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Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches

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FOURTH AMENDMENT LESSONS
FROM THE HIGHWAY AND THE SUBWAY:
A PRINCIPLED APPROACH
TO SUSPICIONLESS SEARCHES

*Ricardo J. Bascuas**

ABSTRACT

The threat of future terrorist attacks has sped the proliferation of random, suspicionless searches and seizures, such as those now made of New York City subway riders. Courts assess the legality of such searches with an inherently flawed balancing test developed to assess searches and seizures made without “probable cause.” Although scholars and Justices alike have decried the resort to balancing individual interests against the government’s need to search, no alternative framework has been proposed. This Article proposes a more principled, objective inquiry for determining when suspicionless searches can be made. To eliminate the need for balancing, this Article advances two propositions to remedy fundamental problems pervading Fourth Amendment jurisprudence. The first proposition is that the Amendment’s protection should not vary according to “expectations of privacy” determined by judges. The generally unquestioned premise that the Fourth Amendment protects an ill-defined “right to privacy” should yield to the recognition that the Amendment protects abstract privacy by protecting concrete property. The second proposition is that the general requirement of probable cause for searches and seizures must always be enforced according to the term’s specific meaning. Although probable cause relates only and specifically to criminal conduct, courts often

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use the term loosely in other contexts, inadvertently creating conditions that permit general searches and seizures of the sort the Framers meant to stop. This Article concludes by applying these propositions to advance a principled framework for evaluating the constitutionality of suspicionless searches.

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I. INTRODUCTION: SUBWAY SEARCHES

On any given day, an average of 4.7 million people ride the New York City subway.¹ Their purses, briefcases, and bags have been subject to random police searches since terrorists attacked the London transportation system in 2005.² The spot searches merely deter terrorist attacks; officials acknowledge that there is no way to prevent such attacks short of shutting down the subway.³ In its first year, the program yielded five arrests for minor

1. See *MacWade v. Kelly*, 460 F.3d 260, 264 (2d Cir. 2006).

2. *Id.* at 264-65.

3. *MacWade v. Kelly*, No. 05CIV6921RMBFM, 2005 WL 3338573, at *7 n.12, *11 (S.D.N.Y. Dec. 7, 2005), *aff'd* 460 F.3d 260 (2d Cir. 2006).

charges such as drug possession and disorderly conduct and one civil liberties lawsuit, but few complaints from riders.⁴

Checkpoints are set up daily at the entrances of a few of New York's 468 subway stations. These stations are selected by a secret method designed to be unpredictable to would-be terrorists. Police at the checkpoints have no discretion to select who will be searched. Rather, a supervisor fixes the number of passengers who go by for each one stopped and searched based on the number of officers available and the number of passengers at the station. Large signs are posted giving notice of the checkpoint. Inspections are conducted near the entry point so that those selected do not feel they are singled out or isolated. Passengers called to a checkpoint have the option of leaving the station if they do not wish to be searched. Police are trained to look only into containers large enough to contain explosives. They are not intentionally to look for drugs or read any written or printed materials.⁵

Despite the measures to narrow the searches and the lack of public outcry, the New York Civil Liberties Union sued to enjoin the search program.⁶ It did not dispute that the New York City subway, the largest in the United States, was a prime terrorist target.⁷ Ironically, because current law requires courts to assess the effectiveness of suspicionless searches as a step in determining their constitutionality, the main argument raised by the NYCLU was that the subway searches were not extensive enough to be effective. The NYCLU complained not that the police were too intrusive but that they searched people too infrequently at too few subway stations and allowed commuters the option of leaving without being searched.⁸ In a straightforward application of Supreme Court precedents, both the district court and the Second Circuit approved the subway search program.⁹ These courts reasoned that preventing a terrorist attack on the subway was obviously important to the government and that the searches as conducted intruded minimally on riders' privacy expectations.¹⁰ Both courts also concluded that the program was reasonably effective at deterring an attack.¹¹

4. Tom Hays, *Subway Searches Quietly Continue*, RECORD (N.J.), July 10, 2006, at A4. *But see MacWade*, 460 F.3d at 265 n.1 (noting counsel represented at oral argument that no arrests were made).

5. *MacWade*, 460 F.3d at 265.

6. *MacWade*, 2005 WL 3338573, at *1.

7. *MacWade*, 460 F.3d at 264.

8. *See id.* at 275.

9. *See MacWade*, 460 F.3d 260; *MacWade*, 2005 WL 3338573, at *1.

10. *MacWade*, 460 F.3d at 269-73; *MacWade*, 2005 WL 3338573, at *17.

11. *MacWade*, 460 F.3d at 273-75; *MacWade*, 2005 WL 3338573, at *17-19.

Notwithstanding the lawsuit, the New York City subway searches are by and large, like airport searches even before September 11th, uncontroversial no doubt because the inconvenience is popularly deemed minor in relation to the potential danger.¹² Perhaps the most noteworthy aspect of the litigation is that the NYCLU sued to enjoin such narrowly tailored security measures implemented to protect so obvious a terrorist target. But if the ease with which this particular search program was justified suggests that the legality of suspicionless searches is readily determined, the fact that the case proceeded to a bench trial belies the idea. In fact, such searches pose particularly difficult conceptual problems for Fourth Amendment jurisprudence, which is notorious for its theoretical and pragmatic inconsistencies even when police have a specific reason for searching a particular person.

While the case for random subway searches may be relatively easy to make, the threat of terrorism promises to proliferate suspicionless searches in public spaces—as suggested, for example, by the recent attempts to pat down football fans at stadiums in some cities.¹³ The extreme dread that terrorist acts calculatedly foster incites demand for preventative measures even though such measures may not be effective or may impose societal costs disproportionate to the actual risk of attack.¹⁴ Fourth Amendment jurisprudence presently offers no rational means for determining whether circumstances justify any given mass suspicionless search.

This Article examines some of the fallacies and inconsistencies in Fourth Amendment jurisprudence upon which courts rely in assessing the legality of suspicionless searches and aims to advance a principled framework for deciding the constitutionality of such searches. Part II discusses two fundamental interpretative problems in Fourth Amendment jurisprudence that impede the implementation of that framework. First, although the Framers meant to address only searches made under general warrants and writs of assistance, courts predicate the Fourth Amendment's scope on the Framers' practices as though the Framers intended the Amendment to apply broadly. Second, the Fourth Amendment is widely deemed to protect "privacy," but this right is too poorly defined to function as much of a bulwark against government incursions into the private sphere. Part III

12. See Hays, *supra* note 4, at A4.

13. See Andrew Herrmann, *Bears Fans Get Frisk-Free Pass Tonight*, CHI. SUN-TIMES, Aug. 18, 2006, at 10; Carrie Weimar, *Judge to Bucs: No More Fan Patdowns*, ST. PETERSBURG TIMES (Fla.), July 29, 2006, at A1.

14. See JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 73-75 (2004).

discusses how these two interpretative problems combine to create an inherently weak Fourth Amendment that is difficult to apply to searches and seizures without individualized suspicion. As a result, cases inevitably devolve into a balancing process that pits privacy expectations against government “needs,” yielding unpredictable and illogical results that defy common sense. Part IV describes how the government exploits the inherently weak interpretation of the Fourth Amendment to engage in exactly what the Framers sought to prevent—generalized searches on a massive scale. Part V concludes by advancing two propositions for curing the conditions that lead courts to find general, suspicionless searches constitutional. It then applies these propositions to create a more consistent and workable framework for evaluating the constitutionality of suspicionless searches.

II. TWO INTERPRETIVE PROBLEMS

Scholars and jurists generally agree that the Fourth Amendment should cover all searches and seizures; in the modern world of organized, professional police forces and extensive government regulation of everyday life through criminal and administrative regimes, an ambitious gloss on the Amendment provides a desirable check on official discretion.¹⁵ There is also broad consensus that what the Fourth Amendment guarantees is a “right to privacy” that is nowhere mentioned in its text.¹⁶ These points of interpretive

15. See, e.g., Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1099-1100 (1998); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 377-78 (1974); Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1040; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 591 (1999); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 7 (1994); James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1139-40 (1992). But see David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051 (2004) (attributing incoherence in Fourth Amendment jurisprudence to extending Amendment beyond house searches under general or no warrant; advocating return to “original understanding”).

16. The Amendment provides:

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

U.S. CONST. amend. IV.

harmony are the source of fundamental problems inherent in both of the principal competing Fourth Amendment theories.

For decades, scholars and judges have divided over whether the word “unreasonable” in the Amendment’s text presumptively requires that searches and seizures be supported by probable cause and accompanied by a judicial warrant.¹⁷ The “warrant preference” construction posits that the first clause of the Fourth Amendment, the Warrant Clause, elaborates upon the second, the Reasonableness Clause.¹⁸ Under this reading, a search or seizure is reasonable if it is made pursuant to a warrant supported by probable cause, oath, and a specific description of the place to be searched and items to be seized. Warrants issued by “neutral and detached” judges or magistrates protect people from overzealous police officers whose judgment may be compromised by the heat of the chase.¹⁹ Because many searches cannot be preceded by a warrant, exceptions are made, for example, when so-called “exigent circumstances” or “special needs” present themselves.²⁰ Nonetheless, even these warrantless searches should be supported by probable cause, though there are exceptions to this requirement as well.²¹ For example, a search without any suspicion whatsoever is allowed when the person whose belongings are to be searched consents.²²

Adherents of the “generalized reasonableness” theory, on the other hand, insist that “[t]he touchstone of the Fourth Amendment is reasonableness.”²³ They argue that the plain text reveals no grammatical or logical relationship

17. This division is not completely sharp, and there are other ways to group Fourth Amendment analyses. Professor Clancy, for example, conceptualizes no fewer than five “models” the Supreme Court has used to resolve Fourth Amendment questions. Clancy, *supra* note 15, at 978. Some searches do not come within any of his five groupings. *Id.* at 1015-16.

18. Maclin, *supra* note 15, at 20-21.

19. See *Illinois v. Rodriguez*, 497 U.S. 177, 191-92 (1990) (Marshall, J., dissenting); *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting), *abrogated by Chimel*, 395 U.S. 752; *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

20. See, e.g., *Brigham City, Utah v. Stuart*, 126 S. Ct. 1943 (2006) (holding that assisting injured people or preventing serious injury justified warrantless entry into house); *Warden v. Hayden*, 387 U.S. 294 (1967) (holding that hot pursuit of armed robber justified warrantless entry and search of house).

21. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 341-43 (1985); *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968).

22. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

23. *Samson v. California*, 126 S. Ct. 2193, 2201 n.4 (2006); accord *Stuart*, 126 S. Ct. at 1947; *United States v. Knights*, 534 U.S. 112, 118-19 (2001); Amar, *supra* note 15, at 1098-99.

between the Warrant Clause and the Reasonableness Clause.²⁴ The clauses, rather, are independent of each other. Warrants are an important consideration, but the Amendment requires only that searches and seizures be reasonable in some colloquial or pragmatic sense, leaving any precision of meaning to case-by-case elaboration.²⁵

The extended debate over which interpretation is superior has distracted from two fundamental problems common to both: the assumptions that the Amendment was intended to cover all government searches and seizures and that it protects merely an abstract right to privacy. These two invalid assumptions are what make a consistent and rational approach to analyzing suspicionless searches impossible under current law. Failing to grapple with these problems, the Supreme Court's jurisprudence "has vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard."²⁶ Confronting these problems exposes the shortcomings each theory has in assessing suspicionless searches and makes a more principled approach possible.

A. *The Fourth Amendment's Original Scope*

Although the Fourth Amendment is now understood to be implicated in an enormous gamut of encounters between government employees and individuals, scholars generally agree that the Framers were concerned only with generalized or suspicionless searches and seizures.²⁷ There is universal agreement that the Framers drafted the Fourth Amendment in response to the English practice of searching homes under general warrants to uncover seditious libels. These warrants did not specify what was to be searched and seized. The similar use of writs of assistance to effect dragnet customs searches also likely motivated the Framers, although there is some dispute about that.²⁸ Nonetheless, two historic decisions condemning searches under general warrants—Lord Camden's celebrated opinion in *Entick v.*

24. See TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 43-44 (1969).

25. See, e.g., *Chimel v. California*, 395 U.S. 752, 772-73 (1969) (White, J., dissenting); *Camara v. Mun. Court*, 387 U.S. 523, 535-37 (1967); *United States v. Rabinowitz*, 339 U.S. 56, 63-66 (1950), *abrogated by Chimel*, 395 U.S. 752.

26. *Groh v. Ramirez*, 540 U.S. 551, 572 (2004) (Thomas, J., dissenting); see also *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

27. See *United States v. Chadwick*, 433 U.S. 1, 8-9 (1977).

28. See Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 75-77 (1996); Maclin, *supra* note 15, at 13-16.

*Carrington*²⁹ and his earlier decision in *Wilkes v. Wood*³⁰—as well as James Otis' 1761 arguments against writs of assistance are repeatedly cited as having inspired the Framers.³¹

Although "unreasonable searches and seizures" in all likelihood referred to nothing but the general searches that animated the Framers, advocates of both theories feel a need to claim that the Framers intended this phrase to cover all searches and seizures. Because the Framers were not in fact concerned with all searches and seizures, they did not understand "unreasonable" to mean either "meeting the requirements of the Warrant Clause" or "on balance, fair in the circumstances." Both of these constructions are twentieth-century responses to the ever-expanding interest and ability of the federal and state governments to undertake searches and seizures. Only by ignoring the Framers' limited purpose can proponents of each theory claim that the other is less faithful to the Framers' intended meaning and therefore less legitimate.³²

The late Professor Telford Taylor famously argued that the Fourth Amendment did not require that searches be preceded by a judicial warrant.³³ He claimed that the "warrant preference" theory had inflated the search warrant "out of all proportion to its real importance in practical terms."³⁴ To support this point, he discussed the history of searches incident to arrest and showed that, though warrantless, they were not controversial at the time of the framing.³⁵ Professor Taylor concluded that the Framers' "prime purpose was to prohibit the oppressive use of warrants, and they were not at all concerned about searches without warrants."³⁶ Although his work is widely relied upon by those who advocate "generalized reasonableness,"³⁷ Professor Taylor himself did not endorse the modern version of this theory.³⁸

29. (1765) 19 How. St. Tri. 1029, reprinted in (1765) 95 Eng. Rep. 807 (K.B.) (partial reprint).

30. (1763) 98 Eng. Rep. 489 (K.B.).

31. See TAYLOR, *supra* note 24, at 29-38; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772-73 (1994); Amsterdam, *supra* note 15, at 411-12; Clancy, *supra* note 15, at 982-87; Davies, *supra* note 15, at 603-07.

32. See Amar, *supra* note 28, at 55-56; Maclin, *supra* note 15, at 8.

33. TAYLOR, *supra* note 24, at 21.

34. *Id.*

35. *Id.* at 27-29.

36. *Id.* at 43; see also Amsterdam, *supra* note 15, at 367, 398-99.

37. See, e.g., Amar, *supra* note 31, at 764-65, 773-74.

38. Professor Taylor suggested that whether a search was "reasonable" depended upon whether it was attended by the safeguards provided by the common law. TAYLOR, *supra* note 24, at 97-100.

Professor Akhil Reed Amar, the “generalized reasonableness” theory’s chief academic proponent, calls Professor Taylor’s study “brilliant” for noting that the Fourth Amendment does not require warrants for all searches and seizures.³⁹ But he ignores Professor Taylor’s conclusion that the Framers did not address warrantless searches at all. Instead, Professor Amar leaps to the conclusion that searches and seizures are constitutional if they are “reasonable” in some common-sense way.⁴⁰ He and other proponents of “generalized reasonableness,” relying on the fact that the Fourth Amendment was inspired by transgressions remedied by tort actions, analogize, if not equate, the meaning of “unreasonable” in the Fourth Amendment to the tort concept of reasonable care. It makes sense to Professor Amar that “tort law concepts of reasonableness may help give meaning to Fourth Amendment reasonableness.”⁴¹ He envisions that judges should “sensibly fashion a reasonableness framework” based on common sense, history, tradition, morality, law, and social norms.⁴² Juries, through civil damages actions brought by aggrieved targets of searches, should play a central role in deciding what “unreasonable” means. “‘Reasonableness’ is largely a matter of common sense, and the jury represents the common sense of the common people.”⁴³

Likewise, in an essay on judging, Justice Scalia asks, “Why should the question whether a person exercised reasonable care be a question of fact, but the question whether a search or seizure was reasonable be a question of law?”⁴⁴ Justice Scalia confesses having no answer to the question he raises.⁴⁵ He concludes that there is no more reason to look for consistency in the scope of Fourth Amendment rights than in, say, the standards of reasonable care in medical malpractice cases: “[J]ust as we tolerate a fair degree of diversity in what juries determine to be negligence, I think we can tolerate a fair degree of diversity in what courts determine to be reasonable seizures.”⁴⁶

This tort analogy, however, incorrectly assumes that the Framers meant to address all searches and seizures, and the historical indications are to the contrary. There are good reasons why it is desirable to have juries decide

39. Amar, *supra* note 31, at 764, 773-74.

40. See Amar, *supra* note 15, at 1110; Amar, *supra* note 31, at 771.

41. Amar, *supra* note 15, at 1119.

42. *Id.* at 1112-13.

43. Amar, *supra* note 31, at 818.

44. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1181 (1989).

45. *Id.* at 1182.

46. *Id.* at 1186.

questions of fault between private parties on the basis of common sense that do not apply to having either juries or judges decide whether a given government search is constitutional on that basis. Chief among these is that judges' sense is not so common. Also, judicial determinations of reasonableness tend to be politically charged because "generalized reasonableness" invites each judge to favor his own notions of desirable public policy. In short, judges cannot be trusted to articulate rights on the basis of anything so unprincipled as "generalized reasonableness" for basically the same reason that Professor Amar says the colonists did not trust judges—they are privileged government officials.⁴⁷ As for juries, while their regionally divergent views on the prevailing standard of care for negligence purposes may be no cause for worry, it hardly makes sense that the contours of the Fourth Amendment should vary with the prevailing political leanings of a given state, county, or city. To achieve anything approaching principled consistency, what is reasonable should no more be left to the unguided gut-reactions of judges or to the unreviewable instincts of jurors than questions of whether "probable cause" existed or "due process" was afforded.

Ultimately, Professor Amar's defense of "generalized reasonableness" proceeds not from an understanding of what "reasonableness" meant to the Framers but from the question, "What should 'reasonableness' mean" now?⁴⁸ Thus, he says that whether a search is reasonable should depend on the intrusiveness of the search, the identity of the target, the availability of other means of obtaining the items sought, and the gravity of the offense.⁴⁹ It should also depend on whether the search implicates other constitutional values, as the search of a newspaper office might have First Amendment implications or a search for a diary might have Fifth Amendment implications.⁵⁰ Reasonable government intrusions, he states, are proportionate.⁵¹ They are respectful of privacy and secrecy as well as of bodily integrity and dignity.⁵² They are race-conscious.⁵³ They minimize officer discretion and are responsive to popular sentiment.⁵⁴

47. See Amar, *supra* note 31, at 772-73.

48. Amar, *supra* note 15, at 1118.

49. *Id.* at 1120-25.

50. See Amar, *supra* note 31, at 804-07.

51. Amar, *supra* note 15, at 1098.

52. *Id.*

53. *Id.*

54. *Id.* at 1098-99.

