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“Move On” Orders as Fourth Amendment Seizures

Stephen E. Henderson*

I. INTRODUCTION

A twenty-three-year-old Arab man sits on a bench. An officer approaches and orders that he “move on.” “Why? Where must I go?” he might inquire. “Because I said so, and anywhere but here,” will serve as our response.

If this park-bench sitter were engaged in protected First Amendment expression, he may have constitutional grounds for refusing to depart.¹ If the bench were located within his private property, he might prevail under the Fourth Amendment.² If the authority for the order to disperse were a vague law, he might look to the Fifth or Fourteenth Amendment’s Due Process Clause.³ If he was the only one ordered to leave despite being surrounded by similarly-situated Anglo-Americans, meaning he was selected based on race, he might successfully assert equal protection.⁴

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1. See *Brown v. Louisiana*, 383 U.S. 131, 132 (1966) (reversing convictions resulting from sit-in at segregated public library); *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1264–65 (C.D. Ill. 1996) (recognizing First Amendment claim and contrasting an eviction order in which no communicative activity was implicated); cf. *City of Chicago v. Morales*, 527 U.S. 41, 52–53 (1999) (plurality rejecting First Amendment right to “loiter” where defined not to include conduct intended to convey a message); *Doe v. City of Lafayette*, 377 F.3d 757, 763–64 (7th Cir. 2004) (en banc) (rejecting First Amendment challenge to ban on entry to public parks where desired conduct had no expressive element). An expressive element will not merely be assumed: “[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

2. See generally *Illinois v. McArthur*, 531 U.S. 326, 333 (2001) (recognizing expulsion as the seizure of a home); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993) (same).

3. See *Morales*, 527 U.S. at 56, 60 (striking down loitering ordinance on vagueness grounds); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (striking down vagrancy law on vagueness grounds).

4. See 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH

But what if the particular facts render these arguments impossible? Is there a federal constitutional right to remain, absent some legitimate government need to the contrary, or is our park-bench sitter solely dependent on state law for any potential redress? Three Justices of the Supreme Court have posited the existence of such a constitutional right. In *City of Chicago v. Morales*, in the context of striking down Chicago's Gang Congregation Ordinance, Justices Stevens, Souter, and Ginsburg identified a "freedom to loiter for innocent purposes," meaning there is a constitutional right "to remain in a public place of . . . choice."⁵ But in a biting dissent Justice Scalia ridiculed the notion that there is any such right,⁶ and it has not yet achieved any significant traction.⁷

A "move on" ("MO") order like that directed to our hypothetical young man is a subset of what can be termed "anywhere but here" ("ABH") orders, in which the government, either via legislation or purely executive action, does not detain a person—the prototypical imposition on liberty—but instead requires that a person not occupy a certain space. In its most limited manifestation, the government requires that a person "move on" from his or her current location, be it a park bench or an apartment, but does not otherwise restrict that person's continued freedom of movement. This Article uses the term "MO order" to describe such a demand. The restriction becomes more significant as the

AMENDMENT § 9.4 n.2 (4th ed. 2004) (noting cases in which those subjected to even nonseizure encounters have raised equal protection challenges, albeit typically unsuccessfully); *see also* *Bennett v. City of Eastpointe*, 410 F.3d 810, 818 (6th Cir. 2005) (describing the law for such a claim). The mere presence of colleagues, without more, does not provide a cause of action because the First Amendment's right of association does not include the mere desire to remain with another person or group of persons. *See Morales*, 527 U.S. at 53 (plurality opinion) (rejecting such a claim for gang members); *Robinson v. Town of Colonic*, 878 F. Supp. 387, 395 (N.D.N.Y. 1995) (rejecting such a claim for store shoppers).

5. *Morales*, 527 U.S. at 53–54 (1999) (Justice Stevens wrote the opinion announcing the judgment of the Court, in which only Justices Souter and Ginsburg joined in its entirety.).

6. *See id.* at 83–88 (Scalia, J., dissenting). According to Justice Scalia, the only relevant right is the Equal Protection guarantee that the government will not single out certain conduct without a rational basis therefore, and to term that a "constitutionally protected right to loiter . . . utterly impoverishes our constitutional discourse." *Id.* at 83–84. Justice Thomas marshaled historical evidence in support of Justice Scalia's position. *See id.* at 102–11 (Thomas, J., dissenting).

7. *See, e.g., Doe v. City of Lafayette*, 377 F.3d 757, 769–73 (7th Cir. 2004) (en banc) (rejecting assertion of right to loiter as fundamental right); *cf. Betancourt v. Bloomberg*, 448 F.3d 547, 555 n.** (2d Cir. 2006) (Calabresi, J., dissenting) (agreeing in dicta with Justice Stevens's plurality in *Morales*), *cert. denied*, 127 S. Ct. 581 (2006).

prohibited area is enlarged, perhaps encompassing a public park, a particularly lawless area of town, or an entire system of public parks or other traditional gathering places. The term "ABH order" includes greater geographic restraints.

As the prohibited area grows, so does the imposition on potential liberties. Even if there is no "right to remain" in our Federal Constitution, there is a right to travel *interstate*,⁸ and there might similarly be a right to travel *intrastate* to the extent necessary to engage in the ordinary activities of life.⁹ Thus, as the geographic scope of an ABH order increases, so too does the likelihood that it will substantially impact a protected liberty interest. Given contemporary society's attempts to protect the vulnerable and prevent future crime by excluding suspect individuals from certain areas,¹⁰ this could become a vibrant area of law.

However, this Article will focus on the most minimal restraint, the executive MO order like that delivered to our hypothetical park-bench sitter. This is the narrowest ABH order. Still, many probably share the intuition of the *Morales* plurality that there must be some "right to remain." At a "gut level," it seems totally unacceptable for the government to move innocent and peaceable persons at whim and without reason, for it can work a significant indignity even if more rarely a significant inconvenience. As Justice Douglas opined for a unanimous Court in *Papachristou v. City of Jacksonville*,¹¹ "loafing" and "loitering" are

historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities [along with 'strolling' and 'wandering'] have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy

8. *Sacz v. Roe*, 526 U.S. 489, 498-99 (1999); *United States v. Guest*, 383 U.S. 745, 758 (1966).

9. See *Johnson v. City of Cincinnati*, 310 F.3d 484, 496-98 (6th Cir. 2002).

10. See, e.g., *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004) (en banc) (excluding sex offender from public parks); *Johnson*, 310 F.3d at 487 (excluding persons arrested for drug crimes from areas of high drug activity).

11. 405 U.S. 156 (1972).

submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.¹²

On the other hand is the need to preserve order. According to Justice Scalia, “No modern urban society—and probably none since London got big enough to have sewers—could function . . . [without a constable having authority] to tell a pedestrian to ‘move on’”¹³

If norms are conflicted and due process liberty interests unclear, what of the Fourth Amendment? It prohibits “unreasonable seizures” of “persons,”¹⁴ and includes within its purview seizures having no effect upon privacy.¹⁵ And activity that constitutes a “seizure” is typically to be analyzed exclusively under its reasonableness criterion.¹⁶ But does a government demand that a person depart from a particular location constitute a “seizure” of his or her “person”?

Few courts have directly confronted the issue, and even fewer have decided it.¹⁷ Nevertheless, it is a question with broad implications. There are many legitimate reasons why an officer might order one to depart, whether it be to free the flow of traffic, to avoid interference with a rescue effort, to protect potential victims from a received threat, to prevent a developing threat from materializing, or to ensure the integrity of a crime scene. Are these all governed by the Fourth Amendment, or are MO orders (perhaps *de minimis*) infractions upon our liberty that do not implicate the constitutional prohibition on unreasonable seizures of the person?

12. *Id.* at 164. This opinion, which struck down a vagrancy ordinance, might not have been unanimous if two then-recent appointees, Justices Powell and Rehnquist, had participated. *See id.* at 156.

13. *City of Chicago v. Morales*, 527 U.S. 41, 87 (1999) (Scalia, J., dissenting).

14. U.S. CONST. amend. IV. The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

15. *See Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (rejecting Seventh Circuit interpretation to the contrary).

16. *See Kernats v. O’Sullivan*, 35 F.3d 1171, 1182 (7th Cir. 1994); 1 LAFAYE, *supra* note 4, § 2.1 n.2.

17. *See infra* Part IV.

There is no certain answer in either text or precedent, and it is a close question. Ultimately, however, this Article concludes that the Fourth Amendment should not restrict most executive MO orders. Logically, this likewise means most ABH orders will not receive Fourth Amendment scrutiny, because increasing the "here" to any reasonable size remains an exclusion rather than a detention. This does not mean that it is not a troubling blow to autonomy if the ability to peaceably remain in a public place is subject to the unbridled discretion of government officials. It is distressing to think the state can move peaceable persons without reason. But egregious MO orders might run afoul of substantive due process, and not every good idea finds a home in our Federal Constitution.¹⁸ States can and should ensure the dignity of their citizens by restricting the ability of their agents to demand that persons "move on."

Part II begins with the Fourth Amendment, examining its text and the Supreme Court's jurisprudence, and concludes that MO orders are not Fourth Amendment seizures of the person. Although it would be especially relevant if one were urging the contrary, Part III briefly considers the history of dispersal orders in the context of vagrancy laws. Part IV then canvasses existing caselaw concerning MO orders, which is sparse and often noncommittal, and Part V considers the potential constitutional alternative of due process. Although there are both benefits and costs of Fourth Amendment regulation, MO orders that do not exclude a person from a recognized property interest fall outside the Amendment's scope.

II. THE LEXICON AND PRECEDENT OF "SEIZURE"

The Fourth Amendment employs a flexible reasonableness criterion: "The touchstone of the Fourth Amendment is reasonableness,"¹⁹ and reasonableness "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."²⁰ In the

18. Cf. *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) ("In my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment.").

19. *United States v. Knights*, 534 U.S. 112, 118 (2001).

20. *Brown v. Texas*, 443 U.S. 47, 50 (1979) (internal quotation marks omitted) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)).

context of a seizure not amounting to an arrest, this “involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”²¹ Because the intrusion upon personal liberty resulting from a “move on” order will often be minimal, broad categories of law enforcement activity would presumably be reasonable. However, a court need not even engage in that analysis if the challenged conduct constitutes neither a “search” nor “seizure.”

Both “search” and “seizure” are commonplace in everyday speech, their usage reflecting dictionary definitions.²² For the Fourth Amendment, however, the Supreme Court has adopted a far different definition of “search,” one that requires courts to determine whether challenged government conduct impinges upon a “reasonable” expectation of privacy.²³ But the Court has not similarly redefined “seizure.”²⁴

Webster’s dictionary defines seizure as “the act or an instance of seizing,” and “a taking possession of an item, property, or person legally or by force.”²⁵ “Seize” is relevantly defined as: “[1] to take hold of suddenly or forcibly; grasp”; “[2] to take possession of by force or at will”; “[3] to take possession of by legal authority; confiscate”; and “[4] to capture; take into custody.”²⁶ According to the Supreme Court, “[f]rom the time of the founding to the present, the word ‘seizure’ has meant a ‘taking possession.’”²⁷ Thus, a seizure of property “occurs when there is some meaningful [government] interference with an individual’s possessory interests in that

21. *Id.* at 50–51.

22. For example, one dictionary gives the following as the first definition of search: “to go or look through (a place, area, etc.) carefully in order to find something missing or lost.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1287 (1989). The definition of “seizure” is discussed *infra* notes 25–29.

23. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). See generally 1 LAFAVE, *supra* note 4, § 2.1; Stephen E. Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507, 517, 544–46 (2005).

24. According to Wayne LaFave, “The word ‘seizures’ in the Fourth Amendment has, in the main, not been a source of difficulty.” 1 LAFAVE, *supra* note 4, § 2.1.

25. WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1292 (1989).

26. *Id.*

27. *California v. Hodari D.*, 499 U.S. 621, 624 (1991).

property."²⁸ And "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."²⁹

In *California v. Hodari D.*, the Court relied on the dictionary definition to hold that a person subject to, but never submitting to, a show of authority is not seized: "The word 'seizure' . . . does not remotely apply . . . to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee."³⁰ The yelling policeman has demonstrated a desire to take hold of the fleeing person, but neither a desire to seize nor an ineffectual attempt thereat constitutes a "seizure."³¹

There is one context in which a MO order can clearly constitute a "taking possession of" or "confiscation," and the Supreme Court has so recognized. When a person is ordered to leave his or her real property, it can work a seizure of that property, and therefore the Fourth Amendment restricts such an eviction.³² However, the Fourth Amendment does not recognize a possessory interest in privately owned "open fields,"³³ let alone whatever interest might arise via the current physical occupation of a portion of public space (e.g., a park bench). Moreover, even in the context of a home, a court might not find a seizure of the property if the government does not take control of the premises, as where police merely force the removal of one of two bartling occupants.³⁴

28. *Jacobsen*, 466 U.S. at 113.

29. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

30. *Hodari D.*, 499 U.S. at 626. Not surprisingly, given its emphasis on the dictionary and the common law, the opinion was authored by Justice Scalia. Justices Stevens and Marshall predictably dissented, *see id.* at 629 (Stevens, J., dissenting), and some have critiqued the Court's reliance on a dictionary in interpreting the Constitution, *see* 4 LAFAYE, *supra* note 4, § 9.4 at text accompanying nn. 176-77.

31. *Hodari D.*, 499 U.S. at 626 n.2.

32. *See generally* *Illinois v. McArthur*, 531 U.S. 326, 333 (2001); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 50 (1993). In the context of the home there is also a due process requirement that the resident be provided notice and an opportunity to be heard. *James Daniel Good*, 510 U.S. at 62.

33. *Soldal v. Cook County*, 506 U.S. 56, 62 n.7 (1992).

34. *See* *Revis v. Meldrum*, 489 F.3d 273, 280 (6th Cir. 2007); *Thomas v. Cohen*, 304 F.3d 563, 572-74 (6th Cir. 2002) (Clay, J., delivering a dissenting opinion on this issue); *id.* at 582-83 (Gilman, J., writing for the majority on this issue). The "no seizure" view has to deal with the following language from the unanimous *Soldal* Court:

[T]he reason why an officer might enter a house or effectuate a seizure is wholly

What about an order directed at movable property? If an officer confiscates an item, it constitutes a seizure of that tangible thing,³⁵ and if the item is somehow indispensable it can work a seizure of the person.³⁶ But if an officer commands only that an item be removed from its current location, the officer has not, strictly speaking, taken hold of that property nor taken possession of it. Thus, one who is prohibited from entering a stadium while in possession of a camera or pocketknife would not typically allege that the item was thereby "seized." Nonetheless, the limitation demonstrably impacts the would-be entrant. If the person wants to enter the stadium, he or she must at least temporarily sacrifice possession of the item and, if there is no suitable bailment available, might risk its permanent loss. Is that a "meaningful interference with [his or her] possessory interests," or is any interference not meaningful because the person is free to possess the item anywhere but this one desired location?

Similarly, consider a MO order directed at a person without a cognizable property interest in his or her current location. Having demanded only that a person depart, an officer did not "take hold of," "take possession of," or "capture" a compliant ordered party. A reasonable recipient would feel free to leave, as that is precisely what is required. So there is a rather strong "dictionary" or "plain meaning" argument that a MO order does not constitute a seizure. On the other hand, the person's liberty and autonomy have been restrained. Although this seems more likely to constitute a potential substantive due process violation than a "seizure," one could contend that the officer has brought the person within his or her physical control by forcing movement when the desire was to remain.³⁷ The Supreme Court's seizure jurisprudence reflects this dichotomy, at times emphasizing a "taking possession" and at other

irrelevant to the threshold question whether the Amendment applies. What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all.

Soldal, 506 U.S. at 69.

35. *United States v. Place*, 462 U.S. 696, 701 (1983).

36. *See United States v. Lee*, 916 F.2d 814, 819 (2d Cir. 1990) (retaining identification or airline ticket); *Place*, 462 U.S. at 708-10 (retaining traveler's luggage).

37. *See California v. Hodari D.*, 499 U.S. 621, 624 (1991) (making clear that "bringing [a thing] within physical control" works a seizure).

times emphasizing an interference with liberty.

Almost any legal analysis of the seizure of a person begins with the seminal opinion of *Terry v. Ohio*.³⁸ As do MO orders, "[t]h[e] case present[ed] serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman."³⁹ On the afternoon of October 31, 1963, Cleveland Police Detective Martin McFadden was engaged in an activity in which he had an impressive thirty years of experience, patrolling a portion of downtown Cleveland for shoplifters and pickpockets.⁴⁰ His modus operandi was to "stand and watch people or walk and watch people at many intervals of the day," and on this afternoon he spotted two strangers who "didn't look right . . . at the time."⁴¹

The two, John Terry and Richard Chilton, had an insatiable interest in a store window on Huron Road. Whether it was to "cas[e] a job, a stick-up," as McFadden postulated,⁴² or to case an attractive shopkeeper, the two engaged in roughly a dozen sorties—one would stroll past the store of apparent interest, pausing briefly to peer inside, and then stroll back to confer with his waiting partner, pausing once again at the relevant storefront en route.⁴³ When they left the area and met up with a third person, with whom they had previously conferred between strolls, McFadden decided it was time to act.⁴⁴ After identifying himself as a police officer and receiving a mumbled response to his request for their names, he "grabbed . . . Terry, spun him around . . . , and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat [he] felt a pistol."⁴⁵ Chilton too was armed; the third individual was not.⁴⁶ The trial court found no Fourth Amendment violation, for without the frisk "the answer to the police officer may [have been] a bullet."⁴⁷

38. 392 U.S. 1 (1968).

39. *Id.* at 4.

40. *Id.* at 5.

41. *Id.*

42. *Id.* at 6.

43. *Id.*

44. *Id.*

45. *Id.* at 6-7.

46. *Id.* Terry and Chilton were prosecuted and convicted for carrying concealed weapons. *Id.* at 4-5.

47. *Id.* at 8.

In an opinion by Chief Justice Earl Warren, the Court recognized that a significant intrusion had taken place,⁴⁸ but nonetheless agreed. The Court began by reaffirming that

[the] inestimable [Fourth Amendment] right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study For, as this Court has always recognized, “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of the law.”⁴⁹

Thus, Terry “was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland.”⁵⁰

But “not all personal intercourse between policemen and citizens involves ‘seizures’ of persons.”⁵¹ The Court recognized that police-citizen encounters were varied and complex,⁵² and that a court was inherently limited in restricting them.⁵³ Nonetheless, in this case McFadden seized Terry when, “by means of physical force or show of authority, [he] in some way restrained the liberty of a citizen.”⁵⁴ In particular, “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”⁵⁵

The *Terry* Court famously rejected a monolithic Fourth

48. *Id.* at 24–25. The Court deemed the patdown “a severe, though brief, intrusion upon cherished personal security” which “may inflict great indignity and arouse strong resentment.” *Id.* at 17, 24–25.

49. *Id.* at 8–9 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

50. *Id.* at 9. The Court focused exclusively on Terry because Chilton, Terry’s codefendant and copetitioner, died following the Court’s grant of certiorari. *Id.* at 5 n.2.

51. *Id.* at 19 n.16.

52. *Id.* at 13 (“Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life.”); *id.* at 15 (“No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us.”). See generally *id.* at 9–16.

53. *Id.* at 12. In part, the Court was recognizing the limitations of the exclusionary rule, in that if police have no desire to prosecute, there is no issue of exclusion. See *id.* at 14–15. To the extent civil suits are viable, this is not a significant limitation, but there is continued debate regarding the efficacy of such civil litigation. See *Hudson v. Michigan*, 126 S. Ct. 2159, 2167–68 (2006) (arguing civil suits provide a viable alternative to the exclusionary rule); *id.* at 2174–75 (Breyer, J., dissenting) (disagreeing).

54. *Terry*, 392 U.S. at 19 n.16.

55. *Id.* at 16.

Amendment requiring probable cause for any search or seizure,⁵⁶ giving us the gradational Fourth Amendment we have lived with ever since. And it made clear that the scope of both was to be relatively broad, "the sounder course [being] to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness."⁵⁷ The Court did not, however, seek to delineate the precise scope of either Fourth Amendment search or seizure, leaving such limitations "to be developed in the concrete factual circumstances of individual cases."⁵⁸

Over the next eleven years the Court applied its *Terry* framework, but without articulating an exclusive test for when a person is seized.⁵⁹ In May of 1980, however, two Justices articulated such a rule in *United States v. Mendenhall*. When Sylvia Mendenhall deplaned at the Detroit Metropolitan Airport, two agents of the Drug Enforcement Administration found her behavior to be consistent with their "drug courier profile."⁶⁰ They therefore approached, "identified themselves as federal agents, and asked to see her identification and airline ticket."⁶¹ Based on her responses to initial inquiries, one of the agents specifically articulated that he was a narcotics agent, returned her airline ticket and driver's license, and asked if she would accompany them to the airport DEA office for further questions.⁶² Mendenhall complied.⁶³

56. *See id.* at 20–21, 24–27. The contrary rule would, in the view of the Court, unduly frustrate the legitimate aims of law enforcement, particularly in the prevention of crime. *See id.* The Court sometimes conflated the seizure with the search that followed, but it did manage to make clear that the requirement of reasonable suspicion applied to both. *See id.* at 33 (Harlan, J., concurring).

57. *Id.* at 17 n.15 (majority opinion).

58. *Id.* at 16, 29.

59. *See, e.g.,* *Brown v. Texas*, 443 U.S. 47 (1979). According to Westlaw KeyCite, the Supreme Court cited its decision in *Terry* sixty-six times prior to May 27, 1980, but some of these are in dissent and many are peripheral. Typically, the Court did not have to expound upon the definition of seizure because it was clear that the person had been detained. *E.g.* *Ybarra v. Illinois*, 444 U.S. 85 (1979) (bar patron frisked); *Dunaway v. New York*, 442 U.S. 200 (1979) (defendant taken involuntarily to police station); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (automobile driver pulled over); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (automobile driver pulled over).

60. *United States v. Mendenhall*, 446 U.S. 544, 547 n.1 (1980).

61. *Id.* at 547–48.

62. *Id.*

Despite the Government having raised the issue for the first time before the Supreme Court, and seven Justices therefore objecting,⁶⁴ Justices Stewart and Rehnquist decided that *Mendenhall* had not been seized: "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."⁶⁵ *Terry* already made clear that an officer accosting an individual and "restrain[ing] his freedom to walk away" constituted a seizure,⁶⁶ and perhaps on the *Mendenhall* facts Justice Stewart's would have been the proper inquiry were it argued by the Government. But the *Terry* Court did not hold that this was the sole manner of seizure, instead equating seizure with any "restrain[t] [on] liberty."⁶⁷

Three years later in *Florida v. Royer*, a four-Justice plurality cited Justice Stewart's *Mendenhall* rule, but also refused to "suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure."⁶⁸ Although this language reflects a healthy realism regarding the fact-specific nature of a "feel free to leave" inquiry, it is also consistent with the *Terry* Court's refusal to cabin what can constitute a "seizure" more precisely than a restraint upon liberty. But Justice Blackmun's reading in dissent was probably a fair one, namely that the four Justices had adopted the *Mendenhall* "free to leave" rule, to which he added his fifth vote.⁶⁹

A year later in *United States v. Jacobsen*, the Court used different language, alleging that "our oft-repeated definition of the 'seizure'

63. *Id.*

64. See *id.* at 560 (Powell, J., concurring in part); *id.* at 567-71 (White, J., dissenting); see also *id.* at 551 n.5 (Stewart, J., announcing judgment of Court and attempting to defend his decision).

65. *Id.* at 554 (Stewart, J., announcing judgment of Court).

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

67. *Id.* at 19 n.16. There are hints in Justice Stewart's opinion that he may not have meant for his rule to apply in all circumstances. In an earlier portion he agrees with the arguably more expansive proposition that "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *Mendenhall*, 446 U.S. at 553. And he contrasts such a seizure with circumstances in which "the person to whom questions are put remains free to disregard the questions and walk away." *Id.* at 554. Someone subject to a MO order only satisfies one of these criteria—he or she must walk away, and therefore, is not free to disregard.

68. *Florida v. Royer*, 460 U.S. 491, 502, 506 (1983).

69. *Id.* at 514. Of the remaining dissenters, at least Justice Rehnquist would also adopt the rule, as he had joined with Justice Stewart in *Mendenhall*.

of a person within the meaning of the Fourth Amendment [is any] meaningful interference, however brief, with an individual's freedom of movement."⁷⁰ Confronted with a potential seizure of property via a chemical field test of a white powder, the Court held that the test was a Fourth Amendment seizure, albeit a reasonable one under the circumstances.⁷¹ Although seizures of such small amounts of material would typically be reasonable given their de minimis impact on the protected property interest, the Court refused to grant law enforcement carte blanche authority by defining them out of the Fourth Amendment.⁷²

But a mere two weeks later Justice Stewart's "free to leave" test was back, and for the first time in an opinion for the Court. In *INS v. Delgado*, the Immigration and Naturalization Service had conducted worksite "surveys" in order to locate illegal aliens, and four employees thereby subjected to questioning filed suit, claiming that the sweeps violated their Fourth Amendment rights.⁷³ Justice Rehnquist, writing for the Court, summarized the law of Fourth Amendment seizure and concluded that

[w]hat has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."⁷⁴

Although Justices Brennan and Marshall in dissent also wrote of an expansive "right to go about one's business free from unwarranted government interference,"⁷⁵ they expressed their acceptance of the majority's statement of the seizure test.⁷⁶

70. *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984).

