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I. PURPOSE AND INTRODUCTION

For nearly two years, United States citizens were subjected to governmental regulations brought in the name of COVID-19.[1] Some of these regulations may have been plausible; others may not have been. This paper serves as a preemptive strike against a foreseeable regulation also brought in the name of health. This topic's relevance is enduring. Not only may the policies of the last two years return, but similar policies brought for other reasons may return, too, as could the foreseeable policy discussed here.

This paper determines whether the Fourth Amendment could reasonably be thought to protect persons against arbitrary and meritless "lockdowns" – lockdowns inspired by a person's classification. To do so, this paper examines a modern-day, unknown, but foreseeable hypothetical: Whether the Fourth Amendment precludes the state or federal government from "locking down" persons for the sole reason of being unvaccinated. It is true that certain jurisdictions within the United States ordered lockdowns of all persons in response to the COVID-19 pandemic that began in early 2020.[2] This paper does not address those lockdowns. Its scope only ventures to lockdowns of unvaccinated persons.

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1. Matt Craven et al., *Ten Lessons From the First Two Years of COVID-19*, MCKINSEY & COMPANY (Mar. 11, 2022), https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/ten-lessons-from-the-first-two-years-of-covid-19.

2. Craven et al., *supra* note 1.

In doing so, this paper examines America's understanding of seizures and confinements – arrests. It does so via historical dictionaries, case law, and expert articles on the subject. Finding that a lockdown could reasonably be construed as a "seizure," this paper then finds that the type of seizures defined in the hypothetical are prima facie unreasonable. They do not align with our understanding of probable cause, reasonable suspicion, or our historical uses of quarantines in response to pandemics. Rather, the hypothetical parallels the *Korematsu* approach, one of the biggest black eyes to American jurisprudence and executive decision-making in the 20th century, and an approach explicitly denounced by the Roberts Court.[3]

Next, this paper examines whether the hypothetical represents a "general warrant," a procedure prohibited in the second clause of the Fourth Amendment.[4] This paper finds that its hypothetical lockdown is not akin to a "general warrant"; however, while this lockdown does not represent a general warrant, this paper finds that the former is even more out of step than what the Fourth Amendment was exclusively intended to prohibit.

Finally, this paper addresses its considerations for making a Fourth Amendment argument, and its considerations for *not* making alternative arguments. The Fourth Amendment offers a unique argument on this unique topic. Its concepts, however, are less abstract and may be dealt with more objectively. This leaves less room for error in analysis and for rebuttals based upon subjective disagreement.

II. DEFINITION OF SEIZURE

The nature of this paper necessarily requires a focus on the word "seizure." Is a person "seized" within the meaning of the Fourth Amendment if they are confined to their home? Is this a seizure (an arrest) or a confinement? Does that make a difference? The evidence does not make it readily apparent that the term "seizure" in the Fourth Amendment context is not fitting for this hypothetical.

Our understanding of the terms "seizure" and "confinement" show little difference. Seizure is "[t]he act or an instance of taking possession of a person or property by legal right or process."[5] While mere words do not make an arrest, an arrest does not require actual touching, but submission is essential.[6] On the other hand, "confinement" is "[t]he act of imprisoning or

3. Trump v. Hawaii, 138 S. Ct. 2392, 2403, 2423 (2018); Korematsu v. United States, 323 U. S. 214 (1944).

4. U.S. CONST. amend. IV.

5. *Seizure*, BLACK'S LAW DICTIONARY (11th ed. 2019).

6. Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 206 (1940).

restraining someone."[7] It is the "restrain[ing] by physical barriers or physical force, or by being subjected to threats of physical force or an asserted legal authority to which he submits."[8] Thus, neither arrest (seizure) nor confinement require touching, but both require submission and are exercised under law.[9]

The English language in Colonial America defined these terms substantially the same, seizure was "the act of taking possession by force of law."[10] To confine was "[t]o bound, to limit, to imprison, to restrain, to bind up."[11] To *be* seized was to be "taken into custody, taken into possession by law."[12] To *be* confined was to be "[r]estrained, bounded, limited, imprisoned."[13] Confinement was "[a] restraint on liberty."[14]

Apparent here, in either case, a person's freedom to move about is impeded, and having possession of someone necessarily implies at least temporary restraint by physical or constructive means.[15] Accordingly, are the terms "seizure" and "confinement" things of the same kind? This is answered by discerning whether the "conditions generically described as A produce a certain legal liability or other consequence X, [and whether] the specific fact or group of facts *n* fall within the genus A?"[16] In other words, do the conditions described as a seizure cause a restriction of movement, and do the characteristics of a "confinement" fall under the scope of A (a seizure)?[17] The answer is yes.[18]

The Court's Fourth Amendment jurisprudence regarding seizure is not distinguished from confinement.[19] According to Justice Scalia in *Hodari*, "An arrest requires either physical force . . . *or*, where that is absent, *submission* to the assertion of authority."[20] The show of authority test was

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7. *Confinement,* BLACK'S LAW DICTIONARY (11th ed. 2019).
8. Perkins, *supra* note 6, at 203.
9. *Id.* at 203, 206.
10. *Seizure*, 2 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775).
11. *Confine*, 1 JOHN ASH THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775).
12. *Seized*, 2 ASH, *supra* note 10.
13. *Confined*, 1 ASH, *supra* note 11.
14. *Confinement*, *id.*
15. *Seized*, 2 ASH, *supra* note 10; *Confinement*, 1 ASH, *supra* note 11.
16. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 54 (2012) (citing FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW 226 (1896)).
17. SCALIA & GARNER, *supra* note 16, at 54.
18. *Id.*
19. California v. Hodari D., 499 U.S. 621, 626 (1991); *Confine*, 1 ASH, *supra* note 11.
20. *Hodari*, 499 U.S. at 626 (1991)*; see* Horton v. California, 496 U.S. 128, 133 (1990) ("[A] seizure deprives the individual of dominion over his or her person or property.") (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984); *see* Brower v. Cty. of Inyo, 489 U.S. 593, 597 (1989) ("[A Fourth

also defined in *Mendenhall*: "[A] person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained."[21] But in *Hodari* and *Mendenhall*, the government's seizures occurred *outside* of the home, and in very different contexts; *Hodari* involved a drug deal on the streets of Oakland while *Mendenhall* involved a federal narcotics operation at an airport.[22] Both cases involved a police presence in the *actual* vicinity of the arrestee.[23] Does that matter?