"Reasonableness" in fact has no fixed meaning. It is just a collection of policy preferences that vary from person to person and judge to judge.⁵⁵ For example, Professor Amar claims that evaluating the reasonableness of a search entails considering whether police officers are motivated by racism.⁵⁶ He fails to allow that others might plausibly think that a search is reasonable only if it incorporates racial profiling.⁵⁷ With New York City's subway search program only two weeks old, New York Assemblyman Dov Hikind complained that random searches were a waste of time.⁵⁸ He advocated that the police should target Arabs for searches: "It's all very nice to be politically correct here, but we're talking about terrorism."⁵⁹ In June 2006, Assemblyman Hikind introduced legislation, pending as of this writing, that would authorize police to use racial profiling.⁶⁰ A unanimous Supreme Court took a third view, holding that whether police are motivated by race to search someone or seize his possessions does not implicate the Fourth Amendment at all.⁶¹

While the "generalized reasonableness" theory pretends that the Framers established a loose standard for all searches and seizures, the "warrant preference" theory applies restrictive standards intended for a narrow category of searches to all searches and seizures. Professor Tracey Maclin, in his response to Professor Amar, acknowledged that the "warrant preference" theory is based neither on the text of the Amendment nor on the Framers'

55. See Amsterdam, *supra* note 15, at 400 ("[T]he values one finds in the history of the Bill of Rights are ineluctably one's own . . .") (citing SAMUEL KRISLOV, *THE SUPREME COURT AND POLITICAL FREEDOM* 55-56 (1968)).

56. See Amar, *supra* note 15, at 1123-24.

57. See generally Tracey Maclin, "Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror, 73 MISS. L.J. 471 (2003) (arguing against post-September 11 proposals to use racial profiling to search for terrorists). Because the "generalized reasonableness" approach expressly posits a common-sense or colloquial understanding of what is reasonable, it cannot be convincingly argued that "reasonableness" must be interpreted in light of other constitutional values to forbid targeting a given racial or ethnic group.

58. See Sara Kugler, *Race Profiling Urged in Subway Searches*, TIMES UNION (Albany, N.Y.), Aug. 3, 2005, at B4.

59. *Id.*

60. Dan Kadison, *Pols Back "Terror" Profiling*, N.Y. POST, June 9, 2006, at 12.

61. *Whren v. United States*, 517 U.S. 806, 813 (1996). Justice Scalia's opinion for the Court rejected a challenge to a car search based in part on the allegation that officers stopped the driver because of his race: "[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* Thus, the Court implicitly rejected the idea that "reasonableness" must be interpreted in light of the values undergirding the Equal Protection Clause.

understanding of it.⁶² He argued that the theory's aim is to discover the "broad themes" that animated the Framers and apply them to modern law enforcement innovations.⁶³ However, the theory's main precepts—the dual requirements of a warrant and probable cause—have no application to suspicionless searches of random people, like those in the New York subway, or in fact to most searches. As a result, the theory offers no insight into what the Fourth Amendment should mean in the majority of situations in which it is said to be implicated. Professor Maclin offered no answer to this shortcoming, which is much more serious today than at the time of his celebrated article: "Of course society will oppose a strict probable cause rule if it prevents metal detectors from being used at airports. . . . These examples tug at our emotions, but they are hardly the stuff of pressing or 'cutting edge' Fourth Amendment problems."⁶⁴ This rigidity is just as frustrating as the meaninglessness of "reasonableness." Although a strict probable cause requirement offers a desirable brake on government intrusions, a workable Fourth Amendment theory of broad application must have some principled way to account for searches that must be made without probable cause, like those at airports.

At bottom, it makes no more sense to say that the Framers required all searches and seizures to be reasonable than to say that they required all searches and seizures to be preceded by a warrant supported by probable cause. While the fixed criteria of a warrant and probable cause are useful for preventing police overreaching in many instances, the "warrant preference" theory simply offers no rationale for permitting highly desirable searches that must be made without a warrant and even without probable cause. Conversely, while "generalized reasonableness" more easily applies to a broad array of searches and seizures, it lacks any real threshold criteria and thus allows suspicionless searches to proliferate too easily.

Neither of the competing definitions of "unreasonable" is either historically correct or presently helpful in resolving Fourth Amendment issues in a consistently principled manner. Progress can come only from re-examining what the Framers meant by "unreasonable" and how that might be applied today. Unfortunately, in all likelihood the Framers used "unreasonable" as nothing more than a convenient label for the general searches that angered the colonists. In his seminal critique of "generalized

62. Maclin, *supra* note 15, at 7-8.

63. *Id.* at 8-9.

64. *Id.* at 27.

reasonableness,” Professor Davies concluded as much.⁶⁵ Misconstruing Professor Taylor as having posited “that the Framers broadly approved of warrantless intrusions,”⁶⁶ Professor Davies countered that the Framers “did not fear warrantless intrusions . . . [T]hey thought the important issue, and the only potential threat to the right to be secure, was whether *general* warrants could be authorized by *legislation*.”⁶⁷ This was, of course, what Professor Taylor had said in the first place. Professor Taylor never claimed that the Framers approved, broadly or otherwise, of warrantless searches. He said only that the Framers found warrantless searches *incident to arrest* non-controversial.⁶⁸

Thus, Professors Taylor and Davies agreed that the Framers intended to leave most searches to be regulated by statutory or common law. They further agreed that the Framers almost certainly intended the phrase “unreasonable searches and seizures” to refer specifically to searches pursuant to general warrants. Both relied on the Massachusetts Constitution of 1780 and other state constitutions that were precursors of the federal one to support this point.⁶⁹ Professor Davies posited that the Reasonableness Clause was essentially rhetorical, arguing that “unreasonable” was nothing more than “a pejorative label for the inherent illegality of any searches or seizures that might be made under general warrants.”⁷⁰ Engaged as he was by more pragmatic concerns, Professor Taylor did not bother to take a position on the original meaning of the Reasonableness Clause: “Nothing in the legislative or other history of the fourth amendment sheds much light on the purpose of the first clause. Quite possibly it was to cover shortcomings in warrants other than those specified in the second clause; quite possibly it was

65. See Davies, *supra* note 15, at 698-700, 723-24.

66. *Id.* at 576.

67. *Id.* at 668.

68. The context of Professor Taylor’s entire discussion leaves no doubt that the only “warrantless searches” he discussed were those incident to arrest. See TAYLOR, *supra* note 24, at 29 (“Neither in the reported cases nor the legal literature is there any indication that search of the person of an arrestee, or the premises in which he was taken, was ever challenged in England until the end of the nineteenth century. When the power was then belatedly contested, . . . the English courts gave the point short shrift.”); *id.* at 39 (“[N]one of the parties was at all concerned about warrantless searches incident to arrest.”); *id.* (“There is no evidence that suggests that the framers of the search provisions of the federal and early state constitutions had in mind warrantless searches incident to arrest.”); *id.* at 45 (“There is no indication or suggestion . . . that the fourth amendment . . . affected the power of search incident to arrest.”).

69. See TAYLOR, *supra* note 24, at 41-43; Davies, *supra* note 15, at 668-93; see also Clancy, *supra* note 15, at 987-90.

70. Davies, *supra* note 15, at 551.

to cover other unforeseeable contingencies.”⁷¹ However, he himself understood that an “unreasonable search” was a general one, i.e., one without a particularly described, specific target.⁷²

Acknowledging that the Framers did not intend to address all searches and seizures does not imply that the Fourth Amendment’s scope should be narrowed accordingly. Rather, it implies only that any theory that posits broad reach for the Fourth Amendment should be tacitly cognizant of the Amendment’s original narrow scope and should give less weight to the Framers’ practices than the Supreme Court has. As the Court once acknowledged in an opinion that echoed Professor Taylor’s writing, the best that can be done is to identify the values the Framers sought to protect and interpret the Amendment accordingly, regardless of what the Framers specifically intended the Amendment to accomplish.⁷³

B. The Fourth Amendment’s Core Value

Floundering between the “warrant preference” and “generalized reasonableness” theories to bring a broad range of searches and seizures within the Fourth Amendment’s reach, the Supreme Court vaunts the “right to privacy” as the Fourth Amendment’s core value. Early Court decisions confined the Fourth Amendment’s protections to property interests.⁷⁴ A shift to privacy was intended to broaden its scope beyond tangible items. While the change may have extended the Amendment’s reach, the price of breadth was potency. “Privacy” is broad enough to cover an expansive array of searches and seizures, but it proves too insubstantial to withstand

71. TAYLOR, *supra* note 24, at 43; *see also* Clancy, *supra* note 15, at 990 (“[N]othing in the drafting or ratification process sheds light on the framers’ use of the word ‘unreasonable’ in the Amendment’s first clause.”).

72. TAYLOR, *supra* note 24, at 67. Professor Davies is simply wrong when he asserts that Professor “Taylor used the terms ‘reasonable’ and ‘unreasonable’ as they are used in modern doctrine.” Davies, *supra* note 15, at 592. The passage on which Davies relies for that says only that the phrasing of the Fourth Amendment obscured the Framers’ meaning, not that the meaning of “unreasonable” was up for grabs. *See* TAYLOR, *supra* note 24, at 43.

73. *See* United States v. Chadwick, 433 U.S. 1, 9 (1977) (“What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.”); TAYLOR, *supra* note 24, at 15 (“[S]uch [a historical] inquiry may yield the clearest view of the values which a particular provision was intended to protect. To achieve its basic purposes, however, the language ‘must be capable of wider application than the mischief [which gave] it birth.’” (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910))).

74. *See infra* note 81 and accompanying text.

government claims of the need for evermore intrusive surveillance and investigative tactics.

1. The Shift from Property to Privacy

Justice Brandeis' impassioned dissent in *Olmstead v. United States* memorably wedded the Fourth Amendment to the notion of privacy.⁷⁵ The defendants in that case were convicted of running a massive bootlegging operation in Seattle during Prohibition.⁷⁶ The evidence against them was obtained by tapping their phone calls.⁷⁷ Because the wiretap at issue did not involve a trespass, the Court held that there was no search or seizure, much less an unreasonable one.⁷⁸ At the time, the Fourth Amendment was understood to protect only tangible property. Justice Brandeis faulted the Court for applying the letter of the law while ignoring its spirit in the telecommunications age.⁷⁹ His emphasis on privacy was meant to bring searches and seizures of even intangible and ephemeral conversations within the Amendment's ambit.⁸⁰

The Court's earlier Fourth Amendment decisions, beginning with *Boyd v. United States*,⁸¹ had closely tied the Amendment's protection to property

75. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[The Framers] conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.").

76. *Id.* at 455 (majority opinion).

77. *Id.* at 456-57.

78. *Id.* at 455-57.

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant, unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

Id. at 466.

79. *Id.* at 473 (Brandeis, J., dissenting) ("When the Fourth and Fifth Amendments were adopted, 'the form that evil had theretofore taken' had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. . . . But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the government." (citation omitted)); *see also id.* at 469 (Holmes, J., dissenting) ("[C]ourts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.").

80. *See id.* at 478-79 (Brandeis, J., dissenting).

81. 116 U.S. 616 (1886).

rights.⁸² *Boyd* was a forfeiture action in which the claimants objected to an order of the trial court requiring them to produce certain invoices to be used as evidence against them.⁸³ Extensively quoting from *Entick v. Carrington*,⁸⁴ the Court held that the search violated the Fourth and Fifth Amendments because the order to produce the papers invaded the "indefeasible right of personal security, personal liberty, and private property."⁸⁵ The Court's reliance on *Entick*, which was famously undergirded by a great solicitude for property rights, fostered the conception that the Fourth Amendment's protections were delineated by property interests.

Entick was a trespass action against messengers of the Crown who ransacked Entick's house in a search for seditious writings.⁸⁶ Lord Camden's celebrated opinion upheld the jury's verdict for the plaintiff, stating: "The great end for which men entered into society was to secure their property. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass."⁸⁷ Relying on this reasoning, *Boyd* held that the government could seize only forfeitable property, i.e., items of contraband or the fruits and instrumentalities of crime, and not items of mere evidentiary value.⁸⁸

By adopting this constricted view of the government's power to search and seize evidence of crimes, *Boyd* needlessly limited the Fourth Amendment's reach to tangible property that could be trespassed. In fact, *Boyd* probably read into *Entick* more than was actually there. As Professor Taylor has pointed out, *Entick* probably never stood for the idea that the Crown could seize only property in which it had a claim of superior interest.⁸⁹ Professor Taylor noted that "one looks in vain for any suggestion of the possessory theory in pre-constitutional times or, indeed, at any time prior to the *Boyd* case, in which it was first enunciated."⁹⁰ *Boyd*'s unfortunate restricting of the Fourth Amendment's scope to tangible property set the

82. See, e.g., *Carroll v. United States*, 267 U.S. 132, 143-44 (1925) (noting that Prohibition law extinguished property rights in liquor that was seized).

83. *Boyd*, 116 U.S. at 617-18.

84. (1765) 19 How. St. Tri. 1029, reprinted in (1765) 95 Eng. Rep. 807 (K.B.) (partial reprint).

85. *Boyd*, 116 U.S. at 630.

86. *Carrington*, 19 How. St. Tri. at 1029, 95 Eng. Rep. at 807-08.

87. 19 How. St. Tri. at 1066 (quotation not reprinted in 95 Eng. Rep. 807).

88. *Boyd*, 116 U.S. at 630; see also *United States v. Lefkowitz*, 285 U.S. 452, 463-64 (1932); *Gouled v. United States*, 255 U.S. 298, 306 (1921).

89. TAYLOR, *supra* note 24, at 62.

90. *Id.*

stage for a protracted and contrived duel between privacy and property as competing rather than congruent Fourth Amendment values.

The pressure to scrap *Boyd*'s untenable proscription on the government's ability to seize mere evidence of a crime led to the collapse of the Fourth Amendment's connection to property and the elevation of abstract privacy as the Amendment's core concern. In *Warden, Maryland Penitentiary v. Hayden*, the Court held that the government could constitutionally seize items of purely evidentiary value, such as clothing described by witnesses to an armed robbery.⁹¹ Justice Brennan's opinion for the Court emphasized "that the principal object of the Fourth Amendment is the protection of privacy rather than property."⁹² The decision declared *Boyd*'s substantive limitation on searches and seizures to the fruits and instrumentalities of crime and contraband to be a legal fiction.⁹³ The Fourth Amendment's protections were thereafter to be found exclusively in the procedural requirements of the Warrant Clause rather than the substantive provisions of property law.⁹⁴

Later that same term, the Fourth Amendment's concern with privacy, which had gradually risen in prominence in Court opinions since *Olmstead*,⁹⁵ achieved preeminence in Justice Harlan's concurrence in *Katz v. United States*.⁹⁶ *Katz* gave effect to Justice Brandeis' more expansive view of the Fourth Amendment by holding that the government's tap of a telephone booth implicated the Amendment though there was no trespass.⁹⁷ The *Katz* majority, like Justice Brandeis, believed that the Fourth Amendment's reach had to evolve with the times and that its scope should be bounded only by Americans' accepted expectations of privacy (or in any event judges'

91. 387 U.S. 294, 296-97 (1967).

92. *Id.* at 304.

93. *See id.* at 302; *see also id.* at 306-07, 309-10.

94. *See id.* at 306, 308; *see also* Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 35-36 (2005).

95. *See, e.g.,* *Berger v. New York*, 388 U.S. 41, 53 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." (quoting *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967))); *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) ("The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy.").

96. 389 U.S. 347 (1967).

97. *Id.* at 351.

perceptions of such expectations).⁹⁸ *Katz* expressly overruled *Olmstead* and entrenched the right to privacy as the Amendment's chief concern.⁹⁹ Although the opinion asserted that the Amendment's protections "go further" than individual privacy "and often have nothing to do with privacy at all,"¹⁰⁰ the two-part test adopted from Justice Harlan's concurrence dealt only with violations of privacy.¹⁰¹ That test is still used to adjudicate violations of the Amendment.¹⁰² Since *Katz*, it has been a foregone conclusion in case after case that the Fourth Amendment safeguards our privacy.¹⁰³

Toward the end of the twentieth century, privacy had so completely eclipsed property as the Fourth Amendment's concern that the Seventh Circuit held that a seizure of property unaccompanied by a search did not implicate the Amendment at all.¹⁰⁴ Police officers helped a landlord tow a trailer home out of a trailer park over its owners' objection.¹⁰⁵ The landlord had commenced eviction proceedings against the trailer-home owners but had not obtained a court order yet.¹⁰⁶ The Seventh Circuit held that, although police seized their property, the owners had no Fourth Amendment claim because their privacy was not invaded.¹⁰⁷ Only had the trailer home been searched would the Fourth Amendment have come into play.¹⁰⁸ The Supreme Court reversed, holding that the Fourth Amendment protects not only privacy and liberty, but property rights as well.¹⁰⁹ In subsequent cases, the Court has

98. *Id.* at 352; see generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

99. *Katz v. United States*, 389 U.S. 347, 353 (1967).

100. *Id.* at 350.

101. *Id.* at 361 (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

102. See, e.g., *Georgia v. Randolph*, 126 S. Ct. 1515, 1532 (2006) (Roberts, C.J., dissenting); *Kyllo v. United States*, 533 U.S. 27, 33 (2001).

103. See, e.g., *Horton v. California*, 496 U.S. 128, 141-42 (1990); *Payton v. New York*, 445 U.S. 573, 589 (1980); *Michigan v. Tyler*, 436 U.S. 499, 504-05 (1978); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 96 (1980) (stating that the "standard line is" that Fourth Amendment protects privacy).

104. *Soldal v. County of Cook*, 942 F.2d 1073, 1076 (7th Cir. 1991), *rev'd*, 506 U.S. 56 (1992).

105. *Id.* at 1074.

106. *Id.*

107. *Id.* at 1077.

108. See *id.*

109. *Soldal v. Cook County*, 506 U.S. 56, 62 (1992).

nonetheless continued to delineate the Fourth Amendment's protection with exclusive reference to privacy expectations.¹¹⁰

2. The Hierarchy of Privacy Expectations

Supplanting the comparatively concrete idea of property with the ill-defined and manipulable notion of privacy has left the Fourth Amendment's protection contingent upon whether judges deem an expectation of privacy "reasonable." The shift to privacy charged judges with deciding where privacy exists—and where it does not. Courts could and did decide that some things are inherently more private than others, resulting in the creation of a strange hierarchy of privacy expectations. As a result, Fourth Amendment rights now ebb and flow with judges' estimations of whether privacy expectations in a given possession or circumstance are "heightened" or "diminished." Countless contingencies, including the place to be searched, the circumstances attending the search, and the type of search conducted, contribute to the privacy-expectation calculus. Although it often produces nonsensical outcomes, the hierarchy of privacy expectations is generally unquestioned as a necessary component of search and seizure law.

Pegging rights to judges' notions about when it is reasonable for people to expect privacy requires judges to make assumptions about daily life—an exercise well beyond juridical expertise that is inherently arbitrary and often absurd. *Katz* itself provides a paradigmatic illustration of the problem. *Katz* held that the government could not tap a telephone booth without a warrant because the user had a justifiable privacy expectation in the content of his call.¹¹¹ This apparent victory for privacy and for individual rights in general was built on this assumption about modern daily life:

One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.¹¹²

However true this may ring, it was not a universal belief, at least in the 1960s. Shortly before the *Katz* decision, Professor Taylor had conclusively

110. See, e.g., *Georgia v. Randolph*, 126 S. Ct. 1515, 1521 (2006); *United States v. Flores-Montano*, 541 U.S. 149, 154 (2004).

111. *Katz v. United States*, 389 U.S. 347, 353 (1967).

