Danger, Safety, and the Fourth Amendment: *Barnes v. Felix*

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Introduction

Danger to human life is constantly offered in law and the popular imagination as a rationale for limiting the reach of the Fourth Amendment. In defense of the Constitution, one could simply cite Benjamin Franklin: "They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."[2] Another, gentler response is that constitutional safeguards for the rights of the accused in fact *further* safety rather than endangering it. While the protection of human life and limb was not addressed by the majority in *Barnes v. Felix*,[3] it was raised by the concurrence as a limiting principle on Fourth Amendment protections. Renewed emphasis on safety as a Fourth Amendment value is a faithful understanding of that provision and a way of promoting cross-ideological support for its guarantees. Constitutionally compliant policing is more than just the law. It protects the safety of suspects, civilians, and officers.

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[2] Online Libr. of Liberty, *Quote: Benjamin Franklin on the Trade Off between Essential Liberty and Temporary Safety (1775)*, https://oll.libertyfund.org/quotes/benjamin-franklin-on-the-trade-off-between-essential-liberty-and-temporary-safety-1775 (quoting 7 The Works of Benjamin Franklin: Letters and Misc. Writings 1775–1779).

[3] 145 S. Ct. 1353 (2025).

I. Safety Is Treated as Reason to Limit the Fourth Amendment

The specter of danger is a constant threat to constitutional liberty. Many people believe that the rule of law is no match for existential danger. Amidst the Great Depression, the Supreme Court made short shrift of the Contracts Clause by holding, "While emergency does not create power, emergency may furnish the occasion for the exercise of power" in ways ordinarily prohibited by the Constitution.[4] Authorities including Justice Robert Jackson and a later majority of the Court insisted that neither the First Amendment nor due process can be understood as "a suicide pact"—both must give way before danger.[5] Outside the American context, too, "emergencies" have been given as a reason to suspend constitutional provisions.[6]

In the years of the Weimar Republic, before he became the foremost Nazi jurist, Carl Schmitt developed a theory that law cannot decide "exceptional" situations.[7] To justify 20th-century authoritarianism, he revived ancient Roman justifications for "commissarial dictatorship," or empowering one man to rule the state to save it from mortal danger.[8] Schmitt's claims about law being unfit for dangerous situations have come back into scholarly vogue in part due

[4] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).

[5] Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (criticizing the "doctrinaire logic" of the majority that led it to uphold freedom of speech for an anti-Semitic, anti-communist political diatribe that triggered an uproar); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159–60 (1963) (invoking the "suicide pact" notion in defending military conscription before holding that draft-dodging cannot be punished with loss of citizenship).

[6] Christian Bjørnskov & Stefan Voigt, *Why Do Governments Call a State of Emergency? On the Determinants of Using Emergency Constitutions*, 54 Euro. J. Pol. Econ. 110, 110 (2018) ("[B]etween 1985 and 2014, 137 countries declared a state of emergency at least once. This implies that roughly 2/3 of all sovereign nations declared a state of emergency during that period.").

[7] *See generally* Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (George Schwab trans., 2d ed. 1934); Carl Schmitt, Dictatorship: From the Origin of the Modern Concept of Sovereignty to the Proletarian Class Struggle (Michael Hoelzl & Graham Ward trans., 7th ed. 1978).

[8] *See* Carlos Pérez-Crespo, *An Apocalyptic Speech Outlining a Theory of Dictatorship: Carl Schmitt Inspired by Juan Donoso Cortés*, 26 Redescriptions 21, 22 (2023); Ellen Kennedy, *Emergency Government Within the Bounds of the Constitution: An Introduction to Carl Schmitt, "The Dictatorship of the Reich President According to Article 48 R.V.,"* 18 Constellations 284, 287 (2011).

to the work of Harvard Law professor Adrian Vermeule.[9] Danger as a reason to suspend the rule of law has found its way into presidential discourse, too. During his first administration, President Donald Trump dismissed due process concerns about seizing firearms: "Take the guns first, go through due process second."[10] More recently, he has echoed Schmitt (and Emperor Napoleon Bonaparte): "He who saves his Country does not violate any Law."[11] Danger—to the community and to the political order more broadly—is seen as the line beyond which the Constitution must yield.

Arguments from danger are particularly common in the Fourth Amendment context. For decades, constitutional protections for Americans suspected of criminal activity have been portrayed in popular culture as an obstacle to safety. Consider the "Dirty Harry"-esque police officers of action films who can protect the public only by setting aside niceties like probable cause.[12] Television dramas and lawmakers alike have imagined scenarios in which a "ticking time bomb" can be defused only by officers who "take matters into their own hands" and commit illegal searches and seizures.[13] Legal "technicalities" are cast as obstacles to rescuing abducted children and thwarting terrorist plots.[14] Popular culture portrays constitutional constraints on criminal investigations as dangerous.

[9] Adrian Vermeule, Common Good Constitutionalism 158 (2022); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 Harv. L. Rev. 1095, 1100–01 (2009).

