CONSTITUTIONAL LAW—DEVELOPING GUIDELINES IN FOURTH AMENDMENT "CLOTHING CASES" AFTER UNITED STATES v. BUTLER

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NOTES

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INTRODUCTION

In Katz v. United States,¹ the United States Supreme Court held that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.”² These “few” exceptions, however, have since mushroomed into a litany of exceptions so numerous that many commentators conclude that the warrant requirement itself has become the exception to the rule.³

Perhaps this expansion is inevitable, given the tension between the amorphous “reasonableness” standard that serves as the touchstone to Fourth Amendment inquiries and the infinite variety of factual scenarios that the amendment seeks to govern. As Professor LaFave has noted, “the art/science of police rulemaking is beleaguered by a collision of those antithetical dynamics which pervade our entire legal system; . . . we are confronted with the ‘conflict

¹. 389 U.S. 347 (1967).
². Id. at 357 (footnote omitted).
³. See, e.g., Lewis R. Katz, In Search of a Fourth Amendment for the Twenty-First Century, 65 IND. L.J. 549, 588 (1990) (arguing that “[t]he formerly proclaimed judicial preference for a warrant is virtually non-existent”); Frank C. Capozza, Note, Whither the Fourth Amendment: An Analysis of Illinois v. Rodriguez, 25 IND. L. REV. 515, 546 (1991) (claiming that “Fourth Amendment jurisprudence has created more exceptions to the warrant requirement than there are words in the amendment itself”); Phyllis T. Bookspan, Reworking the Warrant Requirement: Resuscitating the Fourth Amendment, 44 VAND. L. REV. 473, 501 (1991) (regarding the Katz Court’s assertion that only a few well-delineated exceptions to the warrant requirement exist: “Perhaps no more frequently quoted statement is less true. The narrow exceptions doctrine . . . has given way to an extensive list of exceptions.”); Catherine T. Clarke, Criminal Law and Procedure, 36 LOY. L. REV. 753, 756 n.20 (1990) (“[T]he fact of the matter is that a great majority of police seizures and searches are made and upheld notwithstanding the absence of a warrant.”) (quoting Y. KAMISAR ET AL., BASIC CRIMINAL PROCEDURE 207 (7th ed. 1990) (citations omitted)).
between the simplicity of rules and the complexity of human experience."4

Such "conflict" and "complexity" is apparent in the situation in which police, pursuant to a valid arrest warrant, arrive at a defendant's home and proceed to place the defendant under arrest. The arrestee surely will be taken to the police station for booking. But what if at the time of the arrest the arrestee is not fully clothed, is not wearing shoes, or perhaps is wearing an inadequate amount of clothing to confront the weather conditions outside of his or her home? Before the arrestee is transported to the police station, may the police, consistent with the Fourth Amendment, enter5 the arrestee's residence to obtain additional clothing for him or her?

In an effort to answer this question, this Note will focus on United States v. Butler,6 a case from the Court of Appeals for the Tenth Circuit in which police, without a search warrant, consent from the defendant, or exigent circumstances, entered the defendant's residence to obtain his shoes for the sole purpose of protecting his "health and safety."7

Numerous courts have confronted this issue,8 but only in a tangential and secondary manner. In Butler, by contrast, the majority opinion revolved solely around this issue. Furthermore, unlike previous "clothing cases," Butler possessed the factually-unique combination of a real danger to the arrestee and a lack of opportunity for the arrestee to consent to police entry of his residence. Like these

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5. If the arrest was effectuated inside the defendant's residence, the question becomes: may the police make a further entry into his or her home?

6. 980 F.2d 619 (10th Cir. 1992).

7. Id. at 622.

other "clothing cases," however, the Butler opinion left several essential questions unresolved. First, accepting for argument's sake that the police acted reasonably in entering Butler's residence, they could have taken alternative steps to minimize the invasion of privacy that the entry entailed. The question is, should they have been required to take such steps? Secondly, under what circumstances, if any, are such alternative measures required? This Note will analyze and critique the Butler holding in an attempt to provide an answer to these questions.

Section I provides a brief overview of the Fourth Amendment's warrant requirement and the numerous exceptions that the Supreme Court has recognized. Section II frames the issue raised by Butler and the two distinct factual situations that arise in similar cases: (1) those in which the defendant requests additional clothing; and (2) those in which police are the motivating force behind the request. Section III examines the facts and reasoning of the Butler opinion, noting in particular the incongruity between the majority and the dissenting opinion regarding the amount of danger Butler faced because of the condition of his yard. Section IV assesses the validity of the Butler majority's "health and safety" argument by examining its factual and precedential rooting. This section identifies the key factors utilized by other courts in addressing the issue and applies those factors to Butler. Section V analyzes the competing police and arrestee interests inherent in all "clothing cases" and argues for the implementation of a "least intrusive alternative" requirement. A three-pronged procedure for implementing this proposed requirement is also outlined in this section. Finally, this Note concludes that although the Butler majority may have been mistaken in allowing a police officer's belief in the need to protect the arrestee's health and safety to outweigh the arrestee's legitimate privacy expectations, the opinion nonetheless provides a useful analytical foundation from which standards for future "clothing cases" can be developed.

I. Background

A. The Warrant Requirement and Its Exceptions

The Fourth Amendment to the United States Constitution guarantees the right to be protected against "unreasonable searches

9. Butler, 980 F.2d at 623; see infra note 131, which discusses the factual dispute over the amount of danger that the glass and detritus in Butler's yard actually posed to him.
and seizures" by mandating that "no Warrants shall issue, but upon probable cause." The language of the amendment indicates that citizens will not be shielded from all governmental searches and seizures; rather, only from those which are deemed "unreasonable."

The ever-expanding list of exceptions to the warrant requirement currently includes, but is not limited to, automobile searches, searches performed incident to arrests, plain view seizures, searches occurring under the broad rubric of "exigent circumstances," and consensual searches. The pertinent exceptions raised by Butler are consent, exigent circumstances, and searches incident to arrests. Consequently, each of these categories merits analysis.

1. Consent

For Fourth Amendment purposes, consent, whether express or implied, is the agreement by an individual that police may conduct an otherwise forbidden search or seizure. In Schneckloth v. Bustamonte, the United States Supreme Court laid the foundation for what has become a frequently invoked exception to the warrant re-

10. U.S. CONST. amend. IV states:
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 person or things to be seized.

11. See, e.g., Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures.").


13. See Carroll v. United States, 267 U.S. 132 (1925) (warrantless search of automobile upheld in order to preserve evidence, as car could be driven out of jurisdiction before officers could obtain warrant).

14. See Chimel v. California, 395 U.S. 752 (1969) (in order to protect the police and prevent destruction of evidence, police may search the area within the defendant’s immediate control after a lawful arrest).

15. See Coolidge v. New Hampshire, 403 U.S. 443 (1971) (police may seize evidence in plain view from place where they are lawfully entitled to be).

16. See Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit is an exigent circumstance justifying entry of dwelling without warrant when police have probable cause to believe evidence may be lost or destroyed).


18. Id. at 243.

19. Id. at 218.
quirement.20 Under Schneckloth, the state bears the burden of demonstrating that the defendant's consent to the search was in fact voluntary.21 However, the state is not required to demonstrate that the defendant had knowledge of the right to refuse the search.22 The rationale at work in Schneckloth, and behind consent searches in general, is clear: "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence."23 Thus, it is not "unreasonable" under the Fourth Amendment for the police to conduct a search or seizure when the defendant has voluntarily agreed to it, even though the defendant may not have known that he or she could have refused to grant consent.

Critics, however, charge that the minimal burden on the prosecution in demonstrating the voluntariness of a "consensual" search combined with the broad power police possess once given consent results in great unfairness to defendants.24 Despite such objections, the Supreme Court, and in its wake, state and federal courts, have continued to employ25 and even expand26 the parameters of the consent exception.

2. Exigent Circumstances

The "exigent circumstances" exception to the warrant require-

20. See, e.g., United States v. Mendenhall, 446 U.S. 544, 559-60 (1980); United States v. Lechuga, 925 F.2d 1035, 1041-42 (7th Cir. 1991); United States v. Diaz, 814 F.2d 454, 458-59 (7th Cir. 1987).

21. Schneckloth, 412 U.S. at 227 (voluntariness "is a question of fact to be determined from the totality of all the circumstances."); see also Bumper v. North Carolina, 391 U.S. 543, 548-50 (1968).


23. Id.


25. This exception is often employed in spite of what would appear to be questionable circumstances. See, e.g., United States v. Wilkinson, 926 F.2d 22, 24-25 (1st Cir.), cert. denied, 111 S. Ct. 2813 (1991) (consent to search deemed voluntary even though officers entered homes with guns drawn, handcuffed and frisked defendant, and threatened to "tear the place apart" unless he told them more, because defendant gave specific consent to search duffel bag and told officer location and contents of bag). Similarly, see infra notes 168-71 and accompanying text, discussing the broadly construed "consent" obtained by police officers in Giacalone v. Lucas, 445 F.2d 1238 (6th Cir. 1971).

ment covers innumerable situations in which the need for immediate action on the part of law enforcement officers justifies a warrantless entry into a private dwelling.\textsuperscript{27} There is no precise formula which can be used to determine whether exigent circumstances exist. Instead, the particular facts of each situation must be analyzed. Exigent circumstances, however, can be broken down into the following three primary categories:\textsuperscript{28} (1) "hot pursuit" of a fleeing suspect;\textsuperscript{29} (2) prevention of the imminent destruction of evidence;\textsuperscript{30} and (3) an "emergency" which threatens the life of another.\textsuperscript{31} These three categories merely illustrate the most common scenarios deemed to qualify as exigent circumstances and in no way amount to an exhaustive compilation.\textsuperscript{32}

Because of the wide variety of situations that can give rise to exigent circumstances, the goal of having exceptions to the warrant requirement "jealously and carefully drawn"\textsuperscript{33} can result in an uneasy tension. Balancing an individual's Fourth Amendment protection against the legitimate state interest in permitting police to actively respond to situations in which obtaining a warrant would be impractical\textsuperscript{34} can become a painstakingly fact-specific task. Although the exigent circumstances exception encompasses countless factual situations, it is subject to specific limitations. Police cannot manufacture an exigency\textsuperscript{35} nor engage in any form of

\textsuperscript{27} See, e.g., Dorman v. United States, 435 F.2d 385, 391 (D.C. Cir. 1970) (en banc) (essential question in determining whether exigent circumstances justified warrantless entry is whether law enforcement agents were confronted by urgent need to render aid or take action).