112. *Id.* at 352.

stated that people did not generally expect that their telephone conversations were private: "By and large, the public does not regard the telephone as being as private a medium of communication as the mails."¹¹³ The privacy one may expect in today's cellular phone calls or email messages is no more easily measured.¹¹⁴ This suggests that, from the start, the expectation-of-privacy inquiry was inherently arbitrary by virtue of its being premised on necessarily speculative assumptions passed off as common sense.

Not only does the need for such assumptions render the Fourth Amendment inconsistent in its application, it also makes it extraordinarily difficult for even police and lawyers to predict whether a contemplated intrusion will run afoul of the Constitution. The multidimensional pyramid of privacy protections is not easily discerned because it varies with place, status, and circumstance. There is broad consensus that the privacy enjoyed in one's own home is at the pinnacle.¹¹⁵ This special or heightened protection for houses is usually ascribed to the solicitude the common law (and thus the Framers) had for the sanctity of the home or to the fact that the Framers specifically listed "houses" in the Amendment's text.¹¹⁶ Beyond that, there is little principled guidance. According to the Supreme Court's holdings, people expect less privacy in their offices than in their homes but a government employer may not necessarily search government offices.¹¹⁷ Commercial property in general is less private than residential space.¹¹⁸ Prisoners are not entitled to expect any privacy.¹¹⁹ Probationers may have some privacy,¹²⁰ but parolees can be required to relinquish theirs completely as a condition of release.¹²¹ Public school students enjoy more privacy than

113. TAYLOR, *supra* note 24, at 77.

114. Indeed, anyone's cellular phone can be used by the police as a tracking device. Matt Richtel, *Live Tracking of Mobile Phones Prompts Court Fights on Privacy*, N.Y. TIMES, Dec. 10, 2005, at A1.

115. See *Kyllo v. United States*, 533 U.S. 27, 37-38 (2001); *Dow Chem. Co. v. United States*, 476 U.S. 227, 237 n.4 (1986); *United States v. Karo*, 468 U.S. 705, 714-15 (1984); *Welsh v. Wisconsin*, 466 U.S. 740, 748-49 (1984); *Payton v. New York*, 445 U.S. 573, 590 (1980); *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313 (1972).

116. See, e.g., *Kyllo*, 533 U.S. at 33 (noting house is "explicitly" protected by Fourth Amendment); Amar, *supra* note 28, at 69.

117. See, e.g., *O'Connor v. Ortega*, 480 U.S. 709, 717-18 (1987).

118. *New York v. Burger*, 482 U.S. 691, 700 (1987); see also *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978).

119. *Hudson v. Palmer*, 468 U.S. 517, 530 (1984).

120. *United States v. Knights*, 534 U.S. 112, 119 (2001).

121. *Samson v. California*, 126 S. Ct. 2193, 2196 (2006).

prisoners¹²² but not so much that they are not subject to random, suspicionless drug tests.¹²³ Purses, backpacks, and briefcases retain their privacy when taken to a government office¹²⁴ but lose some when taken to a public school.¹²⁵ Putting such items in a car dramatically reduces the degree of privacy the law recognizes.¹²⁶

The vagaries of privacy expectations are rooted in explanations that would make sense only to someone schooled as a lawyer. The law regards cars, for example, as notoriously not private. When the Supreme Court considered the legality of a warrantless Prohibition-era search of an automobile in *Carroll v. United States*,¹²⁷ the decision turned on the fact that the First Congress, which included some Framers, passed statutes authorizing warrantless customs searches of ships.¹²⁸ Chief Justice Taft's opinion for the Court proceeded from the notion that "[t]he Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted."¹²⁹ No warrant was necessary to search a car because the Framers distinguished "as to the necessity for a search warrant between goods subject to forfeiture" in a house or building and those in a "movable vessel."¹³⁰

That the Framers may have required warrants to search buildings but not ships does not mean that they distinguished ships because of their mobility. That is hardly the only difference between a house and a ship. More fundamentally, the Framers would most likely not have thought the Fourth Amendment implicated by such statutes. They most likely intended to leave the decision of when to require warrants to Congress. The fallacy that any type of search authorized by the Framers or the common law must be constitutional is premised on the baseless assumption that the Fourth

122. *New Jersey v. T.L.O.*, 469 U.S. 325, 338-39 (1985) ("We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment."); *see also* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-57 (1995).

123. *Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 830 (2002).

124. *O'Connor v. Ortega*, 480 U.S. 709, 716 (1987).

125. *T.L.O.*, 469 U.S. at 337-38.

126. *California v. Acevedo*, 500 U.S. 565, 579-80 (1991); *see also id.* at 581 (Scalia, J., concurring); *id.* at 598 (Stevens, J., dissenting).

127. 267 U.S. 132, 143-44 (1925).

128. *Id.* at 150-51.

129. *Id.* at 149.

130. *Id.* at 151.

Amendment was intended to have the broad application it has in the modern era.¹³¹

Be that as it may, the “automobile exception” to the warrant requirement endures on the same footing it had in the time of the Tin Lizzie.¹³² The Supreme Court exacerbates the illogic of relying on the Framers’ practices when the Justices resort to their own not-so-common sense to place the automobile within the hierarchy of privacy expectations. Demonstrating their alienation from ordinary life, several Justices have concluded that “[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects.”¹³³ Worse, even when the vehicle can or does serve as a residence, the “automobile exception” applies because only three of nine Justices believed that “the expectations of privacy within it are not unlike the expectations one has in a fixed dwelling.”¹³⁴ The other six thought that the “pervasive regulation of vehicles capable of traveling on the public highways” reduced the privacy one is entitled to expect in a mobile home.¹³⁵

The Court reinforces the automobile’s low place on the hierarchy of privacy expectations by relying on the Framers’ practices. Citing case law to support the absurd idea that people do not keep personal effects in their cars, the Court in *Wyoming v. Houghton* approved the search of a purse found in a car whose male driver confessed to using illegal drugs.¹³⁶ Though a woman riding in the car claimed the purse before the search, the Court held that, because the officer had probable cause to believe there were drugs in the car, he could search the purse.¹³⁷ Reviving *Carroll*’s approach, Justice Scalia’s opinion for the Court said the first step was to determine “whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”¹³⁸ Relying on the same framing-era statutes authorizing ship searches as Chief Justice Taft, the Court decided that the Framers would have approved of searching an automobile passenger’s purse

131. This idea shows up as far back as *Boyd v. United States*. See 116 U.S. 616, 623 (1886).

132. See *Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999); *California v. Acevedo*, 500 U.S. 565, 569 (1991).

133. *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion); accord *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999).

134. *California v. Carney*, 471 U.S. 386, 402 (1985) (Stevens, J., dissenting). *Contra id.* at 393-94.

135. *Id.* at 392.

136. *Houghton*, 526 U.S. at 307.

137. *Id.* at 301, 303.

138. *Id.* at 299.

for drugs.¹³⁹ Perhaps not fully convinced by its own reasoning, the majority alternatively held that the passenger's "considerably diminished" privacy expectation in the automobile together with the government's pressing need to search automobiles in general rendered the search constitutional.¹⁴⁰

If it is constitutional to search the purse of a car passenger for drugs, it is certainly *not* because the Framers thought it was okay to search ships for uncustomed goods. This Framers fetish overlooks not just that the Amendment originally had only a limited purpose but the obvious fact that we live very differently than the Framers did. Cars are not like eighteenth-century sloops in any way that matters.¹⁴¹ Some people, such as traveling salesmen and doctors who make house calls, work out of their cars.¹⁴² As the phrase suggests, some people live in mobile homes. And people commonly *do* keep all manner of personal effects—everything from condoms to laptop computers loaded with personal and business information—in their cars. That the Court buttresses its contrary assertion with citation to case law does nothing to mitigate its wild implausibility; unsupported assumptions about daily life do not achieve credence through repeated iteration in Supreme Court opinions.¹⁴³

Likewise, the insidious idea that government regulation of cars reduces the privacy that their owners can expect in them suggests that the government can indirectly constrict the Fourth Amendment's reach by enacting administrative regulations.¹⁴⁴ The notion has metastasized

139. *Id.* at 300-01.

140. *Id.* at 303-04.

141. The Court recognized this in approving a statute authorizing suspicionless boardings and inspections of all boats despite precedent that forbade stopping cars in like circumstances. It held that there are "important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area" *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983) (distinguishing *Delaware v. Prouse*, 440 U.S. 648 (1979), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)).

142. *See, e.g.*, Anne Krishnan, *Doctors Going to Patients*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 9, 2006, at D1.

143. *Cf. United States v. Kras*, 409 U.S. 434, 460 (1973) (Stewart, J., dissenting) ("It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.").

144. *See New York v. Burger*, 482 U.S. 691, 720 (1987) (Brennan, J., dissenting) (arguing that vehicle dismantling business in New York was not more closely regulated than other businesses). In 1974, Professor Amsterdam noted the same problem with predicating Fourth Amendment protections on subjective expectations of privacy: "[T]he government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith

throughout Fourth Amendment jurisprudence to justify invasive incursions into even mundane aspects of daily life. In *Vernonia School District 47J v. Acton*, the Court held that grade school and high school athletes can be randomly tested for drugs because their expectations of privacy are reduced.¹⁴⁵ Part of the Court's reasoning was that, because they voluntarily subject themselves to the rules of athletic competition, such students are "like adults who choose to participate in a 'closely regulated industry'"¹⁴⁶ The notion surfaced again in Justice Thomas' opinion for the Court in *Board of Education of Independent School District v. Earls* to explain why high school students who participate in *any* extracurricular activities have a reduced expectation of privacy:

[E]ach of the competitive extracurricular activities governed by the Policy must abide by the rules of the Oklahoma Secondary Schools Activities Association, and a faculty sponsor monitors the students for compliance with the various rules dictated by the clubs and activities. This regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren.¹⁴⁷

The idea that government regulation can reduce the expectation of privacy over certain businesses did not make sense even in the seminal case asserting the proposition. Rather, this rationale is nothing but a thin veil for yet more doubtful judicial assumptions about daily life. In *New York v. Burger*, police officers searched a junkyard pursuant to an administrative regulatory scheme that required such businesses to be licensed and to produce a book of records on demand.¹⁴⁸ As Justice Brennan's dissent pointed out, New York's regulation of junkyards was not in any significant way more extensive than its regulation of virtually all businesses.¹⁴⁹ In addition, the police in that case were clearly using the administrative search provision to effect a criminal investigation without having probable cause or a warrant.¹⁵⁰ Stripped to its essence, the majority's holding amounted to nothing more than the claim that owners of junkyards should expect less

being placed under comprehensive electronic surveillance." Amsterdam, *supra* note 15, at 384.

145. 515 U.S. 646, 664-65 (1995).

146. *Id.* at 657.

147. 536 U.S. 822, 832 (2002) (citation omitted).

148. 482 U.S. at 693-94.

149. *Id.* at 718 (Brennan, J., dissenting).

150. *Id.* at 720-22.

privacy than owners of other businesses because junkyards are inherently more likely to be linked to crime.¹⁵¹ Likewise, the Court's holding in *Earls* reduces to nothing more than the idea that teenagers as a group are inherently likely to be using drugs and so individual teenagers can hardly be surprised that their schools will analyze their urine.¹⁵²

Pervasive government regulation is far from the only dubious rationalization for curtailing the Fourth Amendment protections of students. Even if they play no sports and join no clubs, just because they attend a public school, students should, according to the Court, expect less privacy in their purses and their backpacks than other people.¹⁵³ Explanations for why students enjoy less privacy in their belongings vary from case to case and judge to judge. Justice Powell stated in one case that students surrender their privacy through their "close association with each other, both in the classroom and during recreation periods."¹⁵⁴ He leapt to the conclusion that teachers and principals can search students' belongings because of the non-adversarial "special relationship" they enjoy.¹⁵⁵ Justice Thomas said in *Earls* that privacy is reduced in schools because "the State is responsible for maintaining discipline, health, and safety."¹⁵⁶ Of course, that is true not only in schools. In 1985, the Court rejected the argument that the Fourth Amendment should not apply to searches by school officials because they act *in loco parentis* rather than as government agents.¹⁵⁷ But seventeen years later, a new majority relied on the schools' *in loco parentis* responsibilities to allow suspicionless drug testing of all high school students participating in extracurricular activities.¹⁵⁸

As these examples suggest, the improvised hierarchy of privacy expectations is a shaky edifice of assumptions and rationalizations sitting atop a fallacious foundation. Despite spirited academic debate over the significance of the Framers' statutes allowing ship searches, those laws are in

151. The outcome of the case and the Court's opinion that the junkyard industry is inherently suspicious were both evident in the Court's explanation for its grant of certiorari: "Because of the important state interest in administrative schemes designed to regulate the vehicle-dismantling or automobile-junkyard industry, we granted certiorari." *Id.* at 698 (majority opinion) (footnote omitted).

152. See *Earls*, 536 U.S. at 837-38.

153. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985).

154. *Id.* at 349 (Powell, J., concurring).

155. *Id.* at 349-50 n.1.

156. *Earls*, 536 U.S. at 830.

157. *T.L.O.*, 469 U.S. at 336-37; see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995).

158. *Earls*, 536 U.S. at 840 (Breyer, J., concurring).

all likelihood largely irrelevant to the meaning or utility of the Fourth Amendment.¹⁵⁹ The Framers probably did not think those statutes implicated the Fourth Amendment at all. Likewise, there is no evidence to suggest that the Framers meant the Fourth Amendment to incorporate the common law as of 1791, although Justice Scalia's opinions repeatedly insist upon it.¹⁶⁰ More likely, they left the bulk of search and seizure law to common law or statutory development because they were unconcerned with it. Thus, one's expectation of privacy in one's car has nothing to do with whether the Framers thought ships could be searched without a warrant.

The problem, however, is more fundamental. Any discussion of the Framers' intent or the common law is relevant only insofar as it exposes, in Professor Taylor's words, "the clearest view of the values" the Fourth Amendment was meant to protect.¹⁶¹ Those values must then be applied to modern problems in a principled, consistent manner. We want neither a "rubber Constitution" nor a "rusty one."¹⁶² The protection the Amendment provides will depend on the richness and substance of the value it is regarded as protecting. The idea that the Fourth Amendment protects naked "privacy" demands some limiting principle; it necessitates a judicially created hierarchy of privacy expectations. As Justice Black pointed out, privacy is too malleable and susceptible to political manipulation:

It is impossible for me to think that the wise Framers of the Fourth Amendment would ever have dreamed about drafting an amendment to protect the "right of privacy." That expression, like a chameleon, has a different color for every turning. In fact, use of "privacy" as the keyword in the Fourth Amendment simply gives this Court a useful new tool, as I see it, both to usurp the policy-making power of the Congress and to hold more state and federal laws unconstitutional when the Court entertains a sufficient hostility to them.¹⁶³

The adoption of "privacy" as the core Fourth Amendment value did in fact enable the Court to engage in policy-making, but abstract privacy proved less

159. See Amar, *supra* note 28, at 68-69; Amar, *supra* note 15, at 1104-05; Davies, *supra* note 15, at 605-08.

160. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *Acton*, 515 U.S. at 654; *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring).

161. TAYLOR, *supra* note 24, at 15.

162. *Id.* at 14.

163. *Berger v. New York*, 388 U.S. 41, 77 (1967) (Black, J., dissenting).

than a match for the government's determination to engage in searches without suspicion.

III. SEARCHES WITHOUT SUSPICION

Neither of the prevailing Fourth Amendment theories offers any guidance for conducting suspicionless searches, like those in the New York subway. The "warrant preference" theory's insistence on probable cause at the threshold of every search simply makes no sense when there is reason to search everyone but no one in particular. "Generalized reasonableness" provides no principled guidance, but only an excuse for courts to engage in a legislative-like balancing of privacy expectations against the government's claimed need for searching. In this balancing, the right to privacy too frequently proves to be too insubstantial and abstract to withstand the government's assertions that suspicionless searches are necessary to enforce certain laws. As a result of this interpretive weakness, the Supreme Court has allowed a series of general searches justified by only the government's claim that they are necessary.

A. *Breakdown of Probable Cause*

The "warrant preference" theory posits that the government must justify deviations from the warrant and probable cause requirements in all cases. "Probable cause" has a "fixed and well known meaning"¹⁶⁴ whose substance is always "reasonable ground for belief of guilt."¹⁶⁵ The phrase embodies a "'practical, nontechnical conception'" but one that necessarily relates to suspicion that a particular person committed a particular crime.¹⁶⁶ The probable cause requirement therefore has no meaning outside of criminal cases¹⁶⁷ and offers no help in evaluating the constitutionality of searches outside criminal investigations. Even within the criminal context, an inflexible probable cause requirement proves impossible to maintain because it limits the police's ability to stop suspicious behavior from blossoming into dangerous criminal activity.

164. *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813).

165. *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (citation and internal quotation marks omitted); *see also Ornelas v. United States*, 517 U.S. 690, 695-96 (1996); *Carroll v. United States*, 267 U.S. 132, 149 (1925).

166. *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar*, 338 U.S. at 176).

167. *See Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 828-29 (2002); *O'Connor v. Ortega*, 480 U.S. 709, 723 (1987).

The Supreme Court's initial response to this problem was to redefine probable cause. In November 1963, Roland Camara repeatedly refused to admit building inspectors from the San Francisco Department of Public Health into his leasehold.¹⁶⁸ He was convicted of a misdemeanor for his refusal and appealed, arguing that the search was unconstitutional because the inspectors had no warrant and no probable cause to believe he was violating any particular building code provision.¹⁶⁹ The Supreme Court agreed that a property holder can demand that building inspectors produce a warrant, which the Fourth Amendment plainly requires to be supported by probable cause.¹⁷⁰ Satisfying the probable cause standard posed a problem because the city's code inspectors canvassed entire areas without having reason to think that any given place violated any particular code section.¹⁷¹

The Court attempted to resolve this conundrum by invoking "generalized reasonableness" to relax the probable cause standard.¹⁷² With no criteria beyond the word "reasonable" upon which to predicate its judgment, the Court undertook to balance "the need to search against the invasion which the search entails."¹⁷³ Having cast the issue as necessitating a balance of competing interests, the Court could strike an accommodation only by crafting a new custom-made interpretation of probable cause. It held that probable cause to engage in an area inspection of buildings exists

if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards . . . may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.¹⁷⁴

This contrived definition, which bears no resemblance to the established meaning of "probable cause," allowed the Court to cling to the assumption that the Fourth Amendment governs all searches and seizures and that probable cause is always required.

168. *Camara v. Mun. Court*, 387 U.S. 523, 525 (1967).

169. *Id.* at 527.

170. *Id.* at 531 ("Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes.").

171. *Id.* at 535-36.

172. *Id.* at 535-37.

173. *Id.* at 537.

174. *Id.* at 538.

