to be litigated in the district court and at the Ninth Circuit until December of 2014 when an out-of-court settlement of the lawsuit was announced.[92]

Material witnesses are a very narrow category of federal arrestees, and the power to arrest material witnesses may for now be dormant—on reserve until the next emergency.[93] Nevertheless, as outlined in Part III, it is another example of an expansion of seizure power that seems to have resulted from (or been facilitated by) problems with the Court's evaluation of necessity in seizure cases.[94]

Although an arrest is the "quintessential[]" Fourth Amendment seizure of a person,[95] the definition of a seizure developed by the Supreme Court over the last five decades includes other less intrusive restraints on movement that are briefly addressed in the following sections.

B. Stopping Power

Until 1967, if an individual was not actually arrested by police, courts did not generally find that a Fourth Amendment seizure had oc-

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90. *See* OIG REPORT, *supra* note 85, at 77 ("Under the [*al-Kidd*] Court's Fourth Amendment analysis, if detention can be objectively justified by the need to secure the witness's testimony, it does not matter if the subjective intent of the relevant officials was something else, such as to detain the individual pending the development of probable cause to arrest him.").

91. *al-Kidd*, 131 S. Ct. at 2085 (Kennedy, J., concurring).

92. In al-Kidd's *Bivens* action against the FBI agents who effected his arrest, the District Court of Idaho granted al-Kidd summary judgment, finding that al-Kidd's detention did not comply with the requirements of the statute. *See* al-Kidd v. Gonzales, No. 1:05-CV-093, 2012 WL 4470782, at *1, *6 (D. Idaho Sept. 27, 2012). The government's appeal of that decision was pending before the Ninth Circuit when the case was settled. *See* Richard A. Serrano, *Muslim American Caught Up in Post-9/11 Sweep Gets an Apology*, L.A. TIMES (Feb. 14, 2015, 5:00 AM), http://www.latimes.com/nation/la-na-detainee-apology-20150214-story.html#page=1. Al-Kidd received $415,000 and an acknowledgment from Wendy J. Olson, the U.S. Attorney for the District of Idaho, that fell short of an actual apology (despite the *Times* headline). *Id.* Olson wrote that "[t]he government acknowledges that your arrest and detention as a witness was a difficult experience for you and regrets any hardship or disruption to your life that may have resulted from your arrest and detention." *Id.* (quoting Letter from Wendy J. Olson, U.S. Attorney, to Abdullah al-Kidd (Jan. 15, 2015)).

93. OIG found that the use of the statute to detain material witnesses in connection with terrorism investigations was "concentrated in the 2-year period immediately following the September 11 attacks" and that no witness had been detained in an international terrorism investigation since 2004. OIG REPORT, *supra* note 85, at 65–66.

94. *See infra* Part III.

95. Payton v. New York, 445 U.S. 573, 585 (1980) (quoting United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring)).

curred.[96] To arrest a criminal suspect, police had to have probable cause to suspect the person of having committed a crime,[97] but no suspicion was required for lesser police encounters (which included, for example, a police officer approaching an individual to request information).[98]

1. Terry and its Recent Progeny

The Supreme Court's 1967 decision in *Terry v. Ohio* made clear that street "stops"—ever after deemed *Terry* stops—were Fourth Amendment seizures even though the intrusion on individual rights fell short of a full-blown custodial arrest.[99] Cognizant of the realities facing street-level law enforcement, the *Terry* Court declined to require either probable cause or a warrant for the stop (and frisk) that were the focus of the case. Although Chief Justice Warren, who authored the majority opinion, carefully avoided explicitly defining the requirements of a "stop,"[100] Justice Harlan, in his oft-quoted concurring opinion, set out the reasonable suspicion standard for which the case would come to be known.[101] As Justice Harlan explained, because a stop is a lesser Fourth Amendment intrusion, less suspicion is required.[102] After *Terry*, a stop is justified if a police officer has a reasonable or "articulable suspicion" that "criminal activity may be afoot."[103] *Terry* is equally well-known for deeming a "frisk" to be a Fourth Amendment event. A *Terry* frisk—which is something less than a "full-blown search"—is justified if an officer has a reasonable suspicion that a person he or she has stopped is armed and dangerous.[104] Although stops and frisks, like their search and

96. *See* Terry v. Ohio, 392 U.S. 1, 19 (1968) (explaining (and rejecting) prior view that "the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest'").

97. *See* Dunaway v. New York, 442 U.S. 200, 208 (1979) (noting that prior to *Terry*, "the requirement of probable cause [to make an arrest] . . . was treated as absolute").

98. *See Terry*, 392 U.S. at 16.

99. *Id.* ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."); *see also* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 369–70 n.16 (2011) (clarifying that before *Terry* these encounters were not constitutionally protected).

100. *Terry*, 392 U.S. at 19 & n.16 ("We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation.").

101. *Id.* at 32–33 (Harlan, J., concurring); *see also* John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 793–821 (1998) (documenting the shift from probable cause to reasonableness in the drafting of the *Terry* opinions); Earl C. Dudley, Jr., Terry v. Ohio*, the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 895–96 (1998).

102. *Terry*, 392 U.S. at 31–32 (Harlan, J., concurring).

103. The concept of reasonable suspicion for which *Terry* is known is drawn from Justice Harlan's concurrence. *Terry*, 392 U.S. at 31, 33 (Harlan, J., concurring) (explaining the concept of an "articulable suspicion less than probable cause" and concluding that Officer McFadden's "justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him"). The "criminal activity may be afoot" language is drawn from the majority opinion. *Id.* at 30 (majority opinion).

104. *Id.* at 19, 27.

seizure big siblings, are often conjoined in theory and practice, the focus of this Article is on the seizure component of the pair: the stop.

In seizure cases decided since *Terry* that involve something less than an arrest, the Court has generally evaluated the government's conduct using the sort of reasonableness balancing that the *Terry* Court employed.[105] As the *Terry* Court explained: "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'"[106] In *Brown v. Texas*,[107] decided eleven years after *Terry*, the Court elaborated further on how to balance reasonableness in seizure cases:

> The reasonableness of seizures that are less intrusive than a traditional arrest, depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.[108]

In the nearly fifty years since *Terry*, the Court has significantly broadened the definition of reasonable suspicion and narrowed both (i) the circumstances that will be deemed a stop (instead of a mere encounter) and (ii) the circumstances that will convert a stop into an arrest (requiring probable cause).[109] As outlined below, decisions issued by the Court in the last fifteen years have continued this trend. The cumulative effect of these decisions—pulling back from the exigency presented in

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105. *See, e.g.*, Brown v. Texas, 443 U.S. 47, 50–51 (1979).

106. *Terry*, 392 U.S. at 21 (alterations in original) (quoting Camara v. Mun. Court of S.F., 387 U.S. 523, 536–37 (1967)).

107. 443 U.S. 47 (1979).

108. *Id.* at 50–51 (citations omitted) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

109. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 439 (1991) (holding that an individual's consent to search is voluntary if, under the totality of the circumstances, a reasonable person would have felt free to refuse to cooperate with the police); Alabama v. White, 496 U.S. 325, 332 (1990) (holding that "under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car" when police observed and corroborated some of the innocent behaviors reported in the tip); United States v. Sharpe, 470 U.S. 675, 687–88 (1985) (holding that a 20-minute delay between the initial traffic stop and search of the vehicle was constitutionally permissible); Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (holding that the only relevant inquiry as to custody is how a reasonable man in the suspect's position would have understood his situation); United States v. Place, 462 U.S. 696, 707 (1983) (holding that a narcotics dog "sniff test" was reasonable in a brief *Terry* stop situation); United States v. Mendenhall, 446 U.S. 544, 554 (1980) (giving examples of factors, the presence of which may indicate that exchange with police constitutes a seizure: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled"); Dunaway v. New York, 442 U.S. 200, 216 (1979) (holding incriminating statements made in custody were fruits of an illegal seizure because the application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion is termed an "arrest" under state law).

Terry, lengthening the time span and intrusiveness of *Terry* stops, and moving away from requiring specificity about the offense of suspicion—is readily seen in the dramatic increase in the use of stops and frisks as a regulatory or deterrent tool to manage crime in urban communities.[110] The story of the expansion of *Terry* in the twenty-first century includes several important Court decisions. It is also, however, the story of police exploiting the Court's deferential, laissez faire approach to regulating police conduct in this context.[111]

2. Reasonable Suspicion: Lowering the Bar

The Court's 2000 decision in *Illinois v. Wardlow*[112]—finding that an individual's flight from police in a high-crime neighborhood could justify a stop—significantly broadened the definition of reasonable suspicion.[113] Before *Wardlow*, the Court had held that if an individual was free to leave or terminate an encounter with the police, she was not "seized" under the Fourth Amendment.[114] The Court's pre-*Wardlow* decisions made clear that if the police did not have reasonable suspicion to subject a person to a *Terry* stop, that person had a right to walk away (or otherwise terminate an encounter with police).[115]

The *Wardlow* majority, however, curiously found that the speed with which a person exercised his right to leave an encounter could transform constitutionally legitimate behavior into articulable suspicion.[116] In other words, although prior cases provided a right to walk away, the *Wardlow* Court held that when Wardlow ran from police, his flight created reasonable suspicion for a stop.[117] *Wardlow* was perhaps as noteworthy for what the opinion omitted or downplayed: there was no crime of suspicion identified, it was unclear whether the officers were in unmarked cars (which is essential to determining the significance of the

110. *See Stop-and-Frisk Data*, N.Y.C.L.U., http://www.nyclu.org/content/stop-and-frisk-data (last visited Sep. 19, 2015) (documenting dramatic increase in stops and frisks in New York City); *see also* ACLU OF ILLINOIS, STOP AND FRISK IN CHICAGO 3 (2015), http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf (providing data on stop-and-frisk practices in Chicago; claiming that rate of stops in Chicago outpaced New York by 4 to 1).

111. Frank Zimring has outlined the "basic methodology" of New York's "aggressive" street policing: officers conduct stops and frisks "of suspicious-looking persons" and then "mak[e] arrests for minor offenses as a way to remove perceived risks from the street and to identify persons wanted for other crimes." FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE 118 (2012). See *infra* Section III.A.1 for a discussion of the issues presented in the New York City stop-and-frisk litigation.

112. 528 U.S. 119 (2002).

113. *Id.* at 124–25.

114. *See infra* Section I.E.

115. *See infra* Section I.E.

116. *Wardlow*, 528 U.S. at 125 ("[U]nprovoked flight is simply not a mere refusal to cooperate.").

117. *Id.* at 122–25. The *Wardlow* Court rejected the approach taken by the Illinois Supreme Court which had held that flight was an exercise of the *Royer* right to leave an encounter with police (and thus could not be a basis for reasonable suspicion). *Id.* at 122–23. Instead, the *Wardlow* Court deemed flight "the opposite" of "going about one's business." *Id.* at 125.

flight), and there was no data to support the claim that this was a high-crime neighborhood.[118]

In *United States v. Arvizu*,[119] decided two years later, a unanimous Court upheld a stop based on a combination of factors that the Court acknowledged would have been insufficient to establish reasonable suspicion independently.[120] In *Arvizu*, as in prior decisions, the Court emphasized the need to "give[] due weight to the factual inferences drawn by the law enforcement officer."[121]

More recently, in April 2014, the Supreme Court issued its decision in *Navarette v. California*, a case involving two brothers who were arrested and charged with felony drug charges by state authorities.[122] The central issue in the *Navarette* case was whether an anonymous tip from another driver, who claimed that the defendants had attempted to drive her off the road, was sufficient to establish the reasonable suspicion required for a lawful stop.[123]

In a split 5–4 decision, the Court held that it was.[124] *Navarette* significantly limits the Court's earlier decision in *Florida v. J.L.*, which held that an anonymous tip with limited description of the suspect and no predictive elements was insufficient to establish reasonable suspicion for a stop.[125] The tip in *J.L.* was that a young, black male wearing a plaid shirt standing at a bus stop was carrying a firearm.[126] The Court held that the information in the tip did not establish reasonable suspicion for the stop and frisk of J.L.[127]

Prior to *Navarette*, scholars viewed corroboration of an anonymous tip—and specifically of the criminal conduct alleged in the tip—as essential to a determination that an anonymous tip could qualify as reasonable suspicion.[128] After *Navarette*, not much is required to make an anony-

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118. *Id.* at 138–39 (Stevens, J., dissenting).

119. 534 U.S. 266 (2002).

120. *Id.* at 275–77 (permitting reasonable suspicion for stop based on officer's observation that driver was stiff, children waved awkwardly, and car slowed at sight of officer (among other factors)).

121. *Id.* at 277.

122. Navarette v. California, 134 S. Ct. 1683, 1686–87.

123. *Id.* at 1688–89.

124. *Id.* at 1686.

125. Florida v. J.L., 529 U.S. 266, 268 (2000); *see also* Katie Barlow & Nina Totenberg, *Supreme Court Gives Police New Power to Rely on Anonymous Tips*, NPR (Apr. 22, 2014, 7:40 PM), http://www.npr.org/2014/04/22/305993180/court-gives-police-new-power-to-rely-on-anonymous-tips; Lyle Denniston, *Opinion Analysis: Big New Role for Anonymous Tipsters*, SCOTUSBLOG (Apr. 22, 2014, 9:10 PM), http://www.scotusblog.com/2014/04/opinion-analysis-big-new-role-for-anonymous-tipsters/ (observing "that the Court had added significantly to police authority to conclude that they must act because a crime is in progress").

126. *J.L.*, 529 U.S. at 268.

127. *Id.* at 274.

