Following the Bright Line of *Michigan v. Summers*: A Cause for Concern for Advocates of Bright-Line Fourth Amendment Rules

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I. Introduction

On March 20 and 21, 2002, federal law enforcement agents conducted coordinated raids of sixteen organizations and homes in Northern Virginia.[1] The raids were conducted as part of Operation Green Quest ("Green Quest"), a multi-agency task force charged with investigating the financial supporters of international terrorism.[2] At the urging of a self-proclaimed "terrorist hunter," an agent of Green Quest submitted an affidavit alleging that "individuals associated with [organizations in Northern Virginia were] using the various affiliated charities and companies under their control to transfer money in convoluted transactions through a network of interrelated organizations designed to prevent the United States from tracking the ultimate recipients."[3] Based on this affidavit, a magistrate judge found that probable cause existed and issued a warrant to search for financial records and other documents related to the financial support of terrorism.[4] The homes raided included that of Dr. Iqbal Unus, director of the Child Development Foundation, one of the suspected organizations.[5]

At 10:30 a.m., eleven federal agents and three Fairfax County police officers arrived at the Unus residence and began pounding on the front door.[6] Only Aysha Unus and Hanaa Unus, the wife and eighteen-year-old daughter of Dr. Unus, respectively, were home.[7] After hearing the pounding, Aysha approached the door. Standing a few feet from the door, she saw

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[1] John G. Douglass, *Raiding Islam: Searches that Target Religious Institutions*, 19 J.L. & Religion 95, 96 (2004).

[2] Green Quest was led by the U.S. Customs Service before the Service dissolved and became the Bureau of Customs and Border Protection. It included agents from the IRS, U.S. Secret Service, ATF, FBI, OFAC, FinCEN, the U.S. Postal Inspection Service, and the Naval Criminal Investigative Service. *See* Press Release, U.S. Customs Serv., Operation Green Quest Overview (Feb. 26, 2002), *available at* http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/legacy/2002/22002/02262002.xml (last visited Oct. 8, 2009).

[3] Unus v. Kane, 565 F.3d 103, 109 (4th Cir. 2009) (alterations in original). The affidavit further alleged that the leadership of these organizations was "comprised of persons suspected of supporting terrorism." *Id.*

[4] *Id.* at 110. *See also* Douglass, *supra* note 1, at 97.

[5] *Unus*, 565 F.3d at 109.

[6] *Id.* at 110.

[7] *Id.*

a gun through the side window and screamed for Hanaa, who was sleeping upstairs. The two women retreated to the living room and called 911.[8]

Less than one minute after their arrival,[9] the agents broke through the front door with a battering ram and stormed in with at least one gun drawn.[10] The agents ordered Aysha to hang up the phone and then handcuffed both Aysha and Hanaa behind their backs.[11] The two women remained handcuffed for nearly four hours in the living room while the officers searched their home.[12] During the time of their detention, the women requested permission to pray in accordance with their Muslim faith.[13] The officers permitted the women to pray, but did not allow them to wear headscarves or to pray outside the presence of male agents.[14] The March 20 and 21 raids did not result in any arrests or indictments.[15]

In its first fourteen months, Green Quest executed 177 search warrants.[16] After a long bureaucratic struggle,[17] the FBI assumed control over Green Quest and terminated the operation.[18]

Today, the search warrant is necessarily a major focal point of law enforcement practice and procedure.[19] The Constitution's pronouncement that "no Warrants shall issue, but upon probable cause, supported by Oath or

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[8] *Id.*
[9] *Id.* at 118.
[10] *Id.* at 110.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 110–11.
[14] *Id.* at 111.
[15] *See* Douglass, *supra* note 1, at 98; Judith Miller, *The Money Trail: Raids Seek Evidence of Money-Laundering*, N.Y. TIMES, Mar. 21, 2002, at A19.
[16] Press Release, Bureau of Customs and Border Protection, Fact Sheet on Expansion of Operation Green Quest (Jan. 9, 2003), *available at* http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/cbp_press_releases/012003/01092003.xml (last visited Oct. 8, 2009).
[17] One source reported that "[i]nternally, FBI officials have derided Green Quest agents as a bunch of 'cowboys.'" Michael Isikoff & Mark Hosenball, *Terror Watch: Whose War On Terror?*, NEWSWEEK, Apr. 9, 2003, *available at* http://www.newsweek.com/id/58250 (last visited Mar. 16, 2009). For more on the battle between the FBI and DHS for control over Green Quest, *see generally id.*
[18] *See id.*; Ricardo Alonso-Zaldivar, *New U.S. Agency Gets Cool Reception*, L.A. TIMES, Nov. 29, 2003, at A1.
[19] *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2 (b) (4th ed. 2009) (suggesting that the Court's adherence to the exclusionary rule has led to a "dramatic increase in the use of search warrants where virtually none had been used before, [and] stepped-up efforts to educate the police on the law of search and seizure where such training had before been virtually nonexistent" (footnotes omitted)); *cf.* Steven G. Johnson, *What to Do if a Federal Search Warrant Is Served on Your Corporate Client*, UTAH B.J., Apr. 1997, at 11 (noting that "[t]he number of search warrants obtained by federal prosecutors has increased dramatically in recent years, jumping 84% from 1988 to 1994"); Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 224 n.13 (noting that there were 953 search warrants issued in a single year in San Diego alone).

affirmation"[20] serves as a check on the discretion of law enforcement personnel,[21] requiring them to obtain a search warrant before searching a home.[22] However, it is obvious now—and it was obvious to the Framers of the Constitution—that the warrant requirement, standing alone, would be insufficient to protect the right of every American "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[23] Rather, in order to protect each American's right to security and privacy, the Constitution must also limit the scope of the authority that law enforcement personnel have in executing warrants.[24]

As Aysha and Hanaa's story illustrates, the answer to this question of scope requires more than defining which part of a premises may be searched and the nature of the items that may be seized, but must also set out the authority that law enforcement has over the people encountered during a search. The Supreme Court most squarely addressed this issue in 1981, in *Michigan v. Summers*.[25] In *Summers*, the Court eschewed an approach that would require lower courts to balance, ad hoc, the particular circumstances before them. Instead, the Court announced a specific, bright-line rule:[26] "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[27]

Summers was neither the first nor the last time that the Supreme Court announced a bright-line rule in the Fourth Amendment context; the decision sits alongside several others that help shape Americans' rights under the

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[20] U.S. CONST. amend. IV.

[21] *See* Johnson v. United States, 333 U.S. 10, 13–14 (1948) ("The point of the Fourth Amendment" is that "[i]ts protection consists in requiring that . . . inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."); Steagald v. United States, 451 U.S. 204, 212 (1981) (explaining that warrants are necessary because law enforcement officers "may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty").

[22] *See* Katz v. United States, 389 U.S. 347, 357 (1967) (holding that warrantless searches are "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions"); *see also* Maryland v. Buie, 494 U.S. 325, 331 (1990).

[23] U.S. CONST. amend. IV.

[24] The Fourth Amendment expressly requires that a warrant shall "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV; *see also* Groh v. Ramirez, 540 U.S. 551 (2004) (holding that the execution of a warrant that is not sufficiently particularized is treated the same as a warrantless search); Wilson v. Layne, 526 U.S. 603, 604 (1999) ("It violates the Fourth Amendment rights of homeowners for police to bring members of the media or other third parties into their home during the execution of a warrant . . . ."); Wilson v. Arkansas, 514 U.S. 927 (1995) (holding that the "knock and announce" rule is part of the reasonableness requirement of the Fourth Amendment).

[25] 452 U.S. 692 (1981).

[26] *See, e.g.*, Albert W. Alschuler, *Bright Line Fever and The Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984) (characterizing *Summers* as a bright-line rule); Gerald G. Ashdown, *Good Faith, the Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process*, 24 WM. & MARY L. REV. 335, 349 (1983) (same).

[27] *Summers*, 452 U.S. at 705.

Fourth Amendment.[28] For example, in *United States v. Robinson*,[29] the Supreme Court announced the bright-line rule that "a search incident to . . . arrest requires no additional justification."[30] Similarly, in *New York v. Belton*,[31] the Court announced: "when a policeman has made a lawful custodial arrest of the occupant of an automobile he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[32]

The *Summers* decision thus finds itself within a longstanding debate over the propriety of using bright-line rules to protect the interests safeguarded by the Fourth Amendment, as well as a debate regarding the propriety of using rules or standards in jurisprudence.[33] This Note follows the trajectory of *Summers*'s bright-line rule as the lower courts have applied it and illustrates that some courts have extended the boundaries of the *Summers* rule to permit significant intrusions on liberty that would certainly not have been upheld under the Court's traditional balancing approach. Further, this Note suggests that lower courts' extension of the rule is at least in part due to their failure to consider thoughtfully the policies underlying *Summers*.

Part II of this Note captures the debate over the suitability of using bright-line rules in the Fourth Amendment context and how that debate connects to the larger dialogue on rules and standards. Part III revisits the basis upon which the Supreme Court decided *Summers*. Part IV then demonstrates the degree to which the boundaries of the *Summers* rule have been extended beyond what the decision's original rationale reasonably allows. Finally, Part V argues that the manipulation of *Summers*'s boundaries in the lower courts should be cause for concern for advocates of bright-line rules and suggests that the expansion flows from those courts' reluctance to strictly adhere to *Summers*'s underlying rationale.

II. The Debate: Bright-Line Rules and the Fourth Amendment

The arguments in favor of and against bright-line rules in the Fourth Amendment context have largely mirrored those of the more general debate on rules versus standards.[34] In her essay, *The Justices of Rules and Standards*, Professor Kathleen Sullivan captures the main arguments in favor of adopting rules over standards. First, the formal equality of rules—forcing decisionmakers to treat like cases the same—increases fairness because it

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[28] *See* LaFave, *supra* note 19, § 4.9 nn.117 & 118 (citing United States v. Robinson, 414 U.S. 218 (1973); New York v. Belton, 453 U.S. 454 (1981)).

[29] 414 U.S. 218 (1973).

[30] *Id.*

[31] 453 U.S. 454 (1981).

[32] *Id.* at 460 (footnotes omitted).

[33] *See infra* Part II.