Of course, tweaking the meaning of “probable cause” to accommodate desirable searches could never provide a theoretically sound basis for justifying searches without true probable cause and would not be a workable long-term approach. Just a year after the Supreme Court bent the meaning of “probable cause” beyond the breaking point, it reluctantly conceded that some searches and seizures are valid—even in the criminal context—despite the lack of a warrant and probable cause. The facts of *Terry v. Ohio*¹⁷⁵ are well known. Officer Martin McFadden, having thirty-nine years’ experience and working in plain clothes, observed two suspicious men standing on a Cleveland street corner.¹⁷⁶ As he watched, the two men took turns walking up and down the street and peering into the window of a particular store.¹⁷⁷ A third man briefly conferred with the pair and then walked off.¹⁷⁸ A short while later, the three reunited down the street where Officer McFadden, suspecting an imminent robbery, confronted them.¹⁷⁹ Thinking they might be armed, he frisked the three men and found that the two he had first observed were carrying guns.¹⁸⁰

The case presented a quandary for the Court. Officer McFadden’s actions—however apparently animated by sharp observation, good judgment, and laudable bravery—were not supported by probable cause. Redefining probable cause in the *Camara* style to include the suspicious behavior Officer McFadden observed would be close to eviscerating the concept altogether. Indeed, the Ohio state court decision in *Terry* (and numerous other state and federal cases) had held that such stop-and-frisks were constitutional despite the lack of probable cause.¹⁸¹ The Court could stick to the warrant preference construction, as Justice Douglas urged in dissent, and say Officer McFadden transgressed by acting without probable cause.¹⁸² The law of the land would then be that Officer McFadden should have waited until a suspicious situation escalated into a dangerous one, i.e., until the men drew their guns and began the robbery. The Court could, as the Ohio appellate court did¹⁸³ and as the United States as amicus curiae urged,¹⁸⁴ say

175. 392 U.S. 1 (1968).

176. *Id.* at 5.

177. *Id.* at 6.

178. *Id.*

179. *Id.*

180. *Id.* at 6-7.

181. See *Ohio v. Terry*, 214 N.E.2d 114, 117-18 (Ohio Ct. App. 1966) (collecting cases).

182. *Terry*, 392 U.S. at 35-36 (Douglas, J., dissenting).

183. See *Terry*, 214 N.E.2d at 118.

184. See Brief for the United States as Amicus Curiae at 1, *Terry v. Ohio*, 382 U.S. 1

that a stop-and-frisk is neither a “search” nor a “seizure” and is thus unregulated by the Constitution. Recognizing potential for abuse (and ignoring that the Framers considered Terry’s encounter with McFadden to have no Fourth Amendment implications), the Court “emphatically reject[ed] this notion.”¹⁸⁵ Resigning itself as in *Camara* to determining the constitutionality of searches and seizures by balancing, the Court held instead that probable cause is not always required for a search or seizure and attempted to carefully circumscribe when and how a stop based on “reasonable suspicion” could occur.¹⁸⁶

B. *Balancing of Interests*

Balancing interests to decide what is “reasonable” is not, of course, a legal inquiry or test. That is to say, it is not a process of discerning general rules or principles and applying them evenhandedly to specific disputes as they arise. Rather, balancing is for judges, as Justice Scalia put it, “a regrettable concession of defeat—an acknowledgment that we have passed the point where ‘law,’ properly speaking, has any further application.”¹⁸⁷ The vagueness of the term “reasonable” makes not only the outcome but the very criteria of the “test” unpredictable. Judicial opinions adopt shifting definitions of “reasonable” both when there is individualized suspicion and when there is not. Sometimes “reasonable” means nothing more than “within the bounds of common sense.”¹⁸⁸ Other times, a search is “reasonable” if it is “effective” at thwarting crime.¹⁸⁹ Often, it means something like “on the whole, fair and not extreme.”¹⁹⁰ The method of determining “reasonableness” likewise changes. It may be determined by attempting to discern an analogous common law rule,¹⁹¹ by divining the intent of the Framers,¹⁹² or by

(1968) (No. 67), 1967 WL 93603.

185. *Terry*, 392 U.S. at 16-17.

186. *See id.* at 20-27.

187. Scalia, *supra* note 44, at 1182.

188. *See, e.g.,* *Brigham City, Utah v. Stuart*, 126 S. Ct. 1943, 1949 (2006); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

189. *See, e.g.,* *Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 830, 837 (2002).

190. *See, e.g.,* *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967).

191. *See, e.g.,* *Wyoming v. Houghton*, 526 U.S. 296, 299-300 (1999); *Payton v. New York*, 445 U.S. 573, 591 (1980); *United States v. Watson*, 423 U.S. 411, 418-19 (1976).

192. *See, e.g.,* *Steagald v. United States*, 451 U.S. 204, 220 (1981).

relying on only the judge's idiosyncratic common sense.¹⁹³ Unlike a true legal test, balancing implies a need for judges to reach a compromise solution, one in which the government's desire to search should be accommodated if at all possible. This causes courts routinely to overweigh the government interest in searching and to assume that the Constitution must be interpreted so as to make possible the effective enforcement of all criminal laws.

Justice O'Connor's opinion for the Court in *United States v. Place*¹⁹⁴ illustrates. The case presented a simple issue that the Court quickly and unanimously dispatched.¹⁹⁵ After flying from Miami International Airport to LaGuardia Airport on a Friday afternoon, Raymond Place was confronted by Drug Enforcement Administration agents who suspected he was carrying narcotics.¹⁹⁶ The agents seized Place's suitcases and took them from Queens to John F. Kennedy International Airport in Manhattan where a dog trained to detect drugs sniffed them.¹⁹⁷ Based on the dog sniff, the agents obtained a warrant the following Monday, opened the luggage, and found cocaine.¹⁹⁸ The Court held that seizing a traveler's bags without probable cause for ninety minutes violated the Fourth Amendment.¹⁹⁹ The Court reasoned that the seizure of luggage dispossesses the traveler of his belongings and makes it impossible for him to continue with his plans.²⁰⁰

Although that resolved the case, "[g]iven the enforcement problems associated with the detection of narcotics trafficking and the minimal intrusion that a properly limited detention would entail,"²⁰¹ the majority gratuitously proceeded to produce an advisory constitutional prescription for drug interdiction at airports.²⁰² After balancing its estimation of the privacy interests against the government's interest in intercepting drugs, the Court held that luggage could be "briefly" seized without probable cause for the

193. See, e.g., *Earls*, 536 U.S. at 830, 832; *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985); *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984); *Camara*, 387 U.S. at 538-39.

194. 462 U.S. 696 (1983).

195. *Id.* at 697-98.

196. *Id.* at 698.

197. *Id.* at 699.

198. *Id.*

199. See *id.* at 708-09.

200. *Id.* at 710.

201. *Id.* at 698.

202. *Id.* at 700-10; see also *id.* at 711 (Brennan, J., concurring); *id.* at 720-21 (Blackmun, J., concurring).

purpose of having a dog sniff it for drugs.²⁰³ The Court also concluded, although the issue was not raised by the parties, that having a dog take a whiff of luggage is not a “search” under the Fourth Amendment because it detects only contraband.²⁰⁴

That the Court would reach beyond the facts of the case to resolve purported “enforcement problems” that were not briefed or argued highlights how balancing causes judges to try to accommodate police objectives. The policy-making that *Place* illustrates is even more remarkable given that a previous case noted no issue over police surreptitiously having a drug dog sniff a footlocker at a train station.²⁰⁵ For the Court to circumscribe constitutional protections to accommodate criminal law enforcement is an affront to the very concept of “rights,” but balancing blinds the Court to that basic truism. In a later case, the Court cited *Place* as one of several examples where “the requirement of probable cause” is excused to facilitate law enforcement:

We do not say, of course, that a seizure can never be justified on less than probable cause. We have held that it can—where, for example, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime.²⁰⁶

The twisted reasoning that the Constitution must be interpreted so as to make all criminal laws practicably enforceable justifies virtually any drug interdiction tactic regardless of the costs. Building on *Place*, the Seventh Circuit recently found no constitutional problem with police officers seizing the luggage of a train passenger minutes before the train departed.²⁰⁷ The passenger purportedly fit a “drug courier profile” because he paid cash for a one-way ticket one hour before the scheduled departure.²⁰⁸ Employing a “sliding scale” of Fourth Amendment reasonableness, Judge Posner’s opinion proceeded from the premise that the police’s methods *must* be reasonable if any other interpretation of the Constitution would make drug

203. *Id.* at 706 (majority opinion).

204. *Id.* at 707; *id.* at 723-24 (Blackmun, J., concurring).

205. *United States v. Chadwick*, 433 U.S. 1, 3-4 (1977).

206. *Arizona v. Hicks*, 480 U.S. 321, 327 (1987).

207. *United States v. Goodwin*, 449 F.3d 766, 772 (7th Cir. 2006).

208. *Id.* at 767.

interdiction impracticable.²⁰⁹ With that as a starting point, it was not difficult for the court to find the seizure legal despite the fact that there was no probable cause and that the passenger missed his train.²¹⁰ This was after all, the court reasoned, the passenger's own fault for buying his ticket at the last minute and thus making the police's job too hard: "By buying his ticket at the last minute he created a situation in which even a brief stop would cause him to miss his train, because the stop was bound to occur at the last minute—the police could not fit him to the profile until he bought his ticket."²¹¹

Similarly, in ruling that a mobile home could, like any car, be searched for marijuana without a warrant, the Supreme Court emphasized the vehicles' potential for criminal rather than domestic activities: "[T]o fail to apply the exception to vehicles such as a motor home ignores the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity."²¹² This is naked policy-making rather than adjudication, based as much on the importance of curbing pot smoking relative to securing privacy as on strange assumptions about mobile homes and the people who have them.²¹³ It is perverse for the Court to ask whether the Constitution makes drug interdiction too difficult. Rights cannot recede because judges think that certain types of property, like mobile homes or junkyards, are too dangerous or shady to be afforded constitutional protection. Balancing blinds the Court to its obligation to enforce the Fourth Amendment regardless of the practical problems it poses for law enforcement.²¹⁴

The Court's balancing test for reasonable searches and seizures, rooted in *Camara*,²¹⁵ gained currency after *Terry*'s acknowledgement that an unyielding probable cause requirement was untenable. By creating an exception to the probable cause requirement in a criminal case,²¹⁶ *Terry*

209. *Id.* at 771 ("[W]e must consider whether the police in this case might have conducted a further investigation of the defendant that would not have entailed delaying his trip by 24 hours.").

210. *Id.*

211. *Id.* at 772.

212. *California v. Carney*, 471 U.S. 386, 393-94 (1985).

213. *Id.* at 399 (Stevens, J., dissenting) ("In this case, the Court can barely glimpse the diverse lifestyles associated with recreational vehicles and mobile living quarters.").

214. *Cf. Carroll v. United States*, 267 U.S. 132, 164 (1925) (McReynolds, J., dissenting) ("Difficulties attending enforcement [do not] give us power to supplement the legislation.").

215. *See Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967).

216. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

allowed the Court to engage in balancing in administrative and other suspicionless search cases without having to wrestle with probable cause.²¹⁷ Suspicionless searches can now be justified by so-called "special needs," a label taken from Justice Blackmun's concurrence in *New Jersey v. T.L.O.*: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."²¹⁸ The "special needs" analysis requires the government to assert a reason for conducting a search other than criminal law enforcement.²¹⁹ The Court then considers the strength of the privacy interest implicated, the character of the government intrusion, the nature and immediacy of the government's special needs, and the efficacy of the search.²²⁰

In *T.L.O.*, the Court's first post-*Terry* examination of an administrative search, Justice White's majority opinion concluded simply that it was "reasonable" for teachers and school administrators to search students thought to have broken the law or school rules.²²¹ There was no longer any need to recast the probable cause standard. An assistant high school principal, convinced that a fourteen-year-old freshman was smoking cigarettes in the bathroom, rummaged through her purse after she denied having any cigarettes.²²² He found a pack of smokes and also some marijuana, a pipe, empty plastic bags, money, and an apparent list of customers.²²³ The assistant principal called the girl's mother and the police as well.²²⁴ In addition to being suspended from school, the girl was convicted of a juvenile offense and sentenced to a year of probation.²²⁵ The Supreme Court held that the search was "reasonable" despite the lack of probable cause and that the evidence was legally introduced against her in the juvenile criminal proceeding.²²⁶

217. *Id.* at 30-31 (1968).

218. 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). Ironically, that line itself dispels all doubt that the "special needs" rubric is constitutionally illegitimate and theoretically unsound.

219. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

220. See, e.g., *id.* at 654-64.

221. *T.L.O.*, 469 U.S. 325, 341-42 (1985).

222. *Id.* at 328.

223. *Id.*

224. *Id.*

225. *Id.* at 329 & n.1.

226. See *id.* at 341-43, 347-48.

“Special needs,” suggests *T.L.O.*, are identified by considering federal government policy objectives rather than the specific facts of the case. This tilts the scales in the government’s favor. In *T.L.O.* itself, for example, the Court fretted over problems supposedly plaguing public schools that had no demonstrated connection to the case whatsoever: “Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.”²²⁷ In the same case, Justice Blackmun intoned, “Indeed, because drug use and possession of weapons have become increasingly common among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel.”²²⁸ Justice Brennan agreed “that we can take judicial notice of the serious problems of drugs and violence that plague our schools.”²²⁹ Even Justice Stevens, who dissented on the ground that the suspected infraction of smoking in the bathroom was too minor to justify a search,²³⁰ nonetheless took into consideration “empirical evidence of a contemporary crisis of violence and unlawful behavior” in schools.²³¹ That the case involved a fourteen-year-old marijuana dealer who was neither armed nor dangerous and who caused no disruption beyond allegedly smoking a cigarette in the bathroom was beside the point.²³²

The Justices’ unsupported ruminations about drugs and guns in schools demonstrate how balancing is just policy-making, which drives true legal standards out of Fourth Amendment analysis, compromising predictability and protection. Without principles to guide it, the Court simply ignored the many questions *T.L.O.* left unanswered. As Justice Brennan’s opinion pointed out, it was unclear exactly how the standard the Court adopted—“reasonable grounds for suspecting” a violation of the law or school rules—differed from probable cause.²³³ Also, the Court expressly refused to “decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities.”²³⁴ Finally, the Court did not address whether a different standard would apply

227. *Id.* at 339.

228. *Id.* at 352-53 (Blackmun, J., concurring).

229. *Id.* at 357 (Brennan, J., concurring in part and dissenting in part).

230. *Id.* at 370-71 (Stevens, J., concurring in part and dissenting in part).

231. *Id.* at 378.

232. *See id.* at 328-29 (majority opinion).

233. *Id.* at 364 (Brennan, J., concurring in part and dissenting in part).

234. *Id.* at 342 n.8 (majority opinion).

to pretextual searches—those “conducted by school officials in conjunction with or at the behest of law enforcement agencies”²³⁵

Where speculative, popular assumptions substitute for evidence and real legal standards, they will in short order rationalize mass, suspicionless searches and seizures. Using *T.L.O.*’s policy-making approach, the Court has upheld random drug testing of grade school and high school student athletes,²³⁶ highway checkpoints to find illegal immigrants,²³⁷ and checkpoints to catch drunk drivers.²³⁸ Not surprisingly, these suspicionless searches and seizures are justified in part with reference to the reduced expectations of privacy that drivers and public school students enjoy as well as the government’s self-serving assertions of need.²³⁹ The Court has even allowed police to stop motorists just to ask if they had information regarding a week-old hit-and-run accident on the same basis.²⁴⁰ In that case, the Court’s reasoning was little more than this imperious declaration: “The Fourth Amendment does not treat a motorist’s car as his castle.”²⁴¹

Like *T.L.O.*, these decisions rest on alarmist assumptions regarding some looming crisis that supposedly necessitates government action. In *Vernonia School District 47J v. Acton*, the Court held that it was constitutionally “reasonable” for a school district to require all its athletes to submit urine samples for drug testing on a random basis.²⁴² The opinion does not provide clear criteria for what “reasonable” means, but the case made it clear that individualized suspicion is not a necessary component of a reasonable search.²⁴³ Important considerations in assessing “reasonableness” were: the decreased expectation of privacy that schoolchildren have; the importance of stopping drug use among children across the country; the specific evidence presented about the significant drug problem the school district faced; and the targeting of athletes who were leaders among students and faced risk of injury from drug use.²⁴⁴ The dissenters complained that the decision failed even to acknowledge that individualized suspicion is usually required for a search and that it subjected millions of students across the country to random

235. *Id.* at 342 n.7; see also *id.* at 355-56 (Brennan, J., concurring in part and dissenting in part).

236. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648, 651 (1995).

237. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

238. See *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

239. See, e.g., *Acton*, 515 U.S. at 657; *Martinez-Fuerte*, 428 U.S. at 560-61.

240. *Illinois v. Lidster*, 540 U.S. 419, 421 (2004).

241. *Id.* at 424.

242. *Acton*, 515 U.S. at 651, 665.

243. See *id.* at 653.

244. *Id.* at 648-49, 657.

drug testing.²⁴⁵ While *Acton* could have more narrowly been construed as requiring risk of physical injury or disruption of the school's function to justify random drug testing, the dissent's fears proved prescient in *Board of Education of Independent School District v. Earls*.²⁴⁶

In *Earls*, the question was whether a school district could require all high school students participating in extracurricular activities to submit to random drug testing.²⁴⁷ Not only was the individualized suspicion that supported the search in *T.L.O.*²⁴⁸ lacking, but there was not even any group suspicion as in *Acton*.²⁴⁹ The only evidence of any drug use was purely anecdotal and was not shown to have disrupted the educational mission of the school:

Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. . . . A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member. And the school board president reported that people in the community were calling the board to discuss the "drug situation."²⁵⁰

In light of this, the Court had little choice but to affirm the district court's finding that "the School District did 'not show a drug problem of epidemic proportions.'"²⁵¹

But the lack of a major drug problem, reasoned Justice Thomas, was no obstacle to a widespread program of random drug testing.²⁵² Relying on national policy considerations rather than the facts of the case, the Court excused the school district's failure to show any need to conduct the searches at issue: "Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school."²⁵³ With the Court carefully balancing the wispy and ethereal "right to privacy" against the leaden crush of a supposed nationwide teenage drug epidemic, the students did not stand a

245. *Id.* at 667 (O'Connor, J., dissenting).

246. 536 U.S. 822, 831 (2002).

247. *Id.* at 825.

248. *See New Jersey v. T.L.O.*, 469 U.S. 325, 328-29 (1985).

249. *See Acton*, 515 U.S. at 648-49.

250. *Earls*, 536 U.S. at 834-35 (citations omitted).

251. *Id.* at 827 (quoting *Earls v. Bd. of Educ.*, 115 F. Supp. 2d 1281, 1287 (W.D. Okla. 2000), *rev'd*, 242 F.3d 1264 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002)).

252. *Id.* at 835-36.

253. *Id.* at 834.

chance: "Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant."²⁵⁴ The Court held that random drug testing was "a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use."²⁵⁵ Thus, a government search is "reasonable" in the *Earls* sense if it is "effective" at preventing *potential* drug use among students at *any* school. As though the Court's lack of legal reasoning needed emphasizing, Justice Breyer concurred just to expound upon the "serious national problem" of student drug use.²⁵⁶

Just as *T.L.O.* was undergirded by the Justices' assumed connection between drug use and gunfire in public schools, *Earls* and *Acton* were predicated upon the Justices' supposition that schools have an interest in stopping drug use—even where there is no indication that drugs have interfered with school functions. The reasoning in these cases depends on nothing more than the Justices' personal instinct for what is good policy. While the Supreme Court needs to consider how its holdings may extend beyond the facts immediately before it, the legality of a search should always depend on logical reasoning supported by evidence. If the government can establish a need to search simply by asserting that teenagers in general should not use drugs, the law has failed to erect any principled limits on suspicionless searches.