\textsuperscript{29} See, e.g., United States v. Lindsey, 877 F.2d 777, 781 (9th Cir. 1989).

\textsuperscript{30} See, e.g., United States v. Gonzalez, 967 F.2d 1032, 1034 (5th Cir. 1992) ("Reasonable fear of the destruction or removal of evidence is an exigent circumstance that may justify a warrantless entry into a private home.").

\textsuperscript{31} See, e.g., Root v. Gauper, 438 F.2d 361, 364 (8th Cir. 1971).

\textsuperscript{32} As Chief Justice (then Judge) Burger noted in a frequently-quoted opinion, "[a] myriad of circumstances could fall within the terms 'exigent circumstances.'" 2 WAYNE R. LAFAVE, \textit{SEARCH \& SEIZURE: A TREATISE ON THE FOURTH AMENDMENT} § 6.6(a), at 697-98 (2d ed. 1987) (quoting Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963)).

\textsuperscript{33} See, e.g., United States v. Smith, 797 F.2d 836, 841 (10th Cir. 1986); United States v. Aquino, 836 F.2d 1268, 1270 (1988); United States v. Anderson, 981 F.2d 1560, 1567 (10th Cir. 1992). \textit{See also} discussion of Butler dissent \textit{infra}, notes 129, 145 and accompanying text.

\textsuperscript{34} See Edward G. Mascolo, \textit{The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment}, 22 BUFF. L. REV. 419, 428 (1973) (discussing the "exceedingly useful purpose" provided by the emergency doctrine).

\textsuperscript{35} See United States v. Halliman, 923 F.2d 873, 878 (D.C. Cir. 1991) (citing
3. Search Incident to Arrest

_Chimel v. California_ provides the fountainhead of authority for the proposition that upon arrest, without additional justification, police may search the person and effects of an arrestee and the area within the arrestee’s “immediate control”: the area from which the arrestee might obtain a weapon or destructible evidence. After _Chimel_, the scope of the search incident to arrest was expanded in _Maryland v. Buie_ to allow “protective sweeps” when an arrest occurs in a home. Such a sweep is justified only when “the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”

II. _Butler_ and the Typical “Clothing Case” Scenario

May police, without a warrant, consent of the arrestee, or exigent circumstances, conduct a limited entry into a residence for the sole purpose of protecting the health and safety of an arrestee? If this question is answered affirmatively, subsequent inquiry must explore the circumstances and limitations, if any, governing such an entry. The factual context in which this narrow Fourth Amendment issue arises can vary slightly from case to case, but the underlying issue remains static. Police officers often arrive at the defendant’s residence with a valid arrest warrant. Sometimes, as in _United States v. Di Stefano_, _Giacalone v. Lucas_, and _Walker v. United States v. Socey_, officers may not create emergency and then use it to justify an emergency search.

36. See United States v. Acosta, 965 F.2d 1248, 1253 (3d Cir. 1992) (“The words ‘trickery’ and ‘subterfuge’ are employed in Fourth Amendment context to invalidate police conduct in situations where officers accomplish their objective through deceptive strategy.”).

37. See, e.g., United States v. Dart, 747 F.2d 263, 267 (9th Cir. 1984).


39. _Id._ at 762-63.


41. _Id._ at 325.

42. Other “clothing case” arrests have taken place in the hallway outside of the defendant’s hotel room. See United States v. Anthon, 648 F.2d 669, 672 (10th Cir. 1981),cert. denied, 454 U.S. 1164 (1982).

43. 555 F.2d 1094, 1097 (2d Cir. 1977) (9:00 a.m.).
States, the police arrive at an early morning hour. After knocking at the door and announcing the purpose of their visit, they are allowed into the dwelling.

More frequently, however, the scenario mirrors the pattern seen in Butler, United States v. Kinney, and United States v. Anthon, where the defendant is placed under arrest outside or at the entrance of his dwelling. At this point, the circumstances may allow the defendant to move about the premises before departing to the police station. "Although this may occur for other reasons as well, it occurs with the greatest frequency when the defendant needs to change his clothes or put on additional clothing before departing."

After the defendant is placed under arrest, case law reveals that two distinct factual situations can then arise. Either the defendant will ask to be allowed to obtain clothing, or, less frequently, the police will be the "motivating force" behind the request. Butler is a prime example of the latter situation. In either event, the courts have had little hesitancy... evidence discovered by the police as a consequence.

Washington v. Chrisman, a United States Supreme Court case that formed the basis of the Butler majority's analysis, allows the arresting officer to remain at the arrestee's side and follow him

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44. 445 F.2d 1238, 1244-45 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972) (6:00 a.m.).
45. 318 A.2d 290, 290-91 (D.C. 1974) (6:00 a.m.).
46. Officers are often given permission to enter a residence from a third party (i.e., someone other than the defendant). See id. at 291 (officers admitted by defendant's mother); State v. Bruzzese, 463 A.2d 320, 334 (N.J. 1983) (officers admitted by defendant's aunt).
50. LAFAVE, supra note 32, § 6.4(a), at 636. See infra notes 51-52 for a listing of these "clothing cases."
54. LAFAVE, supra note 32, § 6.4(a), at 636.
56. See infra notes 88-94 and accompanying text for the Butler majority's discussion of Chrisman.
wherever he goes. In Chrisman, the Court held that it is not unreasonable under the Fourth Amendment for a police officer, as his judgment dictates, to routinely monitor the movements of an arrested person following the arrest. "The officer's need to ensure his own safety—as well as the integrity of the arrest—is compelling. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested." 58

Upon entering the residence, the officer then accompanies the arrestee to another part of the dwelling. In Butler, Giacalone, Bruzzese, and Walker, the arrestees, not surprisingly, went or were transported by the officers to their bedrooms to obtain shoes or additional clothing. Finally, once an officer enters a bedroom, a search incident to the arrest, or, more frequently, a plain view observation may reveal the presence of evidence that is subsequently used to convict the defendant. An example of the search incident to arrest situation occurred in Giacalone, where a search of the arrestee's room unearthed a cache of weapons inside a chest. Examples of the latter doctrine took place in Butler and United States v. Titus. Assuming the officer was lawfully entitled to be present in the area where he or she discovered the evidence in question, it may be seized. This assumption, of course, is precisely what was at issue in Butler.

57. Chrisman, however, is not a "clothing case." The arrestee here sought to obtain his identification by returning to his dormitory room. Chrisman, 455 U.S. at 3.
58. Id. at 7.
63. Butler, 980 F.2d at 620; Giacalone, 445 F.2d at 1247; Bruzzese, 463 A.2d at 334-45; Walker, 318 A.2d at 291.
64. Giacalone, 445 F.2d at 1245-46. The court in Giacalone predicated justification of the search of the chest on first obtaining the consent of the arrestee:
Certainly, if immediately after a lawful arrest, the arrestee reads the arrest warrant and without coercion consents to go to his bedroom to change into more appropriate clothing, the arresting officers—incident to that arrest—may search the areas upon which the arrestee focuses his attention and are within his reach to gain access to a weapon or to destroy evidence.
65. Butler, 980 F.2d at 620 (shotgun and two .22 caliber rifles seen in plain view).
66. United States v. Titus, 445 F.2d 577, 578 (2d Cir.), cert. denied, 404 U.S. 957 (1971) (noting that "a considerable quantity of money" was seen on floor of bank robbery suspect's apartment).
III. *United States v. Butler*

A. Facts

On April 30, 1991, two deputy United States marshals and two county sheriff's officers arrived at Billy Deon Butler's rural trailer-home residence near Nashoba, Oklahoma, to serve a warrant for his arrest. The grounds of Butler's property were strewn with litter, including broken glass, several hundred beer cans, and various motor vehicle parts.

Willis Bruce, who lived in the trailer with Butler, met the officers outside the trailer. Marshal Carroll Allberry told Bruce that they had a warrant for Butler's arrest, and asked him if he knew where Butler was. Bruce indicated that Butler was inside the trailer. Butler then appeared and Allberry told him to come outside, where the officers placed him under arrest.

While he handcuffed Butler, Allberry saw that Butler was not wearing shoes, and noticed broken glass on the ground near Butler's feet. The debris on the ground would have prevented the officers from escorting Butler to their vehicles safely. Allberry thus asked Butler if he had any shoes, to which Butler replied that he did, but that they were inside the trailer. Bruce asked his girlfriend, who was also present, if she would go inside to get Butler's shoes, at which time Allberry told Butler, "Well, let's go on in and get them."

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68. 980 F.2d 619 (10th Cir. 1992).
69. *Id.* at 620.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* The level of danger posed to defendant Butler by the debris on the ground is a crucial factual question on which the majority and the dissent sharply disagree. Judge Seymour, in dissent, observed that "the evidence is undisputed that Mr. Butler and his companions, who were also barefooted, had just walked back and forth across the yard without injury to go to the river to bathe." *Id.* at 623. This evidence was conspicuously absent in the majority opinion. *See infra* note 131 and accompanying text.
76. *Butler,* 980 F.2d at 620.
77. *Id.* Unlike the majority, Judge Seymour noted that "Mr. Butler did not express concern about the possibility of injury to his bare feet and did not request the opportunity to put on his shoes." *Id.* at 623. Seymour's account of the exchange between the officer and Butler differed slightly from the majority's account. Seymour, citing volume II of the (unpublished) district court record at page 14 (the only explicit citation to the record in the opinion), records the officer's statement as: "'Let's go inside' . . . 'to get your shoes'." *Id.* at 624. Seymour also noted that "[t]he district court
Allberry escorted Butler inside the trailer, where Butler led him into a bedroom. Allberry noticed two apparently inoperable .22 caliber rifles inside the trailer, one at the entrance, and another in a gun rack in Butler's bedroom. Allberry also noticed a shotgun lying next to Butler's bed. The shotgun was seized and found to be loaded.