[34] For a complete account of the rules and standards debate *see generally* Cass R. Sunstein, *Problems With Rules*, 83 Cal. L. Rev. 953 (1995). *See also* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 56–69 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1687–1713 (1976).

reduces the danger of arbitrariness or bias.[35] Second, rules serve to maximize utility among private actors because they provide certainty and predictability, allowing actors to operate from more complete information and, therefore, more productively.[36] In contrast, the uncertainty that follows from standards serves to repress socially productive behavior.[37] Third, rules are more economical for decisionmakers because they minimize the need for elaborate application of background principles to facts.[38] Fourth, as Professor Sullivan points out, some scholars have suggested that the certainty and predictability of rules is a necessary predicate to liberty because forcing the government to announce beforehand how it will use its coercive powers allows one to plan her individual affairs on the basis of this knowledge.[39] Finally, where there are competing decisionmakers, rules allocate power by defining or constraining the discretion that those decisionmakers have.[40]

Professor Sullivan also set forth the arguments in favor of adopting standards over rules. First, standards are less arbitrary than rules because they give decisionmakers the flexibility to treat like cases similarly, whereas the inherent under- and over-inclusiveness of rules can sacrifice the precision required to reach a fair result in each particular case.[41] Second, standards are more productive because, unlike rules, they can be easily adapted to unique or changing circumstances.[42] Third, unlike rules, standards prevent parties with disproportionate access to information from exploiting lesser-informed parties.[43] That is, in a world of crystal-clear rules, "sharp dealers" are able to use their knowledge of rules to take advantage of the gullible victims who lack such knowledge.[44] As a result, although standards less clearly delineate our entitlements, they make it less likely that the "sharp dealer" can gull his victims, enabling potential victims to participate more freely in society.[45] On similar grounds, scholars have argued that rules can be manipulated by the wealthy and the shrewd, whereas standards promote equality and "serve redistributive purposes better than rules."[46] Finally, standards are preferable because they force deliberation among decisionmakers: "standards make the judge face up to his choices—he cannot absolve himself by saying 'sorry, my hands are tied.'"[47]

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[35] Sullivan, *supra* note 34, at 62.
[36] *Id.*
[37] *Id.* at 62–63.
[38] *Id.* at 63.
[39] *Id.* at 63–64.
[40] *Id.* at 64–65.
[41] *Id.* at 66.
[42] *Id.*
[43] *Id.*
[44] Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 600 (1988), *cited in* Sullivan, *supra* note 34, at 66.
[45] *Id.*
[46] *Id.* at 67.
[47] *Id.*

Despite the potential benefits of a standards-based approach, many scholars have argued that clear rules are necessary in the Fourth Amendment context.[48] The arguments in favor of adopting bright-line Fourth Amendment rules largely echo the arguments described by Professor Sullivan. For instance, Professor Wayne R. LaFave, has argued that clear rules are essential to liberty, suggesting that the security and privacy protected by the Fourth Amendment, "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[49] Professor LaFave has also reasoned along utilitarian lines that certainty and predictability maximize the social productivity of police officers:

> Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."[50]

Notwithstanding the reasonable rationale that scholars like Professor LaFave have provided in favor of using rules in the Fourth Amendment context, the adoption of bright-line Fourth Amendment rules has not gone without criticism. For example, Professor Albert Alschuler, while acknowledging the potential benefits of bright-line rules,[51] long ago criticized the Court's promulgation of such rules to guide law enforcement personnel.[52] Professor Alschuler challenges the fairness of bright-line rules, arguing that because of their over-inclusiveness, "the search for bright line [F]ourth [A]mendment rules typically leads to a disregard of values more substantial than those depicted in the writings of LaFave . . . ."[53] For this reason, Professor Alschuler argues that hard rules have the potential to be the source

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[48] *See* Albert W. Alschuler, *Bright Line Fever and The Fourth Amendment*, 45 U. PITT. L. REV. 227, 227–28 (1984) (citing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); Carl McGowan, *Rulemaking and the Police*, 70 MICH. L. REV. 659 (1972); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 414–29 (1974)).

[49] Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142, *quoted in* New York v. Belton, 453 U.S. 454, 458 (1980).

[50] LaFave, *supra* note 49, at 141 (internal citations omitted) (footnotes omitted).

[51] Alschuler, *supra* note 26.

[52] *See id.*

[53] *Id.* at 231.

of substantial injustice.[54] Professor Alschuler also challenges whether bright-line rules can realistically provide certainty and predictability to enforcement personnel and, rather, suggests that bright-line rules may obfuscate, not clarify, the law primarily for two reasons. First, he argues that delineating the boundaries of these rules is not mechanical, so the rules are, in turn, often difficult, not easy, to apply.[55] Second, he argues that if the Fourth Amendment is codified into a set of rules to guide law enforcement, there will necessarily be too many rules to provide effective guidance.[56]

This debate over the propriety of using bright-line rules in the Fourth Amendment context has found its way to the Supreme Court on more than one occasion. At times, the Court has eschewed the use of bright-line rules to effectuate the underlying principles of the Fourth Amendment: "We have long held that the touchstone of the Fourth Amendment is reasonableness. Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances. In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."[57] In these cases, the Court has opted to sacrifice the benefits of providing clear guidelines to law enforcement personnel in favor of balancing tests that maintain the flexibility required to decide what is reasonable on a case-by-case basis.

However, the Supreme Court has on many occasions referenced "the virtue of providing clear and unequivocal guidelines to the law enforcement profession."[58] In these cases, the Court has largely adopted Professor LaFave's line of reasoning, positing that "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[59] On these grounds, the Supreme Court in its Fourth Amendment jurisprudence has set forth some bright-line rules. For example, in *United States v. Robinson*,[60] a police officer lawfully arrested a motorist for operating a vehicle without a permit.[61] After the arrest, the officer searched the motorist's pockets and found illegal drugs.[62]

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[54] *Id.*

[55] *See id.*

[56] *Id.* at 231, 287.

[57] Ohio v. Robinette, 519 U.S. 33, 39 (1996) (internal quotation marks omitted); *see also* Georgia v. Randolph, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) (suggesting that the Fourth Amendment uses the word "unreasonable" because bright-line rules do not "capture the ever changing complexity of human life").

[58] California v. Acevedo, 500 U.S. 565, 577 (1991) (internal quotation marks omitted); *see also* Montejo v. Louisiana, 129 S. Ct. 2079, 2091 (2009).

[59] New York v. Belton, 453 U.S. 454, 458 (1981) (quoting Dunaway v. New York, 442 U.S. 200, 213–14 (1979) (alterations in original)). *But see* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 325–33 (1982) (expressing disapproval of the Court's bright-line rule in *Belton*).

[60] 414 U.S. 218 (1973).

[61] *Id.* at 220.

[62] *Id.* at 223.

The Supreme Court rejected the Court of Appeals' suggestion "that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest."[63] Rather, the Supreme Court announced the categorical rule that "a search incident to the arrest requires no additional justification."[64]

This Note focuses on another bright-line rule, set out by the Supreme Court in *Michigan v. Summers*, in which the Court announced, "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[65] The *Summers* rule has received considerable attention from both sides of the bright-line debate. For instance, Professor LaFave, in advocating for bright-line rules, has specifically endorsed the *Summers* rule, arguing that *Summers* is a "sound use" of a bright-line rule that will increase the protection of liberty and privacy in the long run.[66] According to Professor LaFave, "the *Summers* rule makes eminently good sense, for it describes a general category in which the government interests identified by the Court . . . are likely to be served."[67] Professor Alschuler, however, has assessed *Summers* very differently. In addition to his general criticism of bright-line rules,[68] he expressed specific concern over the boundaries of the *Summers* rule, suggesting that it might be extended to permit detention in situations well beyond those that its rationale would reasonably support.[69]

A full discussion of the merits of Professors LaFave and Alschuler's arguments should delve beyond the abstract.[70] One means of analysis is provided by examining how the *Summers* rule has been applied in the nearly thirty years since the Court set forth the rule. This Note explores the implications of the *Summers* rule for lower court jurisprudence and for the larger debate over rules and standards.

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[63] *Id.* at 235.

[64] *Id.*; *see also Belton*, 453 U.S. at 460 (announcing that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile") (footnotes omitted).

[65] Michigan v. Summers, 452 U.S. 692, 705 (1981) (footnotes omitted).

[66] LAFAVE, *supra* note 19, § 4.9. *See also* Terrence C. Gill, *Regulating the Police in Investigatory Stops: A Practical Alternative to Bright Line Rules*, 59 S. CAL. L. REV. 183, 188 (1985) (suggesting that the *Summers* rule is effective because it is understandable and easy to apply in the field).

[67] LAFAVE, *supra* note 19, § 4.9.

[68] *See* Alschuler, *supra* note 26, at 227, 231.

[69] *See id.* at 271–72.

[70] Professor Alschuler himself made this point, *see id.* at 227; however, his paper was published shortly after the *Summers* decision was handed down, so his specificity with respect to *Summers* was limited to an evaluation of the Court's opinion and predictions as to the difficulties that would arise. *See id.* at 260–72.

III. *Summers* in The Supreme Court

Before examining the challenges that courts have faced in applying *Summers*'s bright-line rule, it is important to understand the context within which the Supreme Court carved out the rule.

In *Summers*, police officers were about to execute a warrant to search George Summers's house for narcotics when they encountered Mr. Summers on the front steps of the house.[71] The officers knew that Mr. Summers lived in the house[72] and requested his assistance in gaining entry.[73] After Mr. Summers claimed that he had left his keys inside, the officers forced open the door and detained Mr. Summers in his living room with seven other occupants.[74] Mr. Summers remained detained until the officers found a bag of narcotics, at which point he was arrested.[75] The record did not describe the manner in which Mr. Summers was detained or the length of time that he was detained.[76]

The majority opinion, and both parties, agreed that the detention of Mr. Summers "constituted a 'seizure' within the meaning of the Fourth Amendment," and the majority assumed at the outset that the seizure "was unsupported by probable cause."[77] The sole issue before the Court, then, was whether the pre-arrest seizure of Mr. Summers was permissible even though the officers lacked probable cause to seize Mr. Summers.[78]

Over a strong dissent,[79] the majority explained "that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause . . . ."[80] According to the Court, this exception was "not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* [*v. Ohio*[81]] and *Adams* [*v. Williams*[82]]."[83] To

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[71] Michigan v. Summers, 452 U.S. 692, 693 (1981).

[72] *Id.* at 695 n.4.

[73] *Id.* at 693.

[74] *Id.* at 693 n.1 (citing People v. Summers, 286 N.W.2d 226, 226–27 (Mich. 1979), *rev'd sub nom.* Michigan v. Summers, 452 U.S. 692 (1981)).

[75] *Id.*

[76] *Id.* at 711 n.3 (Stewart, J., dissenting). Also, although the *Muehler* Court would later suggest that Summers's name was not mentioned in the search warrant, *see* Muehler v. Mena, 544 U.S. 93, 99 n.2 (2005), it is quite clear that the warrant *did* make reference to Summers' first name, "George," *see Summers*, 286 N.W.2d at 226–27.

[77] *Summers*, 452 U.S. at 696 (footnote omitted).

[78] *Id.*

[79] *See id.* at 710–11 (Stewart, J., dissenting) (urging that "*Terry v. Ohio* defined a special category of Fourth Amendment 'seizures' *so substantially less intrusive* than arrests" and that the detention of Summers "is of a very different order" (citation omitted) (internal quotation marks omitted)).

[80] *Id.* at 699.

[81] 392 U.S. 1 (1968) (holding that probable cause is not required for a "stop and frisk").