[10] Brett Samuels, *Trump: "Take the Guns First, Go Through Due Process Second,"* The Hill (Feb. 28, 2018), https://thehill.com/homenews/administration/376097-trump-take-the-guns-first-go-through-due-process-second/.

[11] Maggie Haberman et al., *Trump Suggests No Laws Are Being Broken if His Motive Is to "Save His Country,"* N.Y. Times (Feb. 16, 2025), https://www.nytimes.com/2025/02/15/us/politics/trump-saves-country-quote.html.

[12] Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. Chi. L. Rev. 1457, 1457–60 (1997) (book review) (summarizing sympathetically Dirty Harry's take on Fourth Amendment law).

[13] Ron E. Hassner, *The Myth of the Ticking Bomb*, 41 Wash. Q. 83, 83–84 (2018).

[14] Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. Crim. L. & Criminology 15, 17 (2003); *cf.* Wendy Kaminer, *When Justice Becomes Mere Technicality*, The Atlantic (May 4, 2011), https://www.theatlantic.com/national/archive/2011/05/when-justice-becomes-mere-technicality/238344/ ("Traditional law-and-order, lock-'em-up-and-throw-away-the-key advocates have always harbored contempt for legal technicalities—by which they mean the Fourth, Fifth, and Sixth Amendment rights of the accused.").

These depictions may well appeal more to lay Americans than to lawyers, but their theories about the limited applicability of the Constitution resemble more legally sophisticated accounts. Consider *Caniglia v. Strom*.[15] In that case, the Court unanimously rejected a standalone "caretaking" exception to the warrant requirement for home entries.[16] While warrantless entry could be justified by an exigent circumstance like the presence of an injured person or imminent risk of injury, the Constitution lacks "an open-ended license" for officers to enter homes for non-law-enforcement purposes.[17] This straightforward holding was accompanied by concurring opinions emphasizing that the Fourth Amendment must often yield before danger. Chief Justice John Roberts, joined by Justice Stephen Breyer, wrote that officers can still enter homes without a warrant to prevent violence and disorder.[18] Justice Samuel Alito noted that the Court's holding did not extend to mental-health assessments, short-term seizures of guns pursuant to "red flag" laws, or home entries meant to determine whether someone was medically incapacitated.[19] Justice Brett Kavanaugh wrote "to underscore and elaborate on" the Chief Justice's concerns, saying that warrantless entries are constitutional "when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now."[20]

Cabining Fourth Amendment protections with concerns about danger is nothing new, nor is it only judicial conservatives who are worried. In *Georgia v. Randolph*, a majority of the Court held that "a physically present co-occupant's stated refusal to permit entry prevails" over the consent given by another home resident.[21] Its opinion confirmed the "undoubted right of the police to enter in order to protect a victim" of domestic violence.[22] Justice Breyer concurred,

[15] Caniglia v. Strom, 593 U.S. 194 (2021).

[16] *Id.* at 196.

[17] *Id.* at 198–99.

[18] *Id.* at 199 (Roberts, C.J., concurring).

[19] *Id.* at 201–03 (Alito, J., concurring).

[20] *Id.* at 204, 206 (Kavanaugh, J., concurring).

[21] Georgia v. Randolph, 547 U.S. 103, 106 (2006).

[22] *Id.* at 118–19.

highlighting the need for flexibility in stopping domestic violence.[23] Unlike *Caniglia*, *Randolph* also featured a dissent concerning danger. Chief Justice Roberts, joined by Justice Antonin Scalia, warned that the majority's holding enabled domestic violence by letting "the abuser whose behavior prompted the request for police assistance" refuse officers entry.[24]

The concerns about danger raised in *Barnes*, *Caniglia*, and *Randolph* are by no means baseless. By its terms, the Fourth Amendment protects people against "unreasonable searches and seizures."[25] Scholars have long debated whether reasonableness is measured in terms of specific historical rules or using broader judicial discretion.[26] Either way, the presence of danger in contexts ranging from traffic stops to suicidality to domestic violence *is* relevant to constitutional standards. To expect officers to remain indifferent to danger facing themselves, suspects, or civilians is unreasonable and ahistorical.[27]

What is remarkable is the one-dimensionality of the Court's narratives. Danger is always the constitutional caveat—the reason to limit the Fourth Amendment—rather than a concern justifying constitutional protections. While no right is unqualified, Fourth Amendment protections are routinely qualified in the same breath as they are voiced (or not even voiced at all, as in the case of the *Randolph* dissent). Constitutional limits on searches and seizures are deemed ill-suited to a dangerous world. The concurrence to the Court's recent decision in *Barnes v. Felix* follows this rights-skeptical approach.

[23] *Id.* at 126–27 (Breyer, J., concurring).

[24] *Id.* at 139 (Roberts, C.J., dissenting).

[25] U.S. Const. amend. IV.

[26] *See generally* Nikolaus Williams, Note, *The Supreme Court's Ahistorical Reasonableness Approach to the Fourth Amendment*, 89 N.Y.U. L. Rev. 1522 (2014) (surveying perspectives).