Butler was indicted in the United States District Court for the Eastern District of Oklahoma on August 7, 1991 and charged with possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Prior to trial, he moved to suppress the firearm, but the motion was denied on September 10, 1991. On October 15, 1991, the jury returned a verdict of guilty. Butler was subsequently sentenced to a twenty-one month prison term, with three years supervision upon his release.

B. Decision of the United States Court of Appeals for the Tenth Circuit

1. Majority Opinion

The majority of the United States Court of Appeals for the Tenth Circuit upheld the district court's denial of Butler's motion to suppress. The court rejected the defendant's contention that the seizure of the firearm violated his rights under the Fourth Amend-

in the present case found neither a request by Mr. Butler that the officer take him into his house, or his consent.” Id. at 623. See infra note 131 and accompanying text.

78. Butler, 980 F.2d at 620.
79. Id.
80. Id.
81. Id. at 621.
82. Id. at 620.
83. 18 U.S.C. § 922(g)(1) (1988) states:
   It shall be unlawful for any person —
   (1) who has been convicted in any court of, a crime punishable by imprison­
   ment for a term exceeding one year;
   ...
   to ship or transport in interstate or foreign commerce, or possess in or affect­
   ing commerce, any firearm or ammunition; or to receive any firearm or ammu­
   nition that has been shipped or transported in interstate or foreign commerce.
   Id.
84. Butler, 980 F.2d at 620. “In denying Butler’s motion to suppress, the district court noted in particular the decision of the Supreme Court in Washington v. Chrisman, 455 U.S. 1 (1982).” Id. at 621. See infra notes 88-95, 134-36 and accompanying text for analysis of Chrisman.
85. 980 F.2d at 620.
86. Id.
ment.\textsuperscript{87} Judge Patrick F. Kelly, writing for the majority, began the court’s opinion by examining \textit{Washington v. Chrisman},\textsuperscript{88} the foundation for the district court’s denial of Butler’s motion to suppress.\textsuperscript{89}

In \textit{Chrisman}, a campus police officer stopped Overdahl, an apparently underage university student, outside of his dorm room because he was carrying a bottle of gin.\textsuperscript{90} The officer asked to see identification. Overdahl responded that his identification was inside his room, and asked to retrieve it.\textsuperscript{91} The officer accompanied Overdahl to his room, then stood in the open doorway while monitoring Overdahl’s actions inside the dorm room.\textsuperscript{92} Approximately thirty to forty-five seconds after Overdahl entered the room, the officer noticed marijuana seeds and a pipe lying on a desk.\textsuperscript{93} In the subsequent prosecution of Overdahl’s roommate, Chrisman, for illegal possession of narcotics, the Supreme Court held that seizure of the drugs and paraphernalia was justified.\textsuperscript{94} The Court explained that the officer was authorized to accompany Overdahl to his room and the evidence of the narcotics was in plain view.\textsuperscript{95} In \textit{Butler}, the defendant argued that \textit{Chrisman} was distinguishable, because in that case it was the defendant who invited the officer into the residence, whereas in Butler’s case, the police officer initiated the entry by telling him to go inside and put on some shoes.\textsuperscript{96} The court was not persuaded by this distinction. Noting that the evidence of broken glass on the ground was “uncontradicted,” the majority was satisfied from reviewing the district court record that the police entry was not made in “bad faith.”\textsuperscript{97}

\begin{thebibliography}{99}
\bibitem{87} Id.
\bibitem{88} 455 U.S. 1 (1982).
\bibitem{89} \textit{Butler}, 980 F.2d at 621.
\bibitem{90} \textit{Chrisman}, 455 U.S. at 3.
\bibitem{91} Id.
\bibitem{92} Id.
\bibitem{93} Id. at 4.
\bibitem{94} Id. at 7.
\bibitem{95} Id.
\bibitem{96} United States v. Butler, 980 F.2d 619, 621 (10th Cir. 1992). Although it is not mentioned in either the majority or dissenting opinions, Butler’s appellate argument misconstrued the facts of \textit{Chrisman}: it was Overdahl, not Chrisman, who invited the officer into the dorm room. See \textit{Chrisman}, 455 U.S. at 3. However, this error is irrelevant to both the reasoning and holding of \textit{Butler} since the pertinent fact of \textit{Chrisman} remains the same: it was the student who invited the officer to accompany him as he returned to his room. Compare infra note 133 and accompanying text regarding Judge Seymour’s emphasis on consent.
\bibitem{97} \textit{Butler}, 980 F.2d at 621. The majority noted that “the district court explicitly found that there was no evidence that the concern for Butler’s welfare, as manifested by
The court then set out the heart of its argument by citing and analogizing to three cases in which police, without an express invitation as in Chrisman, were allowed to conduct a limited entry into an area "for the purpose of protecting the health or safety of an arrestee." 98

In United States v. Titus, the first of these cases, the defendant was naked when FBI agents arrested him in his home. 99 While obtaining clothes for the defendant, the agents discovered evidence connecting him with a recent bank robbery. 100 On appeal, this evidence was upheld as admissible since it was in plain view during the search for the defendant's clothes. 101 The court in Butler noted that "[t]he search for clothing was proper . . . since the agents 'were bound to find some clothing for Titus rather than take him nude to FBI headquarters on a December night.'" 102

The second case the majority relied on for support of this point was United States v. Di Stefano. 103 According to the Butler majority, the defendant in Di Stefano "was arrested outside [of] her house . . . wearing only a nightgown and bathrobe." 104 The police requested that she get dressed, and then, while she was dressing, noticed evidence connecting her to a bank robbery. 105 Relying on Titus, the Di Stefano court upheld the seizure of this evidence stating that "'[t]he officers had a duty to find clothing for . . . [the defendant] to wear or to permit her to do so.'" 106

Lastly, the majority briefly invoked United States v. Brown 107 as an "exception" to the general rule that an arrest outside of a residence does not authorize warrantless entry "'when an officer accompanies the arrestee into a residence or room in order to allow

98. Butler, 980 F.2d at 621.
100. Id.
101. Id. at 579.
102. Butler, 980 F.2d at 621 (quoting Titus, 445 F.2d at 579).
103. 555 F.2d 1094 (2d Cir. 1977).
104. Butler, 980 F.2d at 621. The Butler majority's description of the facts in Di Stefano is inaccurate, since the facts of that case clearly indicate that officers knocked on the door of Di Stefano's house and were admitted. Di Stefano, 555 F.2d at 1097. After the officers were admitted, they placed the defendant under arrest. Id.
105. Id.
106. Id. at 1101.
107. 951 F.2d 999 (9th Cir. 1991).
the arrestee to obtain clothing or identification." In Brown, the Court of Appeals for the Ninth Circuit held that two police officers' connection with a corruption investigation unit did not establish probable cause for a search of their home. Despite the lack of probable cause, the court upheld the resulting search of the officers' home based on the searching agents' good faith belief in the validity of the warrant.

The court in Butler noted that the "health and safety" argument it was promulgating was not an unlimited grant of power to the police. Citing United States v. Anthon, the court reiterated that without consent or exigent circumstances, police may not make a warrantless entry into the defendant's residence solely upon their desire "to complete the arrestee's wardrobe." In Anthon, the defendant was arrested in a hotel hallway, clad only in a swim suit. He was taken to his room (where he was allowed to change into some clothes) and questioned for thirty-four minutes. During the questioning, officers discovered a vial of cocaine and a marijuana cigarette. On appeal, the Court of Appeals for the Tenth Circuit held that the seizure of the narcotics violated the Fourth Amendment and thus suppressed the evidence. There was no evidence that the defendant asked to retrieve his clothes or had consented to the police entry into his room; neither were there any exigent circumstances which would have justified a warrantless entry.

The Butler majority held that the facts of Butler were distinguishable from Anthon, however, because of the non-pretextual "presence of a legitimate and significant threat to the health and

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108. Butler, 980 F.2d at 621 (quoting Brown, 951 F.2d at 1005). But see infra note 142, which notes dissenting Judge Seymour's observation that the facts of Brown make the case inapposite to the "exception" the majority invoked.
109. Brown, 951 F.2d at 1000-03.
110. Id. at 1003-07.
111. Butler, 980 F.2d at 621. "This in no way creates a blank check for intrusion upon the privacy of the sloppily dressed." Id.
112. 648 F.2d 669 (10th Cir. 1981), cert. denied, 454 U.S. 1164 (1982). Although Anthon was a Tenth Circuit case, Judge Seymour was the only Butler judge who had participated in that decision.
113. Butler, 980 F.2d at 621-22.
114. Anthon, 648 F.2d at 672.
115. Id. at 672, 674.
116. Id. at 672, 675.
117. Id. at 675.
118. Id.
safety of the arrestee." The majority concluded, therefore, that "the record is clear that taking Butler to the officers' vehicles would have posed a serious risk to his health."120

2. Dissenting Opinion

In her dissent, Judge Seymour began by arguing that the evidence discovered inside Butler's trailer should have been suppressed because Butler "differs significantly" from Chrisman, and "cannot be persuasively distinguished" from Anthon.121 Unlike the majority, which construed the issue in terms of the legitimacy of police protection of an arrestee's "health and safety," the dissent focused on the fact that the police made a warrantless entry into Butler's home despite the fact that none of the exceptions to the warrant requirement were present.122

Of particular importance to the dissent was the enhanced protection an individual's home receives under the Fourth Amendment.123 Judge Seymour quoted at length from Payton v. New York124 to emphasize her point:

the zone of privacy [is most] clearly defined . . . when bounded by the unambiguous physical dimensions of an individual's home . . . . "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.125

119. Butler, 980 F.2d at 622.
120. Id.
121. Id. (Seymour, J., dissenting).
122. Id. at 622-24.
123. Id. This theme of the home's special protected status under the Fourth Amendment was not mentioned in the majority opinion.
124. 445 U.S. 573 (1980). In Payton, the appellant "challenge[d] the constitutionality of New York statutes [which] authorized police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest." Id. at 574. Acting with probable cause but without warrants, police had gone to the appellant's residence to arrest the appellant based on a felony charge and had entered the premises without the consent of any of the occupants. Id. at 576-77. The Supreme Court held that the Fourth Amendment prohibits police from making such warrantless and nonconsensual entries into a suspect's home in order to make a routine felony arrest. Id. at 603.
125. Butler, 980 F.2d at 622 (quoting Payton, 445 U.S. at 589-90 (citation omitted)).
The dissent's definition of exigent circumstances, unlike the examples of factual scenarios presented by the majority, stressed that since each exception "invariably impinges to some extent on the protective purpose of the Fourth Amendment," exigent circumstances must be "jealously and carefully drawn." Judge Seymour again stressed the location of the intrusion as primary and emphasized the corresponding burden on the government to establish exigent circumstances "because warrantless searches inside a home are presumptively unreasonable."