71. *Id.* at 124-25.

72. *See id.* at 125 n.28.

73. *INS v. Delgado*, 466 U.S. 210, 212-13 (1984). Fifteen to twenty-five armed agents would secure the exits and then proceed through the workplace briefly questioning workers. *Id.* at 212, 230.

74. *Id.* at 215 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Justice Rehnquist was, of course, the only Justice to have joined this portion of Justice Stewart's *Mendenhall* opinion.

75. *Id.* at 226 (Brennan, J., concurring in part and dissenting in part).

76. *See id.* at 228. Despite their acceptance of the rule, Justices Brennan and Marshall thought the Court's application was "rooted more in fantasy than in the record of th[e] case." *Id.* at 229. The author tends to agree, and gives Justice Powell credit for writing a concurrence

So by *Delgado* the Supreme Court had adopted a test for what constitutes a Fourth Amendment seizure of the person, namely whether a reasonable person would feel free to leave.⁷⁷ But a reasonable employee typically will not feel free to leave his or her place of employment on account of obligation to the employer.⁷⁸ Surely this cannot mean that any onsite government contact with an employee constitutes a Fourth Amendment seizure, as the holding of *Delgado* itself demonstrates. To achieve this result, however, requires that the test be modified, which the Court did in *Florida v. Bostick*.⁷⁹

As part of its drug interdiction efforts, members of the Broward County Sheriff's Department boarded busses during scheduled stops, approached passengers without suspicion, and asked questions, including whether the passenger would consent to a search of his or her carry-on luggage.⁸⁰ Terrance Bostick replied in the affirmative, and the resulting search of his suitcase located cocaine.⁸¹ In the very first sentence of its opinion, the Court deviated from its *Mendenhall* rest:

We have held that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate.⁸²

The Court explained that whether a reasonable person would feel "free to leave" is therefore the appropriate inquiry when refusing cooperation and continuing about one's business would consist of leaving, as "[w]hen police attempt to question a person who is walking down the street or through an airport lobby."⁸³ But the central inquiry is not whether one would feel free to leave, but instead "whether a reasonable person would feel free to decline the

that both acknowledged that a reasonable person might not feel free to leave and attempted to credit the significant government interest at stake. *See id.* at 221–24 (Powell, J., concurring).

77. *See Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

78. *See Delgado*, 466 U.S. at 218.

79. 501 U.S. 429 (1991).

80. *Id.* at 431.

81. *Id.* at 432. Although the underlying facts were naturally in dispute, the Court's analysis allowed it to assume such consent. *See id.*

82. *Id.* at 431.

83. *Id.* at 435.

officers' requests or otherwise terminate the encounter."⁸⁴ Or, in slightly different language, whether "a reasonable person would feel free 'to disregard the police and go about his business.'"⁸⁵ The three dissenters agreed that this was the proper test for whether government conduct constitutes a Fourth Amendment seizure,⁸⁶ meaning the Court achieved unanimity on this definitional point. Thus, the Court returned to where it began two decades earlier, with *Terry's* expansive language:

[An] encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. [We] made precisely this point in *Terry v. Ohio*: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."⁸⁷

An officer could politely request that a person leave his or her current location, and a person could choose to voluntarily comply. But this Article uses the term MO order to designate a circumstance in which a reasonable person would not feel free to decline the "request" or to "disregard the police and go about his business." Thus, the High Court's jurisprudence provides a colorable argument that an MO order constitutes a Fourth Amendment seizure.

That argument, however, is not ultimately persuasive. First, and most importantly, the dictionary definition favors the "no seizure" view. To the extent an MO order impinges upon liberty, absent a seizure, that is an issue of substantive due process or for legislation.

84. *Id.* at 436. See also *United States v. Drayton*, 536 U.S. 194, 197 (2002) (articulating a "free to refuse" test). As Wayne LaFare has persuasively argued, the ability to leave remains critically relevant, "for such departure is the most obvious way to 'otherwise terminate the encounter.'" 4 LAFARE, *supra* note 4, § 9.4 at 145.

85. *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). At least one state has articulated its constitutional inquiry as whether "a reasonable person would have believed he or she was not free to ignore the police presence." *Jones v. State*, 745 A.2d 856, 869 (Del. 1999).

86. *Bostick*, 501 U.S. at 444 (Marshall, J., dissenting). However, the dissent stridently disagreed with the Court's application. See *id.* at 445-50.

87. *Id.* at 434 (majority opinion) (citation omitted). Last Term, a unanimous Court repeated this broad language: "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement." *Brendlin v. California*, 127 S. Ct. 2400, 2405 (2007) (internal quotation marks omitted).

Even if an officer applied physical force in the context of an MO order, unless that force would cause a reasonable person to believe he or she was not free to leave, it might constitute a battery or other wrong but would not convert an order to leave into a "seizure." Physical contact is relevant to whether a seizure is a reasonable one, and under *Hodari D.* it sometimes distinguishes a seizure from a mere attempt thereat. But it would transform an MO order into a seizure only if it transformed the interaction, even momentarily, into a detention. Thus, an order to "get lost" emphasized by a physical shove would presumably not work a seizure, whereas a grabbing by the collar in order to menacingly state "get lost" face to face might constitute a momentary detention as well as an MO order.

The second reason to reject the argument that the Supreme Court's recurring emphasis on "liberty" dictates a contrary view is that the Court was not considering the MO issue, and it stretches its precedents too far to cherry-pick language and apply it to this very different context. Just as the Court modified its then-prevailing definition of seizure when confronted with a precise question in *Bostick*, it will be free to do so again in the very different circumstance of an MO order. While the *Bostick* Court was forced to reformulate its test given a bus passenger's preexisting desire to remain, the Court's concern was still—as it has always been—exclusively whether police conduct detained those passengers.

The same is true of the one circumstance in which the Court has considered what the Fourth Amendment requires in the context of an MO order.⁸⁸ The circumstance was a vehicle stop, meaning the driver and any passengers had unquestionably already been, and continued to be, detained. In *Pennsylvania v. Mimms*, the Court held that the Fourth Amendment permits an officer to, as a matter of course, order the driver to exit the vehicle.⁸⁹ In *Maryland v. Wilson*, the Court allowed the same for passengers.⁹⁰ Without minimizing

88. The issue was raised by the facts, but not considered by the Court, in *City of Chicago v. Morales*, 527 U.S. 41 (1999). Chicago's Gang Congregation Ordinance required persons to disperse upon officer command (an MO order) if they were "loitering" with a criminal street gang member, meaning they were "remain[ing] in any one place with no apparent purpose." *Id.* at 46-47. Although six Justices held the ordinance unconstitutionally vague on account of the discretion it afforded officers to determine whether one had an "apparent purpose," *id.* at 60-64, they did so without considering the Fourth Amendment.

89. *Pennsylvania v. Mimms*, 434 U.S. 106, 109-11 (1977).

90. *Maryland v. Wilson*, 519 U.S. 408, 410 (1997).

the inconvenience or indignity of having to exit one's vehicle,⁹¹ such a command falls on the minimally intrusive end of an MO spectrum. The occupant must leave the vehicle, but he or she remains standing next to it.⁹² Nonetheless, in neither case did the Court intimate that such an order might not constitute a Fourth Amendment seizure.⁹³ Instead, both balanced the public interest (officer safety) and the intrusion into the vehicle occupant's liberty, and determined that the seizure was reasonable under the circumstances.⁹⁴ At first blush, if an order to exit a lawfully stopped vehicle constitutes a Fourth Amendment seizure, so must an order to depart a park bench, bridge, or building. However, *Mimms* and *Wilson* concerned a context in which the citizen was detained.⁹⁵ Whether an officer can require one who is detained to move is a different question than

91. See *id.* at 420 (Stevens, J., dissenting) ("In my view, wholly innocent passengers in a taxi, bus, or private car have a constitutionally protected right to decide whether to remain comfortably seated within the vehicle rather than exposing themselves to the elements and the observation of curious bystanders."); *Mimms*, 434 U.S. at 120–21 (Stevens, J., dissenting) ("Nor is it universally true that the driver's interest in remaining in the car is negligible. A woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority.").

92. See *Wilson*, 519 U.S. at 414; *Mimms*, 434 U.S. at 111. For a time, it was unclear whether a passenger could simply walk away, see *Wilson*, 519 U.S. at 415 n.3, but last Term the Supreme Court held that a passenger is seized, and recognized that an officer would quash any attempt to leave, *Brendlin v. California*, 127 S. Ct. 2400, 2406–07 (2007).

93. See *Wilson*, 519 U.S. at 420 n.8 (Stevens, J., dissenting) ("The order to the passenger is unquestionably a 'seizure' within the meaning of the Fourth Amendment."); *Mimms*, 434 U.S. at 116 n.2 (Stevens, J., dissenting) ("The Court does not dispute, nor do I, that ordering *Mimms* out of his car was a seizure. A seizure occurs whenever an 'officer, by means of physical force or show of authority, . . . in some way restrain[s] the liberty of a citizen.'" (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968))).

94. See *Wilson*, 519 U.S. at 413–15; *Mimms*, 437 U.S. at 110–11. At least one court has held that an order to show one's hands constitutes a seizure because it is a meaningful restraint on liberty, in particular one's freedom of movement. See *United States v. Manzo-Jurado*, 457 F.3d 928, 934 n.3 (9th Cir. 2006); *United States v. Enslin*, 327 F.3d 788, 795 (9th Cir. 2003). But see *Brown v. City of Onconta*, 221 F.3d 329, 341 (2d. Cir. 2000) (asserting without analysis that "ask[ing]" to show hands did not constitute seizure); *United States v. Zertuche-Tobias*, 953 F. Supp. 803, 830–32 (S.D. Tex. 1996) (holding that although it is a "close question," instruction to show hands and come to the door did not constitute seizure in the context of a "knock-and-talk"). For further cases on removal from a vehicle, see 4 LAFAYE, *supra* note 4, § 9.4 n.106.

95. Moreover, a driver will typically own the vehicle, meaning such an expulsion could work a seizure of that property. See *supra* notes 2, 32.

whether requiring movement alone constitutes a "seizure."⁹⁶

Thus, the better view seems to be that an MO order does not constitute a Fourth Amendment seizure of the person.

III. DISPERSAL ORDERS IN VAGRANCY LAW

That MO orders typically do not implicate the Fourth Amendment is consistent with our nation's long history of vagrancy laws permitting dispersal orders. According to Justice Thomas, "[l]aws prohibiting loitering and vagrancy have been a fixture of Anglo-American law at least since the time of the Norman Conquest."⁹⁷ They were enacted by the original colonies, "were common in the decades preceding the ratification of the Fourteenth Amendment," and remain the law to this day.⁹⁸

Because our nation's history and tradition play an important role in determining whether government conduct violates the Fourth Amendment,⁹⁹ this history might even seem an overwhelming obstacle to one arguing the contrary view, namely that MO orders are Fourth Amendment "seizures" of the person. But upon closer analysis, the impressive pedigree of vagrancy laws is not inconsistent with Fourth Amendment regulation because that regulation would not render those laws facially deficient.

Consider, for example, the law cited by Justice Scalia in his *Morales* dissent, a New York City provision included in laws

96. Similarly, application of an alternative "seizure" test proposed by Wayne LaFave seems to indicate that an MO order constitutes a seizure, but it too was not drafted for this context. Professor LaFave argues that the *Mendenhall* "free to leave" standard cannot be given a literal reading because it is only the unique individual who would feel free to completely disregard and walk away from even the most polite police officer asking a question. 4 LAFAVE, *supra* note 4, § 9.4 at text accompanying n.60. He therefore proposes that a police-citizen confrontation is a seizure only if the officer adds to the pressure inherent in the citizen's knowing his counterpart is an officer of the law "by engaging in conduct significantly beyond that accepted in social intercourse. The critical factor is whether the policeman, even if making inquiries a private citizen would not, has otherwise conducted himself in a manner which would be perceived as a nonoffensive contact if it occurred between two ordinary citizens." *Id.* at text accompanying notes 64-68 (footnotes omitted). People take offense when ordered from any location, and often go in protest even when the demanding party has the property right to demand compliance. So were this the test, an MO order would constitute a seizure.