[27] *See, e.g.*, Mackenzie R. Lyons, Note, *Revising the Scope of the Fourth Amendment Community Caretaking Exception on Behalf of Older Adults*, 47 S. Ill. U. L.J. 149 (2022); James A. Albert, *The Liability of the Press for Trespass and Invasion of Privacy in Gathering the News—A Call for the Recognition of a Newsgathering Tort Privilege*, 45 N.Y. L. Sch. L. Rev. 331, 363 (2002) ("[I]nspections of hospitals, nursing homes, and surgical centers are not at all unreasonable or in violation of the Fourth Amendment. They are in fact necessary to protect life."); John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. Crim. L. & Criminology 433 (1999).

II. Safety Is Seen as a Fourth Amendment Countervalue by the *Barnes v. Felix* Concurrence

Barnes features the conventional take on danger, safety, and the Fourth Amendment—and highlights why that now-conventional wisdom comes up short. The case concerned a death arising out of a 2016 traffic stop on a Houston freeway.[28] Respondent Roberto Felix Jr., a constable, received an alert about a car with unpaid toll violations.[29] He pulled over the driver, Ashtian Barnes.[30] Mr. Barnes told Constable Felix the car had been rented by his girlfriend.[31] After Constable Felix asked Mr. Barnes to produce identification, Mr. Barnes opened the car trunk and turned off the ignition.[32] Constable Felix rested his hand on his gun holster and told Mr. Barnes to exit, at which point Mr. Barnes turned the ignition back on.[33] Constable Felix unholstered his gun—then jumped onto the car's doorsill above the running board.[34] The car began to move forward.[35] Within two seconds of jumping onto the car, while still unable to see inside, Constable Felix yelled at Mr. Barnes not to move, then fired two shots.[36] Mr. Barnes died on the spot.[37]

Mr. Barnes's mother filed a federal lawsuit under 42 U.S.C. § 1983, alleging that Constable Felix violated her late son's Fourth Amendment right to be free of excessive force.[38] The district court granted summary judgment in favor of Constable Felix and his codefendants, finding that Fifth Circuit precedent forbade it from considering "the officer's conduct precipitating the shooting—which included jumping onto a moving vehicle and blindly firing his weapon inside."[39] Circuit authority also prevented the district court from considering

[28] *Barnes*, 145 S. Ct. at 1356.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] The district court made no finding as to whether the car had started moving when Constable Felix jumped onto it. Barnes v. Felix, 532 F. Supp. 3d 463, 466 (S.D. Tex. 2021).

[36] *Barnes*, 145 S. Ct. at 1356.

[37] *Id.*

[38] *Id.*

[39] *Barnes*, 532 F. Supp. 3d at 466.

the severity of Mr. Barnes's alleged offense and whether he was trying to escape, limiting its inquiry to whether Constable Felix "was in danger *at the moment of the threat*" triggering his use of deadly force.[40] The only fact that mattered was that at the time Constable Felix opened fire, he "was still hanging onto the moving vehicle and believed it would run him over."[41] The district court complained that the Fifth Circuit had "effectively stifled a more robust examination of the Fourth Amendment's protections," but the court deemed itself bound to apply binding authority.[42]

The Fifth Circuit affirmed based on the binding "moment of threat" doctrine, but added more misgivings.[43] Judge Patrick Higginbotham—who wrote the panel's opinion—issued a separate concurring opinion, beginning with indignation: "A routine traffic stop has again ended in the death of an unarmed black man, and again we cloak a police officer with qualified immunity, shielding his liability."[44] Judge Higginbotham believed the moment-of-threat doctrine contradicted the Supreme Court's direction that courts had to assess the reasonableness of deadly force using the totality of the circumstances.[45] Ignoring an officer's decisions leading up to his use of deadly force cheapened human life and weakened the Fourth Amendment.[46] After all, the traffic violations Mr. Barnes allegedly committed did not even authorize his arrest under Texas law.[47] Judge Higginbotham thought it was significant that the Supreme Court limited the use of deadly force against fleeing *felons*, while the Fifth Circuit analyzed deadly force against even petty offenders only with respect to "the precise millisecond" at which an officer used it.[48] This made his court's references to the totality of the circumstances "merely performative."[49]

[40] *Id.* at 468–69 (emphasis in original) (citation omitted).

[41] *Id.* at 471.

[42] *Id.* at 472.

[43] Barnes v. Felix, 91 F.4th 393, 398 (5th Cir. 2024).

[44] *Id.* (Higginbotham, J., concurring).

[45] *Id.*

[46] *Id.*

[47] *Id.* at 399.

[48] *Id.* (citing Tennessee v. Garner, 471 U.S. 1, 9, 21 (1985)).

[49] *Id.* at 400.