Judge Seymour criticized the paucity of factual evidence upon which the majority justified the warrantless entry and proceeded to argue that Butler was controlled by the Tenth Circuit's holding in the factually indistinguishable Anthon case. Like Anthon, Judge Seymour noted, the police in Butler were not responding to an emergency, were not in "hot pursuit" of a suspect, and were not attempting to prevent the destruction of evidence.

Judge Seymour found "significant" the Anthon court's emphasis on the lack of evidence that Anthon had requested to return to

126. Id.
127. See supra notes 99-110 and accompanying text for discussion of the three cases relied upon by the majority. Judge Seymour also noted the situation in which "the search [is not] motivated by an intent to arrest and seize evidence." 980 F.2d at 622 (quoting United States v. Smith, 757 F.2d 836, 840 (10th Cir. 1986)) (other citation omitted) (Seymour, J., dissenting).
128. Butler, 980 F.2d at 623 (quoting Smith, 797 F.2d at 841 (quoting Arkansas v. Sanders, 442 U.S. 753, 759-60 (1979))).
129. Id. at 622 (quoting United States v. Aquino, 836 F.2d 1268, 1270 (10th Cir. 1988)); Smith, 797 F.2d at 841).
130. Id. at 623 (quoting United States v. Maez, 872 F.2d 1444, 1452 (10th Cir. 1989)).
131. "[T]he sole circumstance upon which the majority relies is the fact that Mr. Butler was arrested barefoot in a yard that was littered with flattened beer cans and some broken glass." Id. It is interesting to note the differing emphasis the majority and dissent placed on the broken glass and debris in Butler's yard. Judge Seymour, but not the majority, stressed that "the evidence is undisputed that Mr. Butler and his companions, who were also barefoot, had just walked back and forth across the yard without injury to go to the river to bathe. Moreover, Mr. Butler did not express concern about the possibility of injury to his bare feet . . . ." Id. The majority, in stark contrast, was genuinely convinced from reviewing the record that "taking Butler to the officers' vehicles would have posed a serious risk to his health." Id. at 622. One solution would have been to remand the case in order to determine which side was correct on this point, but the underlying issue in the "clothing cases" (whether police should be required to take alternative steps to minimize the invasion of privacy that entry entails) still would remain unanswered. See infra notes 147-50 and accompanying text for further elaboration of this point.
his room or had consented to the officers’ entry into the room. Using Anthon and Chrisman as “guides,” Judge Seymour claimed it was “clear” that the government failed to “establish[] sufficient exigent circumstances to legitimize the warrantless entry into Butler’s home.”

She acknowledged that Chrisman allows police to accompany an arrestee into his room when the arrestee requests to go there, but she distinguished Chrisman from Butler by invoking Payton.

According to Judge Seymour, the majority failed to realize that application of Chrisman was “fully dependent upon the defendant’s request to return to his room.” Without such a request from the defendant, the police have no right to enter the defendant’s residence, Judge Seymour argued. Judge Seymour criticized the majority’s reliance on Brown, Di Stefano, and Titus, dismissing it as built “on a house of cards that falls with one slight breath.”

She proceeded to distinguish these cases from Butler by establishing that the “health and safety” argument, which formed the core of the majority’s reasoning, was based either on “pure dicta” or factually distinguishable cases.

Judge Seymour concluded her dissent by touching upon the

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133. Id. (citing Anthon, 648 F.2d at 675).
134. Id.
135. Id. (citing Payton v. New York, 445 U.S. 573 (1980)). “Chrisman cannot, under Payton, stand for the proposition that the officer may take an arrestee into his house without consent.” Id.
136. Id. (citing Washington v. Chrisman, 455 U.S. at 6 n.3).
137. Id. Judge Seymour reiterated the fact that the district court had not found evidence of either a request by Butler that the officer take him into his house or his consent to enter. Accord United States v. Morgan, 743 F.2d 1158, 1164 (6th Cir. 1984) (Chrisman not applicable when arrestee did not invite police to accompany him to his room).
141. Butler, 980 F.2d at 623.
142. The language the majority quoted from Brown (see supra note 108 and accompanying text) simply reiterated the holding in Chrisman, and is pure dicta because an officer did not accompany anyone into a home to obtain clothing or identification in that case. Butler, 980 F.2d at 623-24.
143. Di Stefano merely relied on Titus, a controlling case in the same circuit. Butler, 980 F.2d at 624. In Titus, the court held that a warrantless entry was justified as an exigent circumstance in order to prevent the defendant’s escape. Titus, 445 F.2d at 578-79. Commenting on the majority’s reliance on Titus, Judge Seymour tersely stated that “[t]he warrantless entry of a home to prevent the escape of a defendant the police have probable cause to arrest is not analogous to an entry to obtain shoes for a barefoot arrestee who does not request them.” Butler, 980 F.2d at 624.
three factors she had emphasized throughout her opinion: (1) unwillingness to "dilute the concept of exigent circumstances;"\textsuperscript{144} (2) the fact that the police officer, not Butler, had initiated and compelled the warrantless entry; and (3) the majority’s "trivializ[ing]" of the exception to the warrant requirement that should be "jealously and carefully drawn."\textsuperscript{145}

\textbf{IV. Assessing the Validity of Butler’s “Health and Safety” Argument}

Analysis of \textit{United States v. Butler} raises several troubling questions pertaining to both the majority’s reasoning and tacit assumptions contained in the dissenting opinion. Why, for example, did the majority ignore evidence that prior to the police’s arrival, Butler and his companions had been walking back and forth across the yard without injury?\textsuperscript{146} Since there was no suggestion that Butler and his friends were inebriated or under the influence of drugs at the time the police arrived, it is reasonable to infer that the condition of the yard was not as dangerous as the majority believed it to be.\textsuperscript{147} Additionally, as Judge Seymour detailed in her dissenting opinion, \textit{Chrisman} and the triad of cases relied on by the majority are distinguishable from \textit{Butler} and thus do not lend support to the majority’s claim that “even without an express invitation as in \textit{Chrisman}, police may conduct a limited entry into an area for the purpose of protecting the health or safety of an arrestee.”\textsuperscript{148}

This does not mean that the result in \textit{Butler} was incorrect, however. Though the majority’s factual and legal justification for its holding is suspect, the ultimate holding of the case seems inherently reasonable.\textsuperscript{149} The easy solution would have been to remand the case in order to determine precisely how dangerous the situation was to the shoeless arrestee. But even if remand were to take place, the underlying issue in \textit{Butler} and the other “clothing cases”\textsuperscript{150} remains unaddressed by Judge Seymour, who appears to

\begin{itemize}
  \item \textsuperscript{144} Butler, 980 F.2d at 624. See supra notes 123-25 and accompanying text for a discussion of warrantless home entries as per \textit{Payton}.
  \item \textsuperscript{145} Butler, 980 F.2d at 624.
  \item \textsuperscript{146} Id. at 623.
  \item \textsuperscript{147} Id. at 621.
  \item \textsuperscript{148} Id.
  \item \textsuperscript{149} See infra notes 281-82 and accompanying text for an argument supporting the proposition that it is always reasonable for police to require arrestees to wear shoes.
  \item \textsuperscript{150} The issue is whether the police should have been required to take alternative steps to minimize the invasion of privacy that entry entails, and, if so, under what circumstances.
\end{itemize}
assume that even if there was some modicum of dangerous debris on the ground, it was unreasonable for the police to require Butler to obtain shoes after being arrested. Nor is this issue addressed by the majority, who sidestepped it entirely by rationalizing the officer's failure to obtain Butler's consent as legitimate because it was not done in "bad faith."\textsuperscript{151}

Before \textit{Butler} can be synthesized into and distinguished from the larger body of "clothing cases," several distinct analytical steps must be taken. First, the factual and precedential rooting of the "health and safety" standard invoked by the \textit{Butler} majority must be traced. This will be accomplished by examining models utilized in prior "clothing cases" in order to distill the crucial elements or key factors of their reasoning. Next, these factors must be applied to \textit{Butler} in order to reveal and highlight its factually-unique aspects. In this way, an adequate foundation can be laid for using \textit{Butler} as precedent in future "clothing cases."

\textbf{A. The "Health and Safety" Standard: Factual and Precedential Rooting}

As previously noted, \textit{Butler} appears to be the first case in which the validity of a police officer obtaining clothing for the arrestee formed the entirety of the case; prior cases that have addressed this issue only did so as a tangential or secondary matter.\textsuperscript{152} It is useful, however, to analyze these earlier cases in order to develop a framework from which reasonable guidelines for future "clothing cases" can be derived.

\textbf{1. Prior Models}

The "clothing cases" can be roughly divided into two categories: (1) those in which the \textit{arrestee} requests permission to retrieve clothing;\textsuperscript{153} and (2) those in which the \textit{police} cause the defendant to obtain additional clothing.\textsuperscript{154} This rough distinction is useful primarily as an analytic tool; it does not imply that the cases within each of these categories are factually indistinguishable or consistent in their holdings.

\textsuperscript{151} \textit{Butler}, 980 F.2d at 621. Additionally, the majority expanded the scope of \textit{Chrisman} to include cases where an arrestee does not request to return to his residence.

\textsuperscript{152} See supra notes 51-52 for a list of these cases.

\textsuperscript{153} See supra note 51 and accompanying text. In all of these cases, by requesting permission to retrieve clothing, the arrestee is deemed to have implicitly consented to police accompaniment when he goes into his bedroom to change (as per \textit{Chrisman}).