The differences in Fourth Amendment jurisprudence regarding those cases of traditional seizures[24] and the present hypothetical of "constructive seizures" do not matter. For a seizure to occur, the Supreme Court requires either actual physical force or a submission to authority that deprives a person's freedom of movement.[25] That sounds a lot like confinement, which cannot be taken outside the scope of seizure. A lockdown is akin to a seizure, which is akin to confinement. They are cut from the same cloth. The facts of a lockdown (*n*) necessarily "fall within the genus A."[26]

That the Fourth Amendment has rarely, if ever, been utilized for the issue of home "seizures" (quarantines) is irrelevant. The Court has consistently been required to interpret the Constitution in new eras that bring new experiences.[27] The Fourth Amendment, like all other Amendments, describes its prohibitions and edicts in broad language with little to no particularity.[28] This requires the Court to use the *n* under A formula, described above, to determine how, or if, a concept falls under the scope of our Constitution, even though the concept is not within the text or is new altogether.[29] The Court did so in *Kyllo v. United States*.[30]

Kyllo, a Fourth Amendment search case, required the Court to determine whether the use of thermal-imaging by government agents to determine heat radiance from a home, from the street and outside of the home, was a "search" under the Fourth Amendment.[31] The Court, holding that it was a search, and unconstitutional at that, found that the inside of the home required privacy, and allowing an electronic search would constitute an "intrusion into a

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Amendment seizure occurs] when there is a governmental termination of freedom of movement *through means intentionally applied*.").

21. United States v. Mendenhall, 446 U.S. 544, 553 (1980).
22. *Hodari*, 499 U.S. at 622-23; *Mendenhall*, 446 U.S. at 547-48.
23. *Hodari*, 499 U.S. at 622-23; *Mendenhall*, 446 U.S. at 547-48.
24. *Hodari*, 499 U.S. at 626.
25. *Id.*
26. SCALIA & GARNER, *supra* note 16, at 54.
27. Kyllo v. United States, 533 U.S. 27, 34 (2001); Weeks v. United States, 232 U.S. 383, 398 (1914); Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 402 (2009).
28. U.S. CONST. amend. IV.
29. SCALIA & GARNER, *supra* note 16, at 54.
30. *Kyllo*, 533 U.S. at 34.
31. *Id.* at 29-30, 34.

constitutionally protected area."[32] Likewise, the present hypothetical involves the government – from outside the home – prohibiting a person from moving inside of the home to outside of the home. This is governmental restraint on the liberty of movement. It is a constructive seizure – just as *Kyllo* constituted a constructive search.[33]

III. ARE THE SEIZURES IN THE PRESENT HYPOTHETICAL "UNREASONABLE"?

a. The Hypothetical Presents Unreasonable Seizures

The contemporary courts demand proof – a reason – in order to hold that a seizure is lawful. The government must have probable cause, or, alternatively, reasonable suspicion.[34] To begin with probable cause, the Court has stated, "'the substance of all the definitions of probable cause is a reasonable ground for belief of guilt, . . . and that the belief of guilt must be particularized with respect to the person to be searched or seized."[35] For reasonable suspicion, the Court requires that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[36] "[G]ood faith," the Court said, "is not enough."[37]

An order to "lock down" an individual for the sole reason that they are unvaccinated miserably fails probable cause and reasonable suspicion requirements. To prove this, I must first stipulate the uncontroversial premise that not all unvaccinated persons are infected with COVID-19 (or whatever variant of the day that might include). Second, "guilt" in the sense of probable cause or reasonable suspicion, for our purposes, means infected with the virus. With these premises in mind, the government cannot assert that only unvaccinated persons are "guilty" (infected) and cannot assert that a specific person is infected. For probable cause, the only "reasonable ground for belief of guilt"[38] is that the unvaccinated person is a person. This turns probable cause requirements into a game of "pin the tail on the donkey."[39]

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32. *Id*. at 34 (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).
33. *Id.*
34. Maryland v. Pringle, 540 U.S. 366, 371 (2003); Terry v. Ohio, 392 U.S. 1, 30-31 (1968).
35. *Pringle*, 540 U.S. at 371 (quoting Ybarra v. Illinois*,* 444 U.S. 85, 91 (1979)).
36. *Terry*, 392 U.S. at 21.
37. *Id.* at 22.
38. *Pringle*, 540 U.S. at 371 (quoting *Ybarra,* 444 U.S. at 91).
39. "Pin the tail on the donkey" is a game. The players are blind-folded and each attempt to attach a "tail" to an image of a donkey. The player pinning closest to the correct spot wins. The reference is useful in this hypothetical because the government actors (players) are "blind" to a person's actual guilt (status of infection) but are attempting to pin guilt (infection) by way of a seizure, without knowing where

Similarly, the government is unable to "point to specific and articulable facts"[40] to justify that its intrusion is reasonable based on the sole fact of an individual being unvaccinated. A rational inference cannot exist that an unvaccinated person is infected when it is well-settled that they *could* be, but might not be, as could their vaccinated neighbor. Even if an unvaccinated person is more likely to be infected (test positive), this still does not meet the requirement that the government's belief be beyond the measure of good faith.[41] This hypothetical is analogous to determining a person's proclivity to commit crime by the measurements of their skull[42] or validating stop-and-frisk procedures because a person is walking in a certain part of town.[43]

Clearly, our case law shows that the government must have a reason to seize someone.[44] If there is a reasonable ground for believing a person to be guilty, or a factual scenario for which guilt can reasonably be inferred, the government may seize that person; however, if neither of those two exist, that seizure is presumptively unreasonable.[45]

This is not to say that desperate times can never seem to require desperate measures. In other words, exigencies exist, and the Court has allowed exceptions to liberty in those times – including in times of war – such as in *Korematsu*.[46] But *Korematsu* was rejected.[47] The COVID-19 pandemic has been likened to war by Former President Trump, who referred to the pandemic as "our war against the Chinese virus" and an "invisible enemy."[48] A classification of "war" or an "emergency" does not give the government carte blanche for any mechanism for the sake of safety.[49] The catastrophes that arise from exigency-based carte blanche are apparent in *Korematsu*.[50]

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the infection lie. *See* The Strong, *Pin the What?!*, GLOBAL TOY NEWS (Aug. 6, 2020), https://globaltoynews.com/2020/08/06/pin-the-what/.