[82] 407 U.S. 143 (1972) (relying on *Terry* to hold that an officer could forcibly stop a suspect to investigate a tip that the suspect was armed and carrying narcotics).

determine whether an exception was appropriate in *Summers*, it was necessary to balance the extent of the intrusion posed by detention against the law enforcement interests at stake.

In its implementation of this balancing test, the Court directly questioned the seriousness of the intrusion posed by the detention. Of "prime importance" was the search warrant itself:

> A neutral and detached magistrate had found probable cause . . . and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself.[84]

Indeed, the Court was willing to "assume that most citizens–unless they intend flight to avoid arrest–would elect to remain in order to observe the search of their possessions."[85] Finally, the Court reasoned that "because the detention in this case was in respondent's own residence, it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station."[86] On these grounds, the Court concluded that the intrusion posed by detention was "substantially less intrusive" than an arrest.[87]

The *Summers* Court pointed to three law enforcement interests in detaining an occupant encountered during a search. First, the Court identified the interest in preventing the occupant from fleeing in the event that the officers were to find incriminating evidence.[88] Second, the Court emphasized the legitimate interest in minimizing the danger to police officers, observing that searches for narcotics are of a particularly dangerous nature.[89] Third, the Court suggested that detention promoted "the orderly completion of the search," because if the occupant is present, he or she may assist with the search by opening locked doors and containers.[90]

Notably, the Court did not end its analysis there. The Court also acknowledged the importance of an "articulable and individualized suspicion on which the police base the detention of the occupant . . . ."[91] In response

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[83] *Summers*, 452 U.S. at 700.
[84] *Id.* at 701.
[85] *Id.*
[86] *Id.* at 702.
[87] *Id.* (citing Dunaway v. New York, 442 U.S. 200, 210 (1979)).
[88] *Id.*
[89] *See id.* ("Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence.").
[90] *Id.* at 703.
[91] *Id.*

to this requirement, the Court again turned to the significance of the search warrant:

> The existence of a search warrant . . . provides an objective justification for the detention . . . . [A] neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the privacy of a home. The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.[92]

On the basis of both the balance of interests and the fact that an occupant's connection to a home being searched for contraband will usually provide particularized suspicion, the Court carved out its bright-line rule in *Summers*: "[F]or Fourth Amendment purposes . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[93] The Court made clear that it intended the rule to be categorical:

> [T]he balancing of the competing interests . . . "must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers." The rule we adopt today does not depend upon such an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.[94]

The decision to issue a categorical rule in *Summers* results in a transfer of decisionmaking power from courts after-the-fact to law enforcement on the scene. If the Court had not announced a categorical rule in *Summers* and issued a decision limited to the facts presented, then future courts would assess the reasonableness of detention on a case-by-case basis. Under this approach, a court might find a detention unconstitutional even where the person detained was an occupant and there was a warrant to search for contraband. However, the *Summers* rule precludes this result, requiring courts to hold that an entire category of police action is *always* constitutional. After *Summers*, then, the decision of whether an occupant should be detained is committed entirely to the discretion of law enforcement personnel.

When the *Summers* rule categorically upholds detentions that would likely be found unconstitutional if analyzed case-by-case on their particular

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[92] *Id.* at 703–04 (footnote omitted).

[93] *Id.* at 705.

[94] *See id.* at 705 n.19 (citing Dunaway v. New York, 442 U.S. 200, 219–20 (1979) (White, J., concurring)).

facts, it is strikingly over-inclusive. Professor LaFave has argued that this over-inclusiveness is tolerable and is outweighed by the benefit of providing clear guidance to police officers. However, Professor LaFave's approval assumes cases involving (1) a warrant to search for contraband; and (2) the detention of a resident of the premises being searched.[95] Although I take no issue with Professor LaFave's contention that the *Summers* rule is tolerable when confined to its facts, I illustrate below that lower courts have not so narrowly cabined their application of the *Summers* rule to situations that fall within this narrow scenario. Rather, some courts have extended *Summers* well beyond these boundaries, using the rule to curtail, rather than to protect, individual liberty. Consequently, the *Summers* rule creates cause for concern that the boundaries of bright-line Fourth Amendment rules might be manipulated or ignored, regardless of their apparent clarity and sharpness.

IV. The Elastic Boundaries of *Summers*

The language of the *Summers* rule seems simple enough: "we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[96] It seems safe to assume that the Court intended it to be as such, given that the Supreme Court adopted the categorical rule with the purpose of providing clear guidance to law enforcement personnel.

However, notwithstanding the apparent simplicity of *Summers*'s language, lower courts are divided over the boundaries of the rule. Below, I separate the *Summers* rule into its discrete components and examine the ways in which some courts have used *Summers* as a means of infringing, rather than protecting, liberty. For each, I attempt to capture (1) the degree to which lower courts have struggled to apply the rule; and (2) the extent to which some lower courts have been able to uphold intrusions far greater than *Summers*'s rationale reasonably allows.

a. A Warrant to Search for Contraband

If the Supreme Court desired that *Summers* apply only to cases involving a warrant to search for contraband, it could hardly have promulgated clearer language. Indeed, the *Summers* Court's express statement that it was not "decid[ing] whether the same result would be justified if the search

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[95] LaFave, *supra* note 19, § 4.9 ("The rule . . . is that police may *always* detain persons found at the premises named in a search warrant, provided (i) the warrant authorizes a 'search for contraband' and (ii) the persons detained are 'occupants.'" (footnote omitted)).

[96] *Summers*, 452 U.S. at 705 (footnotes omitted).

warrant merely authorized a search for evidence"[97] indicates that this almost certainly was the Court's intention.[98]

Moreover, as some courts have acknowledged, the fact that the warrant in *Summers* concerned contraband was central to the *Summers* Court's rationale in carving out the rule. As one court observed, a search for non-contraband evidence undercuts the asserted law enforcement interest in preventing flight because "a search for evidence [that is not contraband] . . . is much less likely to uncover items that lead to an immediate arrest. . . . [A]s a result, the incentive to flee is greatly diminished."[99] More commonly, courts have emphasized that where the search is for non-contraband evidence, the warrant does not carry with it an individual and articulable suspicion that criminal activity is taking place on the premises, a factor which the *Summers* Court heavily relied on.[100]

Not surprisingly then, some courts have been reluctant to extend *Summers* to cases that do not involve warrants to search for contraband.[101] For instance, in *Heitschmidt v. City of Houston*,[102] police officers detained Edwin Heitschmidt while executing a search warrant for evidence of a prostitution ring operated by Mr. Heitschmidt's housemate.[103] The officers handcuffed Mr. Heitschmidt and forced him to sit on a bar stool in his living room for approximately four and a half hours while they searched the house.[104] When Mr. Heitschmidt brought suit against the officers, the district court held that *Summers* precluded Mr. Heitschmidt from establishing a Fourth Amendment

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[97] *Id.* at 705 n.20.

[98] This interpretation might also explain the Court's reluctance to categorically apply *Summers* in *Los Angeles County v. Rettele*, 550 U.S. 609 (2007) (per curiam). That is, perhaps the Court recognized that the *Summers* rule was confined to warrants to search *for contraband*, whereas *Rettele* merely involved a warrant to search for documents and computer files. *Id.* at 610.

[99] Leveto v. Lapina, 258 F.3d 156, 171 (3d Cir. 2001); *cf.* Zurcher v. Stanford Daily, 436 U.S. 547, 579 (1978) (Stevens, J., dissenting) ("[T]he persons who possess evidence that may help to identify an offender, or explain an aspect of a criminal transaction, far outnumber those who have custody of weapons or plunder. Countless law abiding citizens . . . may have documents in their possession that relate to an ongoing criminal investigation."), *quoted in* LaFave, *supra* note 19, § 4.9 (4th ed. 2009).

[100] Denver Justice & Peace Comm. v. City of Golden, 405 F.3d 923, 931 (10th Cir. 2005) (citing United States v. Ritchie, 35 F.3d 1477, 1483 (10th Cir. 1994)); *see also* Daniel v. Taylor, 808 F.2d 1401, 1404 (11th Cir. 1986) (per curiam) (suggesting that there is no individual articulable suspicion in searches for non-contraband because "the existence of mere evidence, as opposed to contraband, on the premises does not suggest that a crime is being committed on the premises").

[101] *See, e.g.*, Denver Justice & Peace Comm., 405 F.3d at 930–31 (holding that neither *Summers* nor *Muehler v. Mena*, 544 U.S. 93 (2005), could be used to justify frisking because "police were not searching for weapons, the proceeds of a crime, or contraband," but rather for evidence of an alleged vandalism); *Leveto*, 258 F.3d at 170, n.6 (finding that *Summers*'s categorical rule does not justify the eight-hour detention of a taxpayer suspected of tax evasion because "[t]he search warrants at issue . . . sought evidence rather than contraband").

[102] 161 F.3d 834, 835 (5th Cir. 1998).

[103] *Id.* at 835.

[104] *Id.* at 835–36.

violation.[105] The Fifth Circuit reversed, concluding that "[t]he holding in *Summers* was far more narrow"[106] than the district court had interpreted it, and stressed that *Summers* cannot be read without limits. After engaging in thoughtful analysis of *Summers*'s underlying rationale, the court refused to invoke *Summers* because, among other factors, the warrant in *Heitschmidt* did not concern contraband.[107]

However, many other courts have applied *Summers* well beyond the limited set of cases that involve warrants to search for contraband. Some courts have held that *Summers* categorically permits detention even when evidence other than contraband is sought under a search warrant.[108] For example, in *Unus v. Kane*,[109] the Fourth Circuit held that the detention of Aysha and Hanaa (the story with which this Note opened)[110] was reasonable as a matter of law under *Summers*,[111] despite Aysha and Hanaa's contention that *Summers* did not apply to searches for non-contraband.[112] Without explanation, the court found that "the rationale underlying *Summers* . . . applies equally to situations where agents are seeking evidence of federal crimes."[113]

The discord over the centrality of the warrant to the *Summers* rule has not ended there. Some courts have applied *Summers* to uphold detention in cases involving arrest warrants, not search warrants,[114] and even to cases where no search warrant was issued at all.[115]

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[105] *Id.* at 837.

[106] *Id.*

[107] *Id.* at 837–38.

[108] *See, e.g.*, Dawson v. City of Seattle, 435 F.3d 1054, 1066 (9th Cir. 2006) (holding that *Summers* "appl[ies] to all searches upon probable cause, not just to searches for contraband"); United States v. Smith, 704 F.2d 723, 725 (4th Cir. 1983) (upholding detention under *Summers* where warrant is to search for gambling records). *Cf.* Garavaglia v. Budde, No. 93-2542, 1994 U.S. App. LEXIS 36161, at *3 (6th Cir. Dec. 19, 1994) (upholding qualified immunity because under *Summers* "there is no clearly established right to be free from detention during a search, authorized by warrant, for evidence of federal tax evasion"); Pecsi v. Doyle, No. 90-4039, 1991 U.S. App. LEXIS 17828, at *4 n.1 (6th Cir. July 26, 1991) (applying *Summers* to a case involving a warrant to search for stolen property without revisiting whether the *Summers* court intended such extension).