\textsuperscript{154} See supra note 52 and accompanying text.
Cases in the first category include United States v. Whitten,\textsuperscript{155} State v. Bruzzese,\textsuperscript{156} and State v. Griffin.\textsuperscript{157} In Whitten, the defendant was arrested in the doorway of his hotel room, clad only in underwear.\textsuperscript{158} The court, relying on Anthon, emphasized the importance of obtaining an arrestee’s consent and held that the subsequent warrantless entry of defendant’s hotel room violated his Fourth Amendment rights.\textsuperscript{159} “[The defendant] did not ask to be allowed to dress until after the officers had taken him into the room immediately upon his arrest and without his consent. Absent such a ‘specific request or consent,’ the officers’ entry was unlawful.”\textsuperscript{160}

In Bruzzese, the police “arrived [at defendant’s residence] at a reasonable hour at which it was likely that defendant would be dressed.”\textsuperscript{161} Despite this “reasonable” time of arrival, the defendant was not fully dressed when he was arrested pursuant to a warrant.\textsuperscript{162} The Bruzzese court held that “the policeman’s act of following defendant upstairs was a reasonable consequence of defendant’s own voluntary choice to go to his bedroom and get dressed.”\textsuperscript{163}

Cases in the latter category, where police require the arrestee to obtain clothing, include Giacalone v. Lucas,\textsuperscript{164} Walker v. United States,\textsuperscript{165} United States v. Kinney,\textsuperscript{166} and United States v. Anthon.\textsuperscript{167}

In Giacalone, the defendant, arrested at his home in May, came to the door dressed in “shorty pajamas,” slippers, and a robe. He twice announced that he was “ready to go,” but police steadfastly “suggested” he change into street clothes before leaving for his arraignment.\textsuperscript{168} Ultimately, the defendant “willingly accepted the suggestion.”\textsuperscript{169} The trial court found the “suggestion” “per-
fectly reasonable and proper; . . . it was a suggestion, not a directive or an order.”\textsuperscript{170} Arguably, the “consent” ultimately obtained from Giacalone was coerced and not genuine. The dissent noted that there appeared to be “no motivation for appellant to have announced his readiness to go in his robe as he stood in the front foyer other than his desire to limit the officers’ intrusion into the privacy of his home which they had no warrant to search.”\textsuperscript{171}

In \textit{Walker}, the defendant was arrested at 6 a.m. inside his home in a “partially dressed” condition.\textsuperscript{172} The police told him “he would need more clothes before they left” for the police station.\textsuperscript{173} Pursuant to a search incident to arrest, the officers checked a closet in Walker’s bedroom and discovered incriminating evidence.\textsuperscript{174}

In \textit{Kinney}, by contrast, the defendant was arrested on the porch of his apartment in Cleveland, Ohio and then taken inside while a crowd of observers gathered.\textsuperscript{175} On appeal, the Court of Appeals for the Sixth Circuit rejected the government’s argument that a warrantless entry was necessary because Kinney was not fully clothed and a crowd was forming outside of his home.\textsuperscript{176} The court noted that “[t]he defendant did not request permission to secure additional clothing and did not consent to an entry of his home.”\textsuperscript{177} The majority also rejected the dissent’s suggestion that the weather in March justified taking the defendant back into his apartment.\textsuperscript{178}

The Court of Appeals for the Tenth Circuit reached a similar holding in \textit{Anthon}. As detailed in the \textit{Butler} opinion,\textsuperscript{179} the defendant in \textit{Anthon} was arrested in a hotel hallway wearing only a swimsuit.\textsuperscript{180} The court held that “the arresting officers herein were authorized to search Anthon at the time of his arrest in the hotel hallway. However, they were not, absent Anthon’s specific request or consent, empowered to return Anthon to his hotel room and there effectuate a search without benefit of a search warrant.”\textsuperscript{181}

\begin{itemize}
  \item \textsuperscript{170} \textit{Id.}\textsuperscript{1}
  \item \textsuperscript{171} \textit{Id.} at 1256.
  \item \textsuperscript{172} Walker v. United States, 318 A.2d 290, 291 (D.C. 1974).
  \item \textsuperscript{173} \textit{Id.}\textsuperscript{1}
  \item \textsuperscript{174} \textit{Id.}\textsuperscript{1}
  \item \textsuperscript{175} United States v. Kinney, 638 F.2d 941, 943 (6th Cir. 1981).
  \item \textsuperscript{176} \textit{Id.} at 943-45. The facts of the case merely disclose that “Kinney’s shirt was unbuttoned.” \textit{Id.} at 943.
  \item \textsuperscript{177} \textit{Id.} at 945.
  \item \textsuperscript{178} \textit{Id.}\textsuperscript{1}
  \item \textsuperscript{179} See supra notes 112-21 and 131-34 for the analysis of \textit{Anthon} in the \textit{Butler} opinion.
  \item \textsuperscript{180} United States v. Anthon, 648 F.2d 669, 672 (10th Cir. 1981).
  \item \textsuperscript{181} \textit{Id.} at 675.
\end{itemize}

In addition to the rough distinction employed in the previous subsection regarding the source of the request to obtain more clothing, further examination of these cases reveals two broad factors which affect courts' reasoning in deciding whether to justify a warrantless entry in a "clothing case."

The first factor, not surprisingly, is simply the amount of clothing the defendant is wearing at the time of the arrest. The most extreme examples, and therefore the easiest cases, are those like United States v. Titus,¹⁸² where the defendant was naked at the time of arrest.¹⁸³ More frequent is the situation encountered in Walker v. United States,¹⁸⁴ where the arrestee was only "partially dressed,"¹⁸⁵ or, as in Giacalone v. Lucas,¹⁸⁶ wearing bed clothes because the police arrived at his or her home early in the morning.¹⁸⁷

Although it is often interrelated with the first factor, the second factor that plays a major role in courts' reasoning is the weather conditions at the time of the arrest. The more inclement the conditions, the more likely it is that a court will hold that an officer's act of obtaining clothing for an arrestee was justified. A typical example is State v. Griffin,¹⁸⁸ where the defendant was arrested in December in the hallway of his rooming house dwelling.¹⁸⁹ Snow was covering the ground, prompting police to enter the defendant's room to obtain his shoes.¹⁹⁰ At trial, the defendant argued that the officers should have given him the choice of walking in his socks through the snow to the police cruiser; if he was denied this option and refused to let the police enter his room, the officers could have carried him to their car.¹⁹¹ The court, not surprisingly, flatly rejected this suggestion.¹⁹²

Logical inferences from the Anthon opinion demonstrate that weather conditions at the time of arrest can sometimes work in the arrestee's favor. In Anthon, the defendant was arrested in Albu-

¹⁸³. Id. at 578.
¹⁸⁵. Id. at 291.
¹⁸⁶. 445 F.2d 1238 (6th Cir. 1971).
¹⁸⁷. Id. at 1244-45.
¹⁸⁸. 336 N.W.2d 519 (Minn. 1983).
¹⁸⁹. Id. at 521.
¹⁹⁰. In addition, the defendant had said that he wanted to retrieve his jacket. Id.
¹⁹¹. Id. at 524 n.2.
¹⁹². Id.
querque, New Mexico, during the month of September. Despite the fact that he was clad only in a swimsuit, the Court of Appeals for the Tenth Circuit held that the police should have taken Anthon to the station as he was, rather than forcing him to go back into his hotel room to change. The (presumably) balmy weather conditions in New Mexico in September are distinguishable from the snowy Minneapolis December weather conditions in Griffin, which justified the police officers' requirement that the arrestee obtain additional clothing.

B. Application of Key Factors to Butler

1. Lack of Exceptions to the Warrant Requirement

It is important to note that the warrantless entry in Butler was not justified by any exception to the warrant requirement. Judge Seymour recognized that "the government here has not established sufficient exigent circumstances to legitimize the warrantless entry into Mr. Butler's home." There was no hot pursuit involved, no need to prevent the imminent destruction of evidence, and no emergency which threatened the life of another. As the United States Supreme Court stated in Vale v. Louisiana, an arrest outside of the arrestee's premises does not "provide its own 'exigent circumstance' so as to justify a warrantless search of the arrestee's house." Nor can the entry be justified by invoking the consent exception, for, unlike the arrestee in Chrisman, Butler did not consent to the police entry by requesting to enter his residence. "The analysis in Chrisman is fully dependent upon the defendant's request to return to his room . . . ." Butler was not afforded an opportunity to "freely and voluntarily" consent to the entry, as the officer

194. Both Anthon and Butler are Tenth Circuit cases, although the courts were composed of entirely different members save for Judge Seymour.
195. Anthon, 648 F.2d at 674-76.
196. State v. Griffin, 336 N.W.2d 519, 520-21 (Minn. 1983).
200. Id. at 35.
barged in without seeking Butler’s permission.203

Finally, the warrantless entry cannot be justified as a search incident to arrest. Butler was arrested, searched for weapons, and handcuffed outside his residence.204 There were no weapons within his reach and no physical evidence he could grab and destroy or use to harm the arresting officers, thus precluding a Chime-type search of the house incident to the arrest. "If a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house."206

2. Clothing and Weather Factors in Butler

Assessing both the amount of clothing and weather condition factors in Butler presents a unique mixture of problems. Butler was arrested on a presumably warm April day in Oklahoma. According to the dissent, before the police arrived, the defendant had been bathing in a river next to his trailer.207 The Butler opinion is unclear as to whether Butler was still in his swimsuit at the time of arrest, or if he had dressed. It is clear from prior case law, however, that if Butler was only wearing shoes and a swimsuit, the warm weather would have precluded police entry of his residence.208

State v. Griffin209 provides a useful comparison for assessing the clothing issue in Butler. In Griffin, the shoeless defendant was arrested in the hallway of his rooming house residence early on a snowy December morning.210 After the arrest, police asked defendant which room was his, because they wanted to obtain shoes

search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.” Id.