40. *Terry*, 392 U.S. at 21.

41. *Id.* at 22.

42. Deanna Cioppa, *4 Suspect Historical Theories for Predicting Criminality*, MENTAL FLOSS (Jan. 22, 2018), https://www.mentalfloss.com/article/513934/4-suspect-historical-theories-predicting-criminality.

43. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013) ("[I]t is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group are criminals."); *id.* at 632 (citing Illinois v. Wardlow, 528 U.S. 119, 124 (2000)) ("[P]resence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.").

44. Maryland v. Pringle, 540 U.S. 366, 371 (2003).

45. *Id.*

46. Korematsu v. United States, 323 U.S. 214, 215-16 (1944).

47. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

48. Libby Cathey, *Government Response Updates: Trump Calls Himself a 'Wartime President,' Promises 'Total Victory,'* ABC NEWS (Mar. 18, 2020, 6:50 PM), https://abcnews.go.com/Politics/trump-tweets-us-canada-closing-border-white-house/story?id=69660955.

49. *Trump*, 138 S. Ct. at 2423; Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

50. *See generally Korematsu*, 323 U.S. 214.

b. The Hypothetical is Analogous to Korematsu's Wartime Seizures

The judiciary regards *Korematsu* as a black eye: "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[51] The parallels of *Korematsu* with our hypothetical tend to show that it would also be "gravely wrong"[52] if the government ordered that only unvaccinated persons be locked-down.

Korematsu concerned the violation of Civilian Exclusion Order No. 34, which required all persons of Japanese ancestry to leave the West Coast military area.[53] The order prohibited any Japanese person to "enter, remain in, [or] leave . . . any military area or military zone prescribed"[54] As Justice Jackson observed in his dissent, "the only way Korematsu could avoid violation was to give himself up to the military authority."[55] By definition, Korematsu, was "seized" or "confined" by the government.[56]

Notably, however, no questions were raised about Korematsu's loyalty.[57] There was no reason to believe he was guilty or a threat to justify seizure, other than his classification.[58] Rather, Korematsu was "seized" or "confined" because the Court thought the "exclusion of those of Japanese origin was deemed necessary [by the military] because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country."[59] Justice Murphy's dissent brought out another purpose besides the "enemy danger" excuse.[60] Justice Murphy recited the Commanding General who described the Japanese as "subversive," "belonging to 'an enemy race' whose 'racial strains are undiluted,' and as constituting 'over 112,000 potential enemies.'"[61] As the dissent pointed out, although most Japanese persons were not a threat and the General's report was racially motivated, the majority thought that the best decision would be to permit the exclusion.[62]

The majority's reasoning failed the test of probable cause and reasonable suspicion. Moreover, as noted in Justice Murphy's dissent, the majority

51. *Trump*, 138 S. Ct. at 2423 (quoting *Korematsu*, 323 U.S. at 248).
52. *Id.* (quoting *Korematsu*, 323 U.S. at 248).
53. *Korematsu*, 323 U.S. at 215-16.
54. *Id*. at 216.
55. *Id*. at 243 (Jackson, J., dissenting).
56. *Seized*, 2 ASH, *supra* note 10; *Confined*, 1 ASH, *supra* note 11.
57. *Korematsu*, 323 U.S. at 216.
58. *Id.* at 215-16.
59. *Id*. at 218–19.
60. *Id.* at 236 (Murphy, J., dissenting).
61. *Id*.
62. *Korematsu*, 323 U.S. at 234-36, 242.

failed its own test of military necessity[63] (for our purposes, "exigency"). The test is "whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger."[64] Certainly, if the government cannot define *who* constitutes a danger, it cannot say that curtailing any person's liberty is reasonably related to danger. The war-time test of "immediate, imminent, and impending"[65] is insurmountable without particular facts. Thus, *Korematsu* fails all tests for a constitutional seizure, even an exigency based one.

The COVID-19 pandemic and this hypothetical are analogous with *Korematsu*; however, they are not analogous to the "lockdown" and quarantine laws mentioned below.[66] This hypothetical involves an arbitrary seizure imposed upon persons classified as "unvaccinated." The laws mentioned below condition the seizure on the "infected status."[67] But again, the classification of unvaccinated does not imply a classification of infected. Thus, this hypothetical's "justification" for seizure is premised solely upon a classification that has no bearing on guilt (infection). It follows that our hypothetical is related to *Korematsu*, where the seizure was also justified by a classification that failed to bear any relationship to guilt or danger.[68] In the hypothetical, similarly to *Korematsu*, the government cannot determine who the "enemy" is.[69] The "enemy" is "invisible" in both cases.[70] But as *Korematsu* teaches, and as the Fourth Amendment demands, a justified seizure must be based on something realized, and not an unproven "invisible" threat.[71]

This paper does not ignore the differences between *Korematsu* and the hypothetical. *Korematsu* seized persons based upon their ethnicity[72] whereas the hypothetical seizes persons based upon the choice they made – as a necessary health decision, or an act of defiance – to remain unvaccinated. The difference between ethnicity and personal choice is a bit fuzzy and loses any importance when the conclusions drawn from either class are that they

63. *Id.* at 234.
64. *Id.* (citing United States v. Russell, 80 U.S. 623, 627-28 (1871); Mitchell v. Harmony, 54 U.S. 115, 134-35 (1851); Raymond v. Thomas, 91 U.S. 712, 716 (1875)).
65. *Id*. (citing *Russell*, 80 U.S. at 627-28; *Mitchell*, 54 U.S. at 134-35; *Raymond*, 91 U.S. at 716).
66. See *infra* Part III.C.
67. *Id*.
68. *Korematsu*, 323 U.S. at 216 (majority opinion).
69. *Id.* at 240 (Murphy, J., dissenting).
70. *Id.*
71. *Id.* at 223-24 (majority opinion).
72. *Id.* at 215-16.

are "subversive" or an "enemy"[73] – justifying their seizure –without any reasonable line of thought to back it up.