97. *City of Chicago v. Morales*, 527 U.S. 41, 103 (1999) (Thomas, J., dissenting).

98. *Id.* at 103-04, 108 n.7.

99. *See Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999); *id.* at 307-08 (Breyer, J., concurring) (arguing that history informs, but does not determine, the Fourth Amendment inquiry).

governing the use of its parks: "No person shall fail, neglect or refuse to comply with the lawful direction or command of any Police Officer [or] . . . Park Ranger . . . indicated verbally, by gesture or otherwise."¹⁰⁰ A violation is punishable as a misdemeanor.¹⁰¹

The question this Article seeks to answer is of course whether an order to move on constitutes a "lawful direction or command," the argument being that it might violate the Fourth Amendment if it constitutes an unreasonable seizure under the circumstances. But recognizing a Fourth Amendment right to remain would not render such a law generally unenforceable, because there are plenty of circumstances in which the "direction or command" would not implicate that right, or would be a reasonable intrusion upon it. It would mean only that in circumstances under which an order was an unreasonable command to "move on," a person who disobeyed could not be punished therefore, and a person who complied (and was thereby seized) could seek civil redress. Although not addressing the Fourth Amendment, Justice Scalia's critique of the majority's facial holding in *Morales* fits comfortably within this Fourth Amendment mold: "It is one thing to uphold an 'as-applied' challenge when a pedestrian disobeys such an order that is unreasonable But to say that such a general ordinance permitting 'lawful orders' is void in all its applications demands more than a safe and orderly society can reasonably deliver."¹⁰²

Justice Thomas's example of police officers' traditional obligation to preserve the peace is similarly compatible with the requirements of the Fourth Amendment:

In their role as peace officers, the police long have had the authority and the duty to order groups of individuals who threaten the public peace to disperse. For example, the 1887 police manual for the city of New York provided: "It is hereby made the duty of the Police Force at all times of day and night, and the members of such Force are hereby thereunto empowered, to especially preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or

100. 56 Rules and Regs. of the City of New York § 1-03(c)(1) (West 2006).

101. *Id.* § 1-07(a).

102. *Morales*, 527 U.S. at 87 (Scalia, J., dissenting) (emphasis removed).

dangerous assemblages, and assemblages which obstruct the free passage of public streets, sidewalks, parks and places.”¹⁰³

Ordering a group to disperse because it “threaten[s] the public peace” is reasonable under the circumstances, as would be dispersing a group obstructing the public’s right of way.

Modern laws are in the same mold. For example, the first cited by Justice Thomas is a provision of the Alabama Code defining the offense of “Failure of disorderly persons to disperse.”¹⁰⁴ It provides as follows:

A person commits [a] crime . . . if he participates with five or more other persons in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, and intentionally refuses or fails to disperse when ordered to do so by a peace officer or other public servant lawfully engaged in executing or enforcing the law.¹⁰⁵

Of the forty contemporary “move on” laws cited by Justice Thomas, all but one similarly require otherwise proscribable behavior or the intention to engage in such conduct,¹⁰⁶ as do similar provisions in

103. *Id.* at 107–08 (Thomas, J., dissenting) (emphasis removed).

104. *See id.* at 108 n.7; ALA. CODE § 13A-11-6 (LexisNexis 2005).

105. ALA. CODE § 13A-11-6(a) (LexisNexis 2005).

106. *Id.* (requiring “a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm”); ARIZ. REV. STAT. ANN. § 13-2902(A)(2) (2001) (requiring “engag[ing] in or . . . hav[ing] the readily apparent intent to engage in conduct constituting a riot”); ARK. CODE ANN. § 5-71-207(a) (2005) (requiring “the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm”); CAL. PENAL CODE § 727 (West 1985) (applying to “rioters” where “riot” is defined as “[a]ny use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law” (CAL. PENAL CODE, § 404 (West 1999))); COLO. REV. STAT. ANN. § 18-9-107(b) (West 2004) (requiring “a reasonable request or order to move . . . to prevent obstruction of a highway or passageway or to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard”); GA. CODE ANN. § 16-11-36 (2007) (requiring that a person be “in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity”); HAW. REV. STAT. § 711-1102 (1993) (requiring “six or more persons . . . participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm”); IDAHO CODE ANN. § 18-6410 (2004) (requiring “the purpose of disturbing the public peace, or committing any unlawful act”); 720 ILL. COMP. STAT. ANN. 5/25-1(a)(1)–(3) (West 2003) (requiring the “use of force or violence disturbing the public peace” or a purpose to do an unlawful act); KY. REV. STAT. ANN. §§ 525.060, 525.160 (West 1999 & Supp. 2006) (requiring “a course of disorderly conduct likely to cause substantial

harm or serious inconvenience, annoyance or alarm" or "an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency"); ME. REV. STAT. ANN. tit. 17A, § 502(1) (1964) (requiring "6 or more persons . . . participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm"); MASS. GEN. LAWS ANN. ch. 269, § 2 (West 2000) (requiring "riot" or other "unlawful assembly"); MICH. COMP. LAWS ANN. § 750.523 (West 2004) (requiring "riot" or other "unlawful assembly"); MINN. STAT. § 609.715 (2003) (requiring "unlawful assembly"); MISS. CODE ANN. § 97-35-7(1) (2006) (requiring "intent to provoke a breach of the peace, or . . . such circumstances as may lead to a breach of the peace, or which may cause or occasion a breach of the peace"); MO. REV. STAT. § 574.060 (2003) (requiring "riot" or "unlawful assembly"); MONT. CODE ANN. § 45-8-102 (2007) (requiring "disorderly conduct"); NEV. REV. STAT. § 203.020 (2005) (requiring "the purpose of disturbing the public peace, or committing any unlawful act"); N.H. REV. STAT. ANN. § 644:2(a), (c), (d) (2007) (requiring, *inter alia*, "fighting or . . . violent, tumultuous or threatening behavior," or "obstruct[ing of] vehicular or pedestrian traffic," or "substantial[] interference with a criminal investigation . . . [or] emergency services"); N.J. STAT. ANN. § 2C:33-1(b) (West 2005) (requiring "a course of disorderly conduct . . . likely to cause substantial harm"); N.Y. PENAL LAW § 240.20 (McKinney 2000) (requiring "intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof"); N.C. GEN. STAT. § 14-288.5(a) (2005) (requiring reasonable belief "that a riot, or disorderly conduct by an assemblage of three or more persons, is occurring"); N.D. CENT. CODE § 12.1-25-04 (1997) (requiring order "during a riot . . . or when one is immediately impending"); OHIO REV. CODE ANN. § 2917.13(A)(3) (West 2006) (requiring order at "the scene of or in connection with a fire, accident, disaster, riot, or emergency of any kind"); OKLA. STAT. ANN. tit. 21, § 1316 (West 2002) (requiring "riot, rout or unlawful assembly"); OR. REV. STAT. § 166.025(1)(e) (2005) (requiring "intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof"); 18 PA. CONS. STAT. ANN. § 5502 (West 2000) (requiring "disorderly conduct which causes or may reasonably be expected to cause substantial harm or serious inconvenience, annoyance or alarm"); R.I. GEN. LAWS § 11-38-2 (2002) (repealed 2004); S.C. CODE ANN. § 16-7-10(A) (2003) (requiring "state of emergency"); S.D. CODIFIED LAWS § 22-10-11 (2006) (requiring "riot or unlawful assembly"); TENN. CODE ANN. § 39-17-305(a)(2) (2006) (requiring "order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard or other emergency"); TEX. PENAL CODE ANN. § 42.03(a)(2) (Vernon 2003) (requiring "reasonable request or order to move . . . to prevent obstruction of a highway or . . . to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard"); UTAH CODE ANN. § 76-9-104 (West 2004) (requiring "the scene of a riot, disorderly conduct, or an unlawful assembly"); VT. STAT. ANN. tit. 13, § 901 (1998) (requiring "unlawful, tumultuous or riotous assemblage of three or more persons"); VA. CODE ANN. § 18.2-407 (2004) (requiring "riot or unlawful assembly"); WASH. REV. CODE ANN. § 9A.84.020 (West 2000) (requiring "acts of conduct . . . which create a substantial risk of causing injury to any person, or substantial harm to property"); W. VA. CODE ANN. § 61-6-1 (LexisNexis 2005) (requiring "persons riotously, tumultuously, or unlawfully assembled"); WIS. STAT. ANN. § 947.06(1) (West 2005) (requiring "3 or more persons . . . which cause[] such a disturbance of public order that it is reasonable to believe that the assembly will cause injury to persons or damage to property unless it is immediately dispersed"); GUAM CODE ANN. tit. 9, § 61.10(b) (1996) (requiring "four (4) or more persons . . . participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm"); V.I. CODE ANN. tit. 5, §§ 4021, 4022 (1997) (requiring persons be "unlawfully or riotously assembled").

other jurisdictions.¹⁰⁷ Outside of specialized contexts such as schools,¹⁰⁸ it appears that only a minority of state laws purport to broadly penalize a failure to “move on” when ordered, and those still require that the order must have been “lawful.”¹⁰⁹

Therefore, while this Article concludes that MO orders are not Fourth Amendment seizures of the person, this history of vagrancy laws is largely consistent with either view.

IV. EXISTING “MOVE ON” JURISPRUDENCE

Several federal circuits have confronted MO orders, with disparate results. On the “seizure” side is the Sixth Circuit, while the Second Circuit has found no seizure; the Tenth Circuit is conflicted and the Fifth and Seventh Circuits have so far chosen not to decide.

In *Bennett v. City of Eastpointe*, twenty-two black youths alleged racial discrimination and Fourth Amendment violations during allegedly harassing stops when riding their bicycles in Eastpointe,

107. ALASKA STAT. § 11.61.110 (2006) (requiring that a crime have occurred); *id.* § 12.60.180 (requiring “unlawful or riotous assembly”); CONN. GEN. STAT. ANN. § 53a-182 (West 2001) (requiring “intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof”); D.C. CODE ANN. § 22-1321 (LexisNexis 2001) (requiring “intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby”); *id.* § 48-1003 (LexisNexis 2004) (requiring “the purposes of participating in the use, purchase, or sale of illegal drugs”); FLA. STAT. ANN. § 870.04 (West 2000) (requiring persons be “unlawfully, riotously or tumultuously assembled”); IND. CODE ANN. § 36-8-3-10(5) (LexisNexis 2004) (requiring “unlawful and dangerous assemblages and assemblages that obstruct the free passage of public streets, sidewalks, parks, and places”); IOWA CODE ANN. § 723.3 (West 2003) (requiring “riot or unlawful assembly”); LA. REV. STAT. ANN. § 14:329.3 (1985) (requiring reasonable belief “that riot is occurring or about to occur”); MD. CODE ANN., CRJM. LAW § 10-201(c)(3) (LexisNexis 2002) (requiring “order . . . to prevent a disturbance to the public peace”).

108. Jurisdictions often have loitering provisions requiring one in certain locations to move on when ordered. *E.g.* ALA. CODE § 13A-11-9(a)(5) (LexisNexis 2005) (school grounds); *id.* § 17-17-17 (Supp. 2006) (polling place on election day); GA. CODE ANN. § 42-5-17 (1997) (where intimates are employed or kept); ME. REV. STAT. ANN. tit. 23, § 6019 (Supp. 2006) (railroad station).

109. *See* DEL. CODE ANN. tit. 11, § 1321(1) (2001) (criminalizing the “fail[ure] or refus[al] to move on when lawfully ordered to do so by any police officer”); UTAH CODE ANN. § 76-9-102 (West 2004) (criminalizing “refus[al] to comply with the lawful order of the police to move from a public place”). Louisiana has a provision prohibiting persons from “[c]ongregating with others on a public street and refus[ing] to move on when ordered by [an] officer,” but it only applies when the officer is making “a lawful arrest, lawful detention, or seizure of property or . . . serv[ing] any lawful process or court order . . .” LA. REV. STAT. ANN. § 14:108 (Supp. 2007); *see also* State v. Lindsay, 388 So.2d 781, 783 (La. 1980).