[109] 565 F.3d 103, 109 (4th Cir. 2009).

[110] *See supra* Part I.

[111] *Unus*, 565 F.3d at 120.

[112] *See id.* at 119 n.22.

[113] *See id.* The Court only cited to a previous decision in which it upheld the detention of occupants during a search for records, but did not expressly consider the distinction between contraband and non-contraband evidence. *See id.* (citing United States v. Photogrammetric Data Serv., Inc., 259 F.3d 229, 239 (4th Cir. 2001)).

[114] *See, e.g.*, Katzka v. Leong, 11 F. App'x 854, 855 (9th Cir. 2001) ("Although *Summers* dealt with execution of a search warrant, rather than an arrest warrant, its analysis applies equally in this case."); United States v. Vaughan, 718 F.2d 332, 334–35 (9th Cir. 1983) (applying *Summers* to uphold detention of the passenger of a car because police were executing an arrest warrant for the other passengers); People v. Hannah, 51 Cal. App. 4th 1335, 1343 (Cal. Ct. App. 1996) (holding that the distinction between search warrants and arrest warrants "makes no difference" in whether to apply *Summers*); Hovington v. State, 616 A.2d 829, 832 (Del. 1992) (same); *cf.* Freeman v. Gore, 483 F.3d 404, 412 (5th Cir. 2007) (stating in dicta that *Summers* "would authorize the deputies to detain anyone found at that address during the execution of their arrest warrant"). *But see* Solis-Alarcon v. United States, 432 F. Supp. 2d

b. Occupants of the Premises

Central to the scope of police officers' authority to detain under *Summers* is the definition of "occupants." Below I consider the two main challenges that lower courts have faced: (1) whether "occupants" applies only to residents or also to visitors; and (2) whether "occupants" also encompasses "recent occupants."

i. Residents and Visitors

Professors LaFave and Alschuler both have acknowledged the inherent ambiguity of the term "occupants," as it might encompass anyone present on the premises or refer more narrowly to owners and residents.[116] Indeed, throughout its opinion in *Summers*, the Supreme Court itself alternated between the words "occupants" and "residents."[117] Over the past thirty years there has been significant disagreement among the lower courts over whether *Summers* should apply to the visitors and guests of a premises.

Although the *Summers* Court did use the word occupant, the rationale used to carve out the *Summers* rule clearly took for granted that George Summers was a *resident*. Indeed, in opening its assessment, the Court observed:

> Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house . . . . A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had author-

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236, 251–52 (D.P.R. 2006) (rejecting argument that *Summers* authorizes detention in the case of an arrest warrant); Barron v. Sullivan, No. 93 C 6644, 1997 WL 158321, at *5 (N.D. Ill. Mar. 31, 1997) (suggesting that in the case of an arrest warrant a separate individualized reasonable suspicion is necessary); Way v. State, 101 P.3d 203, 209 (Alaska Ct. App. 2004) (same).

[115] *See, e.g.*, Sanchez v. Canales, 574 F.3d 1169 (9th Cir. 2009) (upholding under *Summers* detention of individual during a warrantless probation search); State v. Vorburger, 648 N.W.2d 829, 841, 843 (Wis. 2002) (upholding detention where an occupant was detained before the search warrant was signed, and one hour and ten minutes before the search warrant was executed). *Cf.* United States v. Ritchie, 35 F.3d 1477 (10th Cir. 1994) (upholding detention that began before the search warrant was executed); Commonwealth v. Catanzaro, 803 N.E.2d 287, 291–92 (Mass. 2004) (same).

[116] *See* Alschuler, *supra* note 26, at 270–71 (observing ordinary usage of the word "occupant" could carry either meaning); LaFave, *supra* note 19 (acknowledging the possibility that "occupant" could be interpreted to mean anyone present, but arguing that the literal meaning encompasses only residents).

[117] *Compare, e.g.*, Michigan v. Summers, 452 U.S. 692, 702–03 ("The risk of harm to both the police and the *occupants* is minimized . . ." (emphasis added)) *and id.* ("the orderly completion of the search may be facilitated if the *occupants* . . ." (emphasis added)) *with id.* at 701 ("The detention of one of the *residents* . . . was surely less intrusive than the search itself") *and id.* at 705 n.21 (referring to a "routine detention of *residents*" (emphasis added)). Further, the Supreme Court would later state in *Muehler v. Mena* that *Summers* "made clear that the detention of *an occupant* is 'surely less intrusive than the search itself,'" 544 U.S. 93, 98 (2005) (emphasis added), notwithstanding the fact that the *Summers* Court had specifically made this claim with respect to *residents*. *See Summers*, 452 U.S. at 701.

> ized a substantial invasion of the privacy *of the persons who resided there*. The detention of one of the *residents* while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself. Indeed, we may safely assume that most citizens–unless they intend flight to avoid arrest–would elect to remain in order to observe the search of *their* possessions.[118]

It would certainly be a stretch to assume that non-residents would prefer to remain for the duration of a search of someone else's house. Further, in the case of a non-resident, the search warrant almost certainly does not authorize a search of his or her belongings. The Court deemed "[t]he detention of one of the residents while the premises were searched . . . surely less intrusive than the search itself."[119] Based on the Court's rationale, it is not at all clear that the detention of a non-resident is "'substantially less intrusive' than an arrest,"[120] which was a necessary determination in carving out the *Summers* rule.

Indeed, the law enforcement interests used to justify the rule are also less persuasive where a non-resident is detained. First, "the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found"[121] would most likely be absent in the case of a non-resident because the presence of incriminating evidence would often be pertinent only to the criminal behavior of owners or residents—finding narcotics in a home does not necessarily provide probable cause to arrest all visitors present.[122] For similar reasons, the risk of harm posed by non-residents is reduced: it is less probable that a non-resident would engage in "frantic efforts to conceal or destroy evidence."[123] Second, the interest in "orderly completion of the search" such that the "self-interest [of the individuals detained] may induce them to open locked doors or locked containers" seems inapposite because non-residents are unlikely to have the keys to such doors and containers.

On largely the same grounds, then, many courts have limited *Summers* to categorically permit the detention of only *residents*.[124] However, a small

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[118] *Id.* at 701 (emphasis added).

[119] *Id.*

[120] *Id.* at 702 (citing Dunaway v. New York, 442 U.S. 200, 210 (1979)).

[121] *Id.*

[122] *Cf. supra* text accompanying note 99 (arguing that the interest in preventing flight inherently relies on the assumption that once contraband was found, the officers would be in a position to arrest the individual detained).

[123] *Summers*, 452 U.S. at 702.

[124] *See, e.g.*, United States v. Reid, 997 F.2d 1576, 1579 (D.C. Cir. 1993); Panaderia La Diana, Inc. v. Salt Lake City Corp., 342 F. Supp. 2d 1013, 1042 (D. Utah 2004) ("Nothing in the Court's reasoning in *Summers* suggests that the police would have been justified in detaining a person who merely happened to be on the premises at the time a warrant was executed."); State v. Carrasco, 711 P.2d 1231, 1234 (Ariz. Ct. App. 1985); People v. Ferguson, 179 Cal. Rptr. 437, 440 n.3 (Cal. App. Dep't Super. Ct. 1981); State v. Williams, 665 So.2d

minority of courts hold that *Summers* categorically permits law enforcement personnel to detain anyone on the premises.[125] Again, these courts have provided little or no analysis of *Summers*'s underlying rationale in justifying this extension of the rule.

A third set of courts, has adopted another approach, which I will refer to as "visitors-plus." These courts read *Summers* to neither categorically permit detention of only residents nor categorically permit the detention of visitors. Rather, they have suggested that *Summers* permits the detention of visitors only where the police officers can point to individualized and articulable facts to associate that visitor with either the residence or the criminal activity that is the subject of the warrant. For example, in *Baker v. Monroe Township*,[126] Inez Baker, her son, Corey, and her two daughters, Tiffany and Jacquine, were visiting another family member for dinner. When the Bakers arrived, law enforcement personnel were about to execute a warrant to search the apartment for narcotics.[127] The police encountered the Bakers as they were knocking on the door and forced them to get on the ground as they entered.[128] The officers kept the Baker family handcuffed for approximately twenty-five minutes, until the officers were informed of their identity.[129]

The Third Circuit explained that while *Summers* applies only to the residents of the premises being searched, it follows from *Summers* that "the police may stop people coming to or going from the house if police need to ascertain whether they live there."[130] The court explained that because of the "dangerousness of chaos" in a drug raid, the likelihood that occupants are armed, and the nature of people connected to the drug raid coming and going from the drug operation, it was reasonable for the officers to initially detain the Bakers.[131] However, the court was only willing to uphold detention insofar as there was an independent suspicion connecting the Bakers to the nature of the search.[132] Many other courts[133] have followed this visitors-plus

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112, 115 (La. Ct. App. 1995); People v. Burbank, 358 N.W.2d 348, 349 (Mich. Ct. App. 1984).

[125] United States v. Castro-Portillo, 211 F. App'x 715, 723 (10th Cir. 2007) ("In *Summers*, the Court generally used the term 'occupant' and did not limit the principles of its decision only to known residents."); United States v. Pace, 898 F.2d 1218 (7th Cir. 1990); United States v. Kalasho, Nos. 94-2111, 94-2157, 1996 WL 294452, at *5 (6th Cir. June 3, 1996) ("[The detainee's] emphasis on the difference between his relationship with the house and that of 'owners,' 'residents,' or 'occupants' is misplaced"); United States v. Fountain, 2 F.3d 656 (6th Cir. 1993); *cf.* State v. Vorburger, 648 N.W.2d 829 (Wis. 2002).

[126] 50 F.3d 1186 (3d Cir. 1995).

[127] *Id.* at 1188.

[128] *Id.* at 1188–89.

[129] *Id.* at 1189.

[130] *Id.* at 1192.

[131] *Id.* at 1191.

[132] *See id.* at 1192 (explaining in a *Terry*-like analysis that the officers could only detain for the length required to accomplish the purpose of the stop, which was to identify the Bakers).