Moreover, the analogy between an invisible war with humans and an invisible war with a disease requires further explanation. First, note that both cases involve an invisible enemy.[74] *Korematsu* involved people who might be the enemy (spies), and thus have the capacity to injure or kill.[75] Similarly, the pandemic involves people who might be infected, and thus have the capacity to injure or kill.[76] One unknown person of Japanese descent might relay information to the homeland that causes injury or death to many Americans.[77] Analogously, one unknown person who is not vaccinated (or one who is) might also spread an infection that causes injury or death to many Americans.[78] The similarities show that the difference between these two scenarios is the method of attack – an attack by "espionage, sabotage . . .", or an "attack" by germs.[79]

Certainly, the government is not required to wait for the situation to worsen before it acts.[80] In a pandemic, the government may be allowed to invoke quarantine seizures to stop the spread of infection, but the means of addressing an exigency must be reasonably related to that end.[81] If this were not so, the government could "reasonably" seize someone, not because they were a public danger, but because they lived in the wrong part of town, or on the wrong coast.[82] The government is not permitted to do this.[83] If *Korematsu*, or a similar case were brought today, it should fail constitutional muster on Fourth Amendment grounds. The Court has already stated it "has no place in law under the Constitution."[84] Therefore, *Korematsu* has no legal legs to stand on. Moreover, the Court also found that "[t]he forcible relocation of U.S. citizens to concentration camps, solely, and explicitly on the basis of race, is objectively unlawful.".[85] A forcible relocation necessarily

73. *Id.* at 236 (Murphy, J., dissenting).

74. *Korematsu*, 323 at 217 (majority opinion); Ralph Ellis, *Unvaccinated People Create Higher Risk for Vaccinated, Study Says*, WEBMD (Apr. 27, 2022), https://www.webmd.com/vaccines/covid-19-vaccine/news/20220427/unvaccinated-people-create-higher-risk-for-vaccinated-study-says.

75. *Korematsu*, 323 U.S. at 217, 223-24.

76. Ellis, *supra* note 74.

77. *Korematsu*, 323 U.S. at 217.

78. Ellis, *supra* note 74.

79. *Korematsu*, 323 U.S. at 217; Ellis, *supra* note 74.

80. *See* Brigham City v. Stuart, 547 U.S. 398, 406 (2006). "[A]n officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided." For our purposes, the government (executive) is the police officer.

81. U.S. CONST. amend. IV.

82. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

83. U.S. CONST. amend. IV.

84. *Trump*, 138 S. Ct. at 2423 (quoting *Korematsu*, 323 U.S. at 248).

85. *Id.*

involves a seizure – force or submission – as defined in *Hodari*.[86] Detainment in one's home also requires force or submission to authority. Therefore, *Korematsu* and the present hypothetical's order would fail under the Fourth Amendment's prohibition of "unreasonable seizures."[87]

Mark Tushnet explained that overreaching governmental edicts in times of war are, to an extent, justified.[88] Justified because the governmental actions are taken in times of uncertainty but are found unjustified in *hindsight*.[89] However, judges should take care not to "normaliz[e] the exception," and "ordinary citizens should take a stance of watchful skepticism about claims from executive officials that the actions of the officials are . . . justified by . . . threats to national security."[90] Tushnet's thoughts on the matter are not completely disagreeable. However, his finding of what is unjustified is made in hindsight.[91] Here, this hypothetical is *prejudging* a given set of circumstances and the law's reaction. If it is preemptively shown that the measure is unreasonable, based on history, law, and logic, there is little choice but to find it unjustified *before it happens*.

One argument that supports the contention that the government *could* or *should* be permitted to invoke lockdowns for the unvaccinated is that such an action *might* be useful to stop the spread of infection and is therefore valid. This argument may rest its reasoning in *Gitlow v. New York*, where the Court held that "[i]t cannot be said that the State is acting arbitrarily or unreasonably when . . . it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration."[92] Alternatively, the argument may rest its reasoning in *New York Transit Authority v. Beazer*, where the Court refused to invalidate a "broader than necessary" and "unwise" policy decision, which "serves the general objectives of safety and efficiency."[93]

Both of these cases are distinguishable from the hypothetical to the extent they cannot apply. First, *Gitlow* was a First Amendment case.[94] Supposing that the government is permitted to "extinguish the spark"[95] in a First Amendment case, it does not follow that the government may do the same in a Fourth Amendment case with no evidence of an actual "spark." The Fourth

86. California v. Hodari D., 499 U.S. 621, 626 (1991)
87. U.S. CONST. amend. IV.
88. MARK TUSHNET, THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 125 (2005).
89. *Id.*
90. *Id*. at 136.
91. *Id*. at 125.
92. Gitlow v. New York, 268 U.S. 652, 669 (1925).
93. N.Y. Transit Auth. v. Beazer, 440 U.S. 568, 592 (1979).
94. *Gitlow*, 268 U.S. at 654-55, 666.
95. *Id.* at 669.

Amendment demands that the government meet a certain level of proof to make a seizure reasonable.[96] It is probable cause, reasonable suspicion, or an exigency that determines whether a seizure is reasonable.[97] Probable cause and reasonable suspicion are not applied to First Amendment cases. "[W]e may and do assume that freedom of speech and of the press – . . . are protected by the First Amendment from abridgement by Congress."[98] Noticeably absent is that the Fourth Amendment applies to freedom of speech, or vice-versa. Therefore, what may have been proper in *Gitlow* for First Amendment purposes was not subjected to the same standards that the Fourth Amendment demands today because, as the Court said, the First Amendment protects its own specie of right.[99] To say that the First Amendment may be transplanted to the Fourth Amendment would produce gross misinterpretations of the law. For example, if one could cut and paste language and law from one right to the other, then it would also be proper to say that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted", [100] "without just compensation".[101] The outcomes are grotesque.