Michigan.¹¹⁰ The area is infamous for racial tension, with the famous Eight Mile Road separating the ninety-two-percent-white suburb of Eastpointe from the eighty-two-percent-black Detroit.¹¹¹ In the incident of interest, three youths were riding one block north of Eight Mile into Eastpointe when they were stopped by the flashing lights of a police car.¹¹² After a quick interrogation and a racist joke, the officer allegedly ordered the youths to walk their bicycles "back across Eight Mile," and watched while they did so.¹¹³

Reasoning from *Bostick* and other lower court decisions, the Sixth Circuit concluded that "Fourth Amendment jurisprudence suggests a person is seized not only when a reasonable person would not feel free to leave an encounter with police, but also when a reasonable person would not feel free to remain somewhere, by virtue of some official action."¹¹⁴ Thus, the alleged order constituted a seizure, and an unreasonable one under the circumstances.¹¹⁵

To the contrary is the Second Circuit opinion of *Sheppard v. Beerman*,¹¹⁶ which concerned what is typically the more rarified context of judicial chambers. According to Brian Sheppard, law clerk to the Honorable Leon Beerman, their four-year relationship went sour when Sheppard refused to participate in the "railroading" of a defendant, which the judge had agreed to in *ex parte* communications with the prosecution.¹¹⁷ Sheppard also chose that moment to reveal that he had extensive notes on other instances of alleged judicial misconduct.¹¹⁸ Whether or not Beerman was, as Sheppard claimed, a "corrupt . . . son of a bitch," naturally he did not take kindly to Sheppard's allegations, and when Sheppard next returned to work he was removed by court officers who informed

110. *Bennett v. City of Eastpointe*, 410 F.3d 810, 815 (6th Cir. 2005).

111. *Id.* at 815-16. Rapper Eminem contributed to the area's fame via his starring role in the semi-autobiographical, Oscar-winning movie *8 Mile* (Universal Studios 2002). *8 Mile*, <http://www.imdb.com/tide/tr0298203/>. Eight Mile Road is also less famously known as Michigan Highway 102. Michigan Highways, <http://www.michiganhighways.org/listings/MichHwys100-119.html#M-102>.

112. *Bennett*, 410 F.3d at 833.

113. *Id.*

114. *Id.* at 834.

115. *Id.* The court found reasonable suspicion for the initial stop, making the "go back" order determinative. *See id.* at 833-34.

116. 18 F.3d 147, 153 (2d Cir. 1994).

117. *Id.* at 149.

118. *Id.*

him that his services were no longer required.¹¹⁹

Sheppard claimed this constituted an unconstitutional seizure, but the Second Circuit disagreed in an analysis that makes no mention of *Bostick's* reformulation of the seizure inquiry. Instead, relying solely on *Mendenhall's* "free to leave" test, the court noted that "Sheppard was free to go anywhere else that he desired, with the exception of Beerman's chambers and the court house,"¹²⁰ and that was considered determinative.¹²¹ Second Circuit courts have since followed *Beerman* on several occasions.¹²²

The Tenth Circuit has conflicting precedents, all decided in the context of drug interdictions on buses. Its jurisprudence begins with the district court opinion of *United States v. Brumfield*, in which a Greyhound bus arrived for its scheduled layover in Denver, Colorado.¹²³ All passengers were to debus with their luggage because different equipment would be used to continue to Chicago.¹²⁴ Upon arrival, officers boarded the bus and announced that they were engaged in a drug interdiction operation that required passengers to disembark carrying all luggage in their right hand, so as to be subjected to a canine sniff by a waiting dog.¹²⁵ The dog was not "on 'alert,'" however, and was merely a ruse to provoke any suspicious response.¹²⁶ Passenger Adrian Brumfield obliged, leaving behind a backpack and cooler that were ultimately found to contain methamphetamine and crack cocaine.¹²⁷

Brumfield filed a motion to suppress, arguing that the order to

119. *Id.* at 150.

120. *Id.* at 153 (internal quotation marks omitted).

121. *Id.*

122. See *Maxwell v. City of New York*, 102 F.3d 664, 668 n.2 (2d Cir. 1996) (noting in dicta that turning a car away from its desired destination may not constitute a seizure); *Posr v. Killackey*, No. 01 Civ. 2320, 2003 WL 22962191, at *7 (S.D.N.Y. Dec. 17, 2003) (holding no seizure of videographer removed from courthouse); *Campbell v. Westchester County*, No. 96 Civ. 0467, 1997 WL 773702, at *4 (S.D.N.Y. Dec. 11, 1997) (holding no seizure of former employee removed from hospital); *Anderson v. N. Y. City Hous. Auth.*, No. 91 Civ. 2584, 1995 WL 571375, at *6 (S.D.N.Y. Sept. 28, 1995) (holding no seizure of occupant removed from apartment); *Robinson v. Town of Colonie*, 878 F. Supp. 387, 402 (N.D.N.Y. 1995) (holding no seizure of customer removed from store).

123. *United States v. Brumfield*, 910 F. Supp. 1528, 1530 (D. Colo. 1996).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1530-31.

debus in a particular manner constituted an unreasonable seizure.¹²⁸ The court agreed, finding that a reasonable passenger would not have felt free to decline the officer's demanded mode of disembarking, and therefore, pursuant to *Bostick* the "governmental termination of Brumfield's freedom of movement" was "a Fourth Amendment seizure of [his] person."¹²⁹ Moreover, "[a] reasonable person in Brumfield's position would have experienced both annoyance and trepidation at the officer's commands," making the seizure unreasonable under the circumstances.¹³⁰ Thus, according to *Brumfield*, a mere demand that a person already leaving do so with a particular posture constitutes a seizure of that person.¹³¹

The Tenth Circuit agreed in *United States v. Garzon*.¹³² In a factual scenario similar to that in *Brumfield*, Greyhound required that all passengers debus, although this time, Greyhound explicitly permitted through-passengers to leave behind their carry-on luggage.¹³³ However, an officer required that all carry-on baggage be removed and expressed that he would "appreciate it if [debussing passengers] would hold [their] carry-on luggage in [their] right hand as [they] walk[ed] past the narcotics-trained dog."¹³⁴ Once again the goal was to spur suspicious behavior on the part of guilty persons,¹³⁵ and this time Carlos Garzon obliged, leaving two backpacks on board and holding another high on his left side as he disembarked.¹³⁶

The Government did not argue otherwise, and the court had no trouble determining that the order to debus in a particular manner was an unconstitutional seizure:

[The officer's] order was directly contrary to the advice previously given to the passengers by the bus driver that they could leave their personal belongings on board the bus during the brief layover

128. *Id.* at 1531.

129. *Id.* at 1532-33.

130. *Id.* at 1533.

131. *But see* *United States v. Jones*, 914 F. Supp. 421, 425 (D. Colo. 1996) (holding that merely positioning a canine adjacent to where people are debussing, without controlling their manner of exit, does *not* constitute a seizure), *aff'd*, 124 F.3d 218 (10th Cir. 1997) (unpublished).

132. 119 F.3d 1446, 1450 (10th Cir. 1997).

133. *Id.* at 1448.

134. *Id.*

135. *Id.* at 1448 n.1.

136. *Id.* at 1448.

Thus, the order given by [the officer] was, pure and simple, an unlawful order The order to Garzon to remove his personal belongings . . . was in violation of Garzon's Fourth Amendment rights.¹³⁷

Choosing to follow Greyhound policy rather than the unconstitutional order did not constitute abandonment, and therefore, Garzon retained a reasonable expectation of privacy in the bags he left on board.¹³⁸

However, despite alleged fealty to *Garzon*, a different panel of the Tenth Circuit recently issued a confusing opinion to the contrary. *United States v. Ojeda-Ramos* again concerned drug interdiction during a scheduled layover, but this time the passengers were ordered to debus and claim their luggage solely for the convenience of the police.¹³⁹ Under *Garzon*, such an order, if obeyed, logically must constitute a Fourth Amendment seizure. Nonetheless, the court claimed the officer's "order" was not an order at all because a reasonable passenger would feel free to leave the bus and then ignore the officer's "request" that he or she claim luggage.¹⁴⁰ This of course assumes that the "free to leave" inquiry is determinative. Moreover, the argument that one is necessarily "free to leave" when doing so requires abandoning luggage is inconsistent with the circuit's own precedent, which the court noted a mere two paragraphs earlier.¹⁴¹ One could choose to walk away without a driver's license, ticket, or personal luggage, but when law enforcement retains such items it can constitute a seizure of the person. Additionally, the court's reliance on the officer's failure to "demand, intimidate, threaten or use force against [the passengers]"¹⁴² is a strained standard for whether a reasonable person would deem it necessary to comply. Most of us understand that we

137. *Id.* at 1450.

138. *Id.* at 1450-51.

139. *United States v. Ojeda-Ramos*, 455 F.3d 1178, 1179 (10th Cir. 2006). Police engaged in a ruse with at least one officer posing as a Greyhound employee, but the court deemed the ruse irrelevant. *Id.* at 1183-84 ("[T]he officer's order to leave the bus and claim luggage was not a seizure and would not have been even if he had identified himself as a police officer.").

140. *Id.* at 1184.

141. *Id.* at 1183 ("[W]e have considered several non-exclusive factors in determining whether an individual has been 'seized,' including . . . prolonged retention of a person's personal effects.").

142. *Id.* at 1184.

are required to obey an officer's commands even if the commanding party mercifully leaves his or her firearm in its holster. Even the Supreme Court's heroically libertarian "reasonable bus passengers" of *Florida v. Bostick*¹⁴³ and *United States v. Drayton*¹⁴⁴ were confronted with, on their face, requests. Here the officer "directed the passengers to leave the bus [and] claim their luggage."¹⁴⁵

The court recognized that it had to distinguish *Garzon*, and strained mightily to do so. Latching onto the *Garzon* court's failure to use the term "seizure," its failure to cite relevant precedents, and the holding of *Hodari D.* that one subjected to a show of authority is not seized until he in some manner submits, the *Ojeda-Ramos* court claimed that *Garzon* did not find an unconstitutional seizure.¹⁴⁶ But even if the *Garzon* defendant was not seized because he failed to submit, the *Ojeda-Ramos* defendant did submit, and it is hard to imagine how else one can interpret the *Garzon* holding that the officer's order was "pure and simple, an unlawful order" "in violation of *Garzon's* Fourth Amendment rights."¹⁴⁷ Ultimately the attempt to undermine *Garzon* is not persuasive, but it does cloud the Tenth Circuit's position.

Finally, two circuits have chosen not to decide. In *United States v. Reyes*, an officer, spurred by an apparent canine alert, required that all passengers debus.¹⁴⁸ The Fifth Circuit declined to decide whether this order constituted a Fourth Amendment seizure, as it would have been a reasonable one under the circumstances.¹⁴⁹

143. 501 U.S. 429 (1991).

144. 536 U.S. 194 (2002).

145. *Ojeda-Ramos*, 455 F.3d at 1179.

146. *Id.* at 1185 & n.16, 1186.

147. *United States v. Garzon*, 119 F.3d 1446, 1450 (10th Cir. 1997).

148. *United States v. Reyes*, 349 F.3d 219, 221 (5th Cir. 2003).

149. *Id.* at 222-23. The MO issue was similarly raised by the facts of *United States v. Boone*, 67 F.3d 76 (5th Cir. 1995), but the defendant did not argue it, instead focusing exclusively on the interaction that followed a debussing order. *See id.* at 79 n.2 and surrounding text. It was also raised by the facts of *Laughlin v. Olszewski*, 102 F.3d 190 (5th Cir. 1996), via an order that Laughlin leave the premises of his former employer, but Laughlin's complaint did not even mention the Fourth Amendment and the court focused only on whether there was an unconstitutional *arrest* or seizure of his *property*. *Id.* at 192 n.2, 193 n.3. Although the tenor of the court's opinion indicates that it might not have found a seizure at all, quite clearly a MO order does not constitute an arrest, and the court's analysis is cursory. *See id.* at 193. More recently the court was able to avoid the issue because an officer gave passengers the choice of remaining on a bus or debussing. *United States v. Jackson*, 390 F.3d 393, 397-98 (5th Cir. 2004), *vacated on other grounds*, 544 U.S. 917 (2005). The

Similarly, other than two unpublished district court opinions,¹⁵⁰ courts in the Seventh Circuit remain consistently undecided. The circuit court first confronted the MO issue in *Kernats v. O'Sullivan*,¹⁵¹ and issued a fractured opinion that remains the most developed discussion of the consequences of either rule. The Kernats' landlord wanted them evicted and instituted legal proceedings, but a police officer prematurely ordered the family to leave in "Wyatt Earp-like fashion," and they complied.¹⁵² Chief District Judge Crabb, sitting by designation, believed there was no seizure because MO orders do not constitute Fourth Amendment seizures.¹⁵³ Judge Rovner disagreed, but believed that the rule was not clearly established and therefore that the officer was entitled to qualified immunity.¹⁵⁴ Judge Flaum's lead opinion left the underlying question of seizure undecided, reasoning that even if the MO order were a seizure, the rule was not clearly established.¹⁵⁵ In 1997, the court reached the same conclusion, namely that any rule for MO orders was not clearly established,¹⁵⁶ and in 2002, the court gave only slightly more direction, holding that if the challenged MO order were a seizure, it was reasonable under the circumstances.¹⁵⁷

According to Judge Flaum in *Kernats*, there are two overarching

opinion is noteworthy, therefore, only for its clever use of The Clash's "Should I Stay or Should I Go." See *id.* at 396 n.3.