128. *See, e.g.*, Andrew Guthrie Ferguson, *Predictive Policing and Reasonable Suspicion*, 62 EMORY L.J. 259, 292 (2012) (explaining that for an anonymous tip to constitute reasonable suspicion, "the predictive tip must be corroborated by police observation, *which means corroboration of*

mous tip reliable enough to justify the stop of a vehicle. The *Navarette* majority was satisfied that the anonymous tipster's eyewitness account seemed to have been made roughly contemporaneously with the incident alleged by the tipster.[129] The Court assumed that most 911 callers have awareness of "technological and regulatory developments" that "relay the caller's phone number to 911 dispatchers."[130] As a result, "a reasonable [police] officer could conclude that a false tipster would think twice before using such a system."[131]

It is not difficult to imagine the language that will appear in new editions of police manuals to reflect this expanded power to detain motorists; it can largely quote the majority opinion. An anonymous tip that alleges any of the following "dangerous behaviors . . . would justify a traffic stop on suspicion of drunk driving": "weaving all over the roadway," "'cross[ing] over the center line' . . . and 'almost caus[ing] several head-on collisions,'" or "driving in the median."[132] Of course, having an officer observe any of these behaviors would immediately provide reasonable suspicion. Justice Scalia, in his dissent, described the key problem in the case:

> [The officers] followed the truck for five minutes, presumably to see if it was being operated recklessly. And that was good police work. . . . But the pesky little detail left out of the Court's reasonable-suspicion equation is that, for the five minutes that the truck was being followed (five minutes is a long time), [the defendant's] driving was irreproachable.[133]

Despite the fact that they could not corroborate the anonymous report, the officers stopped the vehicle.[134]

3. *Rodriguez v. United States*: Stopping Short

In its April 2015 decision in *Rodriguez v. United States*,[135] the Court ruled in favor of the defendant, strictly limiting the scope of a traffic stop

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both the specific individual and the ongoing crime" (emphasis added)); *see also* Virginia v. Harris, 558 U.S. 978, 979, 981 (2009) (Roberts, C.J., dissenting) (arguing that the Court should have granted certiorari to the question of whether an officer must visually corroborate an anonymous tip of drunk driving).

129. Navarette v. California, 134 S. Ct. 1683, 1687 n.1, 1689 (2014). The majority opinion notes that the tipper had identified herself but that she was never called to testify. *Id.* at 1689 n.1. As a result, the call was treated as an anonymous tip. *Id.*

130. *Id.* at 1690.

131. *Id.*

132. *Id.* at 1690–91 (first and third alterations in original) (first quoting People v. Wells, 136 P.3d 810, 811 (Cal. 2006); then quoting State v. Prendergast, 83 P.3d 714, 715–16 (Haw. 2004); and then quoting State v. Walshire, 634 N.W.2d 625, 626 (Iowa 2001)).

133. *Id.* at 1696 (Scalia, J., dissenting) ("Had the officers witnessed the petitioners violate a single traffic law, they would have had cause to stop the truck, and this case would not be before us. And not only was the driving irreproachable, but the State offers no evidence to suggest that the petitioners even did anything suspicious, such as suddenly slowing down, pulling off to the side of the road, or turning somewhere to see whether they were being followed." (citation omitted)).

134. *Id.*

to those steps that further the officer's "mission."[136] As Justice Thomas emphasized in his dissent, the majority's decision is not readily compatible with the Court's prior Fourth Amendment cases.[137]

Rodriguez involved a traffic stop: state police officer Morgan Struble pulled Dennys Rodriguez over after Rodriguez veered onto the shoulder of the road while driving on a Nebraska highway.[138] Stops for traffic violations like the one at issue in *Rodriguez* are a sort of hybrid seizure. They involve probable-cause-level suspicion of wrongdoing, but because the detentions involved are generally "relatively brief," they are viewed as "more analogous to a so-called 'Terry stop' . . . than to a formal arrest."[139]

The *Rodriguez* stop really involved two phases. During the first twenty minutes of the detention, Officer Struble ran a records check on both Rodriguez and his passenger; he questioned the two men; he wrote a warning ticket; and eventually, he returned to the men their documentation.[140] The legality of this first phase of the stop was not disputed by the parties.

The *Rodriguez* Court focused on what happened next during the continued seizure of Rodriguez (in what can be viewed as the second phase of the stop). Although Officer Struble admitted that he "got all the reason[s] for the stop out of the way," he declined to let Rodriguez leave.[141] Instead, he asked for "consent"[142] to walk his dog around Rodriguez's car.[143] When Rodriguez refused, Struble ordered him to get out of the car, and they waited for backup.[144] When the second officer arrived, five or six minutes after the first phase of the stop ended, the officers led Officer Struble's dog around the car.[145] The dog alerted on the second

135. 135 S. Ct. 1609 (2015).

136. *Id.* at 1612 (quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005)).

137. *Id.* at 1617 (Thomas, J., dissenting). Justice Thomas emphasized that *Illinois v. Caballes* held that "conducting a dog sniff [does] not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Id.* at 1617 (alternation in original) (quoting *Illinois*, 543 U.S. at 408). Also, Justice Thomas cited *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977), to support his determination that Officer Struble's decision to call for backup (and protect his safety) was reasonable under the circumstances. *Rodriguez*, 135 S. Ct. at 1618.

138. *Rodriguez*, 135 S. Ct. at 1612 (majority opinion).

139. *Id.* at 1614 (alteration in original) (quoting Knowles v. Iowa, 525 U.S. 113, 117 (1998)).

140. *Id.* at 1613.

141. *Id.* (alteration in original) (quoting statement by Officer Struble) (clarifying that Struble "did not consider Rodriguez 'free to leave'" (quoting statement by Officer Struble)).

142. As noted in Section I.E, *infra*, in the text accompanying notes 176–90, if a person does not have the right to refuse a police request, he cannot truly be found to have "consented" to a search or seizure. Based on the way that the events transpired in this case, it is clear that Officer Struble did not believe that Rodriguez had a choice about the dog sniff.

143. *Rodriguez*, 135 S. Ct. at 1613.

144. *Id.*

145. *Id.*

pass around the car.[146] During the ensuing search of the interior of the car, the officers discovered methamphetamines.[147]

Reversing the Eighth Circuit, the majority held that absent reasonable suspicion the extended detention violated the Fourth Amendment.[148] In support of its holding, the Court emphasized that the "mission" or purpose of the traffic stop was completed at the end of the first phase (when the ticket issued and the suspect's documents were returned to him).[149] As the Court explained:

> Like a Terry stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." Authority for the seizure thus ends when tasks tied to the traffic infraction are—or should have been—completed.[150]

The Court cited its previous decision in *Florida v. Royer*[151] for the proposition that "[t]he scope of the detention must be carefully tailored to its underlying justification."[152] The majority's decision is cause for optimism that the Court may be willing to require the government to defend more specific and particularized needs for a seizure.[153] This is true even when that more rigorous scrutiny will create some tension with the Court's seizure (and search) precedents.

C. Search Warrant Seizures

Police officers are also permitted to detain individuals, without probable cause or reasonable suspicion, when those individuals are inside or near a place that is being searched pursuant to a validly executed search warrant.[154] This rule, known as the *Summers* rule, was expanded significantly by the Court in its 2005 decision in *Muehler v. Mena*.[155]

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146. *Id.*
147. *Id.*
148. *Id.* at 1616.
149. *Id.* at 1614 (quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005)).
150. *Id.* (alteration in original) (citations omitted) (quoting *Illinois*, 543 U.S. at 407).
151. 460 U.S. 491 (1983).
152. *Id.* (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)).
153. Tracey Maclin disagrees, cautioning that Rodriguez "does not expand Fourth Amendment protections for motorists." Tracey Maclin, *Perspectives*, 100 MINN. L. REV. (forthcoming 2016) (manuscript at 17) (on file with author). In fact, Maclin argues, the case misses the opportunity to state clearly that police questioning that is unrelated to the crime that is the basis for the stop is "unreasonable" and thus unconstitutional. *Id.* at 24, 28, 33–35.
154. Michigan v. Summers, 452 U.S. 692, 705 (1981) ("[A] warrant . . . founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." (footnote omitted)); *see also* Bailey v. United States, 133 S. Ct. 1031, 1034–35 (2013) (explaining the *Summers* rule).
155. 544 U.S. 93, 98–99 (2005) (noting that the detention in *Muehler* was "more intrusive than that which [was] upheld in *Summers*").

In *Muehler*, the Court held that it was reasonable for eighteen officers conducting a search warrant to detain for two to three hours, in handcuffs, four occupants of the premises being searched.[156] Those occupants were not the targets of the officers' investigation, and they were not otherwise suspected of criminal activity.[157] The duration of their detention and the use of handcuffs the entire time set the degree of the intrusion in *Muehler* well apart from what the *Summers* decision had authorized.[158] The Court upheld this additional intrusion without meaningful inquiry into the officers' need for these precautions. The purported safety-based need to handcuff Mena rested on the fact that the two officers watching the occupants were "outnumber[ed]."[159] This safety-based need, however, was as much the product of on-site staffing allocations as anything else: there were sixteen other officers searching the house while Mena and the others were handcuffed.[160] The Court shied away from second-guessing the officers' allocation of resources.[161]

In *Bailey v. United States*, decided in 2013, the government sought—but the Court rejected—a further spatial expansion of *Summers*.[162] After obtaining a warrant to search defendant Bailey's residence for a handgun, police observed someone matching Bailey's description drive away from the residence with another individual.[163] While one group of officers executed the search warrant at the residence, two other officers followed Bailey and pulled him over about one mile away from the residence.[164] The government argued—and both the district court and the Second Circuit agreed—that *Summers* "authorizes law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected *as soon as reasonably practicable*."[165] The Supreme Court notably rejected that extension of the *Summers* rule, holding instead that *Summers* does not authorize "the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant."[166]

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156. *Id.* at 98–100.

157. *Id.* at 96.

158. Amir Hatem Ali, Note, *Following the Bright Line of* Michigan v. Summers*: A Cause for Concern for Advocates of Bright-Line Fourth Amendment Rules*, 45 HARV. C.R.-C.L. L. REV. 483, 504 (2010) ("Had the [*Muehler*] Court . . . balanced the totality of the circumstances—that is, both the detention and the handcuffing together—it would have been balancing a detention that was significantly more intrusive than that in *Summers* against the aforementioned law enforcement interests."); *see also Muehler*, 544 U.S. at 104–12 (Stevens, J., concurring).

159. *Muehler*, 544 U.S. at 103 (Kennedy, J., concurring).

160. *Id*. at 110 (Stevens, J., concurring).

161. *See infra* Section III.D (challenging the government's allocation of resources as creating the "need" in *Muehler*).

162. Bailey v. United States, 133 S. Ct. 1031, 1040–42 (2013).

163. *Id.* at 1036.

164. *Id.*

165. United States v. Bailey, 652 F.3d 197, 208 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013).

166. *Bailey*, 133 S. Ct. at 1037, 1042.

D. Suspicionless Checkpoints

Seizure doctrine has evolved to encompass high volumes of suspicionless stopping as well. In *United States v. Martinez-Fuerte*[167] and in *Delaware v. Prouse*,[168] the Court expressly established that checkpoint stops (whether at permanent checkpoints or at temporary roadblocks) are "seizures" within the Fourth Amendment.[169] Police officers may briefly stop individuals at checkpoints without any suspicion of criminal wrongdoing if the officers' "primary purpose" is something other than traditional law enforcement.[170] The Court has held that "roadway safety" and "border protection" are valid non-law-enforcement purposes for DWI stops and immigration checkpoints respectively.[171] So long as the government can articulate these sorts of regulatory goals (like highway safety and border control), the Court has permitted it to reap law enforcement benefits in the form of drunk driving and immigration arrests when violators are detected.[172]

Once the primary-purpose condition is satisfied, the Court balances the government's need for a particular checkpoint against the individual's liberty interest.[173] The degree to which the government's checkpoint procedures advance its interests while also minimizing the intrusion on liberty is generally the focus of checkpoint cases.[174] Issues like the length

167. 428 U.S. 543 (1976).

168. 440 U.S. 648 (1979).

169. *Prouse*, 440 U.S. at 653 ("The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief."); *Martinez-Fuerte*, 428 U.S. at 556, 566–67 ("It is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment.") (upholding warrantless stop at permanent immigration checkpoint); *see also* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450, 455 (1990) ("[A] Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint.") (upholding warrantless stop at temporary sobriety checkpoint).

170. City of Indianapolis v. Edmond, 531 U.S. 32, 40–41 (2000) (holding that checkpoint to find narcotics was invalid); *see also* Illinois v. Lidster, 540 U.S. 419, 424–28 (2004) (holding that stopping members of the public to obtain information about a crime they may have observed was constitutional).

171. *Sitz*, 496 U.S. at 451; *Martinez-Fuerte*, 428 U.S. at 557.

172. *Sitz*, 496 U.S. at 447–48 (holding that Michigan's use of highway sobriety checkpoints did not violate the Fourth Amendment; thereby upholding drunk driving arrests); *Martinez-Fuerte*, 428 U.S. at 566 (holding that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant"; affirming immigration convictions of both defendants as a result). As Ricardo Bascuas has explained, this creates obvious opportunities for pretextual stops. Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 759 (2007) ("If criminal charges can be brought with evidence uncovered through administrative or 'special needs' searches, those searches can provide a convenient pretext for circumventing any requirement of individualized suspicion.").

173. *Lidster*, 540 U.S. at 427 ("[I]n judging reasonableness, we look to 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." (quoting Brown v. Texas, 443 U.S. 47, 51 (1979))); *Edmond*, 531 U.S. at 42–43 ("[I]n determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue.").

174. *Lidster*, 540 U.S. at 427; *Edmond*, 531 U.S. at 42–43.

of the stop, the location of the stop, and the limits on any questions that are asked are part of this inquiry.[175] The linchpin of checkpoint cases, however, is whether there are meaningful constraints on officer discretion, including randomization.[176]

In its 2000 decision in *City of Indianapolis v. Edmond*, the Court held that a highway checkpoint to discover illegal narcotics was unconstitutional because its "primary purpose" was the general investigation of "ordinary criminal wrongdoing."[177] Although *Edmond* signaled to some that the Court was prepared to draw meaningful limits around the use of suspicionless checkpoints (and might revisit its prior broad ban on inquiries into officer intent),[178] the Court's decision in *Illinois v. Lidster*, four years later, blurred the *Edmond* line between regulatory aims and traditional law enforcement.[179] The *Lidster* Court held that an "information-seeking" checkpoint designed to locate possible witnesses to a vehicular homicide had a valid purpose that set it apart from checkpoints to stop likely perpetrators (like those at issue in *Edmond*).[180]

E. Mere Encounters and Consent

Not every police interaction with a civilian is a Fourth Amendment event.[181] The Court, in its 1983 decision in *Florida v. Royer*, made that clear:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by

175. *Lidster*, 540 U.S. at 427–28; *Sitz*, 496 U.S. at 450–55.