Moreover, if an exigency-based standard is applied in this hypothetical as it was in *Gitlow* – to "extinguish the spark" – without any verifiable evidence of an actual spark, it seems we are venturing towards *Korematsu*.[102]

In addition, *Gitlow* and *Beazer* both suffer from the "proportional" defect that Josh Blackman realized in distinguishing *Jacobson v. Massachusetts* and *Buck v. Bell*.[103] *Gitlow* was a First Amendment case[104] and *Beazer* was an employment discrimination case.[105] This hypothetical involves seizure law under the Fourth Amendment. In my opinion, there is a substantial difference between censorship and not getting a job as compared to being made a prisoner by the government. The latter is a direct attack on one's person while the former two are not. Applying the reasoning from *Beazer*,[106] or again,

96. U.S. CONST. amend. IV.
97. *Id.*; Terry v. Ohio, 392 U.S. 1, 21 (1968); United States v. Santana, 427 U.S. 38, 43 (1976).
98. *Gitlow*, 268 U.S. at 666.
99. *Id.*
100. U.S. Const. amend. VIII.
101. U.S. Const. amend. V.
102. *Gitlow*, 268 U.S. at 669.
103. Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 BUFF. L. REV. 131, 193 (2022) (". . . a single dose of a well-established vaccine cannot be plausibly compared to the permanent destruction of reproductive organs."); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Buck v. Bell, 274 U.S. 200 (1927).
104. *Gitlow*, 268 U.S. at 654-55, 666.
105. N.Y. Transit Auth. v. Beazer, 440 U.S. 568, 570 (1979).
106. *Id.* at 592.

Gitlow,[107] to this hypothetical, would put us in the realm of *Korematsu*, which, "has no place in law under the Constitution."[108]

c. The Hypothetical's Mandate Falls Outside the Scope of Historical Pandemic Remedies

The posed hypothetical also cuts against historical standards of seizure related to infectious disease.[109] This Nation, in its colonial era and after the Fourth Amendment's adoption, utilized restrictive methods – methods that prohibit free movement – to contain the spread of disease.[110] Quarantine was an accepted government method to maintain public health, also recognized by the Supreme Court.[111] Chief Justice Marshall legitimized health laws in *Gibbons v. Ogden* when he stated the same are "flowing from the acknowledged power of a State, to provide for the health of its citizens."[112] Pre- and post-Fourth Amendment adoption statutes show that quarantine laws were utilized early on in our history.[113] Thus, it is impossible to say that *all* lockdowns on their face are unreasonable; however, history, common-sense, and the Court's on what constitutes a valid search to what is "unreasonable" all show that the government action in the posed hypothetical is unreasonable.

Past governmental edicts using movement-restrictive means in response to contagious disease show that the hypothetical's edict would fail the test of reasonableness, at least compared to history.[114] For example, on May 11, 1758, New Hampshire's General Assembly resolved that "the Selectmen of said Town of Hampton be directed and Required Immediately and without any further Delay use all proper methods for preventing the spreading of the small pox in said Town by Causeing all Infected persons to be Removed to separate Houses."[115]

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107. *Gitlow*, 268 U.S. at 669.

108. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (quoting Korematsu v. United States, 323 U.S. 214, 248 (1944)).

109. 3 LAWS OF NEW HAMPSHIRE, 188-89 (1915); A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, 349-50 (1803); THE REVISED STATUTES OF THE STATE OF MICHIGAN, 166 (1837); Gibbons v. Ogden, 22 U.S. 1, 205 (1824).

110. 3 LAWS OF NEW HAMPSHIRE, *supra* note 109, at188-89; A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 109, at 349-50; THE REVISED STATUTES OF THE STATE OF MICHIGAN, *supra* note 109, at 166.

111. *Gibbons*, 22 U.S. at 205.

112. *Id.*

113. 3 LAWS OF NEW HAMPSHIRE, *supra* note 109, at 188-89; A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 109, at 349-50; THE REVISED STATUTES OF THE STATE OF MICHIGAN, *supra* note 109, at 166.

114. *Id.*

115. 3 LAWS OF NEW HAMPSHIRE, *supra* note 109, at 188-89. Ironically, and somewhat contrary to today, an act was passed by the New Hampshire General Assembly on January 29, 1774, which levied a fine of thirty pounds for any person who inoculated themselves or another for smallpox without license from the governor.

Virginia passed a quarantine law on December 19, 1795: "[I]f any place within this commonwealth, shall become infected with a malignant distemper, which shall be of a nature manifestly contagious, such place shall be co-extensively subject to the operation of the laws for the performance of quarantine with any foreign place."[116]

In 1838, Michigan's Public Health Law permitted the boards of health to remove "such sick or infected person to a separate house," that was infected or was recently infected by a "sickness dangerous to the public health."[117] If an infected person could not be safely removed, the law authorized the board of health to remove other citizens in the neighborhood.[118]

A careless reading of the above legislation would render pointless any argument against *any* quarantine (lockdown) or forced removals. A careless reading would support the notion that all quarantine laws were always and will continue to be reasonable, because the careless reading misses the qualifying condition that enables the government enforcement. The above statutes do not support lockdowns within this hypothetical. A careful reading of the above-stated statutes does not support quarantining persons for the sole reason of being unvaccinated.[119] The examples above use the words "[i]nfected persons," "shall become infected," and "such sick or infected person[s]," respectively, as predicates for a valid governmental action, which included quarantine or forced removal.[120] Thus, if there were no infection, the law had no effect.[121] The present hypothetical poses a different mandate – whether a person *not* known to be infected can be seized. Its failure to differentiate between infected and non-infected persons puts its hypothetical use outside the scope of historical practice.[122]

The hypothetical would also fail the requirement of "reasonableness" under the law at our Founding.[123] "Unreasonable" in the eighteenth century meant "[n]ot agreeable to reason."[124] "Unreasonable," then, was akin to "illogical."[125] If logic commands the day, then even if *all* infected persons

116. A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 109, at 349-50.

117. THE REVISED STATUTES OF THE STATE OF MICHIGAN *supra* note 109, at 166.

118. *Id*.

119. 3 LAWS OF NEW HAMPSHIRE, *supra* note 109, at 188-89; A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 109, at 349-50; THE REVISED STATUTES OF THE STATE OF MICHIGAN, *supra* note 109, at 166.