150. See *Beverlin v. Grimm*, No. 94-C-2834, 1995 WL 470274, at *3 (N.D. Ill. Aug. 4, 1995) (holding MO order can constitute Fourth Amendment seizure); *Muhammad v. Chi. Bd. of Educ.*, No. 94-C-522, 1995 WL 89013, at *2-3 (N.D. Ill. Feb. 4, 1995) (same).

151. 35 F.3d 1171 (7th Cir. 1994).

152. *Id.* at 1173-74.

153. *Id.* at 1184 (Crabb, C.J., concurring).

154. *Id.* at 1183-84 (Rovner, J., concurring).

155. *Id.* at 1181 (majority opinion).

156. *Spiegel v. City of Chicago*, 106 F.3d 209, 212 (7th Cir. 1997).

157. *White v. City of Markham*, 310 F.3d 989, 996 (7th Cir. 2002). This most recent decision accords with Supreme Court guidance that courts first decide whether a constitutional violation occurred before moving to qualified immunity, lest "standards of official conduct . . . tend to remain uncertain, to the detriment both of officials and individuals." *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998). In unreported decisions, the Seventh Circuit courts have continued this trend. See *Lunini v. Grayeb*, 184 Fed. App'x 599 (7th Cir. 2006) (holding MO order reasonable even if a seizure); *Black v. Ferguson*, No. IP-00-1124-C-T/K, 2002 WL 655696 (S.D. Ind. Mar. 13, 2002) (holding MO order reasonable even if a seizure); *Day v. Office of Cook County Sheriff*, No. 2000-C-2529, 2001 WL 561362 (N.D. Ill. May 21, 2001) (granting qualified immunity). Recently, however, a judge in the Northern District of Illinois refused to grant summary judgment given this uncertainty. See *Richman v. Sheahan*, No. 98-C-7350, 2007 WL 489138, at *11 (N.D. Ill. Feb. 2, 2007).

factors in the seizure analysis: "(1) the nature and degree of the official inducement, and (2) the extent of the restriction on the citizen's desired freedom of movement."¹⁵⁸ Because the latter is relatively minor in the context of an MO order, such an order would typically only constitute a seizure if the former were significant, such as if the issuing officer brandished a firearm and verbally threatened physical harm.¹⁵⁹ In other words, even if a reasonable person would not feel free to decline, a person complying with a non-threatening MO order may not have been seized, while one complying with a threatening order may have.¹⁶⁰

Flaum's analysis may initially seem attractive because it provides a middle ground: A court can hold that MO orders typically do not constitute Fourth Amendment seizures, thereby avoiding counterproductive restraints on the police and increased litigation, but reserve the ability to find a seizure on especially sympathetic facts. Without this caveat, the Fourth Amendment potentially becomes powerless to prevent officers from whimsically pointing guns at people and telling them to "get lost," because "even unreasonable, unjustified, or outrageous conduct by an officer is not prohibited by the Fourth Amendment if it does not involve a [search or] seizure."¹⁶¹ Of course, there might be other relevant constitutional restraints—such conduct might shock the conscience, representing the antithesis of due process of law. But more importantly, given the Fourth Amendment's command of reasonableness, the Amendment does not require nor benefit from such initial filtering. Just as it is unnecessary to pre-screen searches for those that invade a reasonable expectation of privacy before

158. *Kernats*, 35 F.3d at 1178.

159. *See id.* at 1178-79.

160. It is possible to read Judge Flaum's opinion more narrowly. Obviously, the degree of coerciveness is relevant to whether a reasonable person would feel free to leave or otherwise ignore an officer's request, and therefore, has been a standard part of that inquiry since the "free to leave" test was announced in *Mendenhall*. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). At times, it appears this is all Judge Flaum is attempting to do. *See, e.g., Kernats*, 35 F.3d at 1180 ("[I] find it at least plausible that a reasonable person would have sought further clarification [rather than feeling compelled to leave]."). The entire tenor of his opinion is to the contrary, however, as he seeks to somehow differentiate "innocuous" MO demands from those he deems worthy of Fourth Amendment scrutiny. *See id.* at 1181 n.7. Without this larger aim, Judge Flaum's entire second factor would be irrelevant because the extent of restriction is not a criterion in the traditional analysis—a person is either free to leave or not.

161. *Kernats*, 35 F.3d at 1177.

deciding whether those that do are reasonable,¹⁶² if some MO orders are to constitute seizures of the person, there is no benefit to creating a subcategory of orders that are allegedly never tested for reasonableness. Put another way, Judge Flaum wants to place much of the Fourth Amendment's work into whether the Amendment is implicated, when that same work can be done via its reasonableness criterion. While the same results can be achieved either way, unless the conduct in question is a type of government conduct that cannot constitute a seizure under any circumstances (which is of course this Article's view of MO orders as to seizures of the person), it is better to subject them all to reasonableness review so people will understand they are protected against unreasonable applications.

Judge Crabb's dissenting view proceeded in part by what he saw as *reductio ad absurdum*. Deeming an MO order to constitute a seizure

would expand Fourth Amendment law into areas it was never intended to reach It is not frivolous . . . to suggest that equating a seizure with any kind of officially coerced compliance raises the specter of evaluating the reasonableness under the Fourth Amendment of police orders to clear a crime scene, form a single line in a highway construction area, stay out of a condemned building or move away from a convenience store.¹⁶³

Although Judge Flaum attempted to avoid this consequence via his two-factor jurisprudence of "significant" disruptions,¹⁶⁴ that merely transmutes the reasonableness inquiry into the definition of "seizure." Thus, Judge Crabb is exactly right. Acknowledging that an MO order constitutes a Fourth Amendment seizure would raise the specter of Fourth Amendment review in all of these cases, as well as the two others he mentions, namely persons loitering on a street corner who are told to move on and a street vendor operating without a license who is directed to do the same.¹⁶⁵

V. DUE PROCESS: A CONSTITUTIONAL ALTERNATIVE

The Fifth and Fourteenth Amendments provide that neither the

162. See Stephen E. Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507, 544-46 (2005).

163. *Kernats*, 35 F.3d at 1185.

164. *Id.* at 1181 n.7.

165. *Id.* at 1184.

federal nor state governments shall deprive any person "of life, liberty, or property, without due process of law."¹⁶⁶ This "limits what the government may do in both its legislative and its executive capacities,"

the touchstone of due process [being] protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness [procedural due process], or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective [substantive due process].¹⁶⁷

Before one can be deprived of a protected interest, procedural due process typically requires notice and an opportunity to be heard, for

[i]t has long been recognized that fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights[,] . . . and no better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.¹⁶⁸

If ABH orders infringe a protected "liberty," such procedural requirements could be important. For example, in *Doe v. City of Lafayette*, a convicted sex offender received a letter from the Superintendent of the Parks and Recreation Department informing him that he had been banned from all city parks.¹⁶⁹ Although he failed to assert the claim, procedural due process might have allowed him to challenge the entirely ex parte procedure via which this decision was made.¹⁷⁰ However, given this Article's limitation to executive MO orders "on the beat," procedural due process will not be considered further.

The sex offender in *Doe* challenged only the order's substance,¹⁷¹

166. U.S. CONST. amends. V, XIV, § 1.

167. *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998) (internal citations and quotation marks omitted).

168. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (internal quotation marks omitted); see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48–51 (1993); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 579–604 (3d ed. 2006).

169. *Doe v. City of Lafayette*, 377 F.3d 757, 758–60 (7th Cir. 2004).

170. See *id.* at 767–68; *id.* at 775 n.5 (Williams, J., dissenting); see also *Brown v. City of Michigan City*, 462 F.3d 720, 728–32 (7th Cir. 2006) (analyzing but rejecting such a claim).

171. *Doe*, 377 F.3d at 768.

and here the law is unfortunately more opaque. In the words of Professor Richard Fallon, “[d]ue process doctrine subsists in confusion,”¹⁷² and the Supreme Court’s recent pronouncements have lived up to this questionable pedigree.¹⁷³ In *County of Sacramento v. Lewis*, the Court distinguished challenges to legislative enactments from those directed at conduct of the executive.¹⁷⁴ Although this Article is limited to the latter, for reasons that will be apparent shortly, it is also necessary to understand the former. As articulated by the en banc Fourth Circuit, the following is the Court’s two-step procedure for challenging legislation, either facially or as applied:

The first step . . . is to determine whether the claimed violation involves one of “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” The next step depends for its nature upon the result of the first. If the asserted interest has been determined to be “fundamental,” it is entitled in the second step to the protection of strict scrutiny judicial review of the challenged legislation.¹⁷⁵ If the interest is determined not to be “fundamental,” it is entitled only to the protection of rational-basis judicial review.¹⁷⁶

When the challenge is to executive action, however, many thought there were two alternatives: a plaintiff could allege either the deprivation of a fundamental right, or assert that the challenged

172. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993).

173. See, e.g., *Hawkins v. Freeman*, 195 F.3d 732, 738 n.1 (4th Cir. 1999) (en banc) (trying to make sense of the Court’s decisions); Robert Chesney, *Old Wine or New? The Shock-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981 (2000) (same).

174. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). There may be circumstances, however, in which it is difficult to determine whether to characterize challenged conduct as executive or merely a ministerial act in furtherance of a legislative enactment. See *Hawkins*, 195 F.3d at 740–41 (ultimately punting and deciding the case under both formulations).

175. Strict scrutiny has its typical formulation: “[T]he Fourteenth Amendment forbids the government to infringe “fundamental” liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted).

176. *Hawkins*, 195 F.3d at 739 (internal citations and quotation marks omitted); see also *Glucksberg*, 521 U.S. at 720–22.

conduct was so irrational or arbitrary that it "shocked the conscience."¹⁷⁷ But seeking to rein in due process review of executive conduct,¹⁷⁸ the *Lewis* Court recrafted the existing "shocks the conscience" test as an initial filter: no matter the asserted right, executive conduct runs afoul of due process only if it "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."¹⁷⁹

So "conscience shocking" became a threshold inquiry, but the Court gave no direction on how to proceed if conduct did satisfy that threshold, leaving only these cryptic lines:

Only if the necessary condition of egregious ["conscience shocking"] behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways.¹⁸⁰

Hence, the Court failed to specify how the "history, tradition, and precedent" that inform whether a right is "fundamental" work into this test.¹⁸¹ Does it inform whether conduct "shocks the conscience,"¹⁸² is it a second required element for the cause of action,¹⁸³ or some combination or alternative thereto? Some have asserted that under *Lewis*, even egregious infringement of a non-fundamental right cannot constitute a substantive due process

177. See *Depoutot v. Raffaely*, 424 F.3d 112, 118 n.4 (1st Cir. 2005); *Moran v. Clarke*, 296 F.3d 638, 651 (8th Cir. 2002) (en banc) (Bye, J., concurring).

178. See *Lewis*, 523 U.S. at 847 n.8 ("For executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law.").

179. *Id.* at 846-47 & n.8. Illustrative of this very high standard is that police conducting a high speed chase cannot violate substantive due process unless an officer has the "purpose to cause harm unrelated to the legitimate object of arrest." *Id.* at 836; see also *Meals v. City of Memphis*, 493 F.3d 720, 730-31 (6th Cir. 2007) (applying this strict standard).

180. *Lewis*, 523 U.S. at 847 n.8.

181. *Hawkins*, 195 F.3d at 738 n.1; Chesney, *supra* note 173, at 998-99.

182. See *Lewis*, 523 U.S. at 847 n.8 (acknowledging that threshold inquiry "may be informed by a history of liberty protection"); *Hawkins*, 195 F.3d at 738 n.1; Chesney, *supra* note 173, at 998-99.

183. See *Lewis*, 523 U.S. at 857 (Kennedy, J., concurring) ("[T]he [shocks the conscience] test can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning."); *Moran v. Clarke*, 296 F.3d 638, 651 (8th Cir. 2002) (Bye, J., concurring); *Hawkins*, 195 F.3d at 747 n.9.

violation.¹⁸⁴ The Court, however, did not provide this, or unfortunately any other, direction.