The Supreme Court granted certiorari.[50] In a unanimous decision by Justice Elena Kagan, the Court held the moment-of-threat rule incompatible with the totality-of-the-circumstances analysis required by the Fourth Amendment.[51] Such a comprehensive inquiry does not have a "time limit," and while "the situation at the precise time of the shooting will often be what matters most," "earlier facts and circumstances" can be relevant.[52] The Court reserved for a future case a further question, "whether or how an officer's own 'creation of a dangerous situation' factors into the reasonableness analysis."[53]

Justice Kavanaugh concurred, joined by Justices Alito, Amy Coney Barrett, and Clarence Thomas.[54] He emphasized that the Fourth Amendment's reach is limited by "the dangers of traffic stops for police officers."[55] Officers' lives are at risk when they approach someone sitting in a car, as the suspect has a tactical advantage.[56] The concurrence recounted several instances of officers being killed during traffic stops—reserving for a footnote the reality that "officers sometimes use excessive force during traffic stops" too and "of course should be held to account for their actions."[57]

The concurrence continued that officers cannot "let their guard down and assume that any particular traffic stop will be safe—even if a driver is pulled over for nothing more than a speeding violation, a broken taillight, or the like."[58] Drivers could be intoxicated or even preparing to commit acts of extreme violence.[59] For example, Oklahoma City bomber Timothy McVeigh was ultimately arrested following a traffic stop for a missing license plate, while serial killer Ted Bundy resisted an officer who pulled him over on suspicion of driving a stolen vehicle.[60] A motorist like Mr. Barnes who tries to

[50] *Barnes*, 145 S. Ct. at 1357.

[51] *Id.*

[52] *Id.* at 1358.

[53] *Id.* at 1360 (citation omitted).

[54] *Id. et seq.* (Kavanaugh, J., concurring).

[55] *Id.*

[56] *Id.* at 1360–61.

[57] *Id.* at 1361 n.2.

[58] *Id.* at 1361.

[59] *Id.*

[60] *Id.*

drive away from a stop could endanger others, and doing so to avoid consequences for a minor offense like a toll violation could even be evidence of particular danger.[61] "He could have an abducted child in the car" or be about to commit a terrorist attack by plowing into a crowd.[62] An officer has "no particularly good or safe options" when faced with a driver who tries to leave.[63] Fourth Amendment jurisprudence has to give officers executing traffic stops broad deference due to "extraordinary dangers."[64]

Justice Kavanaugh's opinion took a standard line: Fourth Amendment protections and danger are opposing values that have to be weighed against each other. Who can say whether someone pulled over for a taillight violation might be Jack the Ripper, with a victim tied up in the trunk? How was Constable Felix to know whether Mr. Barnes started his ignition because he wanted to avoid paying for tickets he did not incur or because he was about to mow down pedestrians? Best not to let legal scrupulosity put too many limits on an officer's ability to kill.

The *Barnes* decision was a straightforward rejection of an artificial doctrinal test, one of several recent decisions instructing lower courts to stop inventing them.[65] In context, though, the case raised anew enduring questions about the reach of constitutional rights in the face of danger. While the concurrence hardly blazed a new route in setting liberty against safety, Fourth Amendment rules should often protect both—and disregarding rights can be dangerous as well. When officers disregard constitutional limits, they can

[61] *Id.*

[62] *Id.* at 1362.

[63] *Id.* at 1363.

[64] *Id.*

[65] *See, e.g.*, Ames v. Ohio Dept. of Youth Servs.,605 U.S. 303, 305–06 (2025) ("[T]his additional 'background circumstances' requirement is not consistent with Title VII's text or our case law construing the statute."); Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 145 S. Ct. 1497, 1507 (2025) (holding the National Environmental Policy Act to be "purely procedural" and so forbidding courts from imposing additional substantive requirements). Justice Thomas's concurrence in *Ames*, joined by Justice Neil Gorsuch, "highlight[ed] the problems that arise when judges create atextual legal rules and frameworks," accusing these of "distort[ing] the underlying statutory text, impos[ing] unnecessary burdens on litigants, and caus[ing] confusion for courts." *Ames*, 605 U.S. at 313 (Thomas, J., concurring). He criticized "improper judicial lawmaking." *Id.* at 314.

endanger themselves, suspects, and civilians. More than being merely compatible with safety, the Fourth Amendment exists in part to further it.

III. Safety Is Actually a Fourth Amendment Value

Not long ago, the Court was accustomed to thinking of the Fourth Amendment as a shield for safety rather than a danger in its own right. In the watershed excessive force case *Tennessee v. Garner*, the Court held that the Fourth Amendment forbids the use of deadly force to stop an unarmed suspected felon from fleeing "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[66] The *Garner* Court emphasized the importance of constitutional limits in safeguarding suspects' lives.[67] "The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon."[68] In addition to a person's own life interest, society has an interest in protecting the life of the accused so that a court can determine guilt and punishment.[69] The respect for human life reflected by the Fourth Amendment could even overcome some concerns about law enforcement effectiveness: "It is not better that all felony suspects die than that they escape."[70]

Garner did set the Fourth Amendment's outer limit as the protection of life, holding that deadly force would be justifiable when the suspect is a threat to others.[71] But it also explored how constitutional constraints advance safety. *Garner* noted the early common law rule categorically authorizing the killing of fleeing suspected felons.[72] It found this rule not to be controlling due to the radical expansion in offenses qualifying as felonies—especially noncapital crimes for which death would not be the routine punishment (or even a legally

[66] *Garner*, 471 U.S. at 3.