When the Court did attempt to draw a line on suspicionless searches, the lack of a principled standard was woefully evident. In *City of Indianapolis v. Edmond*,²⁵⁷ the Court tried to distinguish between the various highway checkpoints it had previously said were constitutional and a checkpoint to have drug-detection dogs sniff random cars.²⁵⁸ Revisiting a point from her dissent in *Acton*, Justice O'Connor wrote for the Court that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."²⁵⁹ But the majority was obviously at pains to find a meaningful difference between a checkpoint to find drugs and one to search for illegal immigrants or drunk drivers. The best the Court could do to articulate a distinction was to say that a checkpoint "whose primary purpose was to detect evidence of ordinary criminal wrongdoing" was

254. *Id.*

255. *Id.* at 837.

256. *Id.* at 838-42 (Breyer, J., concurring).

257. 531 U.S. 32 (2000).

258. *Id.* at 34.

259. *Id.* at 37.

unconstitutional.²⁶⁰ Why drug trafficking is “ordinary” but drunk driving or illegal immigration is “special” is unexplained. At bottom, the decision seemed based primarily on the need “to prevent [roadblocks] from becoming a routine part of American life.”²⁶¹ Betraying the unpredictability of its balancing jurisprudence, the Court immediately conceded that exceptions to its newly crafted prohibition would be made for emergency ordinary crime control if, for example, a roadblock were set up to catch a particular terrorist or “dangerous criminal.”²⁶²

The Court could not decide *Edmond* on principle because its suspicionless search jurisprudence is a jumble of policy preferences. Proceeding from the untenable premises that the Fourth Amendment was intended to apply to all searches and seizures and to require that they be supported by probable cause, search and seizure law descended into chaotic balancing when the probable cause requirement failed in real-world application. Neither factor weighed in the Court’s balancing inquiry is susceptible of evidentiary evaluation. It asks only that the Justices weigh their quirky views of how much privacy one can expect against their personal views regarding the desirability and efficacy of government policies. Without any measure of individualized suspicion to provide a threshold brake on possible searches, “special needs” searches have proliferated through the balancing of an anemic right to privacy against exaggerated government interests. The results are totally arbitrary: roadblocks to catch illegal immigrants and “dangerous criminals” are constitutional but roadblocks to catch drug traffickers are not. This confusion begets absurd litigation over such questions as whether agents expanded a suspicionless checkpoint search for illegal aliens into an impermissible search for narcotics.²⁶³

260. *Id.* at 38.

261. *Id.* at 42. This was the basis for Justice Thomas’ dissent as well. He would have approved the roadblock only because he saw no meaningful distinction between it and the previously approved roadblocks. But Justice Thomas alone “doubt[ed] that the Framers of the Fourth Amendment would have considered ‘reasonable’ a program of indiscriminate stops of individuals not suspected of wrongdoing.” *Id.* at 56 (Thomas, J., dissenting). Indeed, such stops look very much like the general searches that motivated the Fourth Amendment.

262. *Id.* at 44 (majority opinion).

263. *See, e.g.,* *United States v. Jaime*, 473 F.3d 178, 182-87 (5th Cir. 2006) (discussing Fifth Circuit precedents).

IV. THE PROBLEM OF PRETEXT

"Special needs" searches far outnumber "ordinary" searches. They are "special" only in the sense that they are purportedly not made for law enforcement purposes.²⁶⁴ "Ordinary" searches—those that arise in a criminal investigation—are still held to require some degree of individualized suspicion, whether probable cause or reasonable suspicion. The Supreme Court's "special needs" jurisprudence reflects a concern among some Justices that the "reasonableness" analysis that allows checkpoints or administrative searches to dispense with individualized suspicion not be carried over to "ordinary" searches. For that reason, the *Edmond* majority pointedly insisted, after the *Acton* Court failed to mention it, that individualized suspicion is still ordinarily a necessary predicate to a search.²⁶⁵

Consistent with this concern, the Court has repeatedly suggested that whether criminal proceedings are likely to result is an important consideration in deciding the legality or reasonableness of a suspicionless search. The *Acton* decision noted that the results of the student-athletes' drug tests were "not turned over to law enforcement authorities or used for any internal disciplinary function."²⁶⁶ The only consequence to a positive test was counseling or suspension from participation in interscholastic sports.²⁶⁷ In *Earls*, the Court observed that "the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences."²⁶⁸ Conversely, criminal consequences are less problematic when individualized suspicion precipitates the search. In *T.L.O.*, for example, the Court could discount the fact that the search resulted in a criminal prosecution because it was based on some amount of individualized suspicion.²⁶⁹ It nonetheless noted that the search of the student's purse was done without police involvement, suggesting that probable cause would otherwise have been required.²⁷⁰ On the other hand, the Court has allowed evidence from suspicionless checkpoints to support

264. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (Blackmun, J., concurring).

265. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

266. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *see also id.* at 658 n.2.

267. *Id.* at 651.

268. *Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 833 (2002).

269. *See New Jersey v. T.L.O.*, 469 U.S. 325, 372 (Stevens, J., concurring in part and dissenting in part).

270. *Id.* at 342 n.7 (majority opinion).

felony prosecutions for such crimes as drunk driving,²⁷¹ transporting illegal aliens,²⁷² and possession of stolen property.²⁷³ The searches in those cases were justified as being necessary to fulfill some professed government “special need” while infringing on “diminished” privacy expectations.

If criminal charges can be brought with evidence uncovered through administrative or “special needs” searches, those searches can provide a convenient pretext for circumventing any requirement of individualized suspicion.²⁷⁴ This invites the proliferation of checkpoints and other random searches, which the Court sought to stem in *Edmond*,²⁷⁵ that begin to look very much like the general searches that motivated the drafting of the Fourth Amendment. Heedful of this, the New York City police designed the subway search program to minimize the possibility of pretextual searches: “[T]he fact that passengers have advance notice of the inspection and can avoid inspection by leaving the system are indicative of a program designed not to search for contraband but to keep explosives out.”²⁷⁶

Despite *Edmond*’s attempt to limit the expansion of checkpoint searches by emphasizing the “special” in “special needs,” pretextual searches are a more serious problem than the Court has acknowledged. *Edmond*’s failure to make a principled distinction between legitimate and illegitimate checkpoints is symptomatic of a Fourth Amendment jurisprudence that is too confused to provide real protection against government excesses. The Court’s failure to insist on some measure of individualized suspicion, its willingness to favor government convenience over individual autonomy, and its unprincipled equating of Fourth Amendment rights with judicial notions of privacy expectations create opportunities for constitutional violations that escape judicial detection.

Notwithstanding *Edmond*, for example, state and local police nationwide use pretextual traffic stops every day to search scores, if not hundreds, of drivers for drugs or money through a DEA-sponsored program.²⁷⁷ The officers making these stops target individuals based on whether they match a dubious drug-courier profile. But this is neither relevant to nor cognizable

271. See *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 447 (1990).

272. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 547-49 (1976).

273. See *New York v. Burger*, 482 U.S. 691 (1987).

274. *Id.* at 720-21 (Brennan, J., dissenting).

275. See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

276. *MacWade v. Kelly*, No. 05CIV6921RMBFM, 2005 WL 3338573, at *17 (S.D.N.Y. Dec. 7, 2005), *aff’d* 460 F.3d 260 (2d Cir. 2006) (quoting Defendants’ Post-Trial Memorandum of Law at 11), *MacWade v. Kelly*, No. 05CIV6921RMBFM (S.D.N.Y. Nov. 21, 2005), 2005 WL 3654808).

277. See *infra* notes 296-299 and accompanying text.

under a Fourth Amendment challenge. While *Edmond* requires that "special needs" justify highway checkpoints,²⁷⁸ the Court held in *Whren v. United States*²⁷⁹ that a regular traffic stop is justified whenever there is probable cause to believe a traffic violation has occurred—regardless of the officer's actual motive.²⁸⁰ Thus, while the Constitution prevents a checkpoint to conduct drug interdiction, a nationwide indiscriminate dragnet of thousands of traffic stops can legally be used as a pretext to search for drugs.

In June 1993, two vice-squad officers patrolling Washington, D.C. in an unmarked car followed a Nissan Pathfinder that they thought looked suspicious.²⁸¹ Apparently in response to being followed, the driver of the Pathfinder drove somewhat erratically until the police caught up to it at a red light.²⁸² When one of the officers approached the car, he saw two large plastic bags of crack.²⁸³ The defendants moved to suppress the evidence because the police had no reason to suspect there were drugs in the car before stopping it.²⁸⁴ The vice-squad officer implausibly testified in response that he stopped the Pathfinder to give the driver a warning citation for his poor driving.²⁸⁵

The Court held unanimously that it did not matter why the officer stopped the car as long as probable cause for a traffic violation objectively existed: "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."²⁸⁶ In the Supreme Court, the crack dealers' principal argument was that, because traffic regulations are so pervasive, police will practically always have probable cause to stop a car, creating the danger of pretextual stops, potentially on the basis of race.²⁸⁷ The Court rejected this argument, correctly holding that it would have no reason or manner for deciding what provisions of a complex and pervasive code should be enforced.²⁸⁸ It also saw no need to weigh the government's interest in making such stops against the individual privacy interests implicated.²⁸⁹ Balancing is generally necessary, the Court reasoned, only when there is no

278. *Edmond*, 531 U.S. at 37-38.

279. 517 U.S. 806 (1996).

280. *See id.* at 819.

281. *Id.* at 808.

282. *Id.*

283. *Id.* at 808-09.

284. *Id.* at 809.

285. *Id.*

286. *Id.* at 813.

287. *See id.* at 810.

288. *See id.* at 818-19.

289. *See id.* at 816-18.

probable cause for a stop.²⁹⁰ This case was “governed by the usual rule that probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police contact.”²⁹¹

Whren thus held in so many words that the police can constitutionally stop virtually any car at any time for any reason—a proposition whose falsity in light of the motivation for the Fourth Amendment is patent. Even in *Carroll*, the Court avoided drawing that conclusion.²⁹² There the Court stated, “It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.”²⁹³ And it is no answer to say that drivers who commit traffic infractions are not “lawfully” using the highway, for Chief Justice Taft made it clear that what is required is “probable cause for believing that their vehicles are carrying contraband or illegal merchandise.”²⁹⁴ Yet, *Whren* squarely holds that police can stop anyone they want.²⁹⁵ Manifestly, the Court’s jurisprudence has taken a wrong turn.

It is hardly paranoid to think that police will exploit the ability to stop any car to target minorities and to demand that innocent drivers explain their purpose for being out. In fact, *Whren* fueled the DEA’s systematic program to target drivers across the country fitting a drug courier profile (i.e., minorities) for car searches.²⁹⁶ The DEA’s Operation Pipeline, created in 1984 and still operating today, trains state and local law enforcement officers to use traffic stops as pretexts for drug interdiction.²⁹⁷ Officers learn how to lengthen a routine traffic stop and leverage it into a search for drugs by extorting consent or manufacturing probable cause.²⁹⁸ The program involves countless municipal and state law enforcement agencies, which make huge

290. *Id.* at 817-18.

291. *Id.* at 818.

292. *Carroll v. United States*, 267 U.S. 132 (1925); *see supra* text accompanying notes 127-130 (providing information about the factual and legal background in *Carroll*).

293. *Carroll*, 267 U.S. at 153-54.

294. *Id.* at 154. Of course, it is highly doubtful that the Court correctly concluded that the stop in *Carroll* was in fact supported by probable cause. *See id.* at 171-75 (McReynolds, J., dissenting).

295. *See Whren*, 517 U.S. at 818-19.

296. Solomon Moore, *Race Profiling Suit Challenges CHP’s Tactics*, L.A. TIMES, May 28, 2001, at B1; Gary Webb, *DWB* (Driving While Black)*, ESQUIRE, Apr. 1, 1999, at 118, 127 (quoting a CHP officer saying, “After *Whren*, . . . the game was over. We won.”).

297. *See* Inside the DEA, DEA Programs, Operations Pipeline and Convoy, <http://www.usdoj.gov/dea/programs/pipecon.htm> (last visited Jan. 25, 2007).

298. *See* Inside the DEA, *supra* note 297.

profits from the dragnet by splitting seized cash and cars on an 80-20 basis with the DEA.²⁹⁹ A 2,600-person town near Interstate 85 in Georgia seized well over \$2 million in cash and cars in two years.³⁰⁰ A Louisiana town seized more than \$6 million in four years stopping cars along its five miles of Interstate 10.³⁰¹ As of 2000, the DEA had trained more than 25,000 officers in forty-eight states in Pipeline tactics.³⁰²

The DEA claims that it does not train police to use racial profiling, but civil lawsuits against police departments implementing Operation Pipeline suggest otherwise.³⁰³ In 2003, the California Highway Patrol settled a class action suit brought by the American Civil Liberties Union by agreeing to stop making pretextual traffic stops and to extend a ban on consensual car searches through 2006.³⁰⁴ The lawsuit revealed that Hispanics were three times more likely and blacks twice as likely to be stopped as whites and that Hispanics were stopped and let go with a warning more than any other racial group.³⁰⁵ The New Jersey State Police settled a similar lawsuit which revealed that Operation Pipeline's profiles singled out Hispanic and black men for searches.³⁰⁶ A cache of internal documents disclosed by the case showed how New Jersey troopers were trained to target Hispanics and blacks and how management stonewalled a Department of Justice civil rights investigation while the DEA simultaneously praised the troopers' success at interdiction.³⁰⁷ In July 2006, the Arizona Department of Public Safety settled a similar lawsuit by agreeing to train its officers not to employ racial profiling, not to prolong traffic stops without reasonable suspicion or probable cause, and to videotape all traffic stops and maintain statistics on them.³⁰⁸

299. Dahleen Glanton, *Shady Cash Fattens Towns' Coffers Along Drug Routes*, SEATTLE TIMES, May 16, 2005, at A9.

300. *Id.*

301. *Id.*

302. David Kocieniewski, *New Jersey Argues that the U.S. Wrote the Book on Race Profiling*, N.Y. TIMES, Nov. 29, 2000, at A1.

303. Webb, *supra* note 296, at 126 (describing suits in Colorado and Maryland); Jim Herron Zamora, *CHP Stops More Minorities*, SAN FRAN. CHRON., Apr. 20, 2001, at A1.

304. Maura Dolan & John M. Glionna, *CHP Settles Lawsuit over Claims of Racial Profiling*, L.A. TIMES, Feb. 28, 2003, at A1.

305. Zamora, *supra* note 303, at A1.

306. Moore, *supra* note 296, at B1.

307. See David Kocieniewski & Robert Hanley, *An Inside Story of Racial Bias and Denial*, N.Y. TIMES, Dec. 3, 2000, at 53.

308. *Arnold v. Ariz. Dept. of Pub. Safety*, No. CV-01-1463-PHX-LOA, 2006 WL 2168637, at *2-*4, *12 (D. Ariz., July 31, 2006).

Operation Pipeline is exactly what the Framers meant to prohibit: a federally-run general search program that targets people without cause for suspicion, particularly those who belong to disfavored groups. The program's efficacy requires stopping "staggering" numbers of people, particularly blacks and Hispanics, in shotgun fashion.³⁰⁹ A huge number of innocent people fitting the profile must be stopped and searched for every cache of drugs or money that is discovered.³¹⁰ In a deposition taken in the ACLU suit, one California Highway Patrol officer said, "It's sheer numbers. . . . You kiss a lot of frogs before you find a prince."³¹¹

Pipeline officers are trained to check cars for a number of "indicators" (in addition to race) that are supposed hallmarks of drug couriers. Among these are air fresheners, atlases, cellular phones, fast food wrappers, attorney business cards, pre-paid phone cards, rental cars, and borrowed cars.³¹² The officers are also trained to have drivers exit their cars and to ask them a series of questions about their origin, travel plans, and destination while looking for signs of nervousness or inconsistencies.³¹³ After the questioning, the script calls for officers to turn and say, in classic Colombo style, "Just one more thing . . ." and ask whether there are any drugs or guns in the car.³¹⁴ That is followed by something along the lines of, "You don't mind if I search your car then, do you?"³¹⁵ Most drivers give consent.³¹⁶

Consent searches have been controversial since well before Operation Pipeline. In *Schneekloth v. Bustamonte*,³¹⁷ the Court approved a consent search of a car and rejected the argument that police should have to inform

309. *State v. Retherford*, 639 N.E.2d 498, 503-04 & 503 n.3 (Ohio Ct. App. 1994).

310. Webb, *supra* note 296, at 122 (estimating that 95% of Pipeline stops yield no drugs).

311. Zamora, *supra* note 303, at A1.

312. KIRK SIMONE, LT. IN KANSAS HIGHWAY PATROL, EPIC OPERATION PIPELINE PASSENGER VEHICLE DRUG INTERDICTION 4-7 (n.d.), available at http://www.norml.org/pdf_files/brief_bank/Operation_Pipeline_Manual.pdf (last visited May 27, 2007); see also Webb, *supra* note 296, at 122.

313. See SIMONE, *supra* note 312, at 9, 12, 15; see also Webb, *supra* note 296, at 125; cf. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) ("[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.").

314. See Webb, *supra* note 296, at 125.

315. See Dolan & Glionna, *supra* note 304, at A1; Moore, *supra* note 296, at B1; Webb, *supra* note 296, at 118.

316. See Webb, *supra* note 296, at 125.

317. 412 U.S. 218 (1973).

drivers that they have the right to refuse the search.³¹⁸ The Court's rationale was the same utility argument approved in *Place*³¹⁹—simply that consent searches are helpful to the police because they “may be the only means of obtaining important and reliable evidence.”³²⁰ The Court stated that advising drivers of the right to refuse would “be thoroughly impractical” because it would deprive the police of “part of the standard investigatory techniques of law enforcement agencies.”³²¹ Justice Marshall wrote a forceful dissent stating that “consent is ordinarily given as acquiescence in an implicit claim of authority to search” and that the majority failed to make “a realistic assessment of the nature of the interchange between citizens and the police.”³²²

Operation Pipeline is far worse than Justice Marshall's darkest fears at the time of *Bustamonte*. Officers not only target minorities and stop anyone they wish, but the federal government trains them in tactics calculated to exploit the imbalance of power between police and motorists and to browbeat them into consenting to a search of their belongings. Moreover, the Court's rulings have supported and encouraged the tactics because the Court repeatedly fails to appreciate the true nature and scope of the issue confronting it.

Just a few months after *Whren*, the Court held in *Ohio v. Robinette*³²³ that the Fourth Amendment does not require police officers to advise motorists that they are free to go before asking them whether they have drugs or guns and will consent to a search.³²⁴ *Robinette* arose from an Operation Pipeline stop, though that is not mentioned in the opinions or briefs. Robinette was stopped for speeding and eventually given a verbal warning.³²⁵ The officer then said to him, “One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?”³²⁶ Robinette said no but consented to a

318. *Id.* at 231-33.

319. *See supra* text accompanying notes 201-204.

320. *Schneekloth*, 412 U.S. at 227.

321. *Id.* at 231-32.

322. *Id.* at 289 (Marshall, J., dissenting).

323. 519 U.S. 33 (1996).

324. *Id.* at 39-40.

325. *Id.* at 35.