[133] *See* Stanford v. State, 353 Md. 527, 536–37 (1999) (collecting cases).

approach: "the police cannot detain a non-resident unless they have a reasonable basis to believe that the non-resident has some type of connection to the premises or to criminal activity."[134]

ii. Recent Occupants

The divide illustrated by the residents/visitors/visitors-plus debate does not end the confusion with respect to "occupants of the premises." Courts have also struggled to discern whether "occupant" was meant to encompass only individuals who are on the premises at the time they are detained, or whether *Summers* should be applied to any individual who has previously been connected to the premises. The usual usage of "occupants of the premises" seems straightforward. Using a variant of Professor Alschuler's example, one would consider the audience members in a concert hall to be "occupants of the premises," but one would not consider those same members to be "occupants of the premises" after they walk out of the building or as they are on their way home. At best, these people could be classified as "recent occupants."[135]

However, the confusion among lower courts is not without some basis. Most notably, *Summers* itself concerned the detention of an individual who was detained after he had already left the premises being searched[136] and the Court, in a footnote, said: "We do not view the fact that [the defendant] was leaving his house when the officers arrived to be of constitutional significance. The seizure of [the defendant] on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside."[137] Further, particularly in the case of residents, perhaps the plain meaning of "occupants of the premises" is not so clear. For instance, if you are confirming your address over the phone and the person on the other end asks, "And you are still an occupant of 45 Ames Street?" it would be quite ordinary to answer, "Yes" if that is your address even if you are making the call from outside your home, or as you are driving.

Nonetheless, as some courts have recognized, in the case where the limited authority to detain occupants includes the authority to detain individuals who have already left the premises, the rationale underlying *Summers* is severely undercut.[138] First, in these cases, the intrusion posed by detention is

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[134] State v. Graves, 888 P.2d 971, 974 (N.M. Ct. App. 1994).

[135] *See* Alschuler, *supra* note 26, at 270, 274.

[136] *See supra* text accompanying note 71.

[137] Michigan v. Summers, 452 U.S. 692, 702 n.16 (1981).

[138] *See, e.g.*, United States v. Sherrill, 27 F.3d 344, 346 (8th Cir. 1994) (holding that *Summers* does not apply where an individual is detained one block away from his house); United States v. Hogan, 25 F.3d 690, 693 (8th Cir. 1994) (holding that *Summers* does not apply where an individual was detained three to five miles away); United States v. Boyd, 696 F.2d 63, 65 n.2 (8th Cir. 1982) (suggesting that *Summers* would not apply in a case where Boyd was detained several blocks away from his home); State v. Doane, No. C-040523, 2005 WL 1314192, at *2 (Ohio Ct. App. June 3, 2005) (holding that *Summers* does not apply where an individual is detained four blocks away from his house).

more pronounced because the individual is detained outside of his place of residence, often in public, and transported back to the residence being searched. Thus, unlike *Summers*, the detention adds more significantly to "the public stigma associated with the search" and involves *both* "the inconvenience" and "the indignity" of being transported by the police.[139] Second, where the "occupant" is not present on the premises at the time of the search, the law enforcement interests are also severely undercut. Because the individual is not present on the premises, he will generally not be aware that a search is being conducted and, therefore, there is no risk of flight upon the discovery of incriminating evidence.[140] Additionally, an individual who has exited the premises poses no risk of harm to the police officers or other occupants.

Still, the categorical rule from *Summers* has in many cases been extended to permit the detention of people who are not on the premises at the time of the detention. For example, in one instance, police officers were executing a warrant to search an individual's home and "thought it best" to have his cooperation, so the officers stopped him as he was driving his car nearby.[141] The Sixth Circuit held that the seizure was reasonable: "*Summers* does not impose upon police a duty based on geographic proximity."[142] The only asserted rationale was that in *Summers* the police had stopped the individual as he was descending his front steps.[143] In a follow-up case, the Sixth Circuit extended *Summers* even further to apply to an individual who was neither a resident nor on the premises at the time he was detained. *United States v. Kalasho*[144] concerned the detention of an individual who was seen "frequently coming and going" from a house to be searched before the search warrant was executed.[145] The police officers were aware that the individual was neither the subject of the warrant nor a resident of the house, "but, as a security precaution, they handcuffed him and placed him in the

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[139] *See Summers*, 452 U.S. at 702.

[140] *But see* United States v. Cavazos, 288 F.3d 706, 711–12 (5th Cir. 2002) (noting that an individual who was detained two blocks away saw police officers as he exited the premises and might have fled or given a warning to people still on the premises if he were not detained).

[141] United States v. Cochran, 939 F.2d 337, 338 (6th Cir. 1991).

[142] *Id.* at 339; *see also* United States v. Sears, 139 F. App'x 162, 166 (11th Cir. 2005) (holding that seizure of a resident 100 feet away from his house was reasonable under *Summers*); United States v. Bailey, 468 F.Supp.2d 373, 379 (E.D.N.Y. 2006) (holding that an individual's being detained a few blocks away from the premises being searched does not "have any constitutional significance" and that "[t]here is no basis for drawing a 'bright line' test under *Summers* at the residence's curb"); Commonwealth v. Catanzaro, 803 N.E.2d 287, 292 (Mass. 2004) (holding that detention of a resident outside her apartment building was reasonable under *Summers*). *But see, e.g.*, United States v. Hogan, 25 F.3d 690, 693 (8th Cir. 1994) (holding that *Summers* does not apply where an individual was detained three to five miles away); United States v. Boyd, 696 F.2d 63, 65 n.2 (8th Cir. 1982) (suggesting that *Summers* would not apply in a case where an individual was detained several blocks from his home).

[143] *Cochran*, 939 F.2d at 339.

[144] Nos. 94-2111, 94-2157, 1996 WL 294452 (6th Cir. June 3, 1996).

[145] *Id.* at *5.

back of a police car" even though he was no longer on the premises.[146] Nonetheless, the court found "[the detainee's] emphasis on the difference between his relationship with the house and that of 'owners,' 'residents,' or 'occupants' . . . misplaced" and held that the detention was consistent with *Summers*.[147]

In other cases the *Summers* rule has been extended even further, giving police officers the authority to detain individuals who have never even set foot on the premises being searched. For example, *Summers* has been extended to categorically permit the detention of an individual who approached the apartment building being searched,[148] the detention of an individual who drove into the driveway of a suspected drug lab,[149] and the detention in handcuffs of two arriving dinner guests who knocked on the door of a house while officers were conducting a search.[150]

c. "The limited authority to detain"

Another question left open by the *Summers* Court is the extent to which additional intrusions on detained individuals, beyond merely confining the detainee in a room, are categorically permitted under the rule. Below I analyze the extent to which courts have found that (1) the use of force and (2) personal searches are encompassed within the *Summers* rule.

i. The Use of Force

The Supreme Court in *Muehler v. Mena*,[151] twenty-four years after *Summers*, elaborated on the extent to which force was permitted under *Summers*. Before *Muehler*, the extent to which *Summers* permitted the use of force was not entirely clear, as *Summers* itself did not involve force. At the same time, the *Summers* Court's pronouncement that the rule was not dependent on "the extent of the intrusion to be imposed by the seizure"[152] seemed to suggest that the use of force on its own would not make the *Summers* rule inapplicable. Pre-*Muehler* courts, quite sensibly, inferred that the *Summers* rule must

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[146] *Id.* at *1.

[147] *Id.* at *5. *See also* United States v. Cavazos, 288 F.3d 706 (5th Cir. 2002) (holding that it was reasonable under *Summers* for police officers to detain an individual who was two blocks away from the house being searched even though the officers did not know he was a resident, but had merely seen him leave the house).

[148] *See, e.g.*, United States v. Jennings, 544 F.3d 815, 818–19 (7th Cir. 2008); Burchett v. Kiefer, 310 F.3d 937, 943–44 (6th Cir. 2002) (upholding under *Summers* detention of individual who approached but who never actually set foot on premises being searched, yet fled when told to get down).

[149] United States v. Bohannon, 225 F.3d 615, 617 (6th Cir. 2000).

[150] Baker v. Monroe Twp., 50 F.3d 1186, 1191 (3d Cir. 1995).

[151] 544 U.S. 93 (2005).

[152] 452 U.S. 692, 705 n.19 (1981).

carry with it the authority to use reasonable force to effectuate detention.[153] However, courts were reluctant to hold that significant uses of force, such as prolonged handcuffing, were reasonable as a matter of law.[154]

The specific approach taken by the *Muehler* Court significantly expanded the extent of the intrusion permitted in a *Summers*-like detention. Police officers executed a warrant to search Iris Mena's house for deadly weapons and evidence of gang membership.[155] Ms. Mena had rented a room in her house to a gang member who was a suspect in a drive-by shooting.[156] Eight SWAT team officers forcibly entered Ms. Mena's home, entered her bedroom while she was asleep, and handcuffed her at gunpoint.[157] Ms. Mena was then detained in her garage for two to three hours in handcuffs under the guard of two officers.[158] In total, eighteen officers were on the scene.[159] There was no suggestion in the record, or the Court's opinion, that Mena herself posed a threat to the police officers.[160]

Although all members of the Court would have remanded the case for further findings, the Justices split 5–4 over whether it was reasonable as a matter of law to detain Ms. Mena, with the majority upholding Mena's detention. Although the majority acknowledged that the prolonged use of handcuffs made this detention more intrusive than that in *Summers*,[161] it analyzed the detention and the use of handcuffs as separate intrusions. Thus, the majority was able to categorically uphold Ms. Mena's detention under *Summers* without engaging in any ad hoc balancing of the interests at play.[162]

The *Muehler* majority did, however, engage in ad hoc balancing to uphold both the initial decision to use handcuffs and the duration of the handcuffing. The Court explained that, "[i]nherent in *Summer*s's authorization to detain an occupant of the place to be searched is the authority to use

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[153] *See, e.g.*, Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir. 2002); United States v. Denney, 771 F.2d 318, 321 (7th Cir. 1985) (citing *Summers* for the proposition that an officer may use reasonable force to effectuate detention); Spights v. City of Joliet, No. 95 C 1071, 1997 WL 158335, at *4 (N.D. Ill. Mar. 31, 1997).

[154] *See, e.g.*, Mena v. City of Simi Valley, 332 F.3d 1255, 1263 (9th Cir. 2003) (holding that detention in handcuffs for two to three hours was "objectively unreasonable"); Meredith v. Erath, 342 F.3d 1057 (9th Cir. 2003) (holding that overly tight handcuffing for the first thirty minutes of a search violated the Fourth Amendment); Panaderia La Diana, Inc. v. Salt Lake City Corp., 342 F. Supp. 2d 1013, 1049 (D. Utah 2004); Renalde v. City and County of Denver, 807 F. Supp. 668, 672 (D. Colo. 1992) (submitting to jury reasonableness of handcuffing occupants behind their backs face down on the floor); Spights v. City of Joliet, 1997 WL 158335, at *4 (finding genuine issue of material fact as to whether use of force was reasonable).

[155] Muehler v. Mena, 544 U.S. 93, 96 (2005).

[156] *Id.* at 95.

[157] *Id.* at 106–07.

[158] *Id.* at 107.

[159] *Id.* at 110.

[160] No individuals were mentioned in the search warrant, *id.* at 99 n.2, and, as the concurring justices pointed out, she was five feet and two inches tall. *Id*. at 105.

[161] *Id.* at 99.