120. *Id.*

121. *Id.*

122. *Id.*

123. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 687 (1999).

124. *Unreasonable*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792).

125. Davies, *supra* note 123, at 687.

may be seized, but only *some* unvaccinated persons are infected, it does not follow that *all* unvaccinated persons may be seized.[126] This contradicts reasonableness, which is expressly necessary to enact a "seizure," regardless of whether the executive has sufficiently scared its people into compliance.[127]

IV. THE FOURTH AMENDMENT'S PROHIBITION ON GENERAL WARRANTS

Besides simply prohibiting "unreasonable" searches and seizures, the second clause of the Fourth Amendment also prescribes the nature of a valid warrant: "[N]o Warrants shall issue, but upon probable cause . . . particularly describing the place to searched, and the persons or things to be seized."[128] The purpose of the Fourth Amendment, as demonstrated in case law, was to protect against general warrants.[129] General warrants were commonly described as "warrant[s] that lacked specificity as to whom to arrest or where to search" and "lacked an adequate showing of justification for a search or arrest."[130]

General warrants are relevant in this hypothetical given the breadth of the order. *All* persons who are not vaccinated are "seized." Yet there is no particularity as to whom that person is, nor of what "crime" they have committed. In other words, there is no proof that they are infected. If the order *is* making it a crime to not be vaccinated, then an order mandating their seizure, and assuming their "guilt," is a prima facie violation of Due Process, cruel and unusual punishment, or both. These, however, are outside the scope of this paper. The presumption against the validity of general warrants is highlighted by state constitutions against the same in the years leading up to the Fourth Amendment's adoption, as the following examples clearly indicate.

Constitution of Maryland, 1776:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants – to search suspected places, or to apprehend suspected persons, without naming or describing the

126. *See supra* Part II.

127. U.S. CONST. amend. IV.

128. U.S CONST. amend. IV.

129. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1305 (2016). William Cuddihy argues that the Fourth Amendment has a bifurcated purpose. The first clause prohibits all unreasonable searches and seizures, while the second clause only prohibits general warrants. *See* WILLIAM CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602-1791, 765 (2009). This paper follows Cuddihy's approach. For our purposes, any difference is irrelevant. The Fourth Amendment prohibits general warrants in either case.

130. Davies, *supra* note 123, at 558 n.12.

> place, or the person in special – are illegal, and ought not to be granted.[131]
>
> Constitution of Pennsylvania, 1776:
>
> That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.[132]
>
> Constitution of Massachusetts, 1780:
>
> Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.[133]

Early state constitutions in New Hampshire, North Carolina, and Virginia, also explicitly decried general warrants or impliedly rejected the concept.[134]

State constitutions combatting general warrants came after instances such as the *Wilkes Affair* which occurred in 1763 in Britain.[135] There, a printer insulted the secretaries of state and the king in his periodical called *The North Briton*, which the attorney and solicitor general found "'to excite . . . traiterous insurrections' against the government."[136] A secretary of state issued a warrant "to make strict and diligent search[es]" for persons

131. 1 BENJAMIN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 819 (1877).

132. 2 BENJAMIN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1542 (1877)

133. 1 POORE, *supra* note 131, at 959.

134. *See* 2 POORE, *supra* note 132, at 1295, 1409, 1920 (Constitution of New Hampshire, 1792; Constitution of North Carolina, 1776; Constitution of Virginia, 1850).

135. CUDDIHY, *supra* note 129, at 440.

136. *Id*.

connected to the publication, but there was nothing specific in the warrant except for the printer's name.[137] Thus, persons authorized to execute the warrant did not know whom to serve it upon.[138] After three days one person authorized to seize said "that he had been told by a gentleman, who had been told by another gentleman," of the "guilty" printer.[139] In less than two days, under the auspices of a general warrant, the government completed five searches, and forty nine arrests of mostly innocent people.[140] Americans used the *Wilkes Affair* as a rallying cry to their own want of liberty.[141]

But even after the *Wilkes Affair*, and after our own Revolution, general warrants did not disappear in America.[142] Rather, they were used as a mode of oppressing certain groups, such as the Quakers, who were accused of being British spies and thus gained the title of "mischievous people."[143] The use of general warrants largely correlated with war-time while the use of specific warrants increased post-wartime.[144] General warrants remained unacceptable in the opinions of prominent Anti-Federalists and members of the Virginia Convention.[145] For example, Patrick Henry suggested the prohibition of general warrants due to their affront to personal liberty: "[G]eneral warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited."[146] George Mason, another Anti-Federalist, drafted the accepted version of the Virginia Declaration of Rights, which stated that "[general warrants] are grievous and oppressive and ought not to be granted."[147]

In a Connecticut case, *Frisbie v. Butler*, the judiciary nullified general, non-specific warrants.[148] The court described the duty of the justice of the peace to limit "the arrest to such person or persons as the goods shall be found with"[149] – the suspected guilty party. Thus, the general warrant that gave

137. *Id*. at 440-41.
138. *Id*. at 441.
139. *Id*.
140. CUDDIHY, *supra* note 129, at 442-43.
141. Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. QUARTERLY 79, 87 (1999).
142. CUDDIHY, *supra* note 129, at 634.
143. *Id*. at 634-35. *See also* Korematsu v. United States, 323 U.S. 214, 236 (1944) (Murphy, J., dissenting). Note the similarity of "mischievous people" to the Commanding General's description of the Japanese as "subversive" in Justice Murphy's dissent in *Korematsu*.
144. CUDDIHY, *supra* note 129, at 635-37.
145. Donohue, *supra* note 129, at 1265-67, 1284 n.590.
146. *Id*. at 1286.
147. John R. Vile, *George Mason*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1221/george-mason; Donohue, *supra* note 129, at 1267.
148. Frisbie v. Butler, 1 Kirby 213, 215 (Conn. Super. Ct. 1787).
149. *Id.*

authority to "arrest all persons, the complainant should suspect, is clearly illegal."[150]

While the hypothetical poses a mandate that does constitute an unreasonable seizure, it does not fit the category of a general warrant as it was known during its use.[151] Again, a general warrant was an instrument issued by the judiciary that directed government officials (executives) to seize persons or search places, which sometimes was based upon unjustified accusations and little to no particularity.[152] The hypothetical differs in that it is an order by the government (the executive) to a person to stay in their home.[153] This lacks the step of obtaining a warrant from the judiciary to seize that person.