203. See supra note 77 and accompanying text.
204. Butler, 980 F.2d at 620.
206. United States v. Whitten, 706 F.2d 1000, 1016 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984) (citing Vale v. Louisiana, 399 U.S. 30, 33-34 (1970)) (emphasis added). Cf. Walker v. United States, 318 A.2d 290, 290-91 (D.C. 1974) (search of closet, which contained partially-dressed defendant’s clothing, for weapons, was incident to arrest, since closet was area from which defendant might have gained weapon at time when he was obtaining additional clothing).
207. Butler, 980 F.2d at 623.
208. In this situation, lack of consent or exigent circumstances would have prohibited the police from entering. See discussion of Kinney, supra notes 175-78 and accompanying text, and the discussion of Anthon, supra notes 193-95 and accompanying text.
209. 336 N.W.2d 519 (Minn. 1983).
210. Id. at 521.
for him. Upon entering defendant's room, the police observed in plain view a purse that had been reported as stolen. At trial, the arresting officer testified that defendant had said that he wanted to get his jacket before he was taken to the police station. Even if defendant had not made this request, however, it seems clear that because of the snow-covered ground, the court would have held that police concern alone would have been sufficient to justify a limited entry into Griffin's room to obtain shoes for him, despite his objection. Indeed, the Griffin court specifically rejected the defendant's argument that the officers should have allowed him to either walk through the snow in his socks or be carried to the police cruiser. Like the majority opinion in Butler, the Griffin court assumed a priori that police should not be required to take alternative steps to minimize the invasion of privacy that entry into a residence entails.

C. The Factually Unique Aspects of Butler and its Potential Role as Precedent

The sparse simplicity of the facts in Butler belie a unique amalgamation: had Marshal Allberry not made his harried entry, Butler would have been identical to Griffin, and the defendant would have rightfully had the burden to demonstrate that the entry was not justified. But, unlike Griffin or other previous “clothing cases,” Butler contained the unique combination of a real danger to the arrestee and the lack of opportunity for the arrestee to consent to entry. As a result, the majority stretched the case in order to fit it within the reasoning of recognized, but inapposite, precedent.

This unique quality of Butler affords the opportunity to develop guidelines which can govern future Butler-type cases, as well as consistently and fairly resolve the garden variety type of “clothing cases.” Instead of distorting the case by forcing it into ill-fitting precedential molds, it can serve as a vehicle for addressing

211. Id.
212. Id.
213. Id.
214. Id. at 524 n.2.
215. Id.
217. Butler-type cases may be defined as those rare cases in which: (1) a real danger to the arrestee exists and (2) the arrestee is not given an opportunity to consent to police entry of his residence.
218. By “garden variety,” I mean the typical “clothing case” scenario in which the arresting officer manifests a desire to obtain additional clothing for the arrestee and
more difficult, and thus far unanswered questions regarding whether and when police should take less intrusive means to minimize privacy invasions in “clothing cases.”

V. PROPOSAL FOR A WORKABLE MODEL

A model which adequately instructs police officers on what action they may take in future “clothing cases” must balance the police officers’ need for “bright line” rules against the privacy an individual lawfully enjoys in his or her home under the Fourth Amendment. It must seek to prevent the destruction of evidence without becoming “a blank check for intrusion upon the privacy of the sloppily dressed.” The model must also attempt to account for the countless variety of factual situations which can arise within the standard “clothing case” paradigm while simultaneously acknowledging the discretion police officers legitimately possess. It must find a balance between the legitimate governmental interest in protecting police officers and the significant intrusion upon an individual’s privacy that a warrantless entry necessarily entails.

Finally, if the model is to be effective, it must anticipate resistance to its implementation on the federal level and thus pragmatically possess an alternative means of implementation. As such, the model would be implemented pursuant to states’ constitutional counterparts to the Fourth Amendment.

then makes an entry to obtain this clothing. See supra notes 164-81 for examples of such cases.

219. As I argue infra Part VB in the subsection entitled “Establishment of a ‘Clothing Spectrum,’” there should be very few “bright lines” in the “clothing case” context. The rationale for this argument is straightforward: “Not only do categorical Fourth Amendment rules often lead to substantial injustice; in addition, their artificiality commonly makes them difficult ... to apply.” Albert W. Alschuler, Bright Line Fever and the Fourth Amendment, 45 U. PnT. L. REV. 227, 231 (1984). But see infra note 226, presenting arguments by two “bright line” proponents. The most seasoned and zealous advocate of the “bright line” approach, however, is Professor LaFave. See, e.g., Wayne R. LaFave, The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith”, 43 U. PITT. L. REV. 307 (1982); Wayne R. LaFave, “Case-by-Case Adjudication” Versus “Standardized Procedures”: The Robinson Dilemma, 1974 SUP. CT. REV. 127, 141-42.

220. Butler, 980 F.2d at 621.

221. See supra notes 42-52 and accompanying text.

222. “American police have always been expected to exercise discretion in the performance of their duties.” Gregory H. Williams, Police Rulemaking Revisited: Some New Thoughts on an Old Problem, 47 LAW & CONTEMPP. PROBS., Autumn, 1984, at 123, 181.

No "magic formula" or all-inclusive test, however, will cover every future case pertaining to this narrow Fourth Amendment issue. Inevitably, a unique situation will arise which upon application of the guidelines to be outlined in this section, will yield a result which may seem inherently unfair, unreasonable, or simply unsatisfactory. Acknowledging this limitation, I submit that employment of the following broadstroke guidelines would provide a more equitable solution to the majority of future "clothing cases."

A. The "Least Intrusive Alternative" Framework and Protection Pursuant to State Constitutions

Several scholars have argued that the United States Supreme Court has increasingly refrained from categorical application of "bright line" rules in the Fourth Amendment context, preferring instead to apply a "general reasonableness" or "balancing" test. Despite the criticism this balancing methodology has received, it is likely that the Supreme Court, given its current composition and conservative leanings in the criminal procedure context, will continue its preference for a balancing approach. Recognizing this trend, one commentator has responded with the following argument, which should provide the underlying principle to govern police action in future "clothing cases."

so that the Court does not continue to undervalue privacy and liberty rights, or . . . inflate the countervailing law enforcement interests . . . the balancing analysis must compare the marginal costs and benefits of alternative search and seizure techniques, and uphold a particular technique only if it is the least intrusive measure that substantially promotes the state's goals.

Although it is uncertain whether this principle would be utilized

224. See supra note 4 and accompanying text.


226. Bookspan, supra note 225, at 477, criticizes the Supreme Court's "reasonableness" approach to Fourth Amendment jurisprudence as a standard which "focuses on the acts of the police instead of the rights of the people." Similarly, Strossen, supra note 225, at 1175-76, argues that "Fourth Amendment rights . . . should receive the more certain protection resulting from categorical rules rather than the less certain protection resulting from ad hoc balancing."


228. Strossen, supra note 225, at 1266 (emphasis added).
by the current Supreme Court, a least intrusive alternative requirement can and should be embraced by state courts pursuant to their individual state constitutions. The federalist framework entitles states to grant their citizens greater protection in search and seizure cases, pursuant to their state constitutions' Fourth Amendment counterparts, than they would receive under the Federal Constitution. In this situation, so long as the court indicates that its decision is based on independent state grounds, the decision will not be overturned by the United States Supreme Court.

The United States Supreme Court has clearly recognized this principle, having proclaimed that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." Examples of such state departures in the Fourth Amend-

229. See, e.g., Illinois v. Lafayette, 462 U.S. 640, 647 (1983) ("The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."). But see Florida v. Royer, 460 U.S. 491, 500 (1983) (warrantless investigative detentions must last no longer than is necessary and should employ the "least intrusive means reasonably available to verify or dispel the officer's suspicion"). The composition of the Supreme Court, of course, has changed since these opinions were written. Yet, as of this writing, the Court has not explicitly rejected the "least intrusive alternative" framework.


231. Provided that the state guarantee does not intrude upon a separate federal constitutional right. See Talbot, supra note 230, at 1104 nn.36-38 and accompanying text.

ment context are legion. In State v. Miller,233 for example, the Connecticut Supreme Court explicitly rejected the Supreme Court’s holding in Chambers v. Maroney234 by prohibiting warrantless automobile searches supported by probable cause but conducted while the automobile was impounded at police station, by ruling that article first, section 7, of the Connecticut constitution provides broader protection than the Fourth Amendment.

Similarly, in State v. Boland,235 the Washington Supreme Court held that Washington citizens have a state constitutional right to privacy in their garbage, completely contrary to the United States Supreme Court’s holding in California v. Greenwood.236 Finally, in Commonwealth v. Amendola,237 the Massachusetts Supreme Judicial Court, interpreting article fourteen of the Massachusetts constitution, held that a defendant charged with illegal possession of drugs has automatic standing to contest the legality of the seizure, without asserting any privacy interest in the area where the police seized the drugs.238 By upholding the automatic standing doctrine, the Amendola court declined to follow the “one-step” standing test laid out by the United States Supreme Court in Rakas v. Illinois.239

These state-based departures from the United States Supreme Court’s Fourth Amendment jurisprudence dovetail with and buttress Professor Strossen’s proposed “least intrusive alternative” requirement. Professor Strossen developed this analysis after surveying pertinent lower federal and state supreme court decisions and concluding that, “despite the Supreme Court’s unfavorable rulings on point, ample room remains for imposing a least intrusive alternative requirement in Fourth Amendment cases.”240 Professor Strossen acknowledged that “[t]he opinions in these cases tend to

233. 630 A.2d 1315, 1326 (Conn. 1993).
234. 399 U.S. 42, 51-52 (1970) (Fourth Amendment permits warrantless automobile search supported by probable cause and conducted while automobile is impounded at police station).
236. 486 U.S. 35, 39-40 (1988) (Fourth Amendment does not prohibit search and seizure of garbage, since one cannot have a reasonable expectation of privacy in one’s garbage).
238. Id. at 125-26. Interestingly, the Amendola court arrived at this conclusion despite the fact that the two constitutional provisions were “virtually identical in their language and history.” Kelly, supra note 230, at 313 n.37 and accompanying text.
239. 439 U.S. 128 (1978) (defendant may exclude evidence derived from a search or seizure only if his legitimate expectation of privacy is violated).
240. Strossen, supra note 225, at 1231.
focus on the particular situation presented, with little analysis and few citations to other authorities," but concluded that "when these isolated rulings are considered together, there emerges a coherent, comprehensive doctrine requiring that searches and seizures comply with the least intrusive alternative standard."