[67] *Id.* at 7–8.

[68] *Id.* at 9.

[69] *Id.*

[70] *Id.* at 11.

[71] *Id.* at 11–12.

[72] *Id.* at 12.

available one)—and the introduction of handguns allowing officers to kill suspects who were not immediate threats.[73] The Court also noted that the common law limited seizures for the sake of safety, banning the slaying of a fleeing suspected misdemeanant.[74] While *Garner* has been criticized for treating safety as "but one factor in a general policy discussion of proper police conduct"—thus relying on "grisly instrumentalism"—at least it recognized that Fourth Amendment rights can safeguard life.[75]

This theme frequently appeared in earlier cases concerning the seizure of fleeing suspects and homes entries.[76] To begin with seizures like the one at issue in *Garner*, while that Court correctly noted the common law's broad allowance of deadly force to stop fleeing suspected felons, late-19th and early-20th century American authorities also held that deadly force could not be used "simply to prevent an escape."[77] Like *Garner*, they noted the need to save suspects' lives to honor due process.[78] Killing a fleeing suspected misdemeanant was murder.[79] An officer had "no more right to kill him than he would have if the offender were to lie down and refuse to go."[80] "The law value[d] human life too highly to give an officer the right to proceed to the extremity of shooting one whom he is attempting to arrest for a violation" of a petty law.[81]

[73] *Id.* at 13–15.

[74] *Id.* at 15.

[75] T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 990–91 (1987); *see also* Kufere Laing, Note, Killer Cops, *Killer Laws: Fourth Amendment Jurisprudence and Separate, but Equal Policing*, 65 How. L.J. 267, 307 (2021) ("We must also replace *Garner*'s 'balancing' framework . . . . Under no circumstances is it reasonable for the government to kill with no imminent threat to life—flight alone can never justify taking a human life.").

[76] The discussion that follows draws on three Cato Institute amicus briefs written by this article's author: Br. for Cato Inst. et al. as Amicus Curiae, Barnes v. Felix, 145 S. Ct. 1353 (2025); Br. for Cato Inst. as Amicus Curiae, Jimerson v. Lewis, No. 24-473 (U.S. Nov. 29, 2024); Br. for Cato Inst. as Amicus Curiae, Pennington v. West Virginia, No. 22-747 (U.S. Mar. 13, 2023).

[77] Caldwell v. State, 41 Tex. 86, 98 (1874).

[78] *Garner*, 471 U.S. at 12 (citing State v. Smith, 103 N.W. 944, 945 (Iowa 1905)); *see also* State v. Campbell, 12 S.E. 441, 443 (N.C. 1890).

[79] Holloway v. Moser, 136 S.E. 375, 376 (N.C. 1927) (quoting 2 Bishop on Criminal Law §§ 662–63).

[80] Head v. Martin, 3 S.W. 622, 624 (Ky. 1887).

[81] Holmes v. State, 62 S.E. 716, 718 (Ga. Ct. App. 1908).

Some common law cases even extended protection to suspects resisting arrest, forbidding an arrestor's use of "any greater force than [was] reasonably and apparently necessary for his protection."[82] Suspects could be protected even if they triggered an arrestor's use of excessive force.[83] Whenever possible, officers had to secure people "without resorting to the use of fire-arms or dangerous weapons."[84] They could not take life without "diligence and caution."[85] Not even a suspect's use of deadly force categorically authorized deadly force in response—necessity remained the touchstone.[86] An officer who used excessive force would be guilty of assault and battery.[87] "Human life is too sacred," read one decision, to approve of the needless use of deadly force.[88] *Garner*'s explicit treatment of life as a Fourth Amendment value reflected much older authorities.[89]

American courts were also quick to emphasize the importance of protecting safety in the context of searches. Pre-Independence English common law courts recognized that home entries could involve "destruction or breaking."[90] A homeowner facing a chaotic entry and not realizing it was part of a lawful search had "a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost."[91] The common law required

[82] *Head*, 3 S.W. at 623 (cited approvingly by *Holloway*, 136 S.E. at 377).

[83] *Id.* at 624.

[84] Reneau v. State, 70 Tenn. 720, 722 (1879) (cited approvingly by *Garner*, 471 U.S. at 12).

[85] *Id.*; *see also Smith*, 103 N.W. at 946 (holding that killing someone engaged in felony escape was justifiable only if it was "the only reasonably apparent method" available "for the honest and non-negligent purpose of preventing the felony, and not for some other reason").

[86] *Head*, 3 S.W. at 623 ("If the offender puts the life of the officer in jeopardy, the latter may *se defendendo* slay him; but he must not use any greater force than is reasonably and apparently necessary for his protection.").

[87] *Holmes*, 62 S.E. at 718.

[88] *Head*, 3 S.W. at 623.

[89] That said, an early commentary did describe *Garner* as the first Supreme Court decision that "explicitly recognized that the fourth amendment protects an individual's interest in life as well as her interests in property and privacy." *The Supreme Court, 1984 Term: I. Constitutional Law. [Part 2 of 2]*, 99 Harv. L. Rev. 120, 248 (1985) (mentioning also Winston v. Lee, 470 U.S. 753, 761 (1985) ("[A] search for evidence of a crime may be unjustifiable if it endangers the life . . . of the suspect.")).