The hypothetical's failure to fall inside the scope of a general warrant does not undermine the argument of the hypothetical as an invalid mechanism of seizure. That it is *not* a general warrant buttresses the case. This hypothetical order is not checked by anyone or any branch. It is purely an order from the executive that a certain class of people are now seized – unable to move about freely. To the contrary, the general warrant at least required *some* effort – albeit many times a weak effort – to attempt to validate a seizure, even though those efforts might also lack reason and particularity.[154] In other words, there must have been an attempt to show proof.[155] There is no attempt at establishing proof of guilt (infection) within the hypothetical. Thus, while it falls outside the scope of the general warrant in its conceptual form, the reasoning, use, and effect of the hypothetical order fall further outside of the scope of the Fourth Amendment's demands for probability and particularity.[156] The hypothetical is an unchecked order – one that puts us in a more precarious position than if we had to endure the general warrants of the 1700s.

V. THE WHY OF THIS APPROACH AND THE WHY NOT

Readers may ask why this paper approaches the concept of class-based seizures under the realm of the Fourth Amendment. There are certainly other avenues one could take. For example, the hypothetical might be disposed of by Due Process, Equal Protection, First Amendment, or Eighth Amendment claims. There are several reasons for a Fourth Amendment argument. First, the former two possibilities have already been written about when laws are

150. *Id*.
151. *See supra* Parts III.A, III.B.
152. Davies, *supra* note 123, at 558 n.12.
153. *See supra* Part I.
154. Davies, *supra* note 123, at 558 n.12.
155. *Id*.
156. U.S. CONST. amend. IV.

applied by classes of persons. Second, the latter two possibilities – First and Eighth Amendment claims – while valiantly argued, tend to be muddled by less-provable concepts. This is to say that the "right" to practice religion, the "right" to live freely, and the protection from "cruel and unusual punishments" are not physically observed. A seizure is physical act or condition. It can be observed, making for a more objective argument. It does not mean that those terms cannot be defined with a view of history, but if a historical approach is rejected, those terms are prone to personal subjectivity, especially when the precursor to the voidance or illegitimacy of the right is fear.

On the flip side, a "seizure" is a term that is more easily described: a seizure occurs when a person is prohibited from moving by a governmental order.[157] If a governmental order prohibits movement, it follows that a person who does not freely move about is seized.[158] The concept of a seizure – prohibited movement – is less muddled in the tug of war of what individuals believe or *want* it to mean, unlike the concepts of "rights" and "cruel," which, given their subjectivity, leave more room for error in defining them.[159] Simply put, a seizure is, or it is not; there are no "partial seizures."[160] An unvaccinated person cannot physically be at home and at a Christmas dinner away from home.

Once the objective nature of a seizure is defined, the next step is to determine whether the seizure is unreasonable.[161] Unreasonableness, while certainly still subjective, gives less latitude for error if it is defined and applied mechanically.[162] For example, if logic commands the day, then even if *all* infected persons shall be seized, but only *some* unvaccinated persons are infected, it does not follow that *all* unvaccinated persons may be seized.[163] The hypothetical demands that all unvaccinated persons be seized because all infected persons can be seized, but not all unvaccinated persons are infected. Thus, the nature of the order fails to follow logic, which cuts against the reasonableness of the seizure. Needless to say, the opposite of reasonableness is unreasonableness, which the Fourth Amendment explicitly prohibits.[164]

A mechanical approach is more difficult to objectively apply when dealing in "rights" or "cruel" punishments because they are ideas subject to

157. *See supra* Part II.
158. *Seizure*, 2 ASH, *supra* note 10*; see also Seizure,* BLACK'S LAW DICTIONARY*, supra* note 5.
159. *Seizure*, 2 ASH, *supra* note 10*;* U.S. CONST. amend. VIII.
160. *Seizure,* 2 ASH*, supra* note 10*; see generally* California v. Hodari D., 499 U.S. 621(1991).
161. U.S. CONST. amend. IV
162. *Unreasonable*, JOHNSON, *supra* note 124; *unreasonable*, BLACK'S LAW DICTIONARY (11th ed. 2019).
163. *See supra* Part II.
164. U.S. CONST. amend. IV.

personal beliefs, and not determined by a seizure's physical indicators of "touch" or "submission" which are physically observed and thus known. Unquestionably, if certain rights cannot be violated, and the government violates them, it is an unconstitutional government action, and if the government administers punishment that is "cruel and unusual," it would also be contrary to the Constitution.[165] However, people will not agree on what is a "right" and what is "cruel and unusual." This makes it difficult to apply a test of reasonableness to determine whether the government's action was valid. Any conclusion from a mechanical application of the premises will be disputed when the subjective premises of what the concepts embodied were not agreed to in the first place. However, given the more objective nature of a "seizure," and the mechanical application of reasonableness, the conclusions garnered from a Fourth Amendment argument tend to avoid the ether where rights and cruelty find themselves. There is less room for dispute and error.

This paper also steers clear of an Eighth Amendment argument due to the nature of mandates. The Eighth Amendment prohibits "cruel and unusual punishments."[166] "Health-related" lockdowns, as far as Americans know, are for the "health and safety" of our society.[167] It would be unlikely that the government would say that this hypothetical lockdown was a punishment[168] because "health and safety" as a purpose for a mandate is likely more acceptable than a "punishment." Moreover, the government would have no basis to describe it as a punishment. A punishment implies there has been wrongdoing.[169] But neither in this hypothetical, or in the pandemic generally, has the executive or legislative branches mandated vaccines for ordinary people.[170] Thus, the unvaccinated have not broken any law, and the government has not framed a lockdown as a punishment.[171] Subjecting the unvaccinated to punishment without any wrongdoing would shoot the inquiry straight to a Due Process and Equal Protection inquiry. The legitimacy of a punishment without wrongdoing would make for a short paper.