Moreover, commentators have criticized the Court's dichotomy between legislative and executive challenges,¹⁸⁵ and some courts refuse to follow it. Despite the lack of any cited legislative enactment authorizing or affecting the ban from the public parks, in *Doe* the Seventh Circuit began by determining whether the plaintiff's asserted liberty interest—namely the “right to wander and loiter in public parks”—is fundamental.¹⁸⁶ Answering that question in the negative, the court engaged in rational-basis review.¹⁸⁷ In other words, it followed the model for a legislative, rather than an executive, challenge. The Seventh Circuit has somewhat lamely attempted to justify diverging from the *Lewis* framework in non-emergency situations,¹⁸⁸ but has also recognized that even its own jurisprudence is not consistent in this regard.¹⁸⁹ Adding to the confusion, Supreme Court Justices have themselves proved unwilling to be bound by their own *Lewis* dichotomy.¹⁹⁰

Thus, *Lewis* left critical things unsaid, and some have chosen to ignore even those things that were said. This Article will not seek to resolve these due process mysteries, leaving them in the better hands of substantive due process scholars, but whatever the favored analysis, the nature of the asserted right must ultimately constitute a critical component. Thus, an important question is whether there is a liberty “right to remain,” or, in other words, a “freedom to loiter.” Unfortunately, here too the Supreme Court has left a mess, this time

184. *Moran*, 296 F.3d at 651 (Bye, J., concurring).

185. See generally Chesney, *supra* note 173; Matthew D. Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 437 (2001).

186. *Doe v. City of Lafayette*, 377 F.3d 757, 768–73 (7th Cir. 2004) (en banc).

187. *Id.* at 772–74.

188. See *Khan v. Gallirano*, 180 F.3d 829, 836 (7th Cir. 1999).

189. See *Galdikas v. Fagan*, 342 F.3d 684, 690 n.3 (7th Cir. 2003), *abrogated on other grounds* by *Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004).

190. See, e.g., *Chavez v. Martinez*, 538 U.S. 760, 775–76 (2003) (Justice Thomas went on to analyze “legislative” fundamental right review despite having completed executive “conscience shocking” analysis.); *id.* at 787 (Stevens, J., concurring in part and dissenting in part) (“The Due Process Clause of the Fourteenth Amendment protects individuals against state action that either shocks the conscience or interferes with rights implicit in the concept of ordered liberty.”) (internal citation and quotation marks omitted) (emphasis added); see also *United States v. Stein*, 495 F. Supp. 2d 390, 411 (S.D.N.Y. 2007) (“It is not clear that the Supreme Court still adheres to the *County of Sacramento* framework.”).

via the opinions of *City of Chicago v. Morales*,¹⁹¹ another case in which the Court arguably abandoned its own due process framework.

At issue was Chicago's Gang Congregation Ordinance, which authorized a police officer to arrest those refusing to disperse if the officer reasonably believed that a group of two or more persons with "no apparent purpose" included a "criminal street gang member."¹⁹² In an opinion authored by Justice Stevens, three Justices held the ordinance unconstitutional both because it failed to provide adequate notice of what conduct was prohibited¹⁹³ and because it authorized arbitrary and discriminatory enforcement.¹⁹⁴ In particular, they believed the requirement of "no apparent purpose" was unconstitutionally vague.¹⁹⁵ But in a portion of their opinion permitting a facial challenge, the three included the following:

[T]he freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage, or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries.¹⁹⁶

Justice Scalia had harsh words for their "elevating loitering to a constitutionally guaranteed right,"¹⁹⁷ but even more scorn for the three concurring Justices who invalidated the ordinance on vagueness grounds without finding such a right.¹⁹⁸ In other words, the concurrences held the ordinance invalid because it authorized discriminatory enforcement¹⁹⁹ without finding that such enforcement would infringe upon any constitutionally protected interest. If this is

191. 527 U.S. 41 (1999).

192. *Id.* at 47 (internal citation and quotation marks omitted).

193. *Id.* at 56-60.

194. *Id.* at 60-63.

195. *Id.* at 56-57, 60-63.

196. *Id.* at 53-54 (internal citations and quotation marks omitted).

197. *Id.* at 74 (Scalia, J., dissenting); *see also id.* at 83-86.

198. *Id.* at 86-87.

199. *See id.* at 64-69 (O'Connor, J., concurring); *id.* at 69-73 (Kennedy, J., concurring).

a permissible mode of constitutional analysis, then any unrestricted authorization for MO orders would run afoul of due process. After all, requiring officers to determine persons have “no apparent purpose” cannot give more discretion than not requiring any finding at all—a law making it clear that police can order anyone to “move on” would provide even more opportunity for arbitrary or discriminatory enforcement. In the civil-rights case of *Shuttlesworth v. City of Birmingham*, the Court asserted, but did not justify, just such a sweeping proposition: “Literally read . . . [the challenged] ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.”²⁰⁰ If correct, there would be significant due process restraint on executive MO orders that did not require suspicion of criminality or harmful effect.

For the author, however, such a demonstration would have been helpful. In the words of the Fourth Circuit, “There is no general liberty interest in being free of even the most arbitrary and capricious government action; the substantive component of the due process clause only protects from arbitrary government action that infringes a specific liberty interest.”²⁰¹ Although *Morales* can be read to hold differently for vagueness challenges—meaning there is in effect a third substantive due process standard different from both *Lewis*’s shock-the-conscience requirement and rational-basis review—one should question whether such a rule is wise, or even capable of honest application. *Morales* seems to indicate that no matter how clear a law renders prohibited conduct, it is unconstitutionally “vague” if it provides officers too much discretion in choosing whom to arrest for its violation. But of course many laws, especially those defining minor crimes, effectively provide absolute discretion.

For example, given the realities of the modern automobile, social norms, and legislated speed limits, on many roads police are free to stop, and typically arrest, most anyone they choose. But while police are not permitted to make that choice based on grounds that violate a constitutional right (e.g., race), courts have not struck down speeding laws as unduly “vague” because they provide otherwise

200. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965).

201. *Hawkins v. Freeman*, 195 F.3d 732, 749 (4th Cir. 1999) (en banc).

absolute discretion,²⁰² and the Supreme Court has rejected a Fourth Amendment ban on "pretextual" stops.²⁰³ Similarly, some courts have refused to strike down unrestricted "failure-to-obey" laws when challenged on these grounds.²⁰⁴ In *Morales* itself, Justice Kennedy drafted a short concurrence to make explicit that in many circumstances it is constitutional to arrest those disobeying an MO order,²⁰⁵ but as Justice Scalia demonstrated in his dissent, Justice Kennedy's attempt to distinguish those circumstances falls utterly flat.²⁰⁶

Thus, Justice Scalia was correct: there was nothing vague or unclear about a law prohibiting the knowing failure to disperse upon officer command, even if officers were only allowed to issue that command in certain circumstances.²⁰⁷ Nor can officer discretion be

202. See Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bag*, 51 RUTGERS L. REV. 1289, 1290, 1306–07 (1999) (criticizing *Morales* on this basis); Debra Livingston, *Gang Loitering, The Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 172–176 (recognizing this disjointedness). But see Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398, 404 (2001) ("[N]ow that the constitutional norm of controlling police discretion is an essential feature of vagueness law and provides an independent basis to invalidate a criminal statute that does not implicate a constitutional right, then that same constitutional principle can (and should) assist the Court in determining whether a challenged police intrusion violates the guarantees of the Fourth Amendment.").

203. *Whren v. United States*, 517 U.S. 806, 813–16 (1996).

204. See, e.g., *State v. Kaiser*, 65 P.3d 463 (Ariz. Ct. App. 2003) (permitting ordinance criminalizing refusal to obey peace officer); *Ex parte Bartles*, 771 So. 2d 503 (Ala. 2000) (same).

205. *City of Chicago v. Morales*, 527 U.S. 41, 69–70 (1999) (Kennedy, J., concurring) ("It can be assumed, however, that some police commands will subject a citizen to prosecution for disobeying whether or not the citizen knows why the order is given. Illustrative examples include when the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team, or to protect a crime scene, or to secure an area for the protection of a public official.").

206. *Id.* at 87–88 (Scalia, J., dissenting) ("[Justice Kennedy's] followup explanatory sentence, showing how [his] principle invalidates the present ordinance, applies equally to the rescue-team example that Justice Kennedy thinks is constitutional—as is demonstrated by substituting for references to the facts of the present case (shown in italics) references to his rescue-team hypothetical (shown in brackets): 'A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a dispersal order [order not to enter a building] based on the officer's own knowledge of the identity or affiliations of other persons with whom the citizen is congregating [what is going on in the building]; nor may the citizen be able to assess what an officer might conceive to be the citizen's lack of an apparent purpose [the impeding of a rescue team].'" (emphasis omitted, brackets added to indicate source, remaining brackets in original).

207. See *id.* at 90.

determinative, as equal discretion exists in other contexts. Courts are also unlikely to adopt another of the plurality's concerns, namely that a "move on" order might be unconstitutionally vague because persons will not know "[h]ow far" they must move or for "how long" they must remain apart.²⁰⁸ Instead, courts will have to confront whether there is a protected liberty interest in remaining at a desired location.²⁰⁹

Before addressing this issue, however, it is worth noting that if courts ultimately disagree, and seek to follow and expand upon *Shuttlesworth* and *Morales*, the Fourth Amendment could provide the vehicle they require. As indicated by Justice Kennedy's *Morales* concurrence, everyone recognizes the need for police to move persons in certain circumstances, and those circumstances seem difficult to define with any precision *ex ante*. If the courts desire a constitutional right to remain sometimes, the reasonableness criterion of the Fourth Amendment can accommodate that fact-specific analysis.

But is there a "right to remain"? There might be, but it is not a fundamental right. There is disagreement in the circuit courts concerning whether even the more significant right to intrastate travel is fundamental,²¹⁰ and as the Seventh Circuit has demonstrated, a "right to remain" simply pales in comparison to those rights identified by the Supreme Court as being fundamental, namely the rights to marriage, procreation, the rearing of children, marital privacy, contraception, bodily integrity, abortion, and personal control of medical treatment.²¹¹ Despite the strong words of the *Morales* plurality in favor of loitering, it was only the dissent that

208. See *id.* at 59–60 (majority opinion); *id.* at 90–91 (Scalia, J., dissenting). This is not to say, however, that such issues will not arise in litigation. See *Carter v. State*, 814 A.2d 443 (Del. 2002) (rejecting arrest for loitering where defendant did "move on," but not to the satisfaction of arresting officers).

209. Although the Supreme Court counsels to "carefully formulat[e] the interest at stake," *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997), it has not been a model of clarity in demonstrating what that means. See *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (characterizing interest as broad "right to life"); *id.* at 862 (Scalia, J., concurring in judgment) (characterizing interest as narrow "right to be free from 'deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender.'" (quoting *id.* at 836 (majority opinion))). Therefore, it is difficult to know how many particular circumstances the Court would read into the asserted right.

210. See *Doe v. Miller*, 405 F.3d 700, 712–13 (8th Cir. 2005); *Doe v. City of Lafayette*, 377 F.3d 757, 770 (7th Cir. 2004) (*en banc*).

211. *City of Lafayette*, 377 F.3d at 770–71; see also *Glucksberg*, 521 U.S. at 720.

characterized their position as advocating a fundamental right.²¹² Given the courts' understandable reluctance to expand the category of fundamental rights,²¹³ it seems a safe conclusion that the Seventh Circuit correctly determined there is no fundamental right to loiter and, by implication, to remain when ordered to move on.²¹⁴

If correct, a legislative MO order would not violate substantive due process unless it bore no rational relation to any legitimate government interest—a very lenient standard. Given the many circumstances in which lives literally depend upon it, there is quite clearly a rational basis for requiring citizens to obey police orders to disperse. If courts ignore the *Lewis* framework and apply this same standard to executive conduct, MO orders would run afoul of substantive due process only when the issuing officer was admirably honest and totally arbitrary.

Within the *Lewis* framework, further guidance is required. If the Supreme Court ultimately decides that substantive due process protects only fundamental rights from executive abuse, MO orders would be substantively unrestricted by due process. If, instead, especially egregious executive infringements of non-fundamental rights can violate due process, and if the *Morales* plurality is correct in asserting that there is a cognizable—though not fundamental—liberty interest in “remaining,” it would probably be only the most extreme MO orders that would be sufficiently “conscience shocking.”

The “shocks the conscience” standard has a long pedigree. It was first used over fifty years ago in *Rochin v. California* when police took it upon themselves to break into a suspect’s home, struggle with him physically, and ultimately have his stomach pumped to obtain incriminating evidence.²¹⁵ The Court found their course of conduct “brutal,” “offensive to human dignity,” and “bound to offend even hardened sensibilities.”²¹⁶ While *Rochin*’s analysis was free-flowing, more recently the Supreme Court has begun to give more direction on the standard’s application. As gathered by the Fourth Circuit, “conscience shocking” behavior

212. *Morales*, 527 U.S. at 84 (Scalia, J., dissenting) (characterizing plurality’s position as asserting a “Fundamental Freedom to Loiter”).