Professor Strossen then presented an exhaustive compilation of cases in which the least intrusive alternative requirement had been accepted, amounting to seventeen United States courts of appeals decisions from eight different circuits, including the Tenth Circuit Court of Appeals, as well as twelve different United States district court decisions from ten different states and the District of Columbia.

Although the cases cited by Professor Strossen differ from Miller, Boland, and Amendola when they are considered in conjunction with the methodology in these three cases they enhance and strengthen the least intrusive alternative framework. In this manner, the least intrusive alternative framework becomes a viable, constitutionally-based solution to the "clothing case" dilemma.

1. Specific Proposals

In order to effectively implement the goal of requiring police to take the least intrusive alternative in future "clothing cases," states should constitutionally require that the following proce-

241. Id. at 1232.
242. Id.
243. Id. at 1232-33 n.344 (citing United States v. Gonzalez, 763 F.2d 1127, 1133 (10th Cir. 1985) (in suppressing evidence after police officer had coerced a suspect to go to the police station for investigation without arresting him, the court noted "reasonable alternatives," including calling for a backup officer, obtaining the suspect's consent to search, and obtaining the suspect's consent to drive his car to safer location)).
244. Id. at 1233-34 n.345.
245. The difference being that the cases cited by Professor Strossen are not state-based departures from the Supreme Court's interpretation of the Fourth Amendment.
246. Requiring that the states constitutionally mandate standard procedures in "clothing cases" is a pragmatic tactical maneuver consistent with the well-established tradition of using the states as "laboratories" to experiment with various social and economic legislation. As Justice Brandeis proclaimed in 1932:

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. . . . If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Since this case was decided, "other United States Supreme Court Justices have applied the Brandeis laboratory metaphor to state courts as well as to state legislatures, and to criminal law as well as to social and economic legislation." Abrahamson, supra note 230, at 1141.
dures and guidelines be incorporated into police manuals: (a) where reasonably possible, police should attempt to obtain the arrestee's consent to enter; (b) where reasonably possible, police should request that a third party render assistance; and (c) a "clothing spectrum" should be established in order to guide police in making reasonable, non-technical on-site determinations in future "clothing cases."

The reason for requiring that these proposed procedures and guidelines be constitutionally mandated is simple: if they were not, they would undoubtedly be reduced to mere aspirational or optional police procedure, thus thwarting the goal behind the guidelines by perpetuating "clothing case" status-quo.

The benefits of written procedures\(^\text{248}\) accrue to both police officers and arrestees; officers become aware of the parameters of what is deemed "reasonable" police action in specified circumstances,\(^\text{249}\) while arrestees are protected from arbitrariness and extreme exercises of unfair police discretion.\(^\text{250}\) Written procedures can thus mitigate the possibility of Fourth Amendment violations inherent in all "clothing cases."\(^\text{251}\)

a. Obtaining the Arrestee's Consent to Enter

The first element of the least intrusive alternative requires the police to attempt to obtain the arrestee's consent prior to making a

\(^{247}\) See infra notes 252-82 and accompanying text.

\(^{248}\) Professor LaFave suggests that departmental policymaking regarding the Fourth Amendment improves police performance in the following four ways: by (1) enhancing the quality of police decisions; (2) ensuring fair and equal treatment of citizens; (3) increasing the visibility of police policy decisions; and (4) promoting consistency in police officers' obedience and enforcement of constitutional norms, which guarantees citizens' liberty. LaFave, supra note 4, at 451 (citing Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 423-28 (1974)).

\(^{249}\) As an example, consider the holdings in South Dakota v. Opperman, 428 U.S. 364 (1976) and Colorado v. Bertine, 479 U.S. 367 (1987) (both cases upholding inventory search of impounded cars conducted pursuant to standardized police procedures). In both of these cases, however, the scope of the searches allowed pursuant to the written guidelines was quite broad. The procedures in Bertine, for example, allowed police to open a closed backpack and a nylon bag found inside the backpack. Id. at 369. Compare Bertine and Opperman with Florida v. Wells, 495 U.S. 1 (1990) (opening of locked suitcase not justified as an inventory search where police department had no written policy concerning the opening of closed containers).

\(^{250}\) See, e.g., Alschuler, supra note 219, at 228, stating that "[w]hen rules can limit the play of atomistic, idiosyncratic choice without yielding significant injustice . . . they should be adopted."

\(^{251}\) In order for written procedures to mitigate the possibility of Fourth Amendment violations, the procedures must not, of course, grant carte blanche to the arresting officers. See supra note 249.
warrantless entry. Explaining the need for the arrestee to wear shoes or additional clothing because of the cold weather outside, for example, may result in obtaining a valid consent to enter. Such consent, if validly obtained, would render the need for further procedures moot. Case law reveals that the arrestee may often have concerns for his or her health and safety and thus freely choose to obtain more clothing before departing.\(^{252}\)

A critic may respond that the "consent" obtained in these circumstances is a meaningless formality, since the police may ultimately be privileged to enter regardless of whether the arrestee consents.\(^{253}\) The response to this criticism is to note that although police may be privileged to enter in a limited set of circumstances, the majority of "clothing cases" involve a totality of circumstances in which entry is not privileged. In these latter cases, requesting that the arrestee allow entry vests ultimate decision-making power in the arrestee and thus allows him or her to make a meaningful response which must be honored.

b. Requesting a Third Party to Render Assistance

The second element of a least intrusive alternative requirement in the "clothing case" context requires that the police, if possible, request another (non-police and non-arrestee) individual to retrieve clothing for the arrestee rather than making the entry themselves. This procedure is consistent with the twin objectives that should underlie and guide the "least intrusive alternative" policy: it allows police to respond to true health and safety concerns while simultaneously respecting the arrestee's legitimate privacy interests and preventing warrantless entries. Requiring that police request a third party to render assistance does not unreasonably restrict police action, as the officers in "clothing cases" only possess an arrest warrant, and thus are not authorized to search the defendant's residence.

The assumption behind this prong of the proposal is that entry would be made by a friend or family member of the arrestee, not an agent of the government. Undoubtedly, situations will arise in which the defendant is home alone when arrested.\(^{254}\) But it is rea-

\(^{252}\) See *supra* note 51 for a list of these cases.

\(^{253}\) See *infra* part VB regarding the establishment of a "clothing spectrum" which automatically allows police to enter, even if the arrestee refuses, in a narrowly-defined set of circumstances.

\(^{254}\) It is possible that the defendant in Giacalone v. Lucas, 445 F.2d 1238 (6th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972), was alone when arrested. The facts of the
sonable to posit that when an arrest occurs at an individual’s home, there will often be other individuals present who could safely aid both the police and the arrestee.

Several warrantless entries could have been avoided by requiring that this rudimentary procedure be followed. In *Walker v. United States*, for example, the defendant’s mother was present when the police arrived at his home. Similarly, in *State v. Bruzzese*, the court noted that “[e]ven after the police told the defendant they would have to accompany him, he could have declined to go upstairs or asked his aunt at that point to get his clothes.”

This procedure must be sensitive to the need to protect both officers’ safety and the integrity of the arrests. Consequently, if police had specific and articulable facts that the arrestee’s friends or family members could obtain a weapon or destroy evidence upon entering the home, the requirement of requesting third party assistance would be deemed impracticable and thus excused. Arresting officers frequently possess such specific and articulable facts, based on the nature and circumstances of the arrest warrant they are serving and the arrestee’s prior criminal record. For example, using the facts of *United States v. Butler*, if a warrant was being served on an individual who had no prior criminal record and was being arrested for a non-violent crime (such as failure to make child-support payments), police would be required to request one of his friends to enter the house and retrieve the arrestee’s shoes.

Unfortunately, there are not enough facts regarding the nature of Butler’s arrest warrant to accurately apply this test to *Butler*. Regarding the arrest warrant, the majority opinion merely stated that “Butler . . . had previously been convicted of a crime punishable by imprisonment for a term exceeding one year.” The majority opinion, however, did detail the confrontation on Butler’s front porch. “Allberry [the police officer] asked Butler if he had any shoes. Butler said that he did, but that they were in the trailer.

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255. 318 A.2d 290, 291 (D.C. 1974); see supra notes 172-74 and accompanying text for a discussion of this case.
258. 980 F.2d 619 (10th Cir. 1992).
259. Id. at 620.
[Butler’s housemate] asked his girlfriend, who was also present, if she would get Butler’s shoes. Allberry told Butler, ‘Well, let’s go on in and get them.”

Even if there were no specific and articulable facts to which the officer could point to justify fearing for his safety if he allowed one of Butler’s friends to retrieve Butler’s shoes, the officer effectively precluded a legitimate entry by these individuals by entering Butler’s home on his own initiative. It is entirely possible, however, that Butler was being arrested for a violent crime, or had a record of violent crime. Indeed, the officer’s discovery of the guns in Butler’s home suggests the possibility that had Butler’s friend’s girlfriend been permitted to enter the trailer and retrieve Butler’s shoes, she could have used the gun to injure the arresting officers.

The requirement that the police request a third party to enter and retrieve the arrestee’s clothing is thus subject to significant limitations and must, ultimately, err on the side of caution. Police must be allowed to enter based on specific and articulable facts that they would have legitimately feared for their safety if a third party entry took place. However, case law reveals that the possibility of a safe third party entry is far from categorically unreasonable.

B. Establishment of a “Clothing Spectrum”

In order to inform officers of what clothing situations predicate a warrantless and consentless entry, a rough “clothing spectrum” must be compiled for reference in police manuals. The principal distinction underlying this spectrum is between comfort and safety. Articles of clothing which merely relate to comfort do not justify a warrantless entry, while articles pertaining to safety justify entry even over the objection of the arrestee. As long as the arrestee is wearing an amount of clothing which satisfies the minimal requirements of public decency and provides sufficient protection against the elements, upon arrest, he or she must be taken to the police station “as is.”

With this broadstroke guiding principle, the legitimacy of po-

260. Id.

261. Examples of safe third party entries can be seen in the totality of the circumstances surrounding the arrests of the defendants in Walker and Bruzzese. For a description of these circumstances, see supra notes 255-56 and accompanying text.