326. *Id.* at 35-36 (alteration in original) (citation and internal quotation marks omitted). The officer who stopped Robinette testified that he asked many drivers he stopped for consent to search the car sometimes only to “practice” his Operation Pipeline technique. *See State v. Retherford*, 639 N.E.2d 498, 502 (Ohio Ct. App. 1994).

search of his car.³²⁷ The search turned up a personal-use amount of marijuana and one methamphetamine pill.³²⁸ Relying on *Bustamonte*, the Court held that the consent was valid and that the officer did not have to tell Robinette that he was free to leave before asking to search his car.³²⁹

Like the majority opinion, neither Justice Ginsburg's concurrence nor Justice Stevens' dissent evinced awareness of Operation Pipeline. Justice Ginsburg noted that the deputy had testified that he routinely asked drivers he stopped for consent to search the car,³³⁰ but she seemed to have the misimpression that this practice was peculiar to Ohio: "From their unique vantage point, Ohio's courts observed that traffic stops in the State were regularly giving way to contraband searches, characterized as consensual, even when officers had no reason to suspect illegal activity."³³¹ Justice Stevens believed the consent was the product of an unlawful detention and, echoing Justice Marshall's *Bustamonte* dissent, noted that people consent to searches only because they feel they have to:

[I]t is fair to presume that most drivers who have been stopped for speeding are in a hurry to get to their destinations; such drivers have no interest in prolonging the delay occasioned by the stop just to engage in idle conversation with an officer, much less to allow a potentially lengthy search. I also assume that motorists—even those who are not carrying contraband—have an interest in preserving the privacy of their vehicles and possessions from the prying eyes of a curious stranger. . . . Repeated decisions by ordinary citizens to surrender that interest cannot satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so.³³²

The few drivers who refuse to give consent to a Pipeline search will find their cars being sniffed by a drug-detection dog, again with the Court's blessing.³³³ If the dog alerts, there is probable cause to search for drugs.³³⁴ *Illinois v. Caballes* began with a Pipeline stop in Illinois.³³⁵ A state trooper

327. *Robinette*, 519 U.S. at 36.

328. *See id.*

329. *Id.* at 39-40.

330. *Id.* at 40 (Ginsburg, J., concurring in judgment).

331. *Id.*

332. *Id.* at 47-48 (Stevens, J., dissenting) (footnote and internal citation omitted).

333. *See Webb, supra* note 296, at 125.

334. *See id.*

335. *See Illinois v. Caballes*, 543 U.S. 405, 406 (2005).

stopped Roy Caballes in November 1998 for going seventy-one miles per hour in a sixty-five mile-per-hour zone on Interstate 80.³³⁶ The trooper thought it significant that there was an atlas on the front seat, the ashtray was open, and the car smelled of air freshener.³³⁷ The trooper would later testify that Caballes was nervous.³³⁸ With Caballes sitting in the backseat of the patrol car, the trooper informed him that he was writing a warning ticket.³³⁹ He proceeded to ask Caballes where he was going, why he was wearing a suit, whether he had been arrested before, and whether he would consent to a search of his car.³⁴⁰ Caballes refused to allow a search.³⁴¹

Immediately upon hearing over the police radio that Caballes had been stopped, a second trooper, who had a drug-sniffing dog with him, hurried to the scene.³⁴² Though Justice Stevens' opinion for the Court suggested that this was fortuitous,³⁴³ it was, of course, part of the Pipeline script.³⁴⁴ The troopers could not wait for Caballes to refuse consent before commencing the dog sniff because the Illinois Supreme Court had previously ruled that prolonging a traffic stop to perform a dog sniff constitutes "an unconstitutional seizure."³⁴⁵ So, while the first trooper was writing the warning ticket, the second trooper was already walking the dog around Caballes' car.³⁴⁶ The dog alerted to the trunk.³⁴⁷ The first trooper then searched it and found it contained marijuana.³⁴⁸ Caballes was convicted and sentenced to twelve years in prison.³⁴⁹

336. Brief for the Respondent at 2, *Caballes*, 543 U.S. 405 (No. 03-923), 2004 WL 2097415.

337. *Illinois v. Caballes*, 802 N.E.2d 202, 203 (Ill. 2003), *vacated*, *Caballes*, 543 U.S. 405.

338. *Illinois v. Caballes*, 802 N.E.2d at 203.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. See *Illinois v. Caballes*, 543 U.S. 405, 406 (2005) ("When Gillette radioed the police dispatcher to report the stop, a second trooper, Craig Graham, a member of the Illinois State Police Drug Interdiction Team, overheard the transmission and immediately headed for the scene with his narcotics-detection dog.").

344. Brief for Respondent, *supra* note 336, at 2 ("Gillette expected Graham to show up, because that was his 'responsibility as part of the team.'" (citation omitted)).

345. *Caballes*, 543 U.S. at 407-08 (citing *People v. Cox*, 782 N.E.2d 275, 281 (Ill. 2002)).

346. *Id.* at 406.

347. *Id.*

348. *Id.*

349. *Id.* at 407; Brief for Respondent, *supra* note 336, at 2.

Caballes challenged the dog sniff on the grounds that it was conducted without reasonable suspicion or probable cause to believe he had drugs.³⁵⁰ Illinois argued that no justification for bringing the drug-sniffing dog to the scene was necessary beyond probable cause to believe Caballes was speeding because, under *Place*, the dog sniff was not a Fourth Amendment search.³⁵¹ It was, argued the state, no different than if the trooper had seen cocaine on the passenger seat or smelled a corpse rotting in the trunk.³⁵² The Supreme Court agreed, reasoning that because the dog sniff did not prolong the stop or reveal protected information, there was no Fourth Amendment violation.³⁵³ “The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent’s hopes or expectations concerning the nondetection of contraband in the trunk of his car.”³⁵⁴

Caballes gave the first clue that the Justices might have become aware of Operation Pipeline. If they did, they turned a blind eye to it.³⁵⁵ After *Whren*, the reason why Caballes was pulled over was legally irrelevant, but the *Caballes* Court made an oblique and disturbing reference to it. The Court said that it would pretend that Caballes was pulled over for going six miles per hour over the speed limit even though it knew that was not the reason for the stop: “[W]e proceed on the assumption that the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding; accordingly, we have omitted any reference to facts about respondent that might have triggered a modicum of suspicion.”³⁵⁶ Making it sound like it gave Caballes the benefit of the doubt, the Court in fact willfully chose to ignore that Caballes was pulled over on the basis of the DEA’s dubious drug courier profile.

350. Brief for Respondent, *supra* note 336, at 6.

351. Brief for the Petitioner at 6-7, *Caballes*, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 1530261.

352. *See id.* at 8-9.

353. *Caballes*, 543 U.S. at 409.

354. *Id.* at 410.

355. Indeed, an amici brief filed by twenty-eight states in support of Illinois’ position mentioned Operation Pipeline. *See* Brief of Arkansas and 27 Other States as Amici Curiae in Support of Petitioner, at 17 n.2, *Caballes*, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 1475506. But that brief may not have been read. *See* Tony Mauro, *Bench Pressed: A Pair of High Court Justices Offer Advocates Advice About the Proliferation of Amicus Briefs*, AM. LAWYER, Mar. 2005, at 85 (reporting that Justices Ginsburg and O’Connor admitted during panel discussion to not reading many amicus briefs filed with Court).

356. *Caballes*, 543 U.S. at 407.

In separate dissents, both Justices Souter and Ginsburg voiced their skepticism that *Caballes* was actually pulled over for speeding, but neither drew any legal significance from the fact.³⁵⁷ Justice Souter's dissent focused on the fact that drug-sniffing dogs are not the infallible creatures that the Court assumed they were in *Place*.³⁵⁸ Justice Ginsburg considered it irrelevant that the stop was not prolonged by the dog's business. She believed the dog sniff itself was intrinsically problematic because it was unrelated to the justification for the stop: "The unwarranted and nonconsensual expansion of the seizure here from a routine traffic stop to a drug investigation broadened the scope of the investigation in a manner that, in my judgment, runs afoul of the Fourth Amendment."³⁵⁹ Both Justices felt it necessary to point out that a bomb-sniffing dog would not bother them the way a drug-sniffing dog did.³⁶⁰

There is a fundamental problem with a jurisprudence that allows the very sort of searches the Framers condemned to be visited daily on drivers nationwide. What is worse is that the Court is unaware of the problem. Four years after *Whren* and five years before *Caballes*, seven Justices agreed in *Edmond* that the Fourth Amendment prohibits police from stopping cars at a checkpoint to have a dog sniff them for drugs.³⁶¹ With no change in the Court's membership, six Justices held in *Caballes* that a dog sniff during a traffic stop does not violate the Fourth Amendment.³⁶² The Court failed to recognize that *Caballes* and *Edmond* are the same case and involve the same arbitrary seizure. The only difference is that in *Edmond* the systematic nature of the stops was obvious. In *Caballes*, the fact that the stop was part of a federally-created systematic dragnet was hidden from view because the stops are made by various police agencies one car at a time — hundreds of times a day, every day, all over the country.

Highlighting the U.S. Supreme Court's failure to grasp the problem of pretextual traffic stops, some state courts have expressed considerable discomfort with Operation Pipeline's implications for the values protected by

357. *Id.* at 414 n.4 (Souter, J., dissenting); *id.* at 417-18 (Ginsburg, J., dissenting).

358. *Id.* at 410-11 (Souter, J., dissenting).

359. *Id.* at 420-21 (Ginsburg, J., dissenting).

360. *Id.* at 417 n.7 (Souter, J., dissenting); *id.* at 423 (Ginsburg, J., dissenting).

361. *City of Indianapolis v. Edmond*, 531 U.S. 32, 33-36 (2000); *see also id.* at 56 (Thomas, J., dissenting on other grounds).

362. 543 U.S. at 410 (Souter, J., dissenting); *id.* at 417 (Ginsburg, J., dissenting). Chief Justice Rehnquist did not participate.

the Fourth Amendment.³⁶³ They have for that reason found consents invalid under the totality of the circumstances test established in *Bustamonte* and affirmed by *Robinette*. In *Robinette* itself, the Ohio Supreme Court held on remand that Robinette's consent was the product of an illegal detention and affirmed the suppression of evidence in his case.³⁶⁴ Following Ohio's lead, the Maryland Court of Appeals likewise held that a motorist would not have felt free to leave after receiving a citation and being asked to step out of his car and answer questions.³⁶⁵ The Wyoming Supreme Court reached the same conclusion in the case of a man who was stopped for traveling seventy-nine miles per hour in a seventy-five mile-per-hour zone, given a warning, and then extensively interrogated until a drug-sniffing dog arrived.³⁶⁶ The court noted: "We have previously expressed disapproval of the use of traffic violations as a pretext to conduct narcotics investigations. . . . While we acknowledge the importance of drug interdiction, we are deeply concerned by the resulting intrusion upon the privacy rights of Wyoming citizens."³⁶⁷

V. TWO PROPOSITIONS

The fact that Operation Pipeline can operate under the nose of the very Court that prohibited highway checkpoints for drug interdiction shows how arbitrary and irrational Fourth Amendment jurisprudence has become, particularly with regard to suspicionless searches. Generating a principled and greatly simplified framework for assessing the constitutionality of suspicionless searches is possible. Doing so requires, however, two fundamental changes in Fourth Amendment jurisprudence that will establish badly needed objective criteria for determining what searches and seizures can occur.³⁶⁸ The development of such criteria will eliminate the amorphous balancing process that makes Operation Pipeline and other abuses possible. First, it must be recognized that the Fourth Amendment's text protects more

363. *But see* *Salmeron v. State*, 632 S.E.2d 645, 645-48 (Ga. 2006) (upholding drug trafficking conviction arising from stop bearing all indicia of Operation Pipeline where questioning and solicitation of consent did not prolong traffic stop).

364. *State v. Robinette*, 685 N.E.2d 762, 771 (Ohio 1997).

365. *Ferris v. State*, 735 A.2d 491, 502 (Md. 1999).

366. *O'Boyle v. State*, 117 P.3d 401, 404, 410-11 (Wyo. 2005).

367. *Id.* at 411.

368. A separate problem, which the Court has also addressed under the rubric of "reasonableness," is the manner in which a search or seizure is effected. *See, e.g., Muehler v. Mena*, 544 U.S. 93, 98 (2005). The criteria proposed here are threshold criteria and thus do not help resolve whether a search or seizure is unconstitutional because of the way in which it was undertaken.

than a nebulous privacy right. Second, courts must adhere strictly to the meaning of probable cause and avoid redefining it to suit the exigencies of the moment.

A. *Protecting Privacy by Protecting Property*

Privacy and property are not competing Fourth Amendment values. The middle ground excluded from this false dichotomy is that the Fourth Amendment protects privacy *by protecting property*. Even while purporting to disavow the link to property, *Katz* embedded the concept in its holding. The cornerstone of the Court's reasoning, the source of the expectation of privacy the Court identified, was property: "One who occupies [a phone booth], shuts the door behind him, and *pays the toll that permits him to place a call* is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."³⁶⁹ The Court's mention of paying the toll is neither surplusage nor accident. Paying for the call is a clear sign that the caller intends to exclude others from the conversation.

Acknowledging that property interests provide far better signposts of the private sphere than judicial divination of "privacy expectations" does not necessitate a return to the pre-*Hayden* understanding of the Fourth Amendment as protecting only property interests. It implies only that the Fourth Amendment is better understood as protecting at least one's property from government incursions.³⁷⁰ This understanding comports with the text and roots of the Fourth Amendment, which explicitly reference property. The Amendment speaks of the people's "right to be secure" in their selves and their property—"their persons, houses, papers, and effects"³⁷¹—thus delineating a sphere protected from unjustified government intrusion. It is true that "the reach of the Fourth Amendment is not determined by state property law" and that it should not be so determined.³⁷² But that does not negate the fact that the Amendment protects property. It means only that the modifier "their" should be given a practical rather than a technical or legalistic interpretation.³⁷³

369. *Katz v. United States*, 389 U.S. 347, 352 (1967) (emphasis added).

370. See *Cloud*, *supra* note 94, at 71-73.

371. U.S. CONST. amend IV.

372. *California v. Rooney*, 483 U.S. 307, 320 & n.2 (1987) (White, J., dissenting).

373. Compare *Minnesota v. Carter*, 525 U.S. 83, 89 (1998) ("The text of the Amendment suggests that its protections extend only to people in 'their' houses. But we have held that in some circumstances a person may have a legitimate expectation of privacy in the house of someone else."), with *id.* at 94 (Scalia, J., concurring) ("That 'their . . . houses' was

The rejection of property as a Fourth Amendment value sprang from the Court's overreaction to *Boyd's* rigid reading of *Entick*. Lord Camden emphasized that Entick's papers were his "dearest property"³⁷⁴ to highlight the gravity of the trespass committed by the Crown's messengers. His point was not, as *Boyd* took it, that the government cannot seize property without asserting a superior interest but that invasions of property implicate personal privacy and autonomy. Thus, the government cannot infringe property rights without a good reason. By protecting Entick's house and papers, the law protected his privacy. Severing the connection between property and privacy rendered privacy difficult to find and to defend.

The *Katz* test was unworkable from the beginning because the question it asked—whether people expect calls made from telephone booths to be private—is not susceptible of resolution through adjudication. By deemphasizing the Fourth Amendment's protection of private property and focusing on privacy, the Court could delimit the Amendment's reach only by having judges decree what is private. The resulting hierarchy of protection would be neither necessary nor possible if it were acknowledged that the Fourth Amendment accepts and declares that people are entitled to privacy in their property. Property is much more concrete and readily identifiable than privacy and therefore less easily compromised for the sake of a government interest—even a professedly "compelling" one like catching drug couriers or teenage drug users. While the Court can somewhat plausibly claim that people expect less privacy in their cars than in their houses, it could hardly say that people's cars are less "theirs" than their homes are. The Fourth Amendment speaks expansively and inclusively of security in all of one's possessions and there is no reason to distinguish among them.³⁷⁵

Tellingly, the Supreme Court was forced to admit that the Fourth Amendment does not create tiers of privacy when the government tried to push the expectation-of-privacy hierarchy to its extreme. In *United States v. Chadwick*, the government argued that, because the Framers were concerned

understood to mean 'their respective houses' would have been clear to anyone who knew the English and early American law of arrest and trespass that underlay the Fourth Amendment.").

Similarly, the Supreme Court has sought to determine whether hearsay statements are "testimonial" for Confrontation Clause purposes by using a practical rather than a technical definition of the term. See *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006) (discussing *Crawford v. Washington*, 541 U.S. 36, 53-54, 53 n.4 (2004)).

374. *Entick v. Carrington*, (1765) 19 How. St. Tri. 1029, reprinted in (1765) 95 Eng. Rep. 807 (K.B.) (partial reprint).

375. There may be some exceptions on the margins of one's possessions, but "effects" should be interpreted broadly. See *Hester v. United States*, 265 U.S. 57, 59 (1924) (holding that "open fields" were not part of houses or effects).

only with house searches under general warrants, the warrant procedure should apply only to homes, offices, and private papers.³⁷⁶ Rejecting the contention, the Court declared (contrary to many holdings) that the Reasonableness Clause “draws no distinctions among ‘persons, houses, papers, and effects’ in safeguarding against unreasonable searches and seizures.”³⁷⁷ Even though some of the Justices characterized the government’s argument in *Chadwick* as “extreme,” the hierarchy of privacy expectations is not far removed from the government’s position, as the Court’s treatment of cars and students aptly shows.

Whatever practical value the hierarchy of privacy expectations has is utterly outweighed by the insoluble, metaphysical questions it occasions. Eliminating the hierarchy would eliminate the need to predicate the scope of constitutional rights on such bizarre considerations as whether a mobile home is more house than car.³⁷⁸ It would also eliminate the paradoxes created when personal items are moved from a protected place to a less-protected one. Current law “prohibit[s] a search of a briefcase while the owner is carrying it exposed on a public street yet . . . permit[s] a search once the owner has placed the briefcase in the locked trunk of his car.”³⁷⁹ Faced with this conundrum in a recent case challenging suspicionless searches of ferry passengers on Lake Champlain, the Second Circuit simply sidestepped the issue.³⁸⁰ One of the plaintiffs drove his car onto the ferry while the other biked.³⁸¹ Realizing that the law required the senselessly inconsistent holdings that the biker has a full expectation of privacy in his backpack but the driver has only a negligible expectation of privacy in the trunk of his car, the court punted the issue and assumed *arguendo* that the privacy expectations were equivalent.³⁸²

The Amendment’s protection should not ebb and flow as a purse is taken into a car, down the street, or into a school. It makes much more sense to say that the Fourth Amendment protects a student’s purse from government intrusion because it is hers. If she enjoys less protection from government searches of the desk and locker assigned to her by the school, as the Court once suggested might be the case, it is because those are not hers and the

376. 433 U.S. 1, 7 (1977).

377. *Id.* at 8.

378. See *California v. Carney*, 471 U.S. 386, 393-94 (1985); *id.* at 405-06 (Stevens, J., dissenting).

379. *California v. Acevedo*, 500 U.S. 565, 598 (1991) (Stevens, J., dissenting).

380. See *Cassidy v. Chertoff*, 471 F.3d 67, 78 (2d Cir. 2006).

381. *Id.* at 72.

382. *Id.* at 78.

school can lend them to her with conditions.³⁸³ Similarly, a government employee should not have Fourth Amendment rights in the office he uses at work, even if he decorates it with personal items, because it is not his property.³⁸⁴ Cars should be fully protected by the Fourth Amendment because they belong to the people who use them, even if they are leased or just borrowed. That cars are regulated or used on public highways is not any more relevant to the degree of Fourth Amendment protection they have than walking on a public sidewalk would be to the question of whether a person can be stopped and frisked.