[162] *Id.* at 98.

reasonable force to effectuate the detention."[163] The Court found the initial decision to use handcuffs reasonable because "the governmental interests outweighed the marginal intrusion."[164] The Court explained that Ms. Mena "was already being lawfully detained"[165] and that:

> [T]his was no ordinary search. The governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a wanted gang member resides on the premises. In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants.[166]

The Court also upheld the two-to-three-hour duration of the handcuffing, providing its justification in a single sentence stating, "this case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons."[167]

Notably, by not holding that the use of handcuffs was categorically permitted by *Summers*, the *Muehler* Court implicitly recognized the narrowness of *Summers*. That is, it is clear from the *Muehler* decision that the *Summers* rule does not categorically permit the use of force and thus that such force must survive ad hoc balancing. However, I argue that despite construing *Summers* narrowly, the *Muehler* Court expanded the intrusion permitted in *Summers* in two ways. First, the Court expanded on the intrusion permitted by separating the reasonableness of detention from the reasonableness of the prolonged use of handcuffs. Had the Court instead 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. That is, while the law enforcement interests would seem to warrant preliminary detention to get control of a dangerous situation,[168] it is far less clear that the law enforcement interests would justify keeping Ms. Mena detained in handcuffs for two to three hours.[169] In fact, the prolonged use of the handcuffs undermined the law enforcement interests of having Ms. Mena assist with the orderly completion of the search[170] and, once the situation was under control, of ensuring the safety of officers. Indeed, in a

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[163] *Id.* at 98–99.
[164] *Id*. at 99.
[165] *Id.*
[166] *Id.* at 100.
[167] *Id.*
[168] *Cf.* LAFAVE, *supra* note 19, § 4.9 ("It seems clear on the facts of *Mena* that the detention in handcuffs was (as the Court says at one point) 'reasonable as an initial matter.'").
[169] *Cf. id.* (arguing that the Court's justification for the prolonged use of handcuffs was "dubious at best").
[170] *Cf.* United States v. Hogan, 25 F.3d 690, 693 (8th Cir. 1994) ("agents could hardly claim an interest in orderly completing the search with Hogan's aid in view of the fact that they kept him handcuffed and outside the house during the entire search").

case-by-case adjudication the orderly completion rationale would have been undercut entirely because Ms. Mena "was never asked to assist the officers, although she testified that she was willing to do so. Instead, officers broke the locks on several cabinets and dressers to which Mena possessed the keys."[171] However, the Court was able to avoid this difficult balancing by first holding that Ms. Mena's *detention* was categorically permitted under *Summers* and then relying on the fact that Ms. Mena "was already being lawfully detained" for the duration of the search[172] such that it only had to balance the *incremental* intrusion posed by applying handcuffs. Second, in performing its ad hoc balancing of the intrusion posed by two to three hours of handcuffing, the *Muehler* Court's one sentence justification—"this case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons"[173]—set the bar remarkably low. The Court did not address the fact that, although two officers were on guard, there were actually eighteen officers on the scene,[174] or the concurring Justices' observation that "this 5-foot-2-inch young lady posed no threat to the officers."[175] The Court's cursory treatment of the balancing invites cursory treatment of security and privacy interests in future cases.

Although the relative modernity of *Muehler* makes the corpus of follow-up cases more limited than those following *Summers*, lower courts following *Muehler* have been much more willing to rule as a matter of law that the use of handcuffs for the full duration of a search is reasonable,[176] and have only been willing to submit the question to the jury in extreme cases where, for example, law enforcement officers used excessive force to detain small children.[177] One of the best examples of the low bar set by *Muehler* is the Fourth Circuit's assessment of Aysha and Hanaa's detention[178] in *Unus*. Like in *Muehler*, the court assessed the reasonableness of detention separately from the reasonableness of applying handcuffs.[179] The court's balanc-

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[171] 544 U.S. at 107–08 n.5 (Stevens, J., concurring) (internal citations omitted).

[172] *Id.* at 99.

[173] *Id.* at 100.

[174] *Id.* at 110 (Stevens, J., concurring).

[175] *Id.* at 105.

[176] *See, e.g.*, *Unus*, 565 F.3d at 120; Cooper v. City of Fort Wayne, No. 1:06-CV-161-TS, 2007 WL 1455763, at *8 (N.D. Ind. May 15, 2007); *cf.* United States v. Bailey, 468 F. Supp. 2d 373, 379 (E.D.N.Y. 2006) (holding that under *Summers* "[i]t was . . . prudent for the officers to handcuff Poindexter until they could be certain that the situation was safe" (quoting United States v. Fullwood, 86 F.3d 27, 30 (2d Cir. 1996))). *But cf.* Baldwin v. Placer County, 418 F.3d 966, 970 (9th Cir. 2005) (holding that the exigency in executing a warrant to search for narcotics did not justify the pointing of guns and use of handcuffs).

[177] *E.g.*, Lucas v. City of Boston, 2009 WL 1844288, at *19 (D. Mass. 2009) (holding that a reasonable factfinder could conclude that pointing guns and yelling profane language at nine-year-old and twelve-year-old children was unreasonable); *see also* Davage v. City of Eugene, Civ. No. 04-6321-HO, 2007 WL 2007979, at *1 (D. Or. July 6, 2007) (holding that police officers may have used excessive force where they threw an individual to the floor, stood on her neck while they handcuffed her, and put a black hood over her head).

[178] *See supra* Part I.

[179] *Unus*, 565 F.3d 103.

ing amounted to a categorical rule that handcuffing occupants during the course of the search is per se reasonable. Specifically, the court found the fact that "the agents did not know whether they would be confronted by resistance" and that "upon entry into the Unus residence, the agents encountered hectic conditions" marked by "excitement in [Aysha and Hanaa's] voices" because they "were clearly concerned and worried and agitated" sufficient to justify the initial application of handcuffs, notwithstanding that this was a search "for financial documents only—and not for either weapons or persons."[180] Further, the court found that it was reasonable as a matter of law to keep the plaintiffs handcuffed for four hours because of one agent's explanation that "the agents were executing a 'terrorism-related warrant' and because the plaintiffs had 'acted a certain way at the time of entry' " and that the agent "simply wasn't comfortable" with the idea of removing the handcuffs.[181]

ii. Personal Searches

Most courts have recognized that personal searches are outside the scope of the *Summers* rule and have required an additional showing of reasonable suspicion in order to justify the search of a person encountered.[182] However, some courts have extended *Summers* to categorically permit personal frisks or pat-downs of the individuals being detained. For example, the Second Circuit has held that *Summers* gives law enforcement personnel "the authority to make a limited search of an individual on those premises as a self-protective measure" without probable cause or any additional reasonable suspicion.[183]

Although the Supreme Court has not expressly addressed whether *Summers* carries with it the authority to frisk occupants, the Supreme Court addressed a relevant situation in *Los Angeles County v. Rettele*.[184] *Rettele*

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[180] *Id.* at 120.

[181] *Id.* at 121.

[182] United States v. Cole, 628 F.2d 897, 899 (5th Cir. 1980) ("[m]ere presence neither obviates nor satisfies the requirement . . . that specific articulable facts support an inference that the suspect might be armed and dangerous" in order to conduct a pat-down frisk); Panaderia La Diana, Inc. v. Salt Lake City Corp., 342 F. Supp. 2d 1013, 1049 (D. Utah 2004) ("[w]hile *Summers* authorizes temporarily detaining occupants under special circumstances, it does not authorize a search of persons detained"); Germany v. United States, 2009 WL 4328454, at *10 (D.C. 2009) ("the rest of the totality of circumstances, may provide a reasonable articulable basis for police to frisk the individual for weapons when they find him on the premises").

[183] Rivera v. United States, 928 F.2d 592, 606 (2d Cir. 1991) (citing United States v. Barlin, 686 F.2d 81, 87 (2d Cir. 1982)); *see also*, United States v. Banks, 628 F. Supp. 2d 811, 817 (N.D. Ill. 2009) ("[I]t is . . . a 'logical extension' of the rule of *Summers* to permit a pat-down frisk" and "would be inconsistent with [the *Summers*] 'rule' to forbid officers to perform a 'pat-down' frisk on individuals whom they encounter on the premises while executing a narcotics search warrant."); United States v. Bailey, 468 F. Supp. 2d 373, 382 (E.D.N.Y. 2006) ("once an officer has authority to detain under *Summers*, *it is beyond cavil* that the officer also has the authority to conduct a pat-down of the individual") (emphasis added).

[184] 550 U.S. 609 (2007).

concerned the execution of a warrant authorizing a search for documents and computer files in the investigation of fraud and identity theft.[185] Police officers, acting in good faith, mistakenly executed the warrant without knowledge that the suspects of the investigation had sold the house to Max Rettele.[186] When Rettele's son answered the door, the officers ordered him to lie face down on the ground and proceeded into Rettele's bedroom with guns drawn.[187] The officers ordered Rettele and his girlfriend, Judy Sadler, out of bed over their protests that they were naked.[188] The two were detained without cover for a few minutes at gunpoint, at which point they were allowed to cover up and the officers realized their mistake and left their house.[189]

The issue before the Court was limited to whether the detention of Mr. Retelle and Ms. Sadler was reasonable.[190] In its decision, the Court relied heavily on *Summers's* rationale, but, unlike *Muehler*, did not hold that detention was categorically permitted during the execution of the search. Instead, the Court considered, ad hoc, the law enforcement interests in Mr. Retelle and Ms. Sadler in finding that their detention was reasonable.[191] As Professor LaFave has observed, "[g]iven the result in *Rettele*, it would seem likely that the Court would uphold a frisk absent any greater showing of danger from or involvement by the occupant subjected to the patdown."[192]

d. "While a Proper Search Is Conducted"

It is not entirely clear how the length of detention fits into police officers' "limited authority" to detain occupants. After all, the record in *Summers* did not even indicate how long George Summers was detained.[193] Nonetheless, the Court held that a search warrant confers to police officers "the limited authority to detain the occupants of the premises *while a proper search is conducted*."[194] This language seems to plainly permit detention to last for the full duration of the search. This reading is further buttressed by the Court's pronouncement that the reasonableness of detention does not depend on "the extent of the intrusion to be imposed by the seizure."[195] However, in a footnote, the *Summers* majority opened the door to confusion by stating that "special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case."[196] It is not easy to see

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[185] *Id.* at 610.
[186] *Id.* at 611.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *See id.* at 612.
[191] *See id.* at 613–16. *See supra* note 98 (arguing that *Retelle* did not categorically apply *Summers* because it did not involve a warrant to search *for contraband*).
[192] LaFave, *supra* note 19, § 4.9.
[193] Michigan v. Summers, 452 U.S. 692, 711 n.3 (1981) (Stewart, J., dissenting).
[194] *Id.* at 705 (emphasis added).
[195] *Id.* n.19.
[196] *Id.* n.21.

where the Court intended this line to be drawn, particularly in light of *Muehler*, in which the Court held that detention for two to three hours was "plainly permissible."[197]

Not surprisingly, the rule followed by the overwhelming majority of lower courts is that police officers executing a search warrant are permitted to detain the occupants for the duration of the search, even where the duration exceeds the two- to three-hour detention sanctioned in *Muehler*.[198] These courts suggest that the length of detention makes it unreasonable only where police officers have detained an occupant beyond the duration of the search,[199] or where there is an unduly prolonged use of force, such as with handcuffs.[200] For instance, consider again the Fourth Circuit's assessment of Aysha and Hanaa's four-hour detention. The court did not analyze the length of detention as a separate intrusion, but rather found that *Summers* permitted detention for the entire duration of the search.[201] The court only considered the length of detention insofar as it considered the necessity of the continued use of handcuffs.[202]

Although some courts have suggested that detention is not always permitted for the length of the search,[203] there is no substantial divide on this aspect of *Summers*. However, that *Summers* almost always permits detention for the entire duration of the search is relevant for two reasons. First, it is helpful in understanding the extent of the intrusion posed by *Summers*-like detention. Second, the length of detention categorically permitted represents the primary inefficiency or over-inclusiveness of the *Summers* rule. Because *Summers* categorically permits detention for the entire duration of the search without requiring officers to continually balance the interests at stake, the rule constrains courts to uphold detention even where that detention outlasts

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[197] Muehler v. Mena, 544 U.S. 93, 98 (2005). However, the *Muehler* Court did acknowledge that, at least with respect to the use of handcuffs, "[t]he duration of a detention can, of course, affect the balance of interests." *Id.* at 100.