213. See *Glucksberg*, 521 U.S. at 720.

214. *City of Lafayette*, 377 F.3d at 772.

215. *Rochin v. California*, 342 U.S. 165, 166 (1952).

216. *Id.* at 172–74.

is conduct that involves abusing executive power, or employing it as an instrument of oppression. More objectively, it is conduct more blameworthy than simple negligence, which never can support a claim of substantive due process violation by executive act. While intentional conduct is that most likely to meet the test, that alone will not suffice; the conduct must be intended to injure in some way *unjustifiable by any government interest*. And, because specific conduct that in one context would meet the test might not in another, application of this standard demands an exact analysis of circumstances.²¹⁷

The analysis should include a survey of generally existing practices and, if available, judicial responses thereto,²¹⁸ as this is perhaps the best evidence of what shocks the “contemporary conscience.”

The Supreme Court has acknowledged that this provides “no calibrated yard stick,” but with regard to MO orders it might adequately “point the way.”²¹⁹ The existing legal recognition of, but uncertainty regarding, such orders makes a typical instance unlikely to shock even those who think such orders should be constitutionally restricted. For example, in determining that reincarceration of an erroneously paroled inmate did not shock the conscience, the Fourth Circuit took note that erroneous release and delayed incarceration were “surprisingly widespread and recurring phenomenon[a],” a study having found over one hundred such cases in the years since 1895.²²⁰ There have been nine cases considering MO orders in the last thirteen years in the Seventh Circuit alone. So only if an officer were not furthering any government interest and was acting simply to oppress the ordered target, and under the circumstances doing so effectively, would there be a cognizable “shock the conscience” claim. Perhaps this would be the case if the grounds for the order

217. *Hawkins v. Freeman*, 195 F.3d 732, 742 (4th Cir. 1999) (internal citations and quotation marks omitted).

218. *See id.* at 742–43.

219. *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). For Justice Scalia’s opinion to the contrary, inveighing against any “conscience shocking” standard, *see id.* at 860–65 (Scalia, J., concurring in judgment). In a nod to Cole Porter (but not his fellow Justices), Justice Scalia opined that “today’s opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity, th’ ol’ ‘shocks-the-conscience’ test.” *Id.* at 861; *see* Cole Porter Lyrics—You’re the Top, <http://www.sdyrics.com/lyrics/de-lovely/yourethetop.htm>; Timothy Noah, *Bloomsday for Dummies: A Skeleton Key to “You’re the Top.”* SLATE, June 9, 2005, <http://www.slate.com/id/2120550>.

220. *Hawkins*, 195 F.3d at 742.

were totally arbitrary, such as an officer who admits to moving only the balding and apparent left-handers. If so, the "shocks the conscience" inquiry essentially replicates the rational-basis test for non-fundamental rights. If more is required to be "conscience shocking," as seems likely, it would probably be satisfied if a parent were vindictively ordered from the presence of his or her ill (or even dying) child, if a bus passenger were stranded after being ordered from a departing bus following a highway stop, or if persons were ordered to "get lost" at gunpoint. Either way, in routine instances it seems likely that substantive due process provides little restraint on officials issuing MO orders.

If the Fourth Amendment regulates MO orders, it would not typically even be appropriate to engage in substantive due process analysis. So long as an order were accompanied by physical touching or was obeyed,²²¹ then a seizure occurred that would be subject to the Fourth Amendment's reasonableness criterion.²²² Courts are not to "dol[e] out constitutional protections" to a "dominant" right rather than giving effect to them all.²²³ But "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior,"—here potentially the Fourth Amendment—"that Amendment, nor the more generalized notion of substantive due process, must be the guide for analyzing these claims."²²⁴ If, however, no seizure occurred under the circumstances, a substantive due process claim would not be foreclosed.²²⁵

VI. CONCLUSION

There are at least two potential advantages to regulating MO

221. A person who does not submit to a non-tactile show of authority has not been seized for purposes of the Fourth Amendment. *California v. Hodari D.*, 499 U.S. 621, 625 (1991).

222. See *Graham v. Connor*, 490 U.S. 386, 386 (1989); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1182 (7th Cir. 1994); 1 LAFAYE, *supra* note 4, § 2.1 n.2.

223. *Soldal v. Cook County*, 506 U.S. 56, 70 (1992).

224. *Lewis*, 523 U.S. at 842 (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion)); see also *Soldal*, 506 U.S. at 70. The procedural due process requirements of notice and an opportunity to be heard, however, can remain cognizable. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48–52 (1993).

225. See *Lewis*, 523 U.S. at 842–45 (allowing substantive due process claim for death resulting from high speed chase where driver never submitted to show of authority).

orders with the Fourth Amendment. Most notably, such constitutional regulation would provide a floor below which states may not descend, thereby guaranteeing some protection for the dignity and autonomy interests inherently implicated by any such command. Of course, the dignitary intrusion may typically be minor, and the government need may typically be relatively great (e.g., to free the flow of traffic or preserve a crime scene), but the courts are familiar with balancing such interests according to the Amendment's reasonableness criterion. Nor is the Amendment unfamiliar with minor intrusions. Even momentary detentions are unconstitutional without the requisite reasonable suspicion,²²⁶ and being removed from a bus or desired place of business or entertainment can work a greater intrusion than being momentarily delayed.²²⁷

Another benefit is a potential decrease in discriminatory policing. While there is existing constitutional protection for those ordered to move on because of their race or based on some other constitutionally-protected trait, it is difficult to prove such an equal protection challenge, and some often-dispersed groups might only receive rational-basis review. This was the concern of Justice Stevens's dissent in *Mimms*:

[T]o eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision . . . and leaves police discretion utterly without limits. Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive [clothes], or different

226. See *Whren v. United States*, 517 U.S. 806, 809–10 (1996) (“Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of th[e] Fourth Amendment.”); *Florida v. Royer*, 460 U.S. 491, 498 (1983) (expressing that a person “may not be detained even momentarily without reasonable, objective grounds for doing so”); *Brown v. Texas*, 443 U.S. 47, 53 (1979) (holding unsupported demand for name unconstitutional) *United States v. Barrert*, 976 F. Supp. 1105, 1109 (N.D. Ohio 1997) (delaying bus’s departure by two minutes constituted unreasonable seizure of all passengers); cf. *Hübel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 177 (2004) (holding one stopped based on reasonable suspicion can be required to provide name so long as inquiry is reasonably related to circumstances justifying stop).

227. It is also possible that a “move on” intrusion will seem greater to certain segments of society than it does to most. As the Court recognized in *Terry v. Ohio*, 392 U.S. 1, 17 n.14 (1968), “the degree of community resentment aroused by particular practices is clearly relevant,” and perhaps seemingly arbitrary police orders to move on remind some that they are, at least in their view, considered second-class citizens.

[t-shirt logos], or different-colored skin—may escape it entirely.²²⁸

Nor is a world of "equal opportunity hecklers" attractive, in which officers adopt a *modus operandi* of moving people at whim, or perhaps upon hunches, hoping either to spur nervous or otherwise evasive behavior sufficient to justify a stop, or to receive a refusal that can itself be grounds for an arrest.²²⁹

But legislatures are free to restrict MO orders as they deem appropriate, the most egregious are probably prohibited by due process, and the cost of Fourth Amendment restriction would not be insignificant. Fourth Amendment regulation would mean federal judicial intervention in the myriad of circumstances under which police order persons to "move on," including directing traffic around an accident or other disturbance, protecting a public figure, separating angry and volatile persons, emptying a building subject to a terroristic threat or other danger, and preserving a crime scene. In many circumstances the reasonableness determination would perhaps not be a difficult one.²³⁰ However, whereas one would be hard-pressed to articulate an intelligible distinction between "minor" detentions that warrant no review and all other detentions that do, all MO orders can sensibly be defined as "no seizure" events.

Justice Kennedy has eloquently articulated that "[l]iberty comes not from officials by grace but from the Constitution by right,"²³¹

228. *Pennsylvania v. Mimms*, 434 U.S. 106, 122 (1977) (Stevens, J., dissenting). The author has modified Justice Stevens's language to reflect a non-automobile context.

229. *See supra* Part V.

230. Since the Seventh Circuit courts abandoned reliance on qualified immunity, they have had no trouble determining that even if challenged MO orders constituted searches, they were reasonable under the circumstances. *See White v. City of Markham*, 310 F.3d 989 (7th Cir. 2002) (holding MO order reasonable even if a seizure); *Lunini v. Grayeb*, 184 F. App'x 599 (7th Cir. 2006) (unpublished) (same); *Black v. Ferguson*, No. IP 00-1124-C-T/K, 2002 WL 655696 (S.D. Ind. Mar. 13, 2002) (unpublished) (same). These cases would have been no more difficult were it settled that the order constituted a seizure.

However, the broad circumstances under which one might consider him- or herself excluded might require that courts carefully consider the Supreme Court's jurisprudence that a seizure requires "means intentionally applied." *See Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (explaining that Fourth Amendment violation requires "an intentional acquisition of physical control"). In other words, just like locking a door under the impression that nobody is inside cannot work a Fourth Amendment seizure, neither could locking a door under the impression that nobody desired to enter. Courts likewise might need to evaluate the jurisprudence holding that "non-demanding" and "non-stigmatizing" government demands do not constitute seizures, as is the case with a grand jury subpoena. *See United States v. Dionisio*, 410 U.S. 1, 10 (1973).

231. *Maryland v. Wilson*, 519 U.S. 408, 424 (1997) (Kennedy, J., dissenting).

but there are of course circumstances in which government conduct is not restricted by the Constitution, and in which people are therefore limited to just such “grace.” However, as the background of *Morales* demonstrates, this is not always a bad thing. In his dissenting opinion, Justice Thomas included some of the residents’ testimony regarding their constant fear of the street gangs that dominated their neighborhoods:

They watch you. . . . They know where you live. They know what time you leave, what time you come home. I am afraid of them.

....

We used to have a nice neighborhood. We don’t have it anymore. . . . I am scared to go out in the daytime. . . . I have never had the terror that I feel everyday when I walk down the streets of Chicago.

....

I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it’s come to the point where I say, well, do I go out today.²³²

Where it infringes no constitutional right, the ability of elected representatives to impair some liberties may be well worth the cost. In the words of Justice Scalia:

[T]he majority’s real quarrel with the Chicago [Gang Congregation] ordinance is simply that it permits (or indeed requires) too much harmless conduct by innocent citizens to be proscribed. . . . But in our democratic system, how much harmless conduct to proscribe is not a judgment to be made by the courts. So long as constitutionally guaranteed rights are not affected, and so long as the proscription has a rational basis, all sorts of perfectly harmless activity by millions of perfectly innocent people can be forbidden. . . . The citizens of Chicago have decided that depriving themselves of the freedom to “hang out” with a gang member is necessary to eliminate pervasive gang crime and intimidation—and that the elimination of the one is worth the deprivation of the other. This Court has no business second-

232. *City of Chicago v. Morales*, 527 U.S. 41, 100–01 (1999) (Thomas, J., dissenting) (citation omitted).

guessing either the degree of necessity or the fairness of the trade.²³³

This is not to say that the "trade" in *Morales* could not be deemed constitutionally reasonable were it subjected to Fourth Amendment scrutiny, but in the MO context those decisions might typically be better made by locally elected representatives "than by federal judges interpreting the basic charter of Government for the entire country."²³⁴ If not, it is a matter for substantive due process rather than the Fourth Amendment. Throughout the nation's history the Fourth Amendment law of seizures has regulated detentions, and there does not seem to be any pressing need for it to also cover the expulsion of a person from a location in which he or she has no property interest.²³⁵ "Liberty" is defined as the "freedom from arbitrary or despotic government or control,"²³⁶ and that, rather than a question of seizure, is really what is at stake from an MO order. But because due process likely restricts only the most egregious of such orders, state and local legislators can and should investigate how best to restrict the MO authority of their agents in a manner that permits effective policing while avoiding needless indignities that might otherwise be most often inflicted on the disfavored among us. Although the expulsion of the Introduction's "park-bench sitter" does not seem to constitute a Fourth Amendment seizure, quite obviously it does not follow that it is, without more, a good idea.

233. *Id.* at 97-98 (Scalia, J., dissenting) (internal citation and emphasis omitted).

234. *County of Sacramento v. Lewis*, 523 U.S. 833, 854-55 n.14 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 128-129 (1992)).

235. Were a court to disagree with this conclusion, it should nonetheless decide the matter. It has been thirteen years since the Seventh Circuit first confronted the MO issue in a published opinion, and still the people of that circuit do not know whether and when they must comply with MO demands.

236. WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 826 (1989).