[90] Wilson v. Arkansas, 514 U.S. 927, 935–36 (1995) (quoting Semayne's Case, 77 Eng. Rep. 194, 196 (K.B. 1603)).

[91] Ker v. California, 374 U.S. 23, 58 (1963) (op. of Brennan, J.) (quoting Launock v. Brown, 106 Eng. Rep. 482, 483 (1819)).

a knock on the door and an announcement to "protect the arresting officers from being shot as trespassers."[92]

Protecting the lives of suspects and officers alike was articulated as a rationale for Fourth Amendment limits on searches, too. In a 1948 opinion, Justice Robert Jackson foresaw "grave troubles" from unjustified home entries.[93] Innocent homeowners in such cases could well think officers are criminal intruders, and their "natural impulse would be to shoot."[94] Alternatively, an officer "seeing a gun being drawn on him might shoot first"—though Justice Jackson thought this could well be deemed murder.[95] He hoped warrant requirements would end operations that were "reckless" and "fraught with danger and discredit."[96] Later justices also expressed concern, warning that "practical hazards of law enforcement militate strongly against any relaxation" of constitutional rules limiting home entries.[97] The Court's 1980 decision in *Payton v. New York* described the search warrant requirement as preventing "the danger of needless intrusions."[98]

This framing of the Fourth Amendment has not entirely disappeared. The Court's 2006 decision in *Hudson v. Michigan* cited Justice Jackson's *McDonald* concurrence and briefly noted that one historical reason for the knock-and-announce rule is protecting "human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident."[99] Even in that case, though, discussion of safety as a Fourth Amendment interest was minimal. Justice Anthony Kennedy's concurring opinion focused instead on "privacy and security in the home" more generically.[100] Justice Breyer's dissent mentioned only "the privacy of the home"—and the possibility of a constitutionally exceptional no-knock warrant "diminishing any danger to the officers" who execute it.[101]

[92] *Id.*

[93] McDonald v. United States, 335 U.S. 451, 460 (1948) (Jackson, J., concurring).

[94] *Id.* at 460–61.

[95] *Id.* at 461.

[96] *Id.*

[97] *Ker*, 374 U.S. at 57 (Brennan, J., concurring in part and dissenting in part).

[98] Payton v. New York, 445 U.S. 573, 585–56 (1980).

[99] Hudson v. Michigan, 547 U.S. 586, 594 (2006) (citing, *inter alia*, *McDonald*, 335 U.S. at 460–61 (Jackson, J., concurring)).

[100] *Id.* at 603 (Kennedy, J., concurring in part and concurring in the judgment).

[101] *Id.* at 621, 624 (Breyer, J., dissenting).

What the Fourth Amendment does *not* require, rather than what it does, protects safety.

From English common law courts to state decisions from the 1800s and early 1900s, to the Supreme Court's own 20th-century opinions, safety appeared as a reason to both authorize *and* to limit searches and seizures. Safety was a way of striking balances, not a hydraulic mechanism pressing only against constitutional constraints.

The Court's recent neglect of that nuanced understanding is troubling.

Empirical reality suggests the wisdom of the older approach. Returning to the context at issue in *Barnes*, research suggests that fears about the dangerousness of traffic stops may be overstated. To be sure, the "dominant narrative in policing is that each one of these stops is not just highly dangerous but also potentially fatal."[102] For this reason, the Court has endorsed giving officers "unquestioned command" over drivers and passengers.[103] Officers are also trained to assume that any stop can become deadly "if they become complacent on the scene or hesitate to use force."[104] In spite of these assumptions, however, a landmark study

> found that the rate for a felonious killing of an officer during a routine traffic stop for a traffic violation was only 1 in every 6.5 million stops. The rate for an assault that results in serious injury to an officer was only 1 in every 361,111 stops. Finally, the rate for an assault (whether it results in officer injury or not) was only 1 in every 6,959 stops. Less conservative estimates suggest that these rates may be much lower.
>
> In addition, the vast majority (over 98%) of the evaluated cases in the study resulted in no or minor injuries to the officers. Further, only a very small percentage of cases (about 3%) involved violence against officers in which a gun or knife was used or found at the scene, and the overwhelming majority of those cases resulted in no or minor injuries to an officer. Less than 1% of the evaluated cases involved guns or knives and resulted in serious injury to or the felonious killing of an officer.[105]

[102] Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 Mich. L. Rev. 635, 637 (2019).

[103] Arizona v. Johnson, 555 U.S. 323, 330 (2009) (quoting Maryland v. Wilson, 519 U.S. 408, 414 (1997)).

[104] Woods, *supra* note 103, at 638.

[105] *Id.* at 640.

Assuming danger weighs only *against* the Fourth Amendment—and that officers face grave danger every time they pull over a car—unreasonably undermines the safety of the driving public.

Danger is often the excuse that erodes constitutional government, and one-sided fear weighs against Fourth Amendment protections. Recovering its safety-enhancing side would provide fresh reasons for Americans of different ideological persuasions to respect it.