That is not to say that property interests can always be indubitably recognized or that the Fourth Amendment does not protect privacy that is not tied to a property right. There would still be difficult questions to resolve, such as whether the location of one's cellular phone is constitutionally private, if the law recognized both property and privacy as core Fourth Amendment values.³⁸⁵ Insisting, as the Framers did and intended, that the government respect *at least* private property simplifies many questions that current law needlessly complicates and provides an adjudicative rather than political framework for resolving the hard ones. In the context of suspicionless searches, recognition of property as private takes away the Court's ability to characterize a traffic stop, a highway checkpoint stop, or an airport terminal stop for a quick luggage sniff as a "minimal" or "slight" intrusion.³⁸⁶ As *Entick* held, the government must respect property to the same extent that individuals must and avoid committing even a minute trespass without cause:

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.³⁸⁷

Highway checkpoints and luggage sniffs are not validated because they last only a few minutes or even a few seconds, because cars receive less

383. See *New Jersey v. T.L.O.*, 469 U.S. 325, 337-38 & n.5.

384. Cf. *O'Connor v. Ortega*, 480 U.S. 709, 717-18 (1987).

385. Some of these will be examined in a forthcoming article.

386. See, e.g., *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 451-52 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-58 (1976).

387. *Entick v. Carrington*, (1765) 19 How. St. Tri. 1029, 1066, *reprinted in* (1765) 95 Eng. Rep. 807 (K.B.) (partial reprint of case and quotation not reprinted).

protection than houses, or because drug couriers are hard to catch. These rationalizations are just a thin veil for the Court's normative conclusions that even busy travelers or drivers *ought to be willing* to tolerate some amount of delay and intrusion if it means catching more drug dealers—a proposition that is far from unassailable. Just as a landowner need not give any reason for excluding others from treading on his soil, drivers need not explain why they do not want to have their cars sniffed.

The justification for a search or seizure does not and should not depend in any way on *how much* the Fourth Amendment is transgressed but on *whether* it is transgressed. As Justice Ginsburg perceived in her dissent in *Caballes*, the harm of the dog sniff was not whether it lengthened the traffic stop.³⁸⁸ It was the fact that it transformed the traffic stop into a search for drugs.³⁸⁹ There is no need to count minutes or to consider the degree of the intrusion to realize that being stopped so that a dog can sniff one's car is an annoying waste of time for the vast majority of Operation Pipeline targets who are guilty of nothing but driving. Justice Stevens, the author of the *Caballes* decision, recognized this reality in another case, in which he wrote:

In contrast to pedestrians, who are free to keep walking when they encounter police officers handing out flyers or seeking information, motorists who confront a roadblock are required to stop, and to remain stopped for as long as the officers choose to detain them. Such a seizure may seem relatively innocuous to some, but annoying to others who are forced to wait for several minutes when the line of cars is lengthened³⁹⁰

Indeed, as far back as 1925, the Court noted that drivers stopped by police hoping to chance upon contraband would suffer an unconstitutional “inconvenience and indignity.”³⁹¹ This echoes Justice Scalia's insight for the unanimous Court in *Whren* that individuals have a Fourth Amendment interest in “avoiding police contact.”³⁹² This interest is not the interest that a guilty criminal has in evading detection and capture. It is simply “the right to enjoy life,—the right to be let alone”³⁹³ to drive one's car or walk through an airport without being interrupted by a nosy government. This right is best

388. *Illinois v. Caballes*, 543 U.S. 405, 420 (2005) (Ginsburg, J., dissenting).

389. *Id.* at 420-21.

390. *Illinois v. Lidster*, 540 U.S. 419, 428-29 (2004) (Stevens, J., dissenting).

391. *Carroll v. United States*, 267 U.S. 132, 153-54 (1925).

392. *Whren v. United States*, 517 U.S. 806, 818 (1996).

393. *Warren & Brandeis*, *supra* note 98, at 193.

protected, as the Framers understood, by requiring the government to respect private property.

B. Strictly Enforcing Probable Cause

While according uniform Fourth Amendment protection to cars and houses would begin to rationalize the analysis of roadblocks and other mass suspicionless searches, below-the-radar abuses like Operation Pipeline would be unaffected. Unlike checkpoints and urinalyses, Operation Pipeline does not depend for its constitutionality on any diminished expectation of privacy. Yet, it is exactly what the Fourth Amendment was meant to bar. It is tempting to attempt to resolve the anomaly by arguing that, contrary to *Whren*, the Fourth Amendment must require officers to stop cars for only the right reasons, just as they can erect checkpoints only to further “special needs.” *Whren*’s deficiency, however, is not that it refused to consider what was on the officer’s mind. The crack dealers in that case aroused suspicion by their furtive driving maneuvers, and they were careless enough to be caught literally holding the bags of crack in their hands.³⁹⁴ Whether the traffic code was used as a pretext to stop these suspicious people is no more a concern than whether Officer McFadden’s patdown of the gun-toting Terry was motivated in part by racism. Police officers, even those of impure hearts, should investigate objectively suspicious activity.

The problem with cases like *Whren* and *Caballes* is that they fail to recognize that the stops in such cases can never be supported by probable cause. “Probable cause” is a term that relates only and strictly to criminal activity.³⁹⁵ There can therefore never be “probable cause” to believe that a civil traffic infraction has occurred. Both *Whren* and *Caballes* were predicated on the Court’s assertion that there was “probable cause” for the stops—as though going seventy-one in a sixty-five mile-per-hour zone subjected one to being stopped and searched in the same way as robbing or stabbing someone. The very first line of Justice Scalia’s opinion shows the mistake. It describes the case as concerning “a motorist who the police have probable cause to believe has committed a civil traffic violation.”³⁹⁶ The same mistake shows up in Justice Stevens’ majority opinion in *Caballes*:

394. *Whren*, 517 U.S. at 808-09.

395. See Ricardo J. Bascuas, *The Unconstitutionality of “Hold Until Cleared”: Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 716-19 (2005).

396. *Whren*, 517 U.S. at 808.

"Here, the initial seizure of respondent when he was stopped on the highway was based on probable cause, and was concededly lawful."³⁹⁷

To speak of "probable cause" to believe someone committed "a civil traffic infraction" is, at best, utter nonsense and, at worst, a monstrous feat of legerdemain. By mistakenly including government suspicion of even the most trivial regulatory violation within the meaning of "probable cause," the Court guarantees that probable cause will always exist. A seizure made for an administrative purpose—i.e., to cite a civil traffic infraction—then becomes an occasion to quiz and search a driver who does not feel free to leave. It is not the officer's subjective intent that is the problem, as *Whren* correctly perceived. It is the leveraging of an administrative function into a criminal investigation.

It is theoretically possible, of course, that legislatures could make all traffic violations misdemeanor crimes rather than civil infractions and thus salvage *Caballes*' reasoning and Operation Pipeline's supposed legitimacy. Assuming that there are no constitutional limitations on the conduct that can be made a crime,³⁹⁸ that would likely not occur for practical as well as political reasons. An enforcement system predicated on civil infractions affords great efficiencies over one based on petty criminal prosecutions. Civil processes lower the state's burden of proof, resolve the difficulty of proving intent by allowing strict liability, and eliminate the need for certain procedural protections at trial. The benefits to the state of enforcing traffic laws civilly are considerable. Detroit, tellingly, recently began enforcing city codes to combat urban blight as traffic-like civil infractions rather than as minor crimes.³⁹⁹ Cases are now dispatched by hearing officers rather than judges in just a few minutes.⁴⁰⁰ The hearing officers dispose of as many cases in a day as the criminal court used to do in a week.⁴⁰¹ Conversely, criminalizing behavior erects greater procedural hurdles to accomplishing government objectives. In *Camara*, for example, the Court applied the warrant procedure along with the (modified) probable cause requirement

397. 543 U.S. 405, 407 (2005).

398. Justice Brennan's majority opinion in *Hayden* recognized that substantive criminal law can be expanded to weaken the Fourth Amendment and suggested that Congress' power to create crimes may be accordingly restricted, stating "there may be limits to what may be declared contraband." *Warden v. Hayden*, 387 U.S. 294, 306 n.11 (1967).

399. Geoffrey Gagnon, *City of Blight: Detroit's New Weapon in its War on Eyesores*, LEGAL AFFAIRS, July/Aug. 2005, at 8, 9.

400. *Id.*

401. *See id.*

precisely because the codes at issue were “enforced by criminal processes.”⁴⁰²

When a seizure or a search is made without probable cause, Fourth Amendment case law requires that it be limited to the purpose that justifies it. This accommodates the government’s need to fulfill its regulatory responsibilities without giving law enforcement unfettered discretion to search everyone. In the building code context, this presumably means that the Court would not permit housing inspectors to bring drug-sniffing dogs along when they check the wiring or to question residents about their drug habits. Yet, as long as the dog’s sniffing did not lengthen the inspection, *Caballes*’ rationale (which does not depend on the idea that cars are less private than homes) would make this constitutional. A dog-sniff, after all, is no search at all, according to the Court.⁴⁰³ Likewise, the Court would probably deem it outrageous if a housing inspector sought “consent” to rummage around people’s drawers and closets for illegal drugs.⁴⁰⁴ Because it mistakenly finds probable cause where none exists, the Court has failed to recognize that an innocent motorist should not be interrogated about his comings and goings. The fact that the same police enforce both criminal laws and traffic codes is no reason to equate an infraction with a crime. Officers enforcing a civil traffic code are performing an administrative function and should neither seek consent to search a car nor walk a drug-sniffing dog around it. As Justice Stevens and Justice Marshall have separately observed, so many people consent only because they think they have no choice.⁴⁰⁵

A strict interpretation of probable cause is not a matter of semantics. The Fourth Amendment principle that searches without probable cause are generally prohibited is the only guarantee that the police cannot bother whomever they want whenever they want. Even adherents of “generalized reasonableness” recognize that the probable cause requirement is necessary to prevent officers from accumulating too much discretion. The “generalized reasonableness” view limits the need for probable cause to a more narrow class of searches than the “warrant preference” theory, but that class

402. *Camara v. Mun. Court*, 387 U.S. 523, 531 (1967).

403. *See Illinois v. Caballes*, 543 U.S. 405, 409 (2005). *But see State v. Rabb*, 920 So. 2d 1175, 1183-87 (Fla. Dist. Ct. App. 2006) (distinguishing *Caballes* and holding that dog sniff of exterior of residence without warrant was search due to heightened privacy expectation in one’s house).

404. One reason why this does not happen is likely that, unlike traffic codes, housing and building codes are not commonly enforced by the same government officers who enforce criminal laws.

405. *See supra* note 332 and accompanying text for Justice Stevens’s observation. *See supra* note 322 and accompanying text for Justice Marshall’s observation.

certainly includes searches that take place in or affect the sanctity of the home.⁴⁰⁶ However small, this is a concession that strict enforcement of the probable cause standard as a threshold condition for some searches is necessary to make the Fourth Amendment an effective curb on official discretion.

Whatever damage *Terry* did to the probable cause requirement, it at least attempted to limit the exception to what was minimally necessary to avoid bloodshed.⁴⁰⁷ *Whren* eviscerates any limitation by erroneously equating traffic infractions with crimes.⁴⁰⁸ While thus stretching "probable cause" to the point of meaninglessness, *Whren* nonetheless acknowledged that a probable cause finding has important legal consequences: it means that the Fourth Amendment is satisfied and a seizure as well as an interrogation and a dog sniff are all ipso facto justified.⁴⁰⁹ If that is true, then it is essential that the probable cause requirement be correctly enforced or the Fourth Amendment means very little. This is not idle speculation: the result of the Court's failure to realize that there is no such thing as probable cause to believe a driver was speeding is that the police now stop and harass untold numbers of drivers just hoping to find something incriminating.

The Court's recent effort to affirm the distinction between discrete police encounters and "special needs" checkpoints cases demonstrates how the Court lapses into incompetence whenever it abandons the probable cause requirement. In *Brigham City v. Stuart*,⁴¹⁰ the Court held that police officers' entry into a home where a loud party had deteriorated into a drunken brawl was justified by "the need to assist persons who are seriously injured or threatened with such injury."⁴¹¹ It did not matter whether the police officers were motivated by a desire to help or a desire to make arrests: "[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment."⁴¹² Although the Court conceded that it examines the "*programmatic* purpose" of

406. See *United States v. Grubbs*, 126 S. Ct. 1494, 1500 (2006); *Kyllo v. United States*, 533 U.S. 27, 33 (2001); *Arizona v. Hicks*, 480 U.S. 321, 327-28 (1987). Because the Fourth Amendment's text does not distinguish between houses and other effects, there is no reason (other than the Court's contrived hierarchy of privacy expectations) why the probable cause standard should apply only or more strictly to houses.

407. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Of course, later decisions have eroded *Terry*'s limitations considerably. See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000).

408. See *Whren v. United States*, 517 U.S. 806, 818 (1996).

409. See *id.* at 817-18.

410. 126 S. Ct. 1943 (2006).

411. *Id.* at 1947.

412. *Id.* at 1948 (quoting *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000)).

suspicionless searches conducted at checkpoints, it claimed that “has nothing to do with discerning what is in the mind of the individual officer conducting the search.”⁴¹³ The Court failed to realize, however, that the need to enter a home to render aid (like stopping a car to write a ticket) is not, under the Fourth Amendment, equivalent to entering a house with probable cause to believe a crime is afoot. All justifications for a search or seizure are not constitutionally fungible.

The Court should have asked whether the police had probable cause, not merely whether they had a justification for entering the house. If the police did not legitimately obtain reason to believe a crime was occurring, they might have entered the house to render aid or stop the melee but that could not excuse the lack of probable cause for Fourth Amendment purposes. The facts vaguely suggest that the police may have learned of the brawl only by trespassing. The Court failed to attribute any significance to the fact that the officers saw the fight only after entering into the backyard and peering into a window. The Court merely agreed with the trial court that knocking on the door would have been futile given the racket.⁴¹⁴ If the officers’ reason for entering the house was the product of a trespass, they did not legally obtain probable cause and the arrests were tainted by the Fourth Amendment violation. The Court failed to require a showing of probable cause even though that would not have required delving into the minds of the officers.

By not treating the probable cause requirement seriously, the Court creates a legal landscape that equally permits both small-scale Fourth Amendment violations, like backyard trespasses, and systematic dragnets of monumental scale, like Operation Pipeline. Worse, the Court seems totally unaware of this. Both *Caballes*⁴¹⁵ and *Robinette*⁴¹⁶ involved classic Pipeline stops, yet in neither case did the Court evince knowledge of this federal program which systematically stops more innocent people for no reason than any checkpoint.⁴¹⁷ Each of these cases presented the same scenario that the

413. *Id.*

414. *Id.* at 1946, 1949.

415. *Illinois v. Caballes*, 543 U.S. 405 (1985); *see also supra* notes 333-362 and accompanying text.

416. *Ohio v. Robinette*, 519 U.S. 33 (1996); *see also supra* notes 323-332 and accompanying text.

417. One federal district court judge was so taken aback by the implications of Operation Pipeline that he added this cautionary language to an order denying a suppression motion: “The issue is no longer one of pretext, but rather of whether probable cause existed for the traffic stop, and whether police testimony on this issue is credible.” *United States v. Sosa*, 104 F. Supp. 2d 722, 729 n.8 (E.D. Mich. 2000).

Court condemned in *Edmond*⁴¹⁸—yet the same Court reached an inconsistent result because it failed to require a showing of real probable cause. Had the Court strictly interpreted “probable cause” and realized that it did not exist in *Robinette* or *Caballes*, it would have recognized these cases as indistinguishable from *Edmond* even without knowing they arose from a DEA dragnet. Judicial insistence on true probable cause as a threshold condition for searches and seizures would make it much more difficult for the government surreptitiously to engage in unconstitutional general, suspicionless searches.

VI. CONCLUSION: CRITERIA FOR SUSPICIONLESS SEARCHES

Not all suspicionless searches are general searches. The people searched for explosives at New York’s subway stations are selected without individualized suspicion, but they are told exactly what the police are seeking. The searches are circumscribed to target explosives rather than narcotics or any writings. Operation Pipeline, at the other extreme, knows no such limitations. It is a generalized dragnet of enormous scale in which police stop individuals to search indiscriminately for any evidence of crime. With the privacy hierarchy dismantled and traffic stops properly conceptualized as administrative rather than criminal seizures, a legal test for suspicionless searches that will prevent abuses like Operation Pipeline but allow precautions like bomb searches in the New York City subway becomes possible.⁴¹⁹

Suspicionless searches—other than those at the border and those for civilly enforced administrative inspection programs—should be limited to those that meet a legal test comprising three objective conditions. This test will supplant the inconsistent and unpredictable judicial balancing of interests. Border searches would, for the traditional reasons, continue to be treated uniquely.⁴²⁰ Administrative searches to ensure compliance with safety or regulatory codes—building, fire, traffic codes and the like—could be

418. See *supra* notes 257-262 and accompanying text.

419. There is, of course, debate about whether searching subway or airplane passengers in fact makes subway or airplane travel safer. Whether such searches are desirable is a political question. Whether such searches are constitutional is something that a rational Fourth Amendment theory and jurisprudence should be able to answer rather than dismiss as “hardly the stuff of pressing or ‘cutting edge’ Fourth Amendment problems.” Maclin, *supra* note 15, at 27.

420. See *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004) (reciting that Executive has always had “plenary authority” to conduct border searches and seizures).

conducted as long as the possible consequences were limited to non-criminal sanctions: a civil traffic citation, a civil fine, or the like.⁴²¹ This reflects the intuition of the Court in various cases that “special needs” searches are more easily tolerated if they do not result in criminal penalties.⁴²² Obviously, if, as in *Whren*, contraband were discovered in plain view, the government would not have to ignore it. However, a government agent effecting an administrative seizure or search, such as a traffic stop, should have no authority to seek consent for a criminal search or to do anything to uncover crime inconsistent with the administrative purpose justifying the search. This would eliminate the leveraging on which Operation Pipeline is based as well as searches designed merely to harass.⁴²³

All other suspicionless searches must, first, be justified by credible, non-speculative evidence of a specific danger. Second, the threatened danger must entail imminent physical injury. Finally, to eliminate the problem of pretext, anything seized unrelated to the danger justifying the search must be suppressed from evidence. If these three conditions are met, seizures and searches reasonably tailored to avert the danger may be conducted without any need to engage in balancing the government need against individual interest.⁴²⁴ If they are not met, the usual probable cause requirement should be strictly enforced.

The first requirement of specific, credible evidence of danger serves to ensure that the legitimacy of a challenged suspicionless search is determined through adversarial adjudication, rather than by resort to unsupported judicial intuitions of salutary policy. It cannot be satisfied by bare assertions and foreboding conclusory statements. In this regard, the evidentiary presentations justifying the suspicionless searches of bags in the New York

421. See *Illinois v. Lidster*, 540 U.S. 419, 425-26 (2004) (stating that traffic stop is Fourth Amendment seizure); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (same); *Donovan v. Dewey*, 452 U.S. 594, 597-602, 597 n.3 (1981) (holding that federal mine inspection program enforced by civil infractions implicates but does not violate Fourth Amendment). Whether students could be prosecuted for possession of contraband or weapons would depend on whether they were searched with probable cause. This would encourage school officials to do what they should do if they suspect criminal activity: call the police.

422. See *supra* notes 266 to 273 and accompanying text.

423. The Court in *Terry* was likewise concerned that stop-and-frisks would be used to harass minorities if they were not strictly circumscribed. *Terry v. Ohio*, 392 U.S. 1, 14 (1968).