[198] *See e.g.*, United States v. Castro-Portillo, 211 Fed. App'x 715, 721 (10th Cir. 2007) (holding that a search warrant "alone was sufficient to detain [the occupant] during the entirety of the search"); Dawson v. City of Seattle, 435 F.3d 1054, 1066 (9th Cir. 2006) (Under *Muehler*, "the duration of a detention may be coextensive with the period of a search, and require no further justification."); Bills v. City of Rialto, 157 F. App'x 981, 983 (9th Cir. 2005) (holding that plaintiff's detention in handcuffs for "over an hour" was reasonable because "Mena was detained in handcuffs for two to three hours"). *But see* Leveto v. Lapina, 258 F.3d 156, 169 (3d Cir. 2001) (finding the length of an eight-hour detention "highly significant" in holding that the detention was unreasonable).

[199] The Supreme Court in *Muehler* suggested that detention beyond the duration of the search might constitute an unreasonable seizure but did not reach that issue with respect to Mena's detention. *See Muehler*, 544 U.S. at 102.

[200] This is largely as a result of Justice Kennedy's concurrence in *Muehler*, where he wrote separately to "help ensure that police handcuffing during searches becomes neither routine nor unduly prolonged." *Muehler*, 544 U.S. at 102 (Kennedy, J., concurring).

[201] *Unus*, 565 F.3d at 120 (4th Cir. 2009).

[202] *Id.* at 120–21.

[203] *See, e.g.*, Pecsi v. Doyle, No. 90-4039, 1991 U.S. App. LEXIS 17828, at *2 (6th Cir. July 26, 1991) ("the right to detain the occupant of a house for the length of the search is not limitless").

the law enforcement interests at stake. That is, where police officers detain an occupant and realize shortly after that the occupant poses no risk of flight, risk of harm, or risk to the orderly completion of the search, *Summers* categorically permits those officers to continue detaining that occupant.

This synopsis of *Summers* in the lower courts should serve to illustrate that the boundaries of the *Summers* rule have been extended well beyond what the Court's initial rationale should reasonably allow. Particularly in light of the incremental intrusions that may be upheld under *Muehler* and *Retelle*, and the public stigma that has been tolerated in detaining "recent occupants," it is clear that the *Summers* rule is no longer limited to seizures that are "'substantially less intrusive' than an arrest."[204]

V. Bright-Line Rules, Their Boundaries, and Their Rationale

a. The Centrality of Boundaries to Bright-Line Rules

Both the fairness and utilitarian arguments in favor of adopting rules are highly dependent on the boundaries of those rules being respected. As Professor Sullivan observed with respect to the fairness of rules: "A decision favoring rules thus reflects the judgment that the danger of unfairness from official arbitrariness or bias [that results from standards] is greater than the danger of unfairness from the arbitrariness that flows from the grossness of rules."[205] As a rule's boundaries change, the grossness—or over-inclusiveness—of a rule changes and, therefore, the determination as to whether that rule is fair might change. For example, the "arbitrariness that flows from the grossness" of the *Summers* rule is the fact that in some instances judges will be constrained to uphold detention even where detention would not have been upheld had the court engaged in case-by-case adjudication. That is, detention might be upheld even where the particular case involved no risk of flight or to officer safety, or where there was no particularized suspicion. By adopting its categorical rule, the *Summers* Court implicitly approved of this over-inclusion.

With respect to the utility, Professor Sullivan and Professor Duncan Kennedy have observed that proponents of a rule must consider the socially unproductive behavior of the "bad man" who might engage in socially unproductive behavior right up to the line that the rule permits.[206] Thus, a determination that rules produce a net gain in productivity requires a determination "that the gains they elicit from the 'industrious and rational' will exceed the losses from the antisocial exploitation of bright lines."[207] For example, in assessing the utility of the *Summers* rule, one must consider the

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[204] Michigan v. Summers, 452 U.S. 692, 702 (1981) (citing Dunaway v. New York, 442 U.S. 200, 210 (1979)).

[205] Sullivan, *supra* note 34, at 62.

[206] *Id.* at 63 (citing Kennedy, *supra* note 34, at 1773–74).

[207] *Id.*

"bad officer" who executes a warrant to search for contraband and detains a resident knowing that the resident posed no risk of flight, to safety, or to the orderly completion of the search. In order for the *Summers* rule to be valuable, the gain from having certain and predictable rules from which other law enforcement personnel—"good officers"—can follow must outweigh the socially unproductive behavior of the bad officer. In adopting the *Summers* rule, the Supreme Court expressed that the likelihood of a bad officer exploiting the rule was low.[208]

However, when a rule is extended beyond its boundaries, the assessment of that rule's fairness and utility changes. If a rule's boundaries are extended, it may no longer be fair because the new boundaries may often produce an arbitrary result. For instance, consider when the *Summers* rule is extended to categorically permit the detention of "recent occupants." In this case, as some courts observed, there is often no legitimate interest in preventing flight or reducing the risk of harm.[209] Because the law enforcement interests are less significant, it is less likely that the detention would be upheld had the court engaged in a case-by-case balancing of the interests at stake. Thus, the *Summers* rule becomes less efficient when applied to recent occupants because it categorically upholds more cases in which case-by-case adjudication would have found detention unconstitutional. Similarly, if a rule's boundaries are extended, that rule might become less productive because it lets the "bad man" get away with more. For instance, consider where *Summers* is extended to categorically permit detention in cases where there is a warrant to search for non-contraband evidence. This modification alone significantly increases the set of searches to which the *Summers* rule applies and, correspondingly, the set of searches for which the "bad man" police officer can detain individuals even though he knows there is no social benefit.

It is possible that the extension of the *Summers* rule seen among lower courts was unavoidable because all rules are indeterminate at their edges.[210] This claim mirrors Professor Alschuler's argument that bright-line Fourth Amendment rules lead to injustice, in part, because of the difficulty in delineating clear boundaries.[211] It is certainly true that ambiguity inherent in language will lead to some ambiguity in the boundaries of rules. For instance, as previously acknowledged, there is certainly ambiguity in the word "occupants."[212] Similarly, there might be ambiguity with respect to whether

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[208] *Summers*, 452 U.S. at 701 ("the type of detention imposed here is not likely to be exploited by the officer").

[209] *See supra* Part IV.b.ii.

[210] *Cf.* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 421 (2007) ("even clear rules are ambiguous at their boundaries, and lower court judges therefore retained some discretion" in defining the boundaries).

[211] *See* Alschuler, *supra* note 26, at 231.

[212] *See supra* note 116 and accompanying text.

something constitutes "contraband."[213] While the inherent ambiguity in language might be responsible for some of the divergence among lower courts, there are two reasons why this was probably not the only cause. First, ambiguity in language fails to explain why some courts extended the *Summers* rule beyond any reasonable interpretation of the rule. For instance, it is hard to believe that the language "a warrant to search for contraband" could embrace a definition that includes arrest warrants or warrantless searches. Second, to posit that the divergence among lower courts resulted solely from ambiguity in language is to disregard that the rule was accompanied by an opinion stating the rationale for the rule. In other words, where the bright-line rule's language is ambiguous, courts can clarify the meaning of the rule by looking to the Supreme Court's rationale and determining which meaning makes sense in light of that rationale.

I believe that the latter of these two points is instructive—understanding the Supreme Court's rationale is important to properly understanding the boundaries of its bright-line rules. A strong grasp of the Court's rationale is essential not only to clarifying ambiguities in language, but more generally to understanding whether the Court intended the rule to apply to a given circumstance. Lower courts that have diverged from a narrow reading of *Summers* limited to the detention of occupants and warrants to search for contraband have done so largely because they have failed to adhere strictly to the *Summers* Court's underlying rationale.

b. The Centrality of Rationale to Boundaries

The debate over bright-line rules resurfaced in the Supreme Court just last term, in *Arizona v. Gant*.[214] In *Gant*, the court considered the scope of the bright-line rule that it set out in *New York v. Belton*:[215] "when a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest."[216] As occurred with the *Summers* rule,[217] soon after *Belton*, lower courts split over whether "occupant of an automobile" should be read to encompass "recent occupants" as well.[218] In *Gant*, the Court was faced with precisely this question—whether *Belton* authorizes a vehicle search incident to a recent occupant's arrest after the arrestee has been secured—and the Court answered in the negative. The Court adopted Justice Scalia's concurrence[219] in *Thornton*

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[213] *Cf.* LAFAVE, *supra* note 19, § 4.9(e) (noting that there is a distinction between contraband per se and derivative contraband and suggesting that *Summers* meant to include the latter).

[214] 129 S. Ct. 1710 (2009).

[215] 453 U.S. 454 (1981).

[216] Thornton v. United States, 541 U.S. 615, 617 (2004) (citing *Belton*, 453 U.S. at 454).

[217] *See supra* Part IV.b.ii.

[218] *See Gant*, 129 S. Ct. at 1718 n.2.