IV. Safety Should Be a Cross-Ideological Fourth Amendment Principle

Commentators representing different philosophical approaches have identified safety as an important aspect of the Fourth Amendment. Emphasizing this shared belief is especially important in a time of deep fracturing concerning the meaning and legitimacy of constitutional rights. A few years ago, the Black Lives Matter movement and the deaths motivating it inspired scholarship on how Fourth Amendment limits protect life. Breonna Taylor's death at the hands of police officers who entered her apartment based on stale information led one commentator to ask whether enforcing drug prohibition could ever be "an equitable exchange" for a human life.[106] Civil rights scholar Mitchell Crusto has criticized Fourth Amendment doctrines for contributing to a "Blue Shield" that makes it "practically impossible to successfully prosecute a police officer for using lethal force"—a protest that could benefit from appreciating the contrary possibilities of Fourth Amendment jurisprudence.[107] Crusto seeks a remedy in due process doctrines rather than the Fourth Amendment.[108] However, he recognizes that constitutionally compliant policing would protect "lives of innocent civilians while also saving the lives of police officers."[109] This "interest convergence," whereby both sides of a policing encounter are made safer,

[106] Micah Mooring, Comment, *No-Knock Warrants: Protective or Predatory for North Carolinians?*, 45 Campbell L. Rev. 26, 282 (2023).

[107] Mitchell F. Crusto, *Black Lives Matter: Banning Police Lynchings*, 48 Hastings Const. L.Q. 3, 53 (2020).

[108] *See generally* Mitchell F. Crusto, *Right to Life: Interest-Converging Policing*, 71 Rutgers U. L. Rev. 63 (2018).

[109] *Id.* at 68.

is another basis for seeing Fourth Amendment limits as potential common ground.[110]

Convincing law enforcement officers that stronger Fourth Amendment limits could protect their lives would go a long way toward strengthening support for the Constitution. Safety concerns could also motivate other groups to appreciate rights. Unconstrained policing poses extraordinary danger to another group of Americans who tend to lean conservative: gun owners. Right-of-center intellectual David French has written about cases in which "poor tactics and unwise choices" led to the needless deaths of civilians at the hands of officers who overestimated danger based on the suspects' possessing a gun.[111] In one such case, for a man awakened in his car by officers, "death was likely the moment the cops arrived and saw his gun."[112] Regarding another case, French quoted the officer's rationale for fatally shooting a man who was complying with instructions to retrieve his driver's license, but who also announced he had a lawfully owned gun nearby: "if [he] has the . . . guts and the audacity to smoke marijuana in front of a five-year-old girl and risk her lungs and risk her life by giving her secondhand smoke and the front-seat passenger doing the same thing then what, what care does he give about me?"[113] Considering a third killing, French summarized the danger of lawless policing to Americans exercising their Second Amendment rights:

> [M]y home is my castle. It's where my wife and kids are, and it's hard to imagine a situation where there's loud pounding, that late [at night], that doesn't involve a degree of urgency. I have a constitutional and a human right, guaranteed under

[110] *Id.* One of the signers of the Cato Institute's *Barnes* amicus brief was the Law Enforcement Action Partnership, "whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice . . . reforms that will make our communities safer and more just." Br. for Cato Inst. et al. as Amicus Curiae, Barnes v. Felix, *supra* note 77.

[111] David French, *The Underexamined Factor in Too Many Police Shootings*, Nat'l Rev. (Apr. 4, 2019), https://www.nationalreview.com/2019/04/the-underexamined-factor-in-too-many-police-shootings/ (discussing the killing of Willie McCoy).

[112] *Id.*

[113] David French, *The Unwritten Law That Helps Bad Cops Go Free*, Nat'l Rev. (June 21, 2017), https://www.nationalreview.com/2017/06/philando-castile-shooting-police-must-display-reasonable-fear/ (quoting Officer Jeronimo Yanez's rationale for killing Philando Castile).

> the Second Amendment, to defend my family, my life, and my home. Unless, of course, the people pounding on the door are cops who 1) had no search warrant, 2) didn't turn on their emergency lights, 3) didn't identify themselves as police, 4) misunderstood a neighbor's directions, and 5) showed up at the wrong house, the house of a completely innocent man. Then, my right to defend myself turns into a right to die in two seconds flat, without firing a shot or even clambering [sic] a round.[114]

The Fourth Amendment makes it safer to exercise Second Amendment rights.[115]

Showcasing how the Fourth Amendment should protect life could also activate those who adhere to the "consistent life ethic." U.S. Catholic bishops teach that all vulnerable lives "require our respect, protection, and action."[116] This stance has contributed to efforts by Catholics and Evangelical Protestants to oppose capital punishment, linking efforts to abolish it with concerns about abortion and euthanasia.[117] While much of the pro-life movement does not yet name policing reform a core agenda item, some activists do criticize excessive force.[118] Understanding how the Fourth Amendment protects

[114] David French, *Another Federal Court of Appeals Attacks the Second Amendment*, Nat'l Rev. (Mar. 20, 2017), https://www.nationalreview.com/2017/03/andrew-scott-case-second-amendment-attacked-eleventh-circuit-appeals-court/ (discussing the killing of Andrew Scott).