424. These criteria address only the threshold question of whether a search or seizure without probable cause can be undertaken. They do not address the question of whether the manner in which a search or seizure is conducted violates the Fourth Amendment. A search or seizure could satisfy all three criteria and nonetheless be unconstitutional if it were not properly tailored or carried out reasonably.

subway and the drug testing in *Acton* stand in sharp contrast to the hyperbolic speculation underlying *Earls*.⁴²⁵ New York City presented the district court with expert testimony on why transport systems are attractive terrorist targets.⁴²⁶ It showed that the New York subway in particular had been attacked before and that the subways in Moscow, Madrid, and London had been bombed within two years.⁴²⁷ The city's experts gave supported opinions as to why random spot searches were an effective deterrent.⁴²⁸ In *Acton*, the school district presented statistical evidence of a significant drug problem among their student-athletes.⁴²⁹ *Earls*, in contrast, was decided on summary judgment.⁴³⁰ The Court relied only on the supposed "nationwide drug epidemic" to justify the random drug testing.⁴³¹

One problem with implementing this first condition is that courts would have to resolve whether a purported threat was in fact "imminent" as opposed to attenuated or speculative. There would doubtlessly be close cases. However, insistence on evidence of a specific danger would be a considerable improvement over balancing judicial estimations of privacy expectations against judicial estimations of the desirability for searches. There is a difference between requiring the government merely to assert that the New York City subway may be bombed and requiring the government to demonstrate that terrorists, in fact, target transit systems. This requirement would also create a record susceptible to meaningful appellate review.

The second requirement for suspicionless searches is that they be limited to those situations where the government seeks to avert imminent physical injury. This is necessary to limit in a meaningful, concrete way the government's ability to resort to a practice fraught with potential for the very abuses the Framers despised. It can easily be argued that this condition is arbitrary and to some extent it is. However, some arbitrariness is unavoidable given that the very idea that the Fourth Amendment reaches all searches and seizures is itself an arbitrary legal fiction. The requirement of imminent physical danger is not, moreover, merely concocted. Threat of imminent physical injury is the condition that judges otherwise wary of suspicionless

425. Compare *MacWade v. Kelly*, 460 F.3d 260, 264-67 (2006), and *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995), with *Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 827 (2002).

426. *MacWade*, 460 F.3d at 265-67.

427. *Id.* at 264.

428. *See id.*

429. *See Acton*, 515 U.S. at 648-51.

430. *Earls*, 536 U.S. at 827.

431. *Id.* at 834. *Contra id.* at 849 (Ginsburg, J., dissenting).

searches repeatedly identify as the trigger that would cause them to permit otherwise unconstitutional searches. It provides an intuitive threshold criterion that can be evaluated based on the evidence presented rather than policy arguments.

The physical injury criterion comports with the intuition several justices have expressed in suspicionless search cases that the Constitution does (or at least should) make the aversion of serious physical harm legally possible. In *Caballes*, Justice Souter and Justice Ginsburg separately pointed out that, while having a dog sniff random cars for drugs seemed wrong, having a dog sniff cars for bombs would trouble them very much less.⁴³² Neither, however, articulated a principled way to distinguish the two sniffs. Justice Souter stated: "Suffice it to say here that what is a reasonable search depends in part on demonstrated risk."⁴³³ Likewise, Justice O'Connor had no rationale for her caveat in *Edmond* that, although checkpoints to advance a "general interest in crime control" are unconstitutional, they are nonetheless allowed "to thwart an imminent terrorist attack or to catch a dangerous criminal."⁴³⁴ It also vindicates Justice Jackson's frank insight in *Brinegar v. United States*:

If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and indiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.⁴³⁵

The Court has repeatedly pointed out that searches without probable cause (or, at the very least, some individualized suspicion) are exceptional. It was in making this very point that Justice Blackmun created the "special needs" moniker.⁴³⁶ The problem with the "special needs" line of cases is that it knows no principled boundary. The Court confronted that problem in

432. *Illinois v. Caballes*, 543 U.S. 405, 417 n.7 (2005) (Souter, J., dissenting); *id.* at 423 (Ginsburg, J., dissenting).

433. *Id.* at 417 n.7 (Souter, J., dissenting).

434. *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

435. 338 U.S. 160, 183 (Jackson, J., dissenting).

436. *See New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., dissenting).

*Edmond*⁴³⁷ and drew an arbitrary and blurry line. Scholars respond to the problem by proposing to impose on the government the burden of justifying a search. This also fails to provide any real limiting principle. Professor Amar's "proportionality principle," for example, posits that more serious government intrusions require greater justification.⁴³⁸ As Professor Anthony Amsterdam noted in discussing the substantively identical "sliding scale approach" to Fourth Amendment questions, this results in an infinite number of gradations leading inexorably to increased deference to law enforcement.⁴³⁹ Moreover, whether an intrusion is "serious" or a justification "weighty" will vary from judge to judge and case to case. To remedy this, Professor Thomas Clancy argued for "objective" criteria that only purportedly "differs from a balancing test" by requiring the government to advance a "substantial or compelling government interest as a precondition to its use."⁴⁴⁰

This is, in effect, not substantially different from the standard the Court has used for suspicionless searches, which are often supported by a so-called "compelling" need. Under its malleable criteria, the Court approved for example, highway checkpoints for catching illegal aliens on the basis of unsupported government assertions.⁴⁴¹ The Court accepted without question that "the flow of illegal aliens cannot be controlled effectively at the border" and that such checkpoints were "the most important of the traffic-checking operations."⁴⁴² In *Acton*, "[d]eterring drug use by our Nation's schoolchildren" was "perhaps compelling."⁴⁴³ By the time of *Earls*, the national drug problem had only "grown worse"⁴⁴⁴ and was definitely "compelling."⁴⁴⁵ Because privacy makes for such a nebulous right, just about any government interest can seem "compelling" alongside it.

437. See *supra* notes 257-262 and accompanying text.

438. Amar, *supra* note 15, at 1120.

439. Amsterdam, *supra* note 15, at 393-94.

440. Clancy, *supra* note 15, at 1036.

441. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 567 (1976).

442. *Id.* at 556.

443. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995).

444. See *Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 834 (2002).

445. *Id.* at 829 (discussing *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 658, 668 (1989)). In fact, the school's interest in the drug testing program may have been that federal legislation conditioned the receipt of federal education dollars on schools' implementing anti-drug use programs. See 20 U.S.C. § 7102 (Supp. IV 2004). In effect, the policy the school district was implementing was politically, not educationally, mandated. The government should not be able to circumvent the Fourth Amendment by having school officials do what police officers cannot do.

Determining whether the government has demonstrated a threat of imminent physical harm provides a more firm limit on illegitimate government snooping than asking whether the government's asserted need rises to the level of "compelling." That is not to say that there would not be close cases, just that the determination can be made through the normal modes of adjudication rather than balancing. For example, the Second Circuit recently approved a program to search commuters on ferries crossing Lake Champlain, relying only on congressional findings that large ferries could be targeted by terrorists:

[P]laintiffs make a slippery slope argument, claiming that because the threat of terrorism is omnipresent, there is no clear limit to the government power to conduct suspicionless searches. This is a legitimate concern. . . . [H]owever, it is not a concern implicated by the facts in this case, where the government has imposed security requirements only on the nation's largest ferries after making extensive findings about the risk these vessels present in relation to terrorism and . . . the scope of the searches is rather limited.⁴⁴⁶

Acton was also a close case in this regard. Experts testified regarding the effects of drugs, and athletic coaches testified to the threat of injuries from dangerous conditions which they attributed to drug use.⁴⁴⁷ This evidence arguably showed a colorable risk of imminent physical injury on the practice or playing field.⁴⁴⁸ Whether this showing should suffice is at least susceptible of adjudication in a way that *Earl's* generalized alarmist rhetoric about teenage drug use is not.⁴⁴⁹

As a practical matter, it is completely possible for courts to require evidence of a serious, non-speculative threat of physical injury even in an age of terrorist attacks. In 2004, the Eleventh Circuit ordered in *Bourgeois v. Peters*⁴⁵⁰ that a Georgia municipality be enjoined from requiring protestors at an annual rally to submit to magnetometer searches.⁴⁵¹ The protestors were

446. *Cassidy v. Chertoff*, 471 F.3d 67, 80-81 (2d Cir. 2006).

447. *See Acton*, 515 U.S. at 648-51.

448. *Id.* at 649. The argument that student-athletes had to be tested to avert injuries may have been a pretext to render the program immune to constitutional attack. *See id.* at 685 (O'Connor, J., dissenting). But, if the evidence supported the conclusion that injuries could result, then testing of athletes might nonetheless be justifiable.

449. *See Earls v. Bd. of Educ.*, 115 F. Supp. 2d 1281, 1282-84 (W.D. Okla. 2000), *rev'd*, 242 F.3d 1264 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).

450. 387 F.3d 1303 (11th Cir. 2004).

451. *Id.* at 1316.

members of a group which sought to convince the government to stop funding the School of the Americas at Fort Benning.⁴⁵² The school trains Latin American military leaders in combat and counterinsurgency tactics.⁴⁵³ At the time of the suit, the annual protest drew about 15,000 people and had no incidents of violence in its thirteen-year history.⁴⁵⁴ In 2002, Columbus, Georgia, for the first time required all protestors to pass through a magnetometer search checkpoint.⁴⁵⁵ The protestors' group sued to enjoin the searches.⁴⁵⁶

Columbus attempted to justify its search program with alarmist policy arguments rather than anything resembling the sober evidence that New York City would later use to justify its searches.⁴⁵⁷ It contended "that local governments need an opinion that, without question, allows non-discriminatory, low-level magnetometer searches at large gatherings."⁴⁵⁸ It argued that its searches were necessarily reasonable after September 11th and urged the court to hold that a metal detector search "at large gatherings is constitutional as a matter of law."⁴⁵⁹ The Eleventh Circuit rejected not only Columbus' justification for the search, but the invitation to engage in a balancing of interests as well:

Conducting an ad hoc analysis of the reasonableness of the search based on the judge's personal opinions about the governmental and privacy interests at stake, instead of applying the Supreme Court's well-established per se rules regarding warrants, prior judicial scrutiny of proposed searches, probable cause, and individualized suspicion ignores these crucial Fourth Amendment principles.⁴⁶⁰

Characterizing Columbus' invocation of September 11th "ill-advised and groundless," the Eleventh Circuit held the search program violated the Fourth Amendment given the lack of any history of violence and reason to

452. *Id.* at 1306.

453. *Id.*

454. *Id.*

455. *Id.* at 1307.

456. *Id.*

457. *Id.*

458. *Id.* at 1311 (quoting Brief of Appellees at 13, *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. Mar. 26, 2003) (No. 02-16886-CC)).

459. *Id.* (quoting Brief of Appellees at 13, *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. Mar. 26, 2003) (No. 02-16886-CC)).

460. *Id.* at 1314.

believe the event was a terrorist target.⁴⁶¹ The court recognized that its decision not to allow the searches without evidence of a need to prevent violence might mean that some crime, even some violent crime, could go undetected or unaverted:

It is quite possible that both protestors and passersby would be safer if the City were permitted to engage in mass, warrantless, suspicionless searches. Indeed, it is quite possible that our nation would be safer if police were permitted to stop and search anyone they wanted, at any time, for no reason at all. Nevertheless, the Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security.⁴⁶²

The third condition necessary for suspicionless searches is that the exclusionary rule applies to anything seized that is unrelated to the danger justifying the search. This is necessary, as with administrative searches, to prevent suspicionless searches targeted at particular dangers from being used pretextually to conduct prohibited generalized searches. This also ensures that the searches are stopped when the danger subsides by removing any incentive to continue them. Contraband could still be seized, but not used as evidence.

New York City's approach to eliminating the potential for pretextual searches in the subway is slightly different than suppressing all unrelated evidence, but it produces the same result. It has trained its officers not to look for drugs and not to reach any written materials. Moreover, it allows those selected for a search to just walk away and alerts people to this option. These features of the subway search are tantamount to suppression of anything discovered that is not a terrorist weapon. As a result, there have been only a tiny number of arrests made through the search program.

Interestingly, Pipeline officers engage in a form of suppression when it suits their needs by foregoing prosecution of certain offenders entirely. When they find a load of money during a stop, they seize it and the car it came in and routinely drop the driver off at a bus stop.⁴⁶³ Making a case against a money courier is more difficult than making one against a drug courier because possessing money is not in itself illegal. Foregoing charges ensures

461. *Id.* at 1311, 1315-16.

462. *Id.* at 1311-12 (citation omitted).

463. Glanton, *supra* note 299, at A9.

that there is no one around to contest the forfeiture.⁴⁶⁴ If the states can afford to forego convictions to secure lucre, they can afford to forego convictions to secure rights.

Exclusion of evidence unrelated to the justification for suspicionless searches simplifies the *Terry* paradigm as well. Officer McFadden's patdown was justified by the risk of imminent physical harm to himself and those whom *Terry* might have tried to rob. The guns that Officer McFadden found would be admissible. Had he instead found only a joint, *Terry* would require courts to determine whether the patdown's scope exceeded its justification. A categorical rule that weapons will not be suppressed but other evidence will eliminates the need for that analysis. Police officers will not have any reason to look for anything but a gun. This rewards the astute officer who averts a violent crime but not the lazy officer who uses a *Terry* frisk as a pretext to harass people or search for drugs.

[W]e must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies.⁴⁶⁵

The Supreme Court increasingly views exclusion of evidence as a blunt, inefficient weapon. In *Hudson v. Michigan*,⁴⁶⁶ Justice Kennedy felt compelled to devote the opening paragraph of his concurrence, which decided the case, to reassuring readers that the decision did not auger the end of the exclusionary rule: "[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt."⁴⁶⁷ As that clearly suggests, the majority opinion implies that the exclusionary rule's days are numbered. The *Hudson* Court held that, even though the Fourth Amendment requires police to knock and announce their presence, violations of that rule do not justify excluding any evidence.⁴⁶⁸ No doubt the part of Justice Scalia's opinion that alarmed Justice Kennedy was this:

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the

464. *See id.*

465. *Brinegar v. United States*, 338 U.S. 160, 182 (Jackson, J., dissenting).

466. 126 S. Ct. 2159 (2006).

467. *Id.* at 2170 (2006) (Kennedy, J., concurring).

468. *See id.* at 2165-68 (majority opinion).

sins and inadequacies of a legal regime that existed almost half a century ago.⁴⁶⁹

The Court went on to explain that, since *Mapp*,⁴⁷⁰ federal statutes and case law have made civil suits to recover damages for constitutional violations possible against state and federal officials as well as municipalities.⁴⁷¹ Provisions for attorneys' fees should ensure that lawyers would be available to pursue meritorious claims.⁴⁷² The Court also lauded the "increasing professionalism of police forces" with internal discipline procedures.⁴⁷³ All of these supposed reasons why the exclusionary rule is unnecessary to remedy knock-and-announce violations apply to Fourth Amendment violations in general.

Only the exclusionary rule serves to curb pretextual searches. Thus, whatever its drawbacks, the exclusionary rule is necessary to prevent the generalized searches the Fourth Amendment was meant to stop—as Operation Pipeline convincingly illustrates. True, civil liberties suits like those brought in California,⁴⁷⁴ New Jersey,⁴⁷⁵ and Arizona⁴⁷⁶ can, where the problem of racial profiling is widespread enough, change discriminatory policies. But the harm of suspicionless checkpoints, or so-called "consensual" traffic stop searches, is not just that they permit racial profiling. It is that they allow police to stop many innocent people without any reason—something that advocates of enforcing the Fourth Amendment exclusively through tort remedies argue happens only rarely.⁴⁷⁷ The DEA and the modern "professionalized" police forces across the country, in whom the *Hudson* majority expresses so much faith,⁴⁷⁸ unabashedly share in the spoils of Operation Pipeline without feeling the need to discipline any of their ranks. It may seem like police *should* seize drug money to buy expensive equipment, but the price of the slush funds for new cruisers and

469. *Id.* at 2167.

470. *Mapp v. Ohio*, 367 U.S. 643 (1961).

471. *Hudson v. Michigan*, 126 S. Ct. 2159, 2167-68 (2006).

472. *Id.*

473. *Id.*

474. *See supra* notes 304-305 and accompanying text.

475. *See supra* notes 306-307 and accompanying text.

476. *See supra* note 308 and accompanying text.

477. *See, e.g.*, Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 59 (1981) ("If only because the police have limited resources which they try to conserve, the typical violation consists not of harassment of the innocent but of overzealous enforcement against the guilty.").

478. *Hudson*, 126 S. Ct. at 2168.

police stations is the harassment and humiliation visited upon untold numbers of innocent motorists every day. Proper application of the exclusionary rule would bring those constitutional violations to an end.

Exclusion is not the drastic remedy the Court seems to believe it is. Even though government has been arguing since *Entick v. Carrington* that necessity justifies suspicionless searches, where that is actually true, governments will, just as New York City did, forego collateral prosecutorial benefits. And no drastic harm will follow. The proof is not just that New York City lets people carrying marijuana and cocaine walk away from a subway search. It is also manifest in the fact that the state police departments of both California and Arizona agreed to stop Pipeline consensual searches to settle the equal protection cases brought against them. Those settlements may mean that some minuscule proportion of illegal drugs that would otherwise have been seized is successfully delivered to market. But, as Justice Scalia wrote: "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."⁴⁷⁹

Suppressing unrelated contraband and evidence also brings a beneficial side-effect. It makes it unnecessary for courts to consider the efficacy of a "special needs" or suspicionless search. Removing much of the incentive to engage in an ineffective suspicionless search would mean that the police could be trusted to figure out whether measures such as subway searches effectively deter threats of physical harm. The effectiveness inquiry has not been very probing or substantial anyway. For example, the Second Circuit found suspicionless searches of commuters on Lake Champlain reasonably effective even though baggage stored in cars was not searched, tractor-trailers were not searched, and passengers were allowed to board with guns and knives.⁴⁸⁰ Courts prefer (as they should) to leave determinations of efficacy to more institutionally competent, accountable government officials with presumed expertise in addressing public needs.⁴⁸¹ As the Second Circuit put it in upholding the subway searches:

Counter-terrorism experts and politically accountable officials have undertaken the delicate and esoteric task of deciding how best to marshal the available resources in light of the conditions prevailing on any given day. We

479. *Arizona v. Hicks*, 480 U.S. 321, 329 (1987).

480. *See Cassidy v. Chertoff*, 471 F.3d 67, 85 n.7, 87 (2d Cir. 2006).

481. *See Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990).

will not—and *may not*—second-guess the minutiae of their considered decisions.⁴⁸²

Strictly enforcing the threshold requirements for all searches and seizures, particularly administrative seizures and suspicionless searches, while eliminating the hierarchy of privacy expectations will refocus Fourth Amendment law on protecting rights rather than making policy. Seizures to enforce administrative regulations like traffic codes and building codes are necessary to create safe conditions. Suspicionless searches may be necessary to prevent imminent physical harm from a known fugitive or an unknown terrorist. But administrative searches and suspicionless searches cannot be leveraged into general searches for evidence of any crime. The criteria suggested here provide a rational and consistent framework for determining the constitutionality of suspicionless searches, one that builds on the now prevailing legal landscape. Thus, the framework accepts that, despite history, the Fourth Amendment should govern all searches and seizures and also accepts that, despite the Framers' disapproval of general searches, searching airline passengers has been repeatedly held constitutional and embraced by the public. This framework thus makes it possible for law enforcement to perform searches supported by evidence of danger, like those in the New York City subway, but prevents governments from capitalizing on fear to harass unpopular groups, like the School of the Americas protestors. It does so by adopting an adjudicative rather than a political approach to determining the constitutionality of suspicionless searches, offering substantial improvements over the prevailing unpredictable balancing of interests approach.

482. See, e.g., *MacWade v. Kelly*, 460 F.3d 260, 274 (2d Cir. 2006).