[219] *See id.* at 1714, 1718–19, 1721 (adopting Justice Scalia's rationale in *Thornton*).

v. United States[220] in large part, in which Scalia had criticized the majority for applying *Belton* to recent occupants simply to maintain the clarity of the rule, saying this extended the rule beyond the policy justifications on which *Belton* was based.[221] As Justice Scalia put it, "in our search for clarity, we have now abandoned our constitutional moorings."[222]

The problem emphasized by Justice Scalia in *Thornton* is one of the problems underlying the divide among lower courts with respect to *Summers*. When courts do not strictly adhere to the policies underlying the bright-line rule that they apply, they risk extending that rule beyond its rationale, and, in the Fourth Amendment context, beyond constitutionality. It is only when the policies underlying a bright-line rule are respected that the bright-line rule is safe from overbroad expansion. Professor Alschuler's fear that *Summers* would be extended "far beyond" its rationale has consistently resurfaced.

c. Revisiting Summers*'s Balancing*

Courts that provide thorough analysis of *Summers*'s underlying rationale were consistently reluctant to extend *Summers*.[223] Sometimes this has been the product of a general reluctance to revisit the balancing that took place in *Summers* because of the Court's eschewing of ad hoc balancing.[224] However, while it is true that the *Summers* Court sought to preclude courts from engaging in ad hoc balancing, the *Summers* Court did not seek to preempt courts from revisiting the balancing that took place in *Summers* in order to determine whether its rule should apply to a given case. These two approaches ask very different questions. In one case, a court asks: if I balance the law enforcement and liberty interests given the facts before me, was detention reasonable? This is clearly what the *Summers* Court sought to preempt. The second approach asks: given the balancing that took place in

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[220] 541 U.S. 615 (2004).

[221] Edwin J. Butterfoss, *Bright Line Breaking Point: Embracing Justice Scalia's Call for the Supreme Court to Abandon an Unreasonable Approach to Fourth Amendment Search and Seizure Law*, 82 TUL. L. REV. 77, 100–02 (2007); Donald Ostertag, Note, *Clarifying* Thornton*: A Bright-Line Definition of "Recent Occupant,"* 28 T. JEFFERSON L. REV. 479, 511 (2006).

[222] *Thornton*, 541 U.S. at 628 (quoting United States v. McLaughlin, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)).

[223] *See, e.g.*, United States v. Taylor, 716 F.2d 701, 707 (9th Cir. 1983) (holding that *Summers* does not justify detention of individual who is off the premises because "much of the justification for the rule announced in *Summers* is inapplicable").

[224] *See e.g.*, Sanchez v. Canales, 574 F.3d 1169, 1175 n.4 (9th Cir. 2009) (finding detention lawful under *Summers* where there is no search warrant and where there is no contraband involved without revisiting *Summers*'s balancing because "an officer's authority to detain incident to a search is categorical" (citing Muehler v. Mena, 544 U.S. 93, 98 (2005))); United States v. Sanchez, 555 F.3d 910, 916–18 (10th Cir. 2009) (citing *Summers* for the proposition that the rule "does not depend upon such an ad hoc determination" and upholding detention of a non-resident who never set foot on premises after considering the literal definition of "occupant" with little analysis of the interests balanced in *Summers*).

Summers, did the Court intend for X to be covered by the rule?[225] This question was likely not precluded and is essential to understanding the proper scope of the bright-line rule.

d. The Importance of Particularized Suspicion

Aside from some courts' reluctance to revisit the balancing that took place in *Summers*, however, there is a significant split over the role that "individual and articulable suspicion" played in the *Summers* decision.[226] It is clear from *Summers* that law enforcement personnel executing a warrant to search for contraband are permitted to detain occupants in the absence of an additional finding of individual suspicion. However, in carving out that rule, did the *Summers* Court reason that individual suspicion was not necessary, or did the Court reason that a warrant to search for contraband *provides* that suspicion? Contrary to what others have suggested,[227] it is clear that this distinction is material because, as the previous discussion illustrates, the policy underlying a bright-line rule is central to determining whether that rule applies in a given case. Below, I argue (1) that individualized suspicion was central to the Court's rational in *Summers*, and (2) that respecting the centrality of individualized suspicion helps resolve ambiguities in the *Summers* rule.

When one considers the *Summers* opinion in light of its text, the Framers' understanding of the Fourth Amendment, and the surrounding body of Fourth Amendment jurisprudence, it is clear that the Court's reasoning was not abrogating the need for individual suspicion altogether, but carving a rule around circumstances in which individual suspicion was present. First, in justifying its balancing approach, as opposed to the general rule requiring probable cause, the Court engaged in a long summary to illustrate that:

> some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so

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[225] Here, "X" could, for example, be "non-residents" or "arrest warrants."

[226] *Compare* Russel W. Galloway, Jr., *Basic Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 737, 754 (1992) ("Reasonable articulable suspicion *is required* for . . . detentions of occupants during searches of premises." (emphasis added)), *with* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 553 (1995) ("Another permissible *suspicionless* 'incremental intrusion on personal liberty' is the detention of all occupants of a home while the residence is searched pursuant to a search warrant." (emphasis added)).

[227] *Warrantless Searches and Seizures*, 33 GEO. L.J. ANN. REV. CRIM. PROC. 38, 121 (2004) (suggesting that whether or not a court interprets *Summers* to "dispense with the reasonable suspicion requirement during warrant searches or to establish that the warrant provides the reasonable suspicion . . . the result is the same").

> long as police have *an articulable basis for suspecting criminal activity*.[228]

Thus, the *Summers* Court's balancing was necessary but not sufficient to carve out an exception to probable cause; there also had to be articulable suspicion. And, after engaging in balancing, the *Summers* Court, indeed, returned to the issue of individual and articulable suspicion.[229]

As several scholars have observed, the Court's stress on particularized suspicion is not misplaced, but rather follows directly from the Framers' conception of "reasonableness."[230] Not surprisingly, then, particularized suspicion has become a touchstone of various other aspects of Fourth Amendment jurisprudence and, most notably, the other major exception to the probable cause established in *Terry v. Ohio*.[231] In *Terry*, the Court held that police officers that suspect criminal activity have the narrow authority to make limited intrusions on an individual's personal security based on less than probable cause.[232] There, the Court made clear that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[233] The Court further emphasized: "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."[234] Indeed, under *Terry*, absent individualized and articulable suspicion "even the most fleeting detention of a person violates the Fourth Amendment."[235] In light of the Framers, *Terry*, and the *Summers* opinion, it is clear that *Summers* does not abrogate the need for individualized suspicion. Rather, the Court held that in the narrow case where law enforcement personnel are executing a warrant to search for contraband, there is categorically an individualized and reasonable suspicion that the occupants encountered are connected to the criminal activity.

Understanding that the *Summers* rule was based in part on the existence of particularized suspicion aids in resolving each of the discrepancies described in the previous section. First, consider the contraband/non-contraband issue. Aside from the fact that *Summers*'s balancing does not support extending the rule to non-contraband,[236] as one court has observed, in some cases where the warrant is to search for evidence other than contraband, "the existence of a warrant based on probable cause would not give the police 'an easily identifiable basis for determining that suspicion of criminal activity

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[228] Michigan v. Summers, 452 U.S. 692, 699 (1981) (emphasis added).
[229] *See supra* text accompanying note 91.
[230] *See, e.g.*, Clancy, *supra* note 226, at 526–32.
[231] 392 U.S. 1 (1968).
[232] *Id.* at 30.
[233] *Id.* at 21.
[234] *Id.* at 21 n.18.
[235] Clancy, *supra* note 226, at 538.
[236] *See supra* Part IV.c.

justifies a detention of [the] occupant.'"[237] Because seizures based on less than probable cause require particularized suspicion, on these grounds alone it is unlikely that the Supreme Court intended for *Summers* to categorically permit detention where officers are executing a search for evidence of tax evasion or fraud, or other non-contraband. Similarly, it would seem inappropriate to extend *Summers* to cases involving an arrest warrant, because merely being on the same premises as someone who has probably committed a crime does not carry with it the same particularized suspicion as being on premises where there is known drug use or other contraband.

Understanding the centrality of individualized suspicion also suggests that *Summers* should apply only to residents: "There would be little reason to believe that casual visitors to the home, at the time the search warrant was executed, were involved with crime."[238] However, this conception of *Summers* also explains why many courts have adopted the visitor-plus approach.[239] These courts—which require that there be independent suspicion connecting the visitor to the home in order to justify detention—have merely recognized the centrality of particularized suspicion to the *Summers* rule.

It is generally thought that one of the benefits of rules is that they are easy to apply; this ease of application is central to both the fairness and the utility arguments in favor of rules. It is from the ease of application that courts are able to apply rules consistently in order to achieve fairness via formal equality.[240] It is only if they are easy to apply that rules allow private parties to plan their affairs more productively.[241] And, most relevant here, it is only if rules are easy to apply that they can be successful in protecting liberty.[242] The expansion of the *Summers* rule is instructive because it illustrates that the ease of application of a rule may be a vice when trying to delineate its boundaries. Courts that blindly applied *Summers* without a thorough analysis of its underlying rationale abused its boundaries and thus failed to protect the liberty interests at stake. Rather, protection of liberty requires that courts engage in careful and thoughtful analysis of the policy underlying the *Summers* rule in order to ensure that they are not extending the policy behind *Summers* far beyond its "constitutional moorings."[243]

The behavior that I advocate for here—thorough analysis of and strict adherence to policy—does not come without a cost and, in particular, runs

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[237] Denver Justice & Peace Comm., Inc. v. City of Golden, 405 F.3d 923, 931 (10th Cir. 2005) (citing United States v. Ritchie, 35 F.3d 1477, 1483 (10th Cir. 1994)).

[238] Paul R. Joseph, *The Protective Sweep Doctrine: Protecting Arresting Officers from Attack by Persons Other than the Arrestee*, 33 CATH. U. L. REV. 95, 105 (1983).

[239] *See supra* Part IV.b.i.

[240] *See* Sullivan, *supra* note 34, at 62 ("The argument that rules are fairer than standards is that rules require decisionmakers to act consistently, treating like cases alike.").

[241] *Cf. id.* at 62–63 (suggesting that utility gains are achieved where "rules afford certainty and predictability to private actors").

[242] *Id.* at 63–64 (the argument that rules protect liberty assumes that those rules allow one to "foresee with fair certainty how the authority will use its coercive powers").

[243] Thornton v. United States, 541 U.S. 615, 628 (2004) (Scalia, J., concurring) (quoting United States v. McLaughlin, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)).

counter to rules that generally afford judicial economy.[244] Although courts still need not engage in "elaborate, time-consuming, and repetitive application of background principles to facts,"[245] getting the boundaries right requires that a court take the time and effort required to carefully analyze the rule's rationale.

VI. Conclusion

The argument in favor of rules obviously carries with it a very important assumption that those rules will be followed. If the boundaries of a rule are manipulable, then it is reasonable to question the efficacy of that rule. Only by strictly adhering to the policy and principles underlying a rule can a court minimize the extent to which it abuses the boundaries of that rule. It follows, then, that bright-line rules, although they do avoid the time-consuming application of background principles to a given set of facts, still require thorough and thoughtful analysis of those background principles.

For those who advocate in favor of clear rules in order to provide clear guidance to law enforcement personnel, *Summers* should be cause for concern. The story of *Summers* so far illustrates the ease and degree with which a bright-line rule might be manipulated to put at risk the very liberty interests that it was designed to protect.

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[244] *See* Sullivan, *supra* note 34, at 63.
[245] *Id.*