176. *Edmond*, 531 U.S. at 42–43; *see also* Tracey L. Meares, *The Distribution of Dignity and the Fourth Amendment*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 125–26 (Michael Klarman et al. eds., 2012) (describing the checkpoint model as the "lodestar for reasonableness under the Fourth Amendment" and explaining "that randomization is critical to promote the value of evenhandedness, which is necessary to promote the goal of discretion control at the heart of Fourth Amendment reasonableness").

177. *Edmond*, 531 U.S. at 40–41, 48 ("Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.").

178. *See, e.g.*, Craig Bradley, *The Middle Class Fourth Amendment*, 6 BUFF. CRIM. L. REV. 1123, 1135 (2003) ("*Edmond* called a halt to a series of Burger Court cases that had approved of roadblocks to apprehend illegal aliens and drunk drivers." (footnote omitted)); George M. Dery, III & Kevin Meehan, *Making the Roadblock a "Routine Part of American Life:"* Illinois v. Lidster*'s Extension of Police Checkpoint Power*, 32 AM. J. CRIM. L. 105, 113–14 (2004) (noting that "despite the government's valiant efforts, the *Edmond* Court remained unconvinced that the narcotics checkpoints served any purpose other than the prohibited one of 'general interest in crime control,'" and that accordingly, the roadblocks at issue "could not be justified under the Fourth Amendment without individualized suspicion" (footnote omitted) (quoting *Edmond*, 531 U.S. at 48)).

179. *Lidster*, 540 U.S. at 427–28.

180. *Lidster*, 540 U.S. at 426–27. Lower courts attempting to police the suspect/witness line that the Court observed between *Edmond* and *Lidster* have struggled. *See, e.g.*, Palacios v. Burge, 589 F.3d 556, 562, 564 (2d Cir. 2009) (recognizing, as identified in *Edmond*, that there are only limited circumstances where individualized suspicion is not necessary and holding that under *Lidster*, where police need to acquire more information about a recent crime in the vicinity, an identification procedure may be "reasonable in context" (quoting *Lidster*, 540 U.S. at 426)).

181. Florida v. Royer, 460 U.S. 491, 497 (1983).

> putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.[182]

The distinction between a Fourth Amendment seizure and other lesser encounters with police was initially spelled out in *Terry*: "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[183]

The test eventually developed by the Court established that a person is seized under the Fourth Amendment when a reasonable person in his or her shoes would not feel "free to leave"[184] or to "otherwise terminate the encounter."[185] In addition, unless the suspect is physically restrained or submits to a "show of authority" by police, the Court will not find that a seizure has occurred.[186]

In this way, a "consensual seizure" is an impossibility. For consent to be meaningful, a person must have the freedom to refuse to consent. Per the *Mendenhall–Royer–Bostick* line of cases, however, if a person has freedom to leave or to terminate the encounter, she is not, in fact, seized.[187] In other words, an individual who remains in an encounter with police when the law determines that she has the freedom to leave or terminate an encounter cannot claim to have experienced a Fourth Amendment event.[188] For this reason, no affirmative consent is required. This is distinguishable from the search context where officers routinely obtain

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182. *Id.* (citations omitted); *see also* INS v. Delgado, 466 U.S. 210, 215 (1984) ("Given the diversity of encounters between police officers and citizens, however, the Court has been cautious in defining the limits imposed by the Fourth Amendment on encounters between the police and citizens.").

183. Terry v. Ohio, 392 U.S. 1, 16 (1968).

184. United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."); *see also* Maclin, *Locomotion*, *supra* note 30, at 1299–1302 (criticizing *Mendenhall-Royer* free-to-leave test and asserting that Court's embrace of common law right of inquiry (i.e., police right to stop and ask questions of individuals on the street) significantly reduces Fourth Amendment protections and infringes the right of locomotion).

185. Florida v. Bostick, 501 U.S. 429, 434, 439–40 (1991) (enlarging *Mendenhall* test).

186. California v. Hodari D., 499 U.S. 621, 626, 629 (1991).

187. *Cf.* Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 515–16 (2001) (describing the "assumption that when an individual agrees to police requests to engage in conversation, she is not submitting to a 'show of authority' of the kind that would convey the message that she is not free to leave" (quoting *Hodari D.*, 499 U.S. at 625)).

188. *See* Florida v. Rodriguez, 469 U.S. 1, 5–6 (1984) (describing the type "of consensual encounter that implicates no Fourth Amendment interest"); *Bostick*, 501 U.S. at 434–35 ("We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their requests is required." (citations omitted)).

affirmative consent to search and where the issue then litigated is the voluntariness of that consent.[189]

The *Mendenhall–Royer–Bostick* line of cases is controversial because the Court hypothesizes more freedom to terminate encounters with police than most people actually feel. As Tracey Maclin explained: "Common sense teaches that most of us do not have the chutzpah or stupidity to tell a police officer to 'get lost' after he has stopped us . . . ."[190] Even those of us who may know, as a legal matter, that we are free to leave or terminate certain encounters with police, may not actually feel free to do so.[191]

In decisions that attempted to address that concern, and which relied on language from the Court's earlier decision in *Bostick*, the Eleventh Circuit developed a test that arguably required officers conducting bus sweeps to alert passengers that they were not required to comply with the officers' requests.[192] As the Eleventh Circuit explained, "Absent some positive indication that they were free not to cooperate, it is doubtful a [bus] passenger would think he or she had the choice to ignore the police presence."[193] In its 2002 decision in *United States v. Drayton*,[194] however, the Supreme Court sharply rejected the idea that officers conducting bus sweeps should have to advise passengers of their right to terminate the encounter.[195]

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189. Schneckloth v. Bustamonte, 412 U.S. 218, 225–28 (1973) (explaining the test for determining the voluntariness of consent in search cases).

190. Maclin, *Encounters*, *supra* note 30 at 249–50.

191. *See id.*; *see also* Steinbock, *supra* note 187, at 528 ("Like other constitutional doctrines, the law of consensual encounters is hard enough for experts to decipher. Its counter-intuitive and largely inscrutable boundaries create a conundrum for law enforcement personnel and citizens alike. From the citizen's standpoint, uncertainty will almost surely breed compliance."); Scott E. Sundby, "*Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1794 (1994) ("An optimist who reads the Supreme Court's decisions finding that no seizure had occurred might focus on the inherent courage to stand up to authority that the Court presupposes in the citizenry. A passenger seated on a bus that is about to depart, for instance, apparently is sufficiently steeped in constitutional courage that he is capable of telling gun-toting police who have singled him out for questioning that he wishes to be left alone.").

192. United States v. Washington, 151 F.3d 1354, 1357 (11th Cir. 1998), *abrogated by* United States v. Drayton, 536 U.S. 194 (2002).

193. *Id.* at 1357 ("It seems obvious to us that if police officers genuinely want to ensure that their encounters with bus passengers remain absolutely voluntary, they can simply say so. Without such notice in this case, we do not feel a reasonable person would have felt able to decline the agents' requests."); *see also* United States v. Drayton, 231 F.3d 787, 790 (11th Cir. 2000) (coming to the same conclusion as *United States* v. *Washington*), *rev'd*, 536 U.S. 194 (2002); United States v. Stephens, 206 F.3d 914, 917–18 (9th Cir. 2000) (relying on *Washington* to hold that bus passenger should have been advised of right to terminate encounter with officer before being asked for consent to search).

194. 536 U.S. 194 (2002).

195. *Id.* at 207 ("[T]he Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning."); *see also* Ohio v. Robinette, 519 U.S. 33, 35, 39–40 (1996) ("We are here presented with the question whether the Fourth Amendment requires that a lawfully seized defendant must be advised that he is 'free to go' before his consent to search will be recognized as voluntary. We hold that it does not. . . . [I]t [would] be unrealistic to require police officers to always inform detainees that they are free to go before a consent

Drayton was not the only decision in this time period that shifted the line between an encounter and a stop. As noted above, the Court's decision in *Wardlow*—which expanded the definition of reasonable suspicion to include flight from police—also served to restrict the manner in which an individual could exercise his or her freedom to leave an encounter with police.[196]

F. Excessive Force

The final category of Fourth Amendment seizure cases operates differently from the preceding categories of seizures. In all of the prior categories, the focus has been on defining the circumstances in which police may effect seizures of varying degrees—the *when* question. But the Fourth Amendment also governs the *how* question, regulating the force that can be used to effect seizures that are permitted. As the Court recently reiterated in *Plumhoff v. Rickard*,[197] "[a] claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard."[198]

The standard for use of deadly force to apprehend suspects was set by the Court in *Tennessee v. Garner*[199] in 1985. The *Garner* Court held that where there is no danger or threat to the officer or others, the government's interest in apprehending the individual does not justify the use of deadly force nor does it outweigh the suspect's interest in his own life.[200] Where there is probable cause to believe that the suspect poses a threat of serious physical harm to the officer or others, however, the Court indicated that the use of deadly force would not be unreasonable.[201]

The Court has issued two use-of-force decisions since 2000 that have expanded on its holding in *Garner*. In *Scott v. Harris*,[202] decided in 2007, the Court held that, given the high risk to bystanders, the officer's decision to ram his vehicle into a fleeing suspect's car to end a dangerous

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to search may be deemed voluntary."); INS v. Delgado, 466 U.S. 210, 216 (1984) ("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.").

For a thoughtful critique of the Court's conclusion (in the search context) that asking police officers to advise individuals of their right to refuse to consent to a search would create "practical difficulties," see Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 869–72 (2014) (characterizing the Court's conclusion as "highly suspect").

196. Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000).

197. 134 S. Ct. 2012 (2014).

198. *Id.* at 2020; *see also* Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("While it is not always clear just when minimal police interference becomes a seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." (citation omitted)).

199. 471 U.S. 1 (1985).

200. *Id.* at 11.

201. *Id.*

202. 550 U.S. 372 (2007).

high-speed chase was reasonable.[203] The majority was quick to reject the dissent's argument that the officers' continued pursuit of the suspect unnecessarily escalated the situation.[204]

In *Plumhoff v. Rickard*, decided in 2014, the Court held that police firing fifteen gunshots into a vehicle (and killing the two occupants) did not violate the Fourth Amendment.[205] The Court explained, relying on *Scott*, that this was a reasonable use of force to end the pursuit of a fleeing vehicle because the suspect's driving posed a public-safety risk.[206] These cases, relying on a case-by-case totality of the circumstances approach, have been criticized for failing to provide officers (and lower courts) with clear guidelines about how to resolve use-of-force questions.[207]

The question of the need for greater de-escalation of police encounters has come to the forefront in the wake of the series of highly publicized deadly force cases from 2014 and 2015.[208] Although police forces are significantly more professional (and professionalized) than they were in the past, that has not necessarily meant that they are less aggressive. Radley Balko argues that "as a matter of policy, police use more force today than they have in the past. SWAT tactics, for example, are increasingly used for credit card fraud and other low-level offenses, administrative warrants, or even regulatory enforcement."[209] He advocates for greater emphasis in "[u]se-of-force training . . . on conflict resolution and de-escalation."[210]

II. DEFINING LIBERTY AND CONTROL

Being precise about the nature and substance of the rights implicated by an unlawful seizure is essential. As this Article makes clear, the reasonableness of a particular seizure will ultimately turn on both the weight of the government's need for the seizure and the possibility of

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203. *Id.* at 386 ("A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.").

204. *Id.* at 385.

205. Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 (2014).

206. *Id.* ("[I]t is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk. . . . We reject th[e] argument [that petitioners acted unreasonably in firing fifteen shots]. It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.").

207. Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1127 (2008) (asserting that *Garner*, *Graham*, and *Scott* have provided limited guidance to lower courts sorting out use of force claims).

208. *See supra* notes 3–7 and accompanying text.

209. Radley Balko, *Five Myths About America's Police*, WASH. POST (Dec. 5, 2014), http://www.washingtonpost.com/opinions/five-myths-about-americas-police/2014/12/05/35b1af44-7bcd-11e4-9a27-6fdbc612bff8_story.html ("The problem isn't cops breaking the rules—the rules themselves are the problem.").

210. *Id.*

protecting the government's interest in ways less intrusive than a Fourth Amendment seizure.

Reasonableness is a relative measure and the government's interest in effecting a particular seizure will be weighed against the individual interests that are infringed.[211] The important task of defining the individual interests at stake in seizure cases involves two steps. The Court must first clearly identify the nature of the rights that are infringed when a seizure occurs. As outlined below, those individual rights are generally defined in terms of both liberty (or freedom) and control (or autonomy). The second step is the calculation: the Court must try to value those rights by gauging the individual and collective costs of seizures.

A. Individual Rights

The text of the Fourth Amendment itself does not distinguish between searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[212] Nor does it differentiate between seizures of people and seizures of "houses, papers, and effects."[213] But the rights and liberties at issue in seizure cases differ in important ways from those implicated by searches.[214]

The Fourth Amendment's protection against unreasonable seizures of persons is, in fact, a bundle of rights and protections. The interests infringed when a person is seized have been described as rights to "free movement"[215] and "locomotion,"[216] rights to "personal security" and "bodily integrity,"[217] and rights to "personal dignity."[218] Taken together,

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211. Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (explaining that calculating Fourth Amendment reasonableness requires balancing the government's "need" against the "invasion" of a particular search or seizure (quoting Camara v. Mun. Court of S.F., 387 U.S. 523, 537 (1967))).

212. U.S. CONST. amend. IV.

213. *Id.*

214. The *needs* that the government must assert to justify a seizure are different, too. *See infra* Section III.A.

215. Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 346 (1998).

216. Maclin, *Locomotion*, *supra* note 30, at 1260–61 (describing the Fourth Amendment as protecting a "right of locomotion" that was grounded both in the right to be free from "government interference" and the Amendment's protection of "personal security").

217. Clancy, *supra* note 215, at 346 & nn.263–69 ("In referring to protected personhood interests, it has been sometimes stated that the Fourth Amendment protects the right to be left alone, individual freedom, personal dignity, bodily integrity, the 'inviolability of the person,' the 'sanctity of the person,' and the right of free movement." (footnotes omitted) (quoting first Wong Sun v. United States, 371 U.S. 471, 484 (1963); then quoting Sibron v. New York, 392 U.S. 40, 66 (1968)) (collecting Supreme Court cases in the footnotes); *see also* Davis v. Mississippi, 394 U.S. 721, 726–27 (1969) ("Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'").

218. Clancy, *supra* note 215, at 346. The concept of dignity has also been described as the "inviolability" or "sanctity of the person." *Id.* at 346 & nn.263–69 (first quoting *Wong Sun*, 371 U.S. at 484; then quoting *Sibron*, 392 U.S. at 66) (collecting Supreme Court cases in the footnotes); *see also* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2089 (2011) (Ginsburg, J., concurring) (describing al-

these descriptions define both an intrinsic, essential, inalienable liberty or freedom and a means of restraining the government.[219]

In the search context, scholars like Stephen Schulhofer, Jed Rubenfeld, and Thomas Clancy have advocated characterizing the Amendment as affording a right to control or restrict government access to information as opposed to a mere privacy protection.[220] A similar emphasis in seizure cases on these concepts of security and control is important, but any suggestion that we should develop a unifying, autonomy-based explanation of the interests implicated in both search and seizure cases may be problematic.[221] In seizure cases, as noted above, the interest that is implicated—albeit to varying degrees—is the right to control the movement of one's own body.[222] Reframing that specific form of control as some more general autonomy interest that applies similarly or equally to searches and seizures may seem relatively harmless, but it risks—at least in seizure cases—making the interests at stake more vague or removed. Instead, a clearer articulation of the movement, locomotion, and liberty rights at stake in seizure cases might highlight for the Court (or even for law enforcement officers) alternative and less restrictive means of accomplishing the government's ends.[223]

With the right to control one's movement at its core, the right to be free from an unreasonable seizure is readily distinguishable from the property and privacy rights that are implicated by searches (or by seizures of evidence and property).[224] Nevertheless, it would be a mistake to

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Kidd's ordeal as a "grim reminder of the need to install safeguards against disrespect for human dignity, constraints that will control officialdom even in perilous times").

219. *See* Clancy, *supra* note 215, at 354 (asserting the Framers' focus on security reflected a desire "to exclude the government").

220. Stephen Schulhofer, for example, rejects the characterization of Fourth Amendment privacy as a form of *secrecy* and advocates replacing it with a view of privacy as a form of information *control*. SCHULHOFER, *supra* note 21, at 6–9. As Schulhofer explains, privacy defined only as secrecy is too easily dismissed as a protection that only the guilty would need. *Id.* at 6. This is a subtle shift—from emphasizing a desire to *hide* information to the desire to *control* one's information. *Id*. at 6–9 (explaining that Fourth Amendment privacy protection is not about "secrecy," it is about "personal autonomy," "security," and "control over personal information").

Jed Rubenfeld and Thomas Clancy have similarly argued against a privacy-centered view of Fourth Amendment search protections and for greater emphasis on "security." Clancy, *supra* note 215, at 367–68 ("[T]he ability and the right to exclude agents of the government is the essence of the security afforded by the Fourth Amendment. . . . It is not privacy which may motivate a person to assert his or her right. It is the right to prevent intrusions—to exclude—which affords a person security."); Rubenfeld, *supra* note 21, at 104 ("The Fourth Amendment does not guarantee a right of privacy. It guarantees—if its actual words mean anything—a right of security.").

221. Thomas Clancy has asserted that "[t]o look beyond the right to exclude and seek positive attributes to the right to be secure, whether those attributes be called privacy or something else, serves to limit—and ultimately defeat—that right." Clancy, *supra* note 215, at 367. Jed Rubenfeld's desire to jettison privacy and "revitaliz[e] the right to be secure" seems to suggest a similar approach. Rubenfeld, *supra* note 21, at 104–05.

222. *See supra* notes 215–19 and accompanying text.

223. *See infra* Section III.A.

224. *See* Horton v. California, 496 U.S. 128, 133 (1990) ("A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property."); *see also* Maclin, *Locomotion*, *supra* note 30, at 1330 (asserting that the "modern constitutional

insist on a bright line between searches and seizures or between privacy and personhood or movement. Searches and seizures overlap in many cases. Indeed, the need to get the seizure analysis correct is heightened because arrests are generally an automatic trigger for searches incident to arrest.[225] *Terry* stops, likewise, often lead to *Terry* frisks.[226] And a challenge to the evidentiary fruits of one of these seizure-triggered searches is the most frequent means by which the lawfulness of a stop or arrest is litigated.[227]

Nor is there a case being made here that seizures are always more intrusive or offensive than searches. Searches of a person—for example, frisks, pat downs, or other searches of a person's pockets; body cavity searches; or cheek swabs for DNA—may implicate similar personhood and dignity interests and, depending on the nature of the search, could be dramatically more intrusive than, say, a checkpoint stop.[228]

The point is simply that the interests implicated by a seizure of a person are different in important ways from other Fourth Amendment events: they always involve at least some restriction on movement that is not inherent in a search. Precision about the interests and rights implicated by police conduct is essential to evaluating the lawfulness of the government's conduct in any Fourth Amendment case. As outlined in Part III, in every seizure case, the Court must address whether the government can justify the restraint of a particular suspect's movements.

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fascination with the right of privacy [has] obscure[d]" the importance of a "meaningful right of locomotion"); Rubenfeld, *supra* note 21, at 103 (explaining that "expectations of privacy do not really speak to arrests or imprisonment—that is, to seizures of the person").

225. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (holding that a search incident to arrest authorizes extensive and thorough search of suspect's person); Chimel v. California, 395 U.S. 752, 763 (1969) (authorizing search of grab area around arrestee as an incident of an arrest), *abrogation recognized by* Davis v. United States, 131 S. Ct. 2419 (2011). In many states, arrests also trigger DNA swabs. *See, e.g.*, Maryland v. King, 133 S. Ct. 1958, 1970–71 (2013). Custodial arrests may also trigger intrusive searches at the jail. Florence v. Bd. of Chosen Freeholders of Burlington, 132 S. Ct. 1510, 1520 (2012).

226. *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (finding frisk of a constitutionally stopped person appropriate when the officer had reason to suspect the individual was armed).

227. *Cf.* Strossen, *supra* note 34, at 1189–90.

228. *Cf.* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 737–42 (1993) (analyzing results of survey that asked respondents to rank the intrusiveness of a wide range of search and seizure categories). In a frequently quoted passage from his concurrence in *United States v. Watson*, Justice Powell grappled with this question and highlighted the conflict between logic and law in the Court's approach to regulating arrests:

> Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches. Indeed, as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater.

United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring).

B. The Cost of an Unreasonable Seizure

Being specific about the nature of the interests at stake in seizure cases is only part of the process. Scholars have long documented the Court's struggle to accurately measure or value the cost of a particular Fourth Amendment intrusion, particularly when the individuals presenting the claim to the Court are either accused or convicted criminals. As Nadine Strossen has explained, the Court's efforts to weigh the "subjective intrusiveness" of a search or seizure are "particularly dependent upon value judgments" that are regularly made without citation to "any empirical evidence—either specific evidence regarding the reactions of particular individuals, or more generalized evidence such as expert opinions or public opinion surveys."[229]

While the Court's harm-estimation problems are common to both search and seizure cases,[230] there are reasons to think they may be amplified in the seizure context. Particularly in technology cases, Justices seem to be better able (or at least more willing) to put themselves in the position of the individual whose home is being surveilled,[231] whose car is being followed,[232] or whose phone is being searched.[233] There are not similar passages to cite in recent seizure cases. Justices do not seem to get stopped, to ride the bus, or to live in boardinghouses.

In *Atwater*, perhaps the seizure case most likely to strike close to home for the Justices, the Court did acknowledge the "pointless indignity" of Atwater's arrest and confinement for a mere seat belt violation.[234] As noted above, however, Atwater's experience was quickly (and inaccurately) dismissed as an anomaly.

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229. Strossen, *supra* note 34, at 1188; *see also* Baradaran, *supra* note 21, at 35–36.

230. Slobogin & Schumacher, *supra* note 228, at 774 (asserting that survey data reflected a mismatch between "commonly held attitudes about police investigative techniques" and the Court's perceptions of the intrusiveness of those techniques and recommending further empirical studies); *see also* Jeremy A. Blumenthal, Meera Adya & Jacqueline Mogle, *The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy,"* 11 U. PA. J. CONST. L. 331, 339–42 (2009).

231. *See* Kyllo v. United States, 533 U.S. 27, 38 (2001) ("The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider 'intimate' . . . .").

232. At oral argument in *United States v. Jones*, Chief Justice Roberts famously asked the government attorney: "You think there would also not be a search if you put a GPS device on all of [the Justices'] cars, monitored our movements for a month?" Transcript of Oral Argument at 9, United States v. Jones, 132 S. Ct. 945 (2012) (No. 10-1259).

233. Riley v. California, 134 S. Ct. 2473, 2489–90 (2014) (describing cell phones as containing "[t]he sum of an individual's private life"; observing that "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives-from the mundane to the intimate"; and enumerating the types of apps that are typically found on cell phones: "apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life").

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

The *Floyd* litigation from the Southern District of New York highlights that, as scholars like Song Richardson and Shima Baradaran emphasize, having concrete data is transformative for parties (criminal defendants or civil plaintiffs) asserting Fourth Amendment claims.[235] The events of the last year may have brought us to a moment where the government is more willing to develop and share that data. As FBI Director Jim Comey explained in February 2015: "The first step to understanding what is really going on in our communities and in our country is to gather more and better data related to those we arrest, those we confront for breaking the law and jeopardizing public safety, and those who confront us."[236]

The President's Task Force on 21st Century Policing emphasized the need for more data to support a "culture of transparency and accountability."[237] Indeed, in its action items, the Task Force called on law enforcement agencies to (i) "collect, maintain, and analyze demographic data on all detentions (stops, frisks, searches, summons, and arrests)"; and (ii) publish both their department policies and "information about stops, summonses, arrests, reported crime, and other law enforcement data aggregated by demographics."[238]

Even where data sets are hard to come by, detailed and descriptive ethnographic accounts of the experience of those who reside in heavily policed communities provide a clear-eyed view of the costs of aggressive stop-and-arrest policies. In their 2013–2014 analyses of the impacts of New York's aggressive policing on the community being policed, Amanda Geller, Jeffrey Fagan, Tom Tyler, and Bruce G. Link found that "young men reporting police contact, particularly more intrusive contact, also display higher levels of anxiety and trauma associated with their experiences."[239]

In his study of forty Black and Latino boys in East Oakland, California, Victor Rios argued that police perpetuated dislocation of boys in the community by "assuming that all the boys were actively engaged in

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235. The "hit rate" data in *Floyd* was essential to the plaintiffs' success in the District Court. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 575–77 (S.D.N.Y. 2013); *see also* Baradaran, *supra* note 21, at 8 (advocating "informed balancing [which] requires consideration of wider information contained in statistical data, clinical evidence, and experience, rather than common sense alone"); Richardson, *supra* note 21, at 2040 (having data helps courts "reconsider their behavioral assumptions about police decisionmaking and judgments of criminality").

236. Comey, *supra* note 15 ("'Data' seems a dry and boring word but, without it, we cannot understand our world and make it better.").

237. TASK FORCE, *supra* note 13, at 1.

238. *Id.* at 13, 24.

239. Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 24 AM. J. PUB. HEALTH 2321, 2324 (2014); *see also* CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 1 (2012) ("These interviews provide evidence of how deeply this practice impacts individuals and they document widespread civil and human rights abuses, including illegal profiling, improper arrests, inappropriate touching, sexual harassment, humiliation and violence at the hands of police officers. The effects of these abuses can be devastating and often leave behind lasting emotional, psychological, social, and economic harm.").

criminal and violent activity or by providing the boys little choice."[240] Rios also observed that the experience of boys without criminal records in his study was disturbingly similar to the experience of those with criminal records: the boys who had not been arrested "expressed the same feelings and experiences as the boys who had been stigmatized, disciplined, and arrested."[241] Alice Goffman and Elijah Anderson have similarly illuminated the impacts of aggressive policing on communities.[242]

Finally, proposals for the Court to take a broader view of the interests being asserted are as important in the seizure context as they are in search and privacy cases.[243] Anthony Amsterdam cautioned, in 1974, against the more narrow conception of the Fourth Amendment as a "'safeguard' against violation of individuals' isolated spheres of fourth amendment rights."[244] Instead, he advocated a "conception of the amendment as a general command to government to respect the collective security."[245] The Court's failure to account for security as a collective community right is particularly problematic in cases like *Atwater*, where the Court balanced Atwater's individual complaint against the needs of police across the country.[246] As outlined in Section III.D, com-

240. VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 72 (2011).

241. *Id.* at 148.

242. ELIJAH ANDERSON, STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY 191–93 (1990) (describing the experiences and responses of an innocent black man who is stopped by the police in Philadelphia, PA); *see also* ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY, at xii–xiv (2014) (chronicling her experiences with the 6th Street Boys, a group of men "in a lower-income Black neighborhood" in Philadelphia).

243. Baradaran, *supra* note 21, at 8 (advocating that courts "consider not just the criminal defendant before them but also the constitutional rights of a broader swath of society"); Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment is it, Anyway?*, 25 AM. CRIM. L. REV. 669, 669–70 (1988) (criticizing Court's failure "to appreciate the implications of its rulings for persons not immediately involved in the cases before it. Though many may consider this argument an exhausted civil libertarian protest, whenever the Court upholds a challenged police practice against an obviously guilty individual, the Court is also licensing similar intrusions against not-so-obviously innocent persons as well."); Strossen, *supra* note 34, at 1196 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 557–58 (1976)) (using *Martinez-Fuerte* as an example where the Court deemed the intrusion "quite limited" and failed to "take into account the intrusiveness experienced collectively by the thousands of motorists detained at the checkpoint each day, or the hundreds of thousands detained each week").

244. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 372 (1974); *see also* Strossen, *supra* note 34, at 1196 ("The Court's tendency to focus on individual fourth amendment litigants also causes it to neglect systematic evaluation of the collective harm to individual rights resulting from searches or seizures that are similar or identical to the one that gave rise to the case.").

245. Amsterdam, *supra* note 244, at 372; *see also* Sundby, *supra* note 191, at 1777 ("I would characterize the jeopardized constitutional value underlying the Fourth Amendment as that of 'trust' between the government and the citizenry. . . . Government action draws its legitimacy from the trust that the electorate places in its representatives by choosing them to govern.").

246. Strossen, *supra* note 34, at 1204 (criticizing "the Court's regular weighing of the privacy and liberty rights of a single individual against the law enforcement interests of the collective national community"); *see also* Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing* (forthcoming 2016) (manuscript at 16–17) (draft on file with author) (explaining that the Court's balancing is "illusory" because "[w]hen the Court weighs the

munity effects and interests must also be considered when weighing the government's interests. Eventually, the consistent deprivation of individual liberties will create public-safety costs.[247]

III. DEFINING NECESSITY

The other side of *Terry*'s reasonableness balance—and the focus of this final part of the Article—is the government's need for the seizure in question. The sections that follow examine four categories of problems with the necessity calculus in seizure cases: (i) the Court's failure to press the government to articulate the need for a particular seizure; (ii) the Court's unwillingness to use existing laws, guidelines, or norms to guide its assessment of necessity; (iii) the Court's silence about the impact of overcriminalization on the government's seizure power; and (iv) the Court's struggle with its obligation to consider alternative approaches, developing technologies, and long-term impacts in calculating necessity.

A. Articulating the Need to Seize

The government's need to seize an individual is often different from its interest in conducting a search. This is why even searches of a person (which implicate some of the same individual interests as seizures) must be analyzed differently. The government's interest in conducting a seizure must always be justified by some need of the government to control or restrict the movement of a person's body,[248] while its purpose for a search is to obtain access to information, evidence, or weapons.[249] Of course, both of these specific, immediate interests may be in service of general investigative, crime prevention, or other public safety aims that are common to both searches and seizures.[250]

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government's and individual's competing interests, it almost always compares the overarching goal of the search scheme against a single individual's privacy interest"). This apples-to-oranges problem was starkly presented in *Atwater*, where the Court acknowledged that Atwater's individual interest "clearly outweigh[ed] anything the City [could] raise against it *specific to her case*." Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (emphasis added). The *Atwater* Court proceeded, however, to balance her interests against the government's universal need for readily-administrable rules across the full spectrum of factual scenarios. *Id.* at 347–49.

247. *See infra* Section III.D.2.

248. *See, e.g.*, *Atwater*, 532 U.S. at 347, 354; United States v. Watson, 423 U.S. 411, 417 (1976); Terry v. Ohio, 392 U.S. 1, 23–25 (1968).

249. *Cf.* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.4(c) (5th ed. 2013) (explaining that "one primary purpose" of searches of individuals "is to find evidence of the crime" under investigation); Baradaran, *supra* note 21, at 17 (finding that in search cases, the government's interests "include officer safety . . . public safety . . . and judicial economy" (footnotes omitted)).

250. *See* LAFAVE, *supra* note 249, at § 5.4(c); Williamson, *supra* note 28, at 774 ("A seizure of a suspected criminal, in other words, may not only serve the utilitarian function of making criminal prosecution possible by providing a body in court against whom to prosecute the case; it also may enhance investigatory goals by providing the opportunity to obtain evidence."); *see also* Michigan v. Summers, 452 U.S. 692, 702–03 (1981) (describing officer (and occupant) safety as a significant law enforcement interest driving detentions of occupants during execution of search warrants).

At the outset of any reasonableness analysis, the Court must clearly define the need for a particular seizure; vague assertions that a particular arrest or stop is "necessary for effective law enforcement" are insufficient. In too many Fourth Amendment cases, involving both searches and seizures, the Court has been imprecise about the government need at stake. In her 2013 article, *Rebalancing the Fourth Amendment*, Shima Baradaran explained that "effective law enforcement" was the government need or interest most often cited in Fourth Amendment search and seizure cases.[251] Baradaran and others, including Christopher Slobogin, argue persuasively that the Court's acceptance of these overly general and vague justifications for searches and seizures undermines the individual liberties protected by the Amendment.[252]

Courts cannot defer to the sort of intuitive, gut-level calculations that are pervasive in Fourth Amendment jurisprudence.[253] The Court's approach seems particularly problematic in light of social science research revealing the impact of cognitive biases on police decision-making.[254] Specificity and precision are particularly important when the government interest at issue is a combination of investigative, regulatory (deterrent), and preventive needs.[255]

Requiring more clear statements of necessity to justify Fourth Amendment seizures does not mean that every seizure must be adjudicated on a case-by-case, need-by-need basis. Throughout the cases re-

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251. Baradaran, *supra* note 21, at 16–17. This interest was identified in over fifty percent of the cases that she analyzed. *Id.*

252. *See* SLOBOGIN, *supra* note 21, at 31 (noting that the Court's efforts to make an "assessment of the invasiveness of the police action in question . . . have been abysmal"); Baradaran, *supra* note 21, at 20–25; *see also* Lee, *supra* note 34, at 1157; Strossen, *supra* note 34, at 1201 ("The Court's tendency to inflate the governmental stake in any search or seizure is augmented by its corresponding tendency to assume that the search or seizure will be uniquely successful in promoting law enforcement goals. This entails two separate assumptions, neither of which is supported by judicial analysis or evidence. The first is that the challenged law enforcement method will in fact effectively promote the law enforcement goal at issue. The second is that it will do so to a substantially greater degree than alternative law enforcement methods." (footnote omitted)).

253. *See* Richardson, *supra* note 21, at 2052–56 (focusing on problems with police intuition); Stoughton, *supra* note 195, at 849, 857 (noting that it is "common practice [for the Court] to make a statement without citation or support" regarding "its factual assertions about policing" and describing problems with Court's intuitions). *But see* Kerr, *Equilibrium*, *supra* note 23, at 481 (defending "existing [Fourth Amendment] doctrine [as] complex and fact-specific" but not a "mess": "[E]xisting [Fourth Amendment] doctrine . . . . is the product of hundreds of equilibrium-adjustments made over time. *Those adjustments were usually made intuitively in response to felt necessities*, but in rare cases were made out of a conscious recognition of the need for changes to keep the law in balance in the face of new practices and technological change." (emphasis added)).

254. *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 984–87 (1999) (evaluating the role that cognitive biases play in driving law enforcement decisions). *See generally* Richardson, *supra* note 21, at 2035–36 (discussing cognitive biases).

255. *See* Friedman & Stein, *supra* note 246 (manuscript at 6–7) (explaining that "the very nature of policing has shifted – from a reactive crime-solving model towards intelligence gathering, regulation and deterrence," and emphasizing the importance of distinguishing between these categories of police behavior); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 418–20 (1988) (distinguishing between police-initiated searches and "responsive" searches).

viewed in Part I, the Court missed opportunities to narrow entire categories of seizures and rejected litigants' proposals to draw more liberty-protective, bright-line rules. Recent decisions in *Floyd*, *Navarette*, and *Moore* provide useful examples of the importance of requiring the government to articulate its need for a particular seizure.

1. The Need to Deter

The benefit of pressing the government to articulate the need for a seizure was recently made plain in the New York City stop-and-frisk litigation. On August 12, 2013, Judge Shira Scheindlin of the Southern District of New York issued a decision in *Floyd v. City of New York*,[256] holding that the New York City Police Department's (NYPD) stop-and-frisk practices (i) violated the Fourth Amendment because they were not based on the requisite reasonable suspicion and (ii) displayed a pattern and practice of racial profiling in violation of the Fourteenth Amendment.[257] Although *Floyd* is not a Supreme Court case, the developments in that litigation highlight the importance of interrogating the government's purported need for expanded seizure power.

Judge Scheindlin's decision relied heavily on data about stops that had been gathered by the NYPD for more than a decade.[258] This data showed a more than 600% increase in the number of stops over the span of ten years: from 97,296 stops reported in 2002[259] to 685,724 stops in 2011, the year the program peaked.[260] The data also included the number of stops that resulted in an arrest or summons (the hit rate).[261]

The class action plaintiffs relied heavily on the hit rate data to argue that they had been stopped without reasonable suspicion.[262] The dearth of guns found during NYC frisks revealed that early, decades-old predictions about the potential for abuse of *Terry* had been realized.[263] In de-

256. 959 F. Supp. 2d 540, 540, 553 (S.D.N.Y. 2013).

257. *Id.* at 562–65.

258. *Id.* at 582; *see also* U.S. COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY, at ch. 5 (2000), http://www.usccr.gov/pubs/nypolice/main.htm; N.Y. STATE OFFICE OF THE ATTORNEY GEN., CIVIL RIGHTS BUREAU, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES 65 (1999), http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf.

259. *Stop-and-Frisk Data*, *supra* note 110.

260. Second Supplemental Report of Jeffery Fagan, Ph.D. at 10, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034). In 2012, the number of stops dropped to 532,911 and the 2013 figure was 191,558. *Stop-and-Frisk Data*, *supra* note 110. 2014 data (46,235 stops) shows that the downward trend has continued. *Id.*; *see also* Mike Bostock & Ford Fessenden, *'Stop-and-Frisk' Is All But Gone From New York*, N.Y. TIMES (Sept. 19, 2014), http://www.nytimes.com/interactive/2014/09/19/nyregion/stop-and-frisk-is-all-but-gone-from-new-york.html?_r=0 (explaining downward trends in stop-and-frisks).

261. *See* Complaint at 10, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034).

262. *Id.* at 13.

263. *See* Amsterdam, *supra* note 244, at 438 ("The pressures upon policemen to use the stop-and-frisk power as a device for exploratory evidence searches in these areas are intense. Police can

fense of the stop-and-frisk program, the City's expert argued that the low hit rate actually demonstrated the program's effectiveness:

> With the critical shift to a mission of finding crime patterns, deploying police where and when crime is occurring before it occurs, and reducing crime by proactive efforts to stop crime before it happens, i.e., preventing crime, the measure of success has changed. In contrast to the definition of success used in the Fagan Report, a downward trend in the number of weapons found, and even of arrests, by prevention standards, are evidence of success.[264]

In public statements defending the City's aggressive stop-and-frisk program, former New York City Mayor Michael Bloomberg also emphasized deterrence as one of the driving forces behind the program:

> Critics say the fact that we're 'only' finding 800 guns a year through stops of people who fit a description or are engaged in suspicious activity means that we should end stop and frisk.
>
> Wrong. That's the reason we need it—to deter people from carrying guns. We are the First Preventers.[265]

In other words, when pressed to justify the need for this dramatic, exponential increase in *Terry* stops, and when faced with highly problematic data about racial bias in the execution of the program, the City argued that the success of the stop-and-frisk program rested on a deterrence theory (and not on the traditional *Terry* justification for a stop—the investigation, interruption, or prevention of a crime in progress).

The City's deterrence arguments have intuitive appeal (even if they lack empirical support).[266] More aggressive policing creates a greater risk of detection that is generally expected to deter crime.[267] These arguments

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justify virtually any exercise of the power because these are 'high-crime' areas where all young males, at least, are suspect." (footnotes omitted)).

264. Report of Dennis C. Smith, Ph.D. at 20, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034).

265. Michael R. Bloomberg, Mayor of N.Y.C., Address on Public Safety to NYPD Leadership (Apr. 30, 2013) (transcript available at http://www1.nyc.gov/office-of-the-mayor/news/151-13/mayor-bloomberg-delivers-address-public-safety-nypd-leadership); *see also* OAG ARREST REPORT, *supra* note 74, at 2 ("The NYPD identifies stop and frisk as a tool to combat violent and gun-related crime and deter future criminal conduct." (footnote omitted)).

266. ZIMRING, *supra* note 111, at 145 (concluding that, despite the beliefs of police (officials and patrol officers) "these aggressive tactics add significant value to patrol efforts" there is, at best, "mixed evidence of effectiveness"); *see also id.* at 149 ("Of all the undocumented elements of New York City's policing changes, the marginal value to crime reduction of a variety of aggressive tactics—stops, searches, misdemeanor arrests—should be at the very top of the priority for rigorous evaluation efforts but it isn't.").

267. The proposition that increasing the risk of apprehension increases deterrent benefits finds support as a general matter. *See* VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (2010), http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf ("Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits.").

are also unconstitutional. The Court has never permitted officers (or entire departments) to justify stops as a form of general deterrence except at checkpoints where a brief detention is "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."[268] In the street-stop context, officers are required to have individualized suspicion of criminal activity that "must be measured by what the officers knew before they conducted their search."[269] The *Floyd* case demonstrates that, when pressed to articulate the necessity for a particular category of seizures, the government may reveal policy motives or purposes that directly contravene the governing constitutional standard.[270]

2. Needs Versus Interests

The Court's vagueness may, in part, be attributable to the fact that, in some cases, the Court has described the Fourth Amendment as concerned with government interests as opposed to needs. The use of the term "interests" seems best intended as a contrast with the inalienable individual right it is being balanced against, not as some watered-down version of a government need.[271] The government's power to seize—in other words, its authority to infringe individual rights—is contingent on identifying its need for the seizure.[272] Relatedly, any power given to police must be limited according to the government's clearly defined need.[273] Justice Scalia zeroed in on this distinction in the *Bailey* decision

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268. Brown v. Texas, 443 U.S. 47, 51 (1979). Other statements made by Mayor Bloomberg reflected some awareness of this problem with the City's argument. In a press conference held immediately after Judge Scheindlin issued her ruling against the City, Bloomberg described the "vital deterrent" benefit of stop and frisk as a "critically important byproduct" of the program. Michael R. Bloomberg, Mayor of N.Y.C., Press Conference on Floyd Decision (Aug. 12, 2013) (transcript available at http://www.nydailynews.com/news/politics/bloomberg-vows-appeal-federal-judge-ruling-stop-stop-and-frisk-policy-article-1.1424630); *cf.* Friedman & Stein, *supra* note 246 (manuscript at 59) (describing the New York City program as "arbitrary" and unconstitutional because it lacked "the safeguards of deterrent policing").

269. Florida v. J.L., 529 U.S. 266, 271 (2000).

270. *See* Friedman & Stein, *supra* note 246 (manuscript at 59) (explaining that the New York City stop-and-frisk program was "not investigative policing; it [was] *in terrorem* deterrence").

271. *See* Maclin, *supra* note 243, at 670 ("[T]he fourth amendment was designed not to facilitate governmental investigations, but rather to protect citizens from unjustified and arbitrary government invasions.").

272. The original reasonableness cases consistently referred to the government's "need" for a particular search or seizure. Quoting from *Camara*, which had been decided only a year before, the *Terry* Court described the Court's task as "balancing the need to search (or seize) against the invasion which the search (or seizure) entails." Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (alterations in original) (quoting Camara v. Mun. Court of S.F., 387 U.S. 523, 537 (1967)). The *Terry* Court also referred to the "government interest" but made clear that the interest must "justif[y] official intrusion." *Id.* at 21. Later cases have similarly employed this sort of necessity language. *See, e.g.*, Illinois v. McArthur, 531 U.S. 326, 331 (2001) (upholding search-warrant seizure where the government articulated a "specially pressing or urgent law enforcement need" for the seizure and where "the restraint at issue was tailored to that need, being limited in time and scope"); Maryland v. Buie, 494 U.S. 325, 333–34 (1990) (explaining that the *Terry* Court permitted the frisk "which was *no more than necessary* to protect the officer from harm" (emphasis added)).

273. Amsterdam, *supra* note 244, at 437 ("[T]he fourth amendment is thought to tolerate [stop and frisk] power only as the result of a fine balance between its recognized intrusion upon personal

when he emphasized that "[c]onducting a *Summers* seizure incident to the execution of a warrant 'is not the Government's right; it is an exception—justified by *necessity*—to a rule that would otherwise render the [seizure] unlawful.'"[274]

The prospect of seizing a suspect in order to search her provides an example. In justifying a custodial arrest, the Court should not rely on an officer's interest in conducting incidental searches or frisks as part of the evaluation of the necessity for custody. In the course of upholding a custodial arrest in *Virginia v. Moore*,[275] however, the Court explained that "[a]rrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation."[276] The Court was vague about the kind of "in-custody investigation" being referenced, but it reiterated shortly afterward that custodial arrests "enable officers to investigate [an] incident more thoroughly."[277] The Court cited Wayne LaFave's thorough treatise on arrests as support for this proposition.[278]

The LaFave citation does not support the idea that the desire to conduct a search incident to arrest (the search that ultimately revealed narcotics in Moore's case) could justify an arrest. Instead, in that section, LaFave describes, but does not endorse, the practical incentives that lead officers, who have "adequate grounds" for an arrest, to prefer to take a suspect into custody: "[A]n arrest is commonly made when a search is desired. Consequently, the suspect may be taken into custody under circumstances in which the risk of nonappearance would not be great."[279] Indeed, earlier in the book, LaFave notes that "neither courts nor legislatures have given sustained attention to . . . whether the initial taking into custody is necessary."[280]

Of course, stops and arrests give the government easy access to information (through the various warrantless frisks and searches that can accompany those seizures).[281] It is not entirely clear whether the *Moore* Court was including the power of police to conduct a protective search

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privacy and security and its justification by a specific police need. Exercised in excess of that need, the power makes the intrusion without the justification and destroys the balance." (footnote omitted)).

274. Bailey v. United States, 133 S. Ct. 1031, 1044 (2013) (second alteration in original) (emphasis added) (quoting Thornton v. United States, 541 U.S. 615, 627 (2004) (Scalia, J., concurring)).

275. 553 U.S. 164 (2008).

276. *Id.* at 173.

277. *Id.* at 173–74.

278. *Id.* at 173 (citing LAFAVE, *supra* note 55, at 177–202.)

279. LAFAVE, *supra* note 55, at 186–87 ("An officer who has adequate grounds may arrest a suspect to make it possible to conduct a lawful search of his person.").

280. *Id.* at 168.

281. Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) (explaining that the majority's holding empowered officers faced with a traffic violation to "stop the car, arrest the driver, search the driver, search the entire passenger compartment of the car including any purse or package inside, and impound the car and inventory all of its contents" (citations omitted)).

incident to arrest of Moore as a constitutional justification for the arrest.[282] Although a protective frisk or search may frequently operate as a practical incentive for a police officer to conduct a stop or an arrest, these corollary searches should not be used by the Court as a constitutionally legitimate justification for the triggering Fourth Amendment seizure.[283]

3. Tying Necessity to a Specific Crime

Precedents that discourage consideration of law enforcement purposes or motives have complicated the inquiry into the need for a particular seizure.[284] After *Whren*, the Court has been excessively cautious about probing the government's actual motivations for a particular seizure.[285] The Court's pretext decisions effectively write the Court out of aiding in the solution of significant profiling problems. And they have the potential to undermine the Court's ability to calculate government needs: if police are not required to disclose their purposes, the Court will be unable to tailor seizure power to the government's actual needs.

In more recent cases, the Court has relaxed the requirement that an officer conducting a stop or an arrest must identify the crime of suspicion. That requirement was clearly articulated in the Court's 1979 decision in *Brown v. Texas*, where the Court emphasized that a *Terry* stop should be based on reasonable suspicion that an individual is involved with "specific misconduct."[286] Nevertheless, more recent decisions in cases like *Illinois v. Wardlow* have upheld *Terry* stops even where officers have been silent about the crime of suspicion.[287]

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282. *Moore*, 553 U.S. at 174.

283. As Anthony Amsterdam explained in 1974: "When a frisk power allowed exclusively upon the predicate that the officer needs it to protect himself from deadly assaults by a person he has stopped for questioning becomes a motive to stop and question persons whom the officer would not stop at all except for the opportunity to use a frisk as an evidence-gathering device, surely fourth amendment values are seriously infringed." Amsterdam, *supra* note 244, at 437. The Court's decision in *Whren v. United States*, which permits pretextual stops, does not demand a different result because the pretext for the search was an independently legitimate basis for the stop. 517 U.S. 806, 813 (1996) (refusing to invalidate a pretextual traffic stop that was motivated by the officers' desire to search the car and its occupants for narcotics).

284. *Compare* Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013) ("[W]hether the officers had an implied license to enter the porch [which was integral to whether there was a "search"] depends upon the purpose for which they entered."), *and* City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (holding that the programmatic purpose of the checkpoint—traditional narcotics enforcement—was the basis for Court's finding that it was unconstitutional), *with Whren*, 517 U.S. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

285. *See, e.g.*, Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080, 2082 (2011) (explaining that the Court generally "eschew[s] inquiries into intent" because "the Fourth Amendment regulates conduct rather than thoughts"); Brigham City v. Stuart, 547 U.S. 398, 404 (2006) (holding that an "officer's subjective motivation is irrelevant"); *see also Whren*, 517 U.S. at 813–14.

286. Brown v. Texas, 443 U.S. 47, 49, 51 (1979); *see also* Terry v. Ohio, 392 U.S. 1, 27 (1968) (explaining that reasonable suspicion required proof of something more than an "inchoate and unparticularized suspicion or 'hunch'"); Friedman & Stein, *supra* note 246 (manuscript at 61) ("In *Terry*, the stop was predicated on the perceived imminence of a specific crime.").

287. Illinois v. Wardlow, 528 U.S. 119, 123–25 (2000) (holding that a *Terry* stop was justified where the individual who was stopped was in a neighborhood known for heavy narcotics trafficking and ran away from police). The *Wardlow* Court noted that "the determination of reasonable suspi-

The shift from the Court's 1968 decision in *Terry*—where the exigency of the situation was what prompted the Court to uphold the stop and frisk[288]—to the regulatory and deterrent rationales driving current stop-and-frisk programs also highlights this problem.[289] The record presented in *Floyd* suggested that *Terry* stops on this sort of general suspicion of criminality had become increasingly routine: "Between 2004 and 2009, the percentage of stops where the officer failed to state a specific suspected crime rose from 1% to 36%."[290]

The Court's 2014 decision in *Navarette* provides another variation on this problem. In *Navarette*, the anonymous tip clearly described a past episode of reckless driving, but the caller did not allege ongoing drunk driving.[291] Under *Terry*, this subtle distinction carries weight. An investigative *Terry* stop is clearly justified when an officer has reasonable suspicion of ongoing criminal activity.[292] An officer's power to stop an individual on reasonable suspicion that they committed a past, completed crime is less clear.[293] The *Navarette* majority avoided resolving this question by finding that the anonymous tip of past conduct could have provided sufficient reasonable suspicion for ongoing criminal activity.[294] By basing that claim of reasonable suspicion on an anonymous tip that the officers could not confirm, the majority significantly broadened the definition of reasonable suspicion.[295]

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cion must be based on commonsense judgments and inferences about human behavior" and that the officer was "justified in suspecting that [defendant] was involved in criminal activity, and, therefore, in investigating further." *Id.* at 125 (noting that no crime of suspicion was identified).

288. *See Terry*, 392 U.S. at 20. Officer McFadden suspected that Terry and his two associates were "casing" a store for a potential burglary or robbery. *Id.* at 6; *see also* United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (asserting that a *Terry* stop must be investigation of "ongoing or imminent criminal activity"); LAFAVE, *supra* note 249, § 9.2(c) (explaining that the *Terry* decision "stressed that the officer acted 'to protect himself and others from possible danger, and took limited steps to do so'" and advocating that *Terry* stops "should be expressly limited to investigation of serious offenses" (quoting *Terry*, 392 U.S. at 28)).

289. *See* Nick Pinto, *The Point of Order*, N.Y. TIMES, Jan. 18, 2015, at MM13 ("Most people now think of the police primarily in their role of crime fighting. But it is at least as much their other original mandate, the prevention of disorder, that perpetuates the suspicion many hold for them. Order is a subjective thing, and the people who define it are not often the people who experience its imposition.").

290. Floyd v. City of New York, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013) (these facts were not contested by the parties).

291. Navarette v. California, 134 S. Ct. 1683, 1690 (2014).

292. *See Terry*, 392 U.S. at 30. Some argue that *Terry* stops should be limited to investigations of serious crimes. *E.g.*, Colb, *supra* note 34, at 1692.

293. Justice Thomas, writing for the majority, explained that the Court was left to evaluate "whether the 911 caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated episode of past recklessness." *Navarette*, 134 S. Ct. at 1690; *see also id.* at 1695 n.3 (Scalia, J., dissenting) ("The circumstances that may justify a stop under [*Terry*] to investigate past criminal activity are far from clear and have not been discussed in this litigation." (citations omitted) (citing United States v. Hensley, 469 U.S. 221, 229 (1985)). *But see* Colb, *supra* note 34, at 1692–93.

294. *Navarette*, 134 S. Ct. at 1690.

295. *See id.* at 1695 (Scalia, J., dissenting) ("I fail to see how reasonable suspicion of a *discrete instance* of irregular or hazardous driving generates a reasonable suspicion of *ongoing intoxicated driving*.").

B. The Role of Guidelines, Statutes, and Norms

This Article is intentionally Court focused in its diagnoses and prescriptions. That focus reflects enduring optimism about the role that the judiciary can play and must play in repairing a criminal justice system that is desperately failing in many urban communities. While other scholars have ably suggested promising complementary legislative, prosecutorial, and departmental reforms,[296] the Court still has a fundamental role to play in restraining aggressive police power.[297] Our system is constructed on the premise that the Court can and will perform this function.[298] Furthermore, the Court's missteps in some of the cases documented in this Article are partly to blame for the categorical enlargement of seizure power.

This is not to say that state legislation and departmental guidelines are not important mechanisms for restraining police behavior. They clearly are, and they should play a more central role in guiding the Court's assessment of the necessity for and the reasonableness of a particular seizure. As Anthony Amsterdam observed four decades ago, the Court could require searches and seizures to comply with clearly articulated departmental guidelines or state laws in order to survive reasonableness challenges.[299] Scholars like John Rappaport, Rachel Harmon,

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296. *See, e.g.*, STUNTZ, *supra* note 99, at 294 (explaining that "urban police forces are more attentive to local preferences than a generation ago" but this requires investment in personnel; "Better styles of policing and less cash-strapped urban police forces are mutually reinforcing."); Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1594–95 (2014) (arguing that prosecutors "as executive officers should refrain from introducing evidence that they conclude was unconstitutionally obtained without regard to judicial admissibility—a duty of administrative suppression"); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 768–81 (2012) [hereinafter Harmon, *Policing*] (describing shortcomings of Court-focused and constitution-based solutions; advocating regulatory reforms and rigorous cost-benefit evaluations of police policy); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 3–4 (2009) (arguing that 42 U.S.C. § 14141, which allows "the Justice Department to bring suits for equitable remedies against police departments that" show a pattern of police misconduct is underutilized, and if departments were compelled and induced to reform, by way of this statute, departments would be motivated to proactively reform); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 101, 106–09 (2015) ("Rather than attempting to regulate policing primarily post hoc through episodic exclusion motions or the occasional action for money damages, policing policies and practices should be governed through transparent democratic processes such as legislative authorization and public rulemaking.") (collecting sources calling for more statutory or administrative rulemaking for police).

297. Amsterdam, *supra* note 244, at 439 ("In an age where our shrinking privacy and liberty would otherwise be enjoyable only at the sufferance of expanding, militaristically organized bodies of professional police, the fourth amendment demands that an independent judiciary play a direct, strong role in their regulation."). The two avenues of reform are complementary. The judiciary might more effectively regulate the police by, for example, only giving deference to police when their conduct comports with democratically authorized policing rules or giving clearer direction to legislatures about how to craft rules for police. *See* Friedman & Ponomarenko, *supra* note 296, at 179–83.

298. Even with greater reliance on administrative regulations or legislative action to constrain police, "courts still will need to adjudicate the constitutionality of whatever that process comes up with." Friedman & Stein, *supra* note 246 (manuscript at 26).

299. Amsterdam, *supra* note 244, at 416–29 (explaining that administrative rulemaking by police would supply "a needed check against arbitrariness," add clarity to the process of evaluating

Barry Friedman, and Maria Ponomarenko persuasively advocate using "legislators and law enforcement administrators" to "write the conduct rules" for street-level law enforcement.[300] The Court, however, in seizure cases like *Atwater*, *Whren*, *Muehler*, and *Moore* has explicitly rejected the option of using police norms, departmental regulations, or even state law to provide backbone to the constitutional concept of reasonableness.[301] This is so despite the fact that in numerous other Fourth Amendment contexts, the Court explicitly relies upon community norms and objective expectations to define what is reasonable.[302]

C. More Crimes, More Seizing

The Court is, regrettably, generally silent in seizure cases about the well-documented problem of overcriminalization in this country.[303] But the connection between the substantive criminal law and the power of police to seize criminal suspects is direct. As legislators write more criminal laws, they empower police to effect more seizures.

Given the growth in criminal codes, the seriousness of the underlying offense ought to be a relevant consideration when the need for a particular stop or arrest is being evaluated. In other words, an assumption that probable cause works as a reasonable proxy for the government's need for a particular seizure does not hold up as criminal codes become bloated. Justice Marshall articulated a version of this concern in his dis-

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police conduct, support "local autonomy," increase visibility of individual officer practices, and develop clearly articulated categories of standard police practice).

300. John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CAL. L. REV. 205, 208 (2015) (asserting, at least in some contexts, "law enforcement conduct will hew closer to constitutional norms if the Court gets political policy makers to write the conduct rules than if it writes the rules itself"); *see also* Friedman & Ponomarenko, *supra* note 296, at 106–09; Harmon, *Policing*, *supra* note 296, at 764.

301. Virginia v. Moore, 553 U.S. 164, 176 (2008) (rejecting the argument that an arrest was unreasonable because it contravened state law); Muehler v. Mena, 544 U.S. 93, 103 (2005) (Kennedy, J., concurring) (rejecting the argument that the use of handcuffs for a two to three hour detention was unreasonable because it "deviated from standard police procedure"); Atwater v. City of Lago Vista, 532 U.S. 318, 326, 354 (2001) (rejecting the argument that a custodial arrest for a seat belt violation was unreasonable because it contravened department norms); Whren v. United States, 517 U.S. 806, 816–17, 819 (1996) (rejecting argument that traffic stop was unreasonable because department regulations directed that narcotics officers should not make traffic stops).

302. *See, e.g.*, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining that in addition to manifesting an "actual (subjective) expectation of privacy," a person must establish that "the expectation be one that *society is prepared to recognize as 'reasonable'*" (emphasis added)).

303. Douglas Husak's seminal book outlined the broad expansion of potentially criminal conduct and developed "a normative framework to distinguish those criminal laws that are justified from those that are not." DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3, 58 (2008) ("Too much criminal law will continue to produce too much punishment until we have a principled means to limit the scope of the criminal sanction."); *see also* Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 64, 71 (describing the "inexhaustible supply of criminal law in the United States"); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712–19 (2005) (defining and documenting overcriminalization). *But see* Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585, 1622 (2012) (cautioning against quick adoption of hyperlexis critiques).

sent in *Watson*.[304] The *Watson* majority—holding that police did not need to obtain warrants for public arrests—defended the decision as preserving "[t]he balance struck by the common law."[305] That characterization, however, glossed over an exponential increase (since the drafting of the Fourth Amendment) in the number of crimes that qualify as felonies.[306] This taxonomy shift meant that the arrest power authorized by *Watson* in 1976 was magnitudes greater than the arrest power that existed when the Fourth Amendment was drafted.[307]

In his dissent, Justice Marshall explained that the seriousness of the crimes defined as felonies at the founding ensured that the government was only afforded warrantless arrest power in cases where it most needed that authority. In Marshall's words:

> Applied in its original context, the common-law rule would allow the warrantless arrest of some, but not all, of those we call felons today. . . . As a matter of substance, the balance struck by the common law in accommodating the public need for the most certain and immediate arrest of criminal suspects with the requirement of magisterial oversight to protect against mistaken insults to privacy decreed that only in the most serious of cases could the warrant be dispensed with. This balance is not recognized when the common-law rule is unthinkingly transposed to our present classifications of criminal offenses.[308]

The majority rejected this view and did not elaborate on the government's need for greater warrantless arrest power other than to emphasize the general burdens of obtaining an arrest warrant.[309]

Watson, as an abiding precedent, continues to broaden police power every time a new crime is defined. The significant increase in the number

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304. United States v. Watson, 423 U.S. 411, 441–42 (1976) (Marshall, J., dissenting).

305. *Id.* at 418, 421 (majority opinion); *see also* Kerr, *Equilibrium*, *supra* note 23, at 522 (echoing the *Watson* majority; noting that "[w]hile there have been changes to what counts as a felony, and certainly to what happens after the arrest, the basic balance between liberty and public safety raised by taking a suspect into custody is the same today as it was at common law").

306. *See Watson*, 423 U.S. at 441–42 (Marshall, J., dissenting).

307. The fact that the Court was, in its view, simply sanctioning what the vast majority of state and federal jurisdictions had been doing does not alter this balancing question. Although *Watson* did not result in a transformation of the government's *de facto* seizure power, its cementing of federal and state practices set a new *de jure* baseline.

308. *Id.* at 442 (Marshall, J., dissenting); *see also id.* at 439–41 (Marshal, J., dissenting) ("Only the most serious crimes were felonies at common law, and many crimes now classified as felonies under federal or state law were treated as misdemeanors. . . . Applied in its original context, the common-law rule would allow the warrantless arrest of some, but not all, of those we call felons today. Accordingly, the Court is simply historically wrong when it tells us that '(t)he balance struck by the common law in generally authorizing felony arrests on probable cause, but without warrant, has survived substantially intact.'" (alteration in original) (quoting *id.* at 421 (majority opinion))); SCHULHOFER, *supra* note 21, at 51 (noting that the warrantless arrest rule, while "clear enough in the eighteenth century, has no straightforward meaning in modern circumstances"). Schulhofer explains that in 1792, "a roughly comparable crime" to the credit card theft and fraud committed by Watson "would have been a misdemeanor." SCHULHOFER, *supra* note 21, at 51–52.

309. *Watson*, 423 U.S. at 417.

of felony and misdemeanor arrests since *Watson* can be attributed both to the continued growth in the criminal code and to the continued professionalization of the police force (where arrests are tracked, counted, and used as performance measures).[310]

The Court's determination in *Atwater* that a custodial arrest was reasonable, even for a traffic violation punishable only by a fine, seems to foreclose the possibility of using the Fourth Amendment to help address what has since been described as a misdemeanor crisis.[311] Indeed, in 2001, the Court seemed unaware of the rising rates of arrests for minor offenses.[312] The idea that these low-level offenses might pose the greatest potential for discriminatory enforcement and abuse, however, was clearly articulated long before *Atwater* was decided.[313]

The Court's December 2014 decision in *Heien v. North Carolina*[314] was similarly silent about questions of overcriminalization. In *Heien*, the issue presented to the Court was whether an officer's mistake of law would invalidate a traffic stop.[315] Under the mistaken belief that driving with one broken taillight violated state law, the officer stopped Heien's

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310. *See* JOHN A. ETERNO & ELI B. SILVERMAN, THE CRIME NUMBERS GAME: MANAGEMENT BY MANIPULATION 8–9 (2012) (detailing the "story of police reform that has lost its way, gone astray, and succumbed to short-term numbers games" by departments that have "adopted the statistical performance crime model of police effectiveness"). The President's Task Force on 21st Century Policing expressed concern about the extent to which these kinds of performance incentives (and not real public safety needs) were driving tickets, summons, and arrests. TASK FORCE, *supra* note 13, at 26.

311. *See* Kohler-Hausmann, *supra* note 73, at 630; Natapoff, *supra* note 73, at 1320; *see also* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1080 (2015) (explaining that *Atwater* complicates decriminalization efforts because despite "popular perception . . . legally speaking, the reclassification of an offense into a summons-only infraction does not necessarily take arrest and its concomitant burdens off the table").

312. *Compare* Atwater v. City of Lago Vista, 532 U.S. 318, 351–52 (2001) ("The very fact that the law has never jelled the way Atwater would have it leads one to wonder whether warrantless misdemeanor arrests need constitutional attention, and there is cause to think the answer is no."), *with* Natapoff, *supra* note 73, at 1320; *see also* Kohler-Hausmann, *supra* note 73, at 630. New York City's recent experience with marijuana arrests demonstrates the problem. From 1994 to 2010, the City witnessed an exponential increase in marijuana arrests (from approximately 8,000 to over 56,000 per year). Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 367 (2013). This phenomenon has been a curiosity because it does not reflect public enforcement priorities. As Frank Zimring has observed, marijuana clearly did not become a law enforcement priority at this very late stage of the drug war. ZIMRING, *supra* note 111, at 122. Those arrests, instead, were a tool used to regulate other criminal activity. *Id.* ("These arrests are police on patrol concentrating effort in high-crime areas and with persons whom police regard as potential offenders for more serious crimes. But the threshold offense of marijuana provides the patrolman a method of obtaining fingerprints and removing the suspect from the street. Fundamentally, these arrests are attempts not of drug control but of crime control.").

313. *See* Amsterdam, *supra* note 244, at 415 ("A police officer will always arrest a murderer or an armed robber if he sees one, but whether he will arrest and search a brawler or a drunk or a loiterer, or make an investigative stop or a frisk or a street interrogation, or order people to 'move on,' . . . depends upon his mood and inclinations."); *see also* Fagan & Davies, *supra* note 75, at 462, 476 (describing increases in low-level arrests); Livingston, *supra* note 75, at 590 (describing aggressive "quality-of-life enforcement").

314. 135 S. Ct. 530 (2014).

315. *Id.* at 534.

car.[316] The Court held that the stop was lawful—even though the defendant was not, in fact, violating any traffic provision at the time of the stop—"[b]ecause the officer's mistake about the brake-light law was reasonable."[317]

The *Heien* decision does not seem particularly controversial or significant except perhaps in one respect. Drawing on strands from both *Atwater* and *Moore*—where the Court also sought to avoid imposing on officers in the field the burden of knowing the consequences of a particular violation—the *Heien* decision implicitly accepts as a premise the massive volume of criminal proscriptions. Although the Court asserted that its decision "does not discourage officers from learning the law,"[318] it said nothing about the burden the government arguably should bear for creating such a vast scheme of criminal laws and penalties.

Justice Sotomayor alluded to these concerns in her dissent in *Heien*, noting that "permitting mistakes of law to justify seizures has the perverse effect of preventing or delaying the clarification of the law."[319] None of the Justices acknowledged that the decision effectively rewarded the government for creating a complex and admittedly unknowable criminal code. In other words, if so much is criminalized that is not clearly morally wrong—for example, regulatory offenses like seat belting and broken taillights—we should not permit the government to rely on the bulk of the law to justify enhanced contact with citizens.[320]

D. Calculating Necessity: Alternatives, Technology, and Myopia

Calculating the need for a particular seizure also requires meaningful consideration of alternatives.[321] Court decisions that insist that the Court will never require the police to employ the least intrusive or restrictive alternative to a proposed seizure have been too readily applied to foreclose any consideration of alternatives, even when the Court

316. The traffic code required only one operational taillight, so the officer was, in fact, mistaken about the law. *Id.* at 535 (citing N.C. GEN. STAT. § 20–129(g) (2007)). The North Carolina Supreme Court cited a nearby conflicting provision to support its conclusion that the mistake was reasonable. *Id.* (citing N.C. GEN. STAT. § 20–129(d) (2007)).

317. *Id.* at 534.

318. *Id.* at 539.

319. *Id.* at 543–44 (Sotomayor, J., dissenting) ("Giving officers license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation (or misinterpretation) that suggests a law has been violated significantly expands this authority.").

320. It is worth distinguishing here between this concept of overcriminalization (which refers to the growth of the criminal codes) and the different concept of "hypercriminalization" which sociologist Victor Rios uses to describe a particular form of overaggressive police profiling. Hypercriminalization, according to Rios, is "the process by which an individual's everyday behaviors and styles become ubiquitously treated as deviant, risky, threatening, or criminal, across social contexts." RIOS, *supra* note 240, at xiv.