[115] Unfortunately, not all Second Amendment supporters are as ready to recognize this as French. *See* Jacob Sullum, *NRA Breaks Its Silence on Philando Castile Shooting*, Reason (July 10, 2017), https://reason.com/2017/07/10/nra-breaks-silence-on-philando-castile-s/ ("... Should Yanez have been calmer and more careful, or was the onus on Castile to put the officer at ease after announcing that he was carrying a gun? [NRA spokeswoman Dana Loesch] splits the difference by saying 'there were a lot of things that I wish would have been done differently.'").

[116] John L. Carr, *The Consistent Life Ethic: A Look Back, A Look Around, A Look Ahead*, 2 U. St. Thomas L.J. 256, 261 (2005).

[117] Ben Jones, *The Republican Party, Conservatives, and the Future of Capital Punishment*, 108 J. Crim. L. & Criminology 223, 237–39 (2018); see also Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B.C. L. Rev. 1545, 1547–48 (2019).

[118] *See Police Brutality*, Rehumanize Int'l, https://www.rehumanizeintl.org/police-brutality (accessed July 5, 2025); *Responding to Police Brutality as Pro-Life Advocates*, The Minimise Project, (June 4, 2020), https://theminimiseproject.ie/2020/06/04/responding-to-police-brutality-as-pro-life-advocates/; Rachel MacNair, *Voices on Police Brutality in the Aftermath of the Murder of George Floyd*, Consistent Life Network (June 2, 2020), https://consistent-life.org/blog/index.php/2020/06/02/police-brutality/.

safety could mobilize new advocacy against dangerous policing and deepen appreciation for constitutional principles.

Constitutional rights have been questioned by intellectuals holding different ideological positions. Vermeule has urged critics of American democracy to "abandon[] the defensive crouch of originalism and . . . refuse[] any longer to play within the terms set by legal liberalism," rejecting a constitutional jurisprudence that seeks to "minimize the abuse of power" in favor of one ensuring that "the ruler has the power needed to rule well."[119] Left-wing criticism of constitutional criminal procedure as under-protective abounds.[120] Appreciating the positive role safety should already hold in Fourth Amendment law could help address these criticisms.[121]

Conclusion

Long before the New Deal Court's embrace of emergency exceptions, *The Federalist*'s Publius argued that America needed a Supreme Court "to act as a final barrier for protecting the long-range 'interests' of the people from their temporary 'inclinations,' . . . and overall, to preserve the integrity of what he called 'a limited Constitution,' without which the goal of the 'real welfare' of the people could not

[119] Adrian Vermeule, *Beyond Originalism*, The Atlantic (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

[120] *See, e.g.*, Jessica Beckman, *Extending Fourth Amendment Protections and* Bivens *Claims for Damages to Non-Citizens in Cross-Border Killing Context*, 53 UIC J. Marshall L. Rev. 343 (2020); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 164 (2017) (". . . Fourth Amendment law helped to stage [Eric] Garner's trajectory from life to death. Which is to say, the extraordinary violence [Officer Daniel] Pantaleo mobilized against Garner grew out of an ordinary police interaction whose life-and-death boundaries Fourth Amendment law helps to produce."); Mary Ellen O'Connell, *Ending the Excessive Use of Force at Home and Abroad*, 31 Temp. Int'l & Comp. L.J. 87, 105–06 (2017); Joëlle Anne Moreno, *Flagrant Abuse: Why Black Lives (Also) Matter to the Fourth Amendment*, 21 Berkeley J. Crim. L. 36 (2016); Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 Wm. & Mary Bill of Rts. J. 689 (2016); Laing, *supra* note 74, at 306–07 (criticizing *Terry* frisks and even *Garner*'s rules concerning deadly force). *See also* this author's Br. for Cato Inst. as Amicus Curiae, Cooper v. United States, No. 24-5381 (U.S. Sept. 23, 2024) (criticizing *Terry* as antioriginalist).

[121] *Cf.* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 Va. L. Rev. 211, 213–14 (2017) ("From politicians, to community groups, to policing organizations, leading voices have called into question the Fourth Amendment's 'objective reasonableness' standard, arguing that it is insufficiently protective of life and a poor guide for law enforcement. We agree, but argue that need not be the case.").

be met."[122] In other words, Publius saw the need for safety in the face of danger as a justification for the constitutional rule of law—not a reason to limit it.

Experience proves what the Founders and the judges who followed them knew: safety can be endangered not just by recognizing Fourth Amendment limits but also by abandoning them. Recently, the Supreme Court has cast the Fourth Amendment only as a threat and not as a shield. A more balanced approach may bring more Americans to appreciate the Constitution, rather than dismissing it as an obstacle to normative values and urgent needs.

[122] Benjamin Lozano, *A Limited Constitution: Publius, the State of Emergency, and "One Supreme Tribunal"*, 37 Boundary 2 215, 229 (2010).