262. If the arrestee was clothed in a see-through nightgown or similar garb, the police would be justified in requiring that the arrestee obtain more “appropriate” clothing, even though the clothing may be sufficient protection against the elements. See infra notes 268-71 and accompanying text.
lice entry in each "clothing case" becomes a crucial question to be resolved by the finder of fact; mere "good faith" on the part of an officer does not transform a clearly "comfort-based" entry into a legitimate "safety-based" entry. Instead, a "good faith comfort-based" entry should be unconstitutional as a matter of law, and thus result in the suppression of evidence obtained pursuant to this illegal entry.263

An interrelated branch of the comfort/safety distinction is the weather conditions extant at the location and timing of arrest.264 As an example, assume the following facts of State v. Griffin: snow-covered ground and cold, December Minnesota weather at the time of the arrest.265 Accordingly, entry predicated on the officer's interest in obtaining a hat or scarf for the otherwise fully dressed arrestee would be deemed illegitimate while an entry to obtain a coat may well be justified. A hat or scarf would provide additional, but unnecessary, "comfort" to the arrestee, while shoes and a jacket are requisite "safety" wear in such climates. Articles of clothing are not intrinsically "comfort" or "safety" based;266 rather, their categorization varies267 according to specific weather conditions, location of arrest, and modicum of clothing worn by the defendant at the time of arrest. It is ultimately the factfinder's duty to determine whether the combination of these factors justified police entry in a given case.

On one end of the spectrum are clear cases like United States v. Titus,268 where the defendant was naked at the time of arrest.269 Under this proposal, nakedness is a "bright line" which would allow the police to make a unilateral entry even if the arrestee objects. Clearly, health and safety concerns as well as public decency man-

263. Suppressing evidence obtained as a result of a "good faith comfort-based" entry would occur pursuant to the "fruit of the poisonous tree" doctrine. See, e.g., Wong Sun v. United States, 371 U.S. 471 (1963) (contraband taken from defendant's residence was fruit of agents' illegal entry and should not have been admitted as evidence).

264. See supra notes 188-96 and accompanying text.

265. 336 N.W.2d 519, 521 (Minn. 1983).

266. Another way of conceptualizing this statement is to say that articles of clothing are not irrevocably tied to one location on the "clothing spectrum." For example, a pair of trousers would be required if the arrest occurred in Alaska, but they would not be required if the arrest occurred in the Hawaiian tropics. In the Hawaiian case, shorts or a swimsuit would suffice.

267. For hygienic and safety reasons, however, the arrestee should always be required to wear shoes. See infra notes 281-82 and accompanying text.


269. Id. at 578.
date that the arrestee be required to wear some modicum of clothing when he is taken to the police station.\textsuperscript{270} In these cases, the police will be privileged to enter the arrestee’s residence, even if the arrestee objects. In such a scenario, the officer’s legitimate concern for the threat posed to the arrestee’s health and safety “trumps” the arrestee’s privacy expectations and refusal to permit police entry.\textsuperscript{271}

On the other end of the spectrum is the situation where a police officer merely deems the arrestee’s clothing “inappropriate,” even though neither safety concerns nor weather conditions render the amount or type of the arrestee’s clothing entirely unreasonable. In \textit{Giacalone v. Lucas},\textsuperscript{272} for example, the defendant was arrested in May, dressed in pajamas, bathrobe, and slippers.\textsuperscript{273} Similarly, in \textit{Di Stefano}, the defendant was arrested in June, wearing a nightgown and a bathrobe.\textsuperscript{274}

\textit{Giacalone} and \textit{Di Stefano} are ideal illustrations of the most egregious type of police abuse of power occurring in the “clothing case” context, and thus provide the ultimate justification for the least intrusive alternative argument. Rather than allow the arrestee to be transported clothed in the adequate amount of clothing currently worn, officers in these cases require that the arrestee change into “street clothing” before he or she is allowed to leave for the police station.\textsuperscript{275} Examining the facts in these cases, it is difficult to argue that the resulting entries are anything other than pretextual.

No less an authority than Professor LaFave, however, argues that these entries are justified. Commenting on \textit{Giacalone}, he opined that “[a]ssuming a lawful arrest at the defendant’s residence, it does not seem at all unreasonable for the police to require the defendant to don street clothing, without regard to his wishes.”\textsuperscript{276} Professor LaFave’s argument is consistent with the \textit{Giacalone} majority opinion, which assumed without question that police were

\begin{footnotes}
\item[270] A Massachusetts prosecutor related the story of a (non-reported) district court case in which a woman was arrested naked in a wheelchair and brought into the courtroom covered only with a bedsheet. Clearly the arresting officers in this case were negligent in failing to obtain any clothing for the arrestee.
\item[271] This was the precise situation in \textit{Griffin}. See supra notes 209-14.
\item[272] 445 F.2d 1238 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972).
\item[273] \textit{Id.} at 1244.
\item[274] United States v. Di Stefano, 555 F.2d 1094, 1097 (2d Cir. 1977).
\item[275] \textit{Compare} State v. Bruzzese, 463 A.2d 320, 334 (N.J. 1983), where the court noted that “[i]f defendant, partially clad, had elected to depart from his house with the police, the officers could not have entered his bedroom without a search warrant.” \textit{Id.} (emphasis added).
\item[276] \textit{LaFave}, supra note 32, § 6.4(a) at 638.
\end{footnotes}
privileged to enter the defendant's residence simply because the defendant was wearing his "bed clothes" when he was arrested.\textsuperscript{277} The least intrusive alternative, in contrast, would grant the arrestee the choice of either going to the police station in his then-current state of (un)dress\textsuperscript{278} or retrieving some clothing for himself, subject to police accompaniment as per \textit{Washington v. Chrisman}.\textsuperscript{279}

Somewhere between these two extremes\textsuperscript{280} lie cases such as \textit{Butler} where the arrestee is not wearing shoes and may or may not be in danger\textsuperscript{281} due to debris on the ground at the arrest site. Even if he or she is not in immediate danger, however, the range of safety concerns stemming from an arrestee's lack of shoes places cases like \textit{Butler} closer to \textit{Titus'} "naked" end of the spectrum. Concerns for the shoeless arrestee's safety do not end once he is transported from his residence to the police car; he may be injured en route from the police car to the police station or when he is finally jailed. There are also legitimate hygiene concerns at every stage of the procedure.

As a result, it seems inherently reasonable for the police to always require that an arrestee have some type of footwear, appropriate to the location and weather conditions at the site of the arrest.\textsuperscript{282} Sandals would suffice for an arrest made in a warm cli-


\textsuperscript{278} The arrestee could not elect to go to the police station if he was naked or shoeless at the time of the arrest. Nudity and shoelessness are thus two "bright lines" in the clothing spectrum. Additional constraints include weather conditions, location of arrest, and modicum of clothing worn by the defendant at the time of arrest. \textit{See supra} notes 264-71 and accompanying text.

\textsuperscript{279} 455 U.S. 1 (1982). Cases such as United States v. Anthon, 648 F.2d 669, 674-75 (10th Cir. 1981), \textit{cert. denied}, 454 U.S. 1164 (1982) (arrestee should have been allowed to go to police station wearing only his swimsuit), and United States v. Kinney, 638 F.2d 941, 945 (6th Cir.), \textit{cert. denied}, 452 U.S. 918 (1981) ("March" weather did not justify taking defendant back into his house to obtain more clothing) are consistent with this proposal, while cases such as \textit{Giacalone} and \textit{Di Stefano} would be overruled. \textit{See also} State v. Bruzzese, 463 A.2d 320, 334 (N.J. 1983) ("If defendant, partially clad, had elected to depart from his house with the police, the officers could not have entered his bedroom without a search warrant.").

\textsuperscript{280} Cases between these two extremes lie in the middle of the "clothing spectrum."

\textsuperscript{281} \textit{See supra} notes 149-50 and accompanying text.

\textsuperscript{282} Judge Seymour, however, clearly disagrees with this proposition. In the penultimate sentence of her dissent, she argued that "[t]aking an arrestee in bare feet across a littered yard he has just traversed safely presents no greater exigency than taking an arrestee to the police station in his bathing suit" (the situation upheld in United States v. Anthon, 648 F.2d 669 (10th Cir. 1981), \textit{cert. denied}, 454 U.S. 1164 (1982)). \textit{Butler}, 980 F.2d at 624 (Seymour, J., dissenting). Although I am inclined to side with Judge Seymour on the factual issue regarding the amount of danger Butler
mate, but in a winter context a police officer would be justified in requiring that an arrestee wear more appropriate footwear. The ability for police to make such reasonable, non-technical judgments pursuant to this clothing spectrum is the anchor which removes it from the realm of the theoretical and grounds it in the pragmatic. In the vast majority of "clothing cases" the clothing spectrum can provide a method for calculating a sufficient modicum of protection for the health and safety of the arrestee while correspondingly respecting his or her Fourth Amendment rights.

**Conclusion**

Although the factual and legal analysis performed by the Butler majority is suspect, the ultimate holding of the case seems inherently reasonable. Butler presented the factually-unique combination of a real danger to the arrestee and the lack of opportunity for the arrestee to consent to the police entry. Despite the fact that neither the majority nor the dissent analyzed it as such, this unique combination provides the ideal framework from which a "least intrusive alternative" requirement for future "clothing cases" can be developed.

States should implement a least intrusive alternative framework in their constitutional counterparts to the Fourth Amendment in order to minimize the invasion of privacy that warrantless entry in the "clothing case" context necessarily entails. States should also implement written guidelines which place a high premium on the consent of the arrestee, require police to request a third party to render assistance (if possible), and develop a "clothing spectrum" that is sensitive to the unique clothing and weather factors of each case.

Although it is uncertain whether the Supreme Court would adopt the least intrusive alternative requirement if it were to hear a "clothing case," federal and state courts can and should zealously utilize this framework. In this manner, a judicious balance can be achieved in future "clothing cases" which provides reasonable

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faced because of the condition of his yard (See supra notes 149-50 and accompanying text), I believe that it is reasonable to always require that an arrestee wear shoes before departing from his residence.

283. The subsequent ability to assess these judgments by an objective "reasonableness" standard is another benefit which would accrue from establishing a clothing spectrum.
guidelines for the police while simultaneously respecting an arrestee's Fourth Amendment protections.

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