321. Nadine Strossen's 1988 critique of the Court's failures in this regard still rings true. Strossen, *supra* note 34, at 1176. As Strossen explained, "the Court's fourth amendment balancing analyses have neither systematically evaluated the marginal law enforcement benefits of challenged searches and seizures, nor regularly incorporated the 'least intrusive alternative' requirement, which is an integral component of other balancing tests . . . ." *Id.*

adopts categorical changes to the rules governing seizures.[322] While the Court may not want police to have to calculate in absolute terms the least restrictive alternative in any particular situation, the availability of less restrictive alternatives is always relevant to reasonableness balancing and to the calculation of necessity.[323]

The Court has also been reluctant, in cases like *Muehler v. Mena*, to second-guess the government's allocation of available resources in seizure cases. As noted above, Mena was detained when officers investigating one of her tenants came to her home with a search warrant.[324] The officers' need to detain her in handcuffs (and in her nightclothes) for the two to three hours that it took them to search the residence was never adequately explained.[325] In fact, details supplied in the concurrence made clear that any purported need was principally the product of the officers' decision to assign only two of the eighteen officers on the scene to monitor four detainees.[326] The Court upheld the detention as reasonable even after accepting the plaintiff's assertions that (i) she and the other detainees were not the targets of the search, (ii) they "posed no readily apparent danger," and (iii) "keeping them handcuffed deviated from standard police procedure."[327]

1. The Effect of Technology on Necessity

Because a search is about acquiring information, changes in technology (and behavior) about the collection, storage, maintenance, searching, and dissemination of information have had a significant impact on the definition and perceived intrusiveness of a search. In plain terms, developing technologies enable better hiding of information and more

322. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 349–50 (2001) (rejecting defendant's request for a rule forbidding custodial arrest for minor, fine-only offenses and holding that requiring police to not arrest when they are unsure about severity of offense "would boil down to something akin to a least-restrictive-alternative limitation, which is itself one of those 'ifs, ands, and buts' rules, generally thought inappropriate in working out Fourth Amendment protection" (citation omitted)); United States v. Sokolow, 490 U.S. 1, 11 (1989) ("The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques."); United States v. Sharpe, 470 U.S. 675, 686–87 (1985) ("A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.").

323. Strossen, *supra* note 34, at 1238 ("If the benefits which flow from one measure could be substantially achieved through a second measure entailing lesser costs, the latter should surely be deemed more reasonable, on balance, than the former.").

324. Muehler v. Mena, 544 U.S. 93, 98–99 (2005).

325. *See id.* at 98–100.

326. *Id.* at 103–04 (Kennedy, J., concurring).

327. *Id.* ("Where the detainees outnumber those supervising them, and this situation could not be remedied without diverting officers from an extensive, complex, and time-consuming search, the continued use of handcuffs after the initial sweep may be justified, subject to adjustments or temporary release under supervision to avoid pain or excessive physical discomfort.").

sophisticated seeking.[328] The Court's recent search jurisprudence reflects its efforts to adapt to both sorts of changes.[329]

There are, however, no recent (or projected) technological changes in the seizure context that have impacted the individual's experience of a seizure. Indeed, his observation that the law of arrest is an example of a "law enforcement tool or fact pattern [that is] essentially impervious to change" is what prompted Orin Kerr to conclude that "the basic balance between liberty and public safety raised by taking a suspect into custody is the same today as it was at common law."[330] Kerr's conclusion, however, ignores an important variable: while the physical nature of a seizure may not vary with technology, the government's purported need for the intrusion might.

There are a number of available and evolving technologies that might affect the need for a seizure. For example, if the need to ensure an individual's appearance in court is driving the government need to take low-level offenders[331] and material witnesses[332] into custody, then sophisticated GPS tracking technologies can reduce that necessity. The increasing availability of body-scanning devices may make claims of urban police departments that regular street stops are necessary to detect and deter gun possession less compelling.[333] Use of cameras and other technology to detect traffic offenses (or development of other mechanisms for issuing citations for traffic offenses) makes car stops less necessary.[334] More extensive camera surveillance in high-crime neighborhoods ought to reduce the need for aggressive stop-and-frisk policing strategies. Indeed, significant advances in (and employment of) technology enabling physical surveillance and transaction surveillance[335] ought

328. *See* Kerr, *Equilibrium*, *supra* note 23, at 480. Of course, another key part of the equation, particularly, in the last fifteen years, is the heightened security environment and the government's aggressive deployment of novel technologies to detect and manage potential security threats. SLOBOGIN, *supra* note 21, at 3–4 ("A second difference between the surveillance of yesteryear and today is the strength of the government's resolve to use it. Especially since September 11, 2001, the United States government has been obsessed, as perhaps it should be, with ferreting out national security threats, and modern surveillance techniques . . . have played a major role in this pursuit.").

329. *See, e.g.*, Riley v. California, 134 S. Ct. 2473, 2484–85 (2014) (warrantless search of cell phone incident to arrest held unconstitutional); Maryland v. King, 133 S. Ct. 1958, 1980 (2013) (DNA swabbing of arrestees constitutional); United States v. Jones, 132 S. Ct. 945, 949 (2012) (warrantless GPS tracking unconstitutional); Kyllo v. United States, 533 U.S. 27, 40 (2001) (warrantless use of thermal heat imager unconstitutional).

330. Kerr, *Equilibrium*, *supra* note 23, at 517, 522.

331. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001); Virginia v. Moore, 553 U.S. 164, 176 (2008).

332. *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011).

333. *But cf.* Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1372 (2008) (cautioning against the assumption that "technological restraints are always preferable to physical ones").

334. Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 221 (2007) ("By remotely and automatically enforcing the laws normally used by police to conduct traffic stops, DSRC [dedicated short-range communication] systems could eliminate or drastically reduce the number of police-conducted traffic stops.").

335. SLOBOGIN, *supra* note 21, at 7–9 (describing five categories of physical surveillance, including "cameras, tracking devices, telescopic devices, illumination devices, and detection devices

to reduce or delay the need for seizures in criminal investigations. One simple way to improve a frequently used calculation of necessity is to require more data for establishing claims like "high-crime area."[336]

Other technologies might reduce the likelihood that a police encounter might result in excessive or deadly force. The President's Task Force on 21st Century Policing cited studies that found that the use of body-worn cameras seemed to act as a sort of deterrent for the officers who wore them: they "reduce[d] . . . officer[s'] use of force" in stops and arrests.[337] The same Task Force report described advances in "less than lethal" technology that are being developed to reduce the number of cases where police resort to deadly force.[338]

In general, the Court is more effective at articulating the burdens that technology imposes on law enforcement than it is at identifying those burdens that technology alleviates.[339] Sometimes, as in the warrant context, technology evolves in ways that could justify less intrusion than had been necessary to satisfy the needs of earlier police departments.

The Court's holding in *Watson*, discussed in Section I.A above, was premised, in part, on the perceived "encumbrance" that an arrest warrant requirement would impose on police.[340] Technology has changed, however, in ways that call into question the reasonableness balancing that yielded the *Watson* result. The possibility of obtaining, from the field, near-immediate telephonic warrants makes the consideration of the question presented in *Watson* a much different proposition today than it was in 1976 (and worlds apart from the situation in 1789).[341] As Oren Bar-Gill and Barry Friedman have recently observed:

> Feasibility and exigency are both functions of technology, which operates in today's world to favor warrants. . . . For too long we have lived with a caricature of the warrant process: a detective pounding out a warrant request in triplicate on a battered Smith Corona, assuredly a time-consuming task almost impossible to meet in the fast-paced arena of police work. We do not live in that world, however,

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(i.e., devices capable of detecting concealed items)"); *see also id.* at 51–70 (discussing the limitations of current Fourth Amendment protections in these contexts); *id.* at 9–12, 168–91 (discussing "target-driven transaction surveillance" much of which can be obtained without either a warrant or even a third-party subpoena; this includes collection of decades of general financial and public records information from commercial data brokers, more specific financial transaction information, phone records, click-stream data, and email records, among other types of data).

336. *See* Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1642–43 (2008).

337. TASK FORCE, supra note 13, at 32.

338. *Id.* at 37–38.

339. The role that technology should play in reducing the need for Fourth Amendment intrusions is the subject of a separate work in progress.

340. *See* United States v. Watson, 423 U.S. 411, 423–24 (1976).

341. Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1614–15 (2012).

> and have not for some time. . . . If a magistrate is not on hand, technology can often fill the gap; telephonic warrants are increasingly commonplace. . . . In short, today's technology makes obtaining permission from an official remote from the heat of the decision fast and easy.[342]

In the search context, the Court has begun to adjust the definition of reasonableness to reflect technological advances. The Court's recent decisions in *Missouri v. McNeely*[343] and *Riley v. California*[344] both acknowledged technological developments (and corresponding rule changes) that have increased the ability of officers to obtain warrants remotely.[345] As the *McNeely* Court explained: "[T]echnological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency."[346]

Although there is no suggestion (yet) that the Court is inclined to revisit the question of requiring more arrest warrants, any modern defense of (and reliance on) the *Watson* holding should acknowledge the Court's response to changing technologies in other Fourth Amendment contexts.

Similarly, one of the prevailing arguments in *Atwater* was that it would be too cumbersome to require officers to know which misdemeanor offenses were fine only.[347] The *Atwater* majority did not consider whether it was difficult for any officer to obtain that information through existing mechanisms—nor did it consider the possibility that a readily accessible police database could be easily developed. If not then, certain-

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342. *Id.* (footnote omitted).

343. 133 S. Ct. 1552 (2013).

344. 134 S. Ct. 2473 (2014).

345. In *McNeely*, the Court noted the changes over time of advancements in technology as they relate to obtaining warrants by looking at the amendments of the federal rules (a magistrate judge could once issue a warrant via a telephone conversation; the rules now permit issuance of a warrant via telephone *or other electronic communication*). *McNeely*, 133 S. Ct. at 1562 (allowing a magistrate judge to "consider 'information communicated by telephone or other reliable electronic means'" (quoting FED. R. CRIM. P. 4.1)). The *McNeely* Court also recognized that in some jurisdictions, prosecutors may apply for warrants via radio, telephone, email, and video conferencing and in some cases can receive a signed warrant in less than fifteen minutes. *Id.* at 1562; *see also id.* at 1573 (Roberts, C.J., concurring in part and dissenting in part) (describing warrants received via email to iPads). In *Riley*, while acknowledging that a warrant requirement may hinder police, the Court described the ease with which warrants can be obtained because of the advances of technology in recent years. *Riley*, 134 S. Ct. at 2493 ("Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient.").

346. *McNeely*, 133 S. Ct. at 1562–63 (acknowledging, however, the delays built into any warrant process).

347. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 348 (2001) ("It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest." (citation omitted)).

ly now. Indeed, as Chief Justice Roberts recently observed in the *Riley* case: "[T]here's an app for that."[348]

2. Necessity and Myopia

As the 2014 protests have made clear, aggressive stop-and-arrest practices also inflict broad, long-term damage by undermining the perceived legitimacy of the criminal justice system.[349] These approaches may actually backfire in the long run by alienating communities and by possibly increasing the delinquency rates among community members.[350] The President's Task Force on 21st Century Policing emphasized this need for "legitimacy" in its May 2015 report: "[P]eople are more likely to obey the law" when those who enforce it are perceived to be "acting in procedurally just ways."[351] In support of the goal of "build[ing] public trust and legitimacy," the Task Force emphasized the need for a shift in law enforcement culture from a more aggressive and confrontational "warrior—mindset" to a more protective "guardian" approach.[352]

Fourth Amendment questions are too often presented as zero-sum choices between competing (and never coextensive) public-safety and liberty interests.[353] The obvious liberty costs of expanding seizure authority are viewed by the Court as being offset by the asserted law enforcement interests. But what if the government is not particularly good at calculating its security interests—either because its community focus is too narrow or its time horizon is too short? Increasing executive branch awareness of this issue is reassuring. As the President's Task Force explained: "Crime reduction is not self-justifying. Overly aggressive law

348. *Riley*, 134 S. Ct. at 2490.

349. *See* FACT SHEET, *supra* note 13 ("As the nation has observed, trust between law enforcement agencies and the people they protect and serve is essential to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services."); *see also* Anderson, *supra* note 5 (explaining that racial biases that are evident from stop and frisk data "extend to other forms of aggressive policing, causing black people to associate police officers with humiliation and injustice, and stirring distrust for police in black communities around the country"); *cf.* Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 348 (2011) ("The research on cooperation finds that willingness to assist the police—for example, by reporting suspicious behavior or by participating in crime prevention programs—is strongly linked to a person's belief that police authority is legitimate. And that belief is strong only when officials exercise their authority fairly.").

350. JENNIFER FRATELLO ET AL., VERA INST. OF JUSTICE, COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS 6 (2013) ("[I]ntensive policing can actually 'backfire' and weaken conventional norms among residents and their willingness to cooperate with police, eventually leading to higher levels of crime." (footnotes omitted)); Stephanie A. Wiley & Finn-Aage Esbensen, *The Effect of Police Contact: Does Official Intervention Result in Deviance Amplification?*, 25 CRIME & DELINQ. 1, 16–19 (2013).

351. TASK FORCE, *supra* note 13, at 1.

352. *Id.* at 1, 11–12.

353. *See* Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1483 (criticizing "the Court's insistence in Fourth Amendment cases that collective interests are always in tension with individual interests, and never in tension with each other").

enforcement strategies can potentially harm communities and do lasting damage to public trust."[354]

This is a message that is too often missing in Court analyses of the government's power to seize individuals under the Fourth Amendment. The Court, too, has a more active role to play to ensure that longer term public-safety costs of broadened seizure authority are weighed in the balance.

CONCLUSION

Over the last fifteen years, the Court's reasonableness balancing in cases involving seizures of people has yielded greater authority to the government and significantly narrowed the protections of the Fourth Amendment. Police make more arrests for minor offenses. They employ stop-and-frisk policies in ways that far exceed the "carefully guarded" approach initially envisioned by the *Terry* Court. The Court has largely withdrawn from regulation of "consensual" encounters. Lines previously drawn in checkpoint cases, in search warrant-seizure cases, and in cases involving police use of force have shifted and blurred.

These trends are based, in some measure, on the Court's underestimation of the individual rights and community interests at stake in these cases. Close examination of the cases reveals that this expansion has been driven, in large part, by the Court's reluctance to scrutinize the other side of the balance: the government's need to detain a particular criminal suspect (or category of potential suspects). This must change. The Fourth Amendment protection against unreasonable seizures is meaningless if the Court does not play an active role in restraining aggressive police power.

354. TASK FORCE, supra note 13, at 16; *see also id.* at 42 ("It must also be stressed that the absence of crime is not the final goal of law enforcement. Rather, it is the promotion and protection of public safety while respecting the dignity and rights of all.").