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165. U.S. CONST. amend. VIII.

166. *Id.*

167. Zachary Evans, *Fauci Says We May Never Know If Cost of Covid Lockdowns Outweigh Benefits*, NAT'L REV. (Mar. 29, 2022, 7:15 PM), https://www.nationalreview.com/news/fauci-says-we-may-never-know-if-costs-of-covid-lockdowns-outweigh-benefits/.

168. Though that day may come.

169. SCALIA & GARNER, *supra* note 16, at 295 (quoting JAMES KENT, COMMENTARIES ON AMERICAN LAW 436 (1826) ("If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful, though there be no prohibitory words in the statute.").

170. *Vaccine Mandates: What to Know*, WEBMD, https://www.webmd.com/vaccines/covid-19-vaccine/vaccine-mandates#1 (last visited Jul. 29, 2022).

171. *Id.*

This paper must also address its choice not to directly apply *Jacobson v. Massachusetts*, a pandemic-related case from the early twentieth century, to its analysis of the present hypothetical.[172] Its differences with the present hypothetical are too great to justify a direct application.[173] First, the legislation in *Jacobson* had a penalty feature.[174] Persons not within any exception who did not get vaccinated were subject to a penalty of five dollars.[175] As stated previously, it is unlikely that the government would propose a lockdown solely for the unvaccinated and describe it as a punishment. And if they did, Due Process and Equal Protection claims would quickly follow. This paper's purpose, however, is to address lockdowns as within the scope of the Fourth Amendment – pre-penalty.

Second, *Jacobson* falls outside of the scope of the Fourth Amendment and the concept of "seizure."[176] The only punishment for an unvaccinated person in *Jacobson* was a five dollar fine.[177] A person could pay five dollars but carry on their business without further governmental molestation.[178] Nor was there any "compulsion,"[179] or a "governmental termination of a person's movement"[180] for being within the class of unvaccinated persons. The present hypothetical does terminate the freedom of movement for being within a class of unvaccinated persons, making *Jacobson* not readily applicable to a Fourth Amendment question.[181]

While *Jacobson* is not applicable to the present hypothetical, this is not to say that a discussion of it is completely unwarranted.[182] *Jacobson* is important for reasons of prudent forethought and a realization of the implications that flow from arguably bad law.[183] That is, *Jacobson's* precedent left room for a broader application that the Court used to impose a "health law" that bordered barbarism.[184] In *Buck v. Bell*, the State of Virginia enacted a law that found "the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives."[185] The Court found that Carrie Buck was feeble minded, that her mother was

172. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 23-24 (1905).
173. *See id.* at 11.
174. *Id.* at 26.
175. *Id.* at 11.
176. *See generally id.*
177. *Jacobson*, 197 U.S. at 7.
178. *Id.* at 7-8.
179. *See* Blackman, *supra* note 103, at 194 (citing Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 287 n.360 (1963)).
180. Brower v. County of Inyo, 489 U.S. 593 (1989).
181. *See Jacobson*, 197 U.S. at 11.
182. *See generally id.*
183. *See generally id.*; *see also* Blackman, *supra* note 103, at 193-94.
184. *See* Blackman, *supra* note 103, at 193-94.
185. Buck v. Bell, 274 U.S. 200, 205 (1927).

feeble minded, and that Carrie's child was feeble minded.[186] Relying on *Jacobson*, the Court found that "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."[187] In less than a quarter century, the Court justified a forced surgical procedure because it previously justified "compulsory vaccination."[188] This is alarming.

Professor Josh Blackman correctly asserts that *Jacobson* did not involve "compulsory vaccination," but only a fine for the unvaccinated.[189] As stated above in reference to the Fourth Amendment, no person was *seized* in the process.[190] Blackman's finding clearly shows that the *Jacobson* Court was wrong in its application of precedent.[191] Moreover, Blackman finds a "proportional" distinction between an injection and a "permanent destruction of reproductive organs."[192] The alarming part here is that it suggests that the Court will readily expand precedent – even if wrong in doing so – in instances where it finds "[i]t is better for all the world," to the extent of "prevent[ing] those who are manifestly unfit from continuing their kind."[193]

The purpose of discussing *Jacobson* and *Buck* in this paper is not to show that case law would validate or invalidate the hypothetical's legality. They are not analogous. Rather, *Jacobson* and *Buck* show that precedent – arguably bad precedent – creates openings for even worse precedent.[194] A preemptive abrogation of the hypothetical, via law, logic, and history, prevents a future application of bad law that could very well violate all notions of decency.

VI. CONCLUSION

This paper addressed a hypothetical meant as a preemptive strike on a foreseeable application of governmental executive power regarding COVID-19 health law in the United States through the lens of the Fourth Amendment.[195] As stated, the Fourth Amendment has not, or has hardly been used to counter governmental lockdown or quarantine orders.[196] Albeit a novel approach, the Amendment's history, concepts, and application make it

186. *Id.*
187. *Id.* at 207 (citing *Jacobson*, 197 U.S. at 11).
188. *Id.*
189. Blackman, *supra* note 103, at 193-94.
190. *See supra* Part V.
191. Blackman, *supra* note 103, at 193.
192. *Id*.
193. *Id*.; *Buck*, 274 U.S. at 207.
194. Blackman, *supra* note 103, at 193-94.
195. *See supra* Part I.
196. *See supra* Part III.

readily applicable to claims of constitutional violations where governmental actions unreasonably restrict movement via constructive means.[197]

This preemptive attack is beneficial because it focuses on what could be, *prior* to the "emergency," when society is more clear-minded and less prone to acquiescence due to fear of the unknown. Our past illustrates that when society is fearful, we are more likely to accept the government's taking of what belongs to us, even though that taking fails the test of logic, law, and decency.[198] Though sometimes "the law is a ass – a idiot,"[199] as may be those who make the law, it does not mean that the people "under" the law and the law's makers are the same. It is best to reject bad law and build unique mechanisms to defeat it before it occurs in the first place.

197. *See supra* Part V.
198. *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944); *see also supra* note 143.
199. CHARLES DICKENS, OLIVER TWIST 422 (Kathleen Tillotson ed., Oxford Univ. Press 1837).