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A Return to Fourth Amendment Basics: Undoing the Mischief of *Camara* and *Terry*

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INTRODUCTION

In its fourth amendment jurisprudence, the United States Supreme Court has struggled continually, and unsuccessfully, to develop a coherent analytical framework. Indeed, the Court has admitted its fourth amendment shortcomings, confessing that "[t]he course of true law pertaining to searches and seizures . . . has not—to put it mildly—run smooth."[1] Abundant criticism from both outside and within the Court has accomplished little, however, other than to highlight the Court's failures.[2] If anything, the situation has grown more dire, with the Court retaining a semblance of coherent fourth amendment analysis only by resorting to exceptions or an ill-defined balancing test.[3] Such stopgap measures, in turn, have merely rendered fourth amendment analysis more makeshift, lacking continuity in design and purpose.

The current state of affairs suggests that a reexamination of fourth amendment basics is in order. Many of the Court's present fourth amendment ills are symptoms of its failure to meet two basic challenges presented by the fourth amendment's text. First, the reasonableness clause's general proscrip-

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1. Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

2. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971) ("[I]t would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony."); Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468-69 (1985) (Court's fourth amendment doctrine is contradictory); Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974) (doctrine is unstable).

3. *See generally* Bradley, *supra* note 2, at 1471-72 (detailing Court's use of exceptions in fourth amendment area).

tion against "unreasonable searches and seizures" must be reconciled with the warrant clause's mandate that "no Warrants shall issue, but upon probable cause."[4] Second, the concept of reasonableness must be defined to reflect the amendment's underlying values and purposes. Until the Court meets these challenges, a systematic and coherent fourth amendment analysis cannot emerge, relegating fourth amendment case law to ad hoc resolutions lacking consistency and clear justification.

Although the challenge of reconciling the warrant and reasonableness clauses appears elementary, the Court's inability to meet the challenge is understandable considering that the task goes to the very core of the amendment's meaning and purpose. Reconciling the clauses requires balancing the citizenry's privacy interest against the government's power to intrude in pursuing important government objectives. If the Court assigns the warrant clause the greater role in fourth amendment analysis, the warrant and probable cause requirements will restrict the government's right to intrude. On the other hand, if the Court primarily relies on a general reasonableness standard, the obstacles of obtaining a warrant and proving probable cause are removed, and the scope of valid government intrusions broadens.[5] The two clauses thus strike different balances between the citizenry's privacy interests and the government's police power, and emphasizing one clause or the other will reflect the different balances. In many ways, to decide how the two clauses interrelate is to determine the fourth amendment's values and purposes.

Delineating the relationship between the warrant and reasonableness clauses in turn raises the second challenge—devising a test to guide the reasonableness inquiry that reflects the values underlying the fourth amendment. Determining that the reasonableness clause governs certain government intrusions accomplishes little unless the Court adequately defines a reasonable search or seizure. As the Court's current efforts il-

4. The fourth amendment provides that:

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

U.S. CONST. amend. IV.

5. *See generally* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393-94 (1974) (describing problems of general reasonableness standard).

lustrate, reasonableness is a slippery concept that, without definitional restraints, can allow the range of acceptable government intrusions to expand and overwhelm the privacy interests at stake.[6] Consequently, the definition of a reasonable search or seizure should be sufficiently stringent to preclude the temptation to undervalue privacy rights in comparison to important government objectives.

The two challenges of fourth amendment interpretation are formidable standing alone, and the Court's decisions in *Camara v. Municipal Court*[7] and *Terry v. Ohio*[8] have compounded the difficulty. Faced with novel fourth amendment questions, the Court in *Camara* and *Terry* turned to a broad reasonableness standard and an ill-defined balancing test for the immediate solutions. The combined effect of the *Camara* and *Terry* holdings, however, has proven to be something of a Faustian pact. The decisions allowed the fourth amendment's scope to extend to government activities like housing inspections, but in the process they significantly undermined the role of probable cause and set the stage for the long-term expansion of the reasonableness balancing test without proper justification or limits. Until the Court uncovers and remedies the hidden effects of *Camara* and *Terry* on fourth amendment analysis, its struggle to meet the two challenges will be based on a flawed view of the fourth amendment.

Because the effects of the *Camara* and *Terry* decisions on fourth amendment analysis have placed the Court in its present predicament, reevaluation of the Court's fourth amendment jurisprudence should begin with those cases. Part I of this Article traces the Court's fourth amendment analysis from the warrant clause's dominance through the eventual enthronement by *Camara* and *Terry* of the reasonableness balancing test. In Part II the Article analyzes the conceptual shortcomings of *Camara* and *Terry*. The Article demonstrates that those cases have failed to meet the challenges of fourth amendment interpretation because the relationship between the warrant and reasonableness clauses remains unclear, and the Court's attempts to contain the reasonableness balancing test have failed. In Parts III and IV, the Article proposes a composite model of the fourth amendment to meet its interpretational challenges. The model provides independent roles for the warrant and rea-

6. *See generally id.* at 393.
7. 387 U.S. 523 (1967).
8. 392 U.S. 1 (1968).

sonableness clauses based on an initiatory–responsive intrusion dichotomy. That distinction enables traditional probable cause to regain a prominent analytical role while still retaining sufficient flexibility to accommodate initiatory intrusions through the reasonableness clause. The model also replaces the Court's vague reasonableness balancing test with a strict scrutiny standard that provides precise guidance for the reasonableness inquiry and appropriately reorients fourth amendment analysis toward protecting privacy interests. The Article concludes that the Court should adopt the composite model to provide a coherent analytical framework, something conspicuously absent from the Court's current fourth amendment jurisprudence.

I. THE RISE OF REASONABLENESS IN FOURTH AMENDMENT ANALYSIS

A. WHEN THE WARRANT CLAUSE WAS KING

Prior to *Camara*, fourth amendment analysis had a relatively high amount of predictability: the Court presumed that a warrant based on probable cause was required before the police could perform a search or arrest.[9] The Court's strong preference for the warrant requirement relegated the amendment's reasonableness clause, which bans "unreasonable searches and seizures," to a secondary role. The Court used the concept of reasonableness primarily to justify making an exception to the warrant requirement when exigent circumstances dictated excusing the police from procuring a warrant.[10] Although reason-

9. The Supreme Court even implied that a warrantless search was *always* invalid under the fourth amendment. *See* Agnello v. United States, 269 U.S. 20, 32 (1925). Although the Court has clearly retreated from that position, it has almost unfailingly maintained its strong preference for the warrant requirement. *See, e.g.*, O'Connor v. Ortega, 107 S. Ct. 1492, 1499 (1987) (recognizing that warrant is normally required); Mancusi v. DeForte, 392 U.S. 364, 370 (1968) (warrantless search of office for union papers unreasonable even if subpoena *duces tecum* issued); United States v. Jeffers, 342 U.S. 48, 51 (1951) (warrant requirement too frequently ignored); Johnson v. United States, 333 U.S. 10, 13-15 (1948) (warrant requirement protects citizens from police discretion). The Court's warrant preference, however, has been neither unanimous, *see generally* C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE 136-40 (1986), nor always strictly implemented, *see O'Connor*, 107 S. Ct. at 1506 (Blackmun, J., dissenting) (contending that plurality did not properly defer to warrant preference). *See generally* Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 258-62 (1984) (discussing conventional interpretations of the fourth amendment).

10. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 393-94 (1978) ("exigencies of the situation" may make warrant unnecessary); *Jeffers*, 342 U.S. at 51 (warrant may be excused if "exceptional circumstances"); McDonald v. United

ableness sometimes necessitated making an exception for obtaining a warrant, probable cause remained sacrosanct, immune from modification even in the name of reasonableness.[11]

The Court's downplaying of an independent role for the reasonableness clause resulted largely from its wariness of the potential open-endedness of a fourth amendment test based on reasonableness. For example, in rejecting the argument that all searches incident to arrest are "reasonable" and thus constitutional, the Court explained that the argument relied on purely subjective views regarding the appropriateness of certain police conduct while ignoring relevant fourth amendment interests.[12] Under such an unrestrained analysis, "Fourth Amendment protection . . . would approach the evaporation point."[13] The reasonableness clause thus served only as a back-

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States, 335 U.S. 451, 454-55 (1948) (invalidating search because compelling reason for absence of warrant lacking). Moreover, the Court has interpreted exigent circumstances fairly narrowly, rejecting a generalized emergency exception. *See* Thompson v. Lousiana, 469 U.S. 17, 20-21 (1984) (per curiam) (only narrow exceptions exist to warrant requirement); *Mincey*, 437 U.S. at 393 ("[A] warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.' " (quoting Terry v. Ohio, 392 U.S. 1, 25-26 (1968))). *But cf.* Michigan v. Tyler, 436 U.S. 499, 511 (1978) (immediate warrantless reentry to investigate fire's origins valid under fourth amendment).

11. The Court specifically noted that if a warrantless search could be based on less than probable cause, "a principal incentive . . . for the procurement of . . . warrants would be destroyed." Wong Sun v. United States, 371 U.S. 471, 479-80 (1963) (footnotes omitted). *But cf. infra* note 39 (adapting probable cause to administrative subpoenas).

12. Specifically, the Court stated:

> It is argued in the present case that it is "reasonable" to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests.

Chimel v. California, 395 U.S. 752, 764-65 (1969).

13. *Id.* at 765. The warrant clause's dominance was also partly premised on a combined historical and textual argument:

> One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of the colonial Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable." Words must be read with the gloss of the experience of those who framed them. . . . When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity. Even a warrant cannot authorize it except when it is issued "upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized."

ground value in guiding the Court's interpretation and application of the warrant clause.[14]

The Court's almost exclusive focus on the warrant clause yielded predictability and strong protections, but it was not without costs. Because requiring a warrant based on probable

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United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) (footnote omitted).

14. The one major deviation from the exceptions approach—in which the Court used reasonableness alone as the measure of fourth amendment constitutionality—was in the area of searches incident to arrest. In *Rabinowitz* a majority of the Court relied on a generalized reasonableness approach to hold that no warrant was required for a search incident to arrest:

> [T]he Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.

Rabinowitz, 339 U.S. at 65-66 (emphasis in original).

The *Rabinowitz* majority's analysis represents what might be termed the rule of reasonableness approach to the fourth amendment. Unlike the exceptions approach, in which the Court uses reasonableness to decide whether an exception should be made to the warrant clause, the rule of reasonableness approach views reasonableness as the controlling rule of law. Thus the requirement of a warrant based on probable cause serves only as a guidepost in determining whether a search was constitutional, but it is not determinative of the constitutionality of the search.

The victory for the rule of reasonableness in *Rabinowitz* was ephemeral; the holding was overruled in *Chimel*, 395 U.S. 756-62. The *Chimel* majority strongly reaffirmed an exceptions approach to the fourth amendment, expressly rejecting the rule of reasonableness approach:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

Id. at 761 (quoting McDonald v. United States, 335 U.S. 451, 455-56 (1948)).

The Court also arguably used a reasonableness rather than exigent circumstances analysis in Carroll v. United States, 267 U.S. 132 (1925). In upholding a warrantless automobile search, the *Carroll* Court stressed the need for exigent circumstances to justify a warrantless search. *Id.* at 155-56. But the *Carroll* opinion also included broad language supporting warrantless searches of vehicles based on the difference between homes and vehicles without mentioning exigent circumstances. *Id.* at 153. The Court later characterized *Carroll* as both an exigent and nonexigent circumstances decision. *See* Chambers v. Maroney, 399 U.S. 42, 48-51 (1970) (discussing *Carroll* and subsequent cases). Justice Harlan, however, viewed *Carroll* as based solely on an exigency rationale. *See id.* at 62 (Harlan, J., concurring and dissenting) (criticizing the majority's reliance on *Carroll*).

cause would have precluded suspicionless government inspections, the Court did not extend the amendment's coverage very far beyond the context of criminal arrests and searches.[15] When the fourth amendment governed, therefore, it provided the full protections of the warrant clause—but the protections generally did not apply to government intrusions other than criminal investigations.

The Court's warrant clause emphasis and corresponding reluctance to expand fourth amendment protections beyond criminal investigations largely explain its holding in *Frank v. Maryland*.[16] In *Frank* the Court addressed the issue whether the defendant's conviction for resisting a warrantless inspection of his house violated the fourth amendment.[17] Upholding the

15. The Court's unwillingness to extend fourth amendment protections arguably was a result of inaction rather than an affirmative decision to limit its scope to criminal investigations. Although historical evidence suggests that the fourth amendment's origins were not limited to criminal investigation concerns, *see* Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 70-71, the Court's consideration of government activities short of a full-scale search and seizure was primarily limited to court orders to produce papers. *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886) (refusal to enforce order for invoices in custom duties case). Even in the area of subpoenas, the Court's extension of fourth amendment protections was less than enthusiastic. *See generally* Oklahoma Press Publishing Co. v. Rawling, 327 U.S. 186, 204-06 (1946) (holding fourth amendment protection against production of corporate papers is minimal). The Court was thus relatively free from precedential restraints in later concluding that the amendment's applicability in noncriminal investigation "touched at most upon the periphery." Frank v. Maryland, 359 U.S. 360, 367 (1959). *See also* Stahl & Kuhn, *Inspections and the Fourth Amendment*, 11 U. PITT. L. REV. 256, 262-63 (1950) (fourth amendment traditionally limited to "criminal or quasi-criminal proceedings"); Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1129 n.3 (1984) (discussing relation between civil and criminal searches under fourth amendment).

16. 359 U.S. 360 (1959). In *Frank* a city health inspector looking for a source of rats in the neighborhood found the defendant's house in an "extreme state of decay" and asked the defendant's permission to inspect the basement. *Id.* at 361. The defendant refused permission, and after a subsequent attempt to gain entry, the inspector swore out a complaint for the defendant's arrest based on a city code section providing:

> "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars."

Id. at 361 (quoting BALTIMORE, MD., CODE art. 12, § 120 (1958)).

17. The *Frank* majority actually used due process terminology and was less than explicit as to how, or to what extent, it viewed the fourth amendment as incorporated into its due process analysis. Justice Whittaker specially concurred simply to state his understanding that the majority opinion "ad-

conviction and fine, the *Frank* majority espoused the traditional view that if inspections like those at issue were subject to full fourth amendment protections, the search would have to satisfy the warrant requirement.[18] Yet requiring a warrant based on probable cause for housing inspections would defeat the inspections' objective of maintaining community health.[19] Resisting efforts to modify the warrant and probable cause requirements, the majority adopted an all-or-nothing view that if the Constitution required a search warrant, "the requirement [could not] be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue."[20]

Consistent with the Court's warrant clause orientation, the *Frank* majority also argued that because Frank's asserted privacy interest did not concern a criminal investigation, his claim, at most, touched "upon the periphery" of the important fourth amendment interests protected against invasion by government officials.[21] Stressing that the housing inspection was not a

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here[d] fully to th[e] principle" that "[t]he core of the Fourth Amendment prohibiting unreasonable searches applies to the States through the Due Process Clause of the Fourteenth Amendment." *Frank*, 359 U.S. at 373. Justice Whittaker's understanding of the majority's view of the fourth amendment appears correct given the majority's heavy reliance on the history of the fourth amendment and its case law and values. *See also infra* note 26 (discussing *Camara* majority's understanding of *Frank*). Justice Frankfurter's vacillation between fourth amendment and general due process analysis may in part reflect an ambiguity at the time over the fourth amendment's applicability to the states. *See* 3 W. LAFAVE, SEARCH AND SEIZURE § 10.1, at 599 (2d ed. 1987).

18. *Frank*, 359 U.S. at 373; *see supra* notes 9-14 and accompanying text (discussing traditional supremacy of warrant requirement).

19. Justice Frankfurter argued:

> Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts.

Frank, 359 U.S. at 372.

20. *Id.* at 373. Justice Frankfurter also argued that full fourth amendment protections were not necessary because the power of inspection already was "hedged about with safeguards designed to make the least possible demand on the individual occupant, and to cause only the slightest restriction on his claims of privacy." *Id.* at 367. For instance, the ordinance required that the inspector have cause to suspect that a nuisance exists and that the inspection be made during the day. *Id.* at 366. The ordinance also did not give the inspector the power to make forceable entries if the occupant refused entrance. *See id.* at 366-67. For the majority the effect of such a narrowly tailored inspection power was to further diminish the force of the defendant's asserted privacy interest. *See id.* at 367.

21. *See id.* at 367.

search for criminal evidence, Justice Frankfurter argued that the Constitution's prohibition against official invasion arose almost entirely from the individual's fundamental right to be secure from evidentiary searches made in connection with criminal prosecutions.[22] The majority pointed to the historical acceptance of warrantless inspections, not as an enforcement mechanism of the criminal law, but "as an adjunct to a regulatory scheme for the general welfare."[23] Consequently, the majority concluded that any legitimate liberty interest Frank had was overwhelmed by the government's need for inspection and the desirability of not tampering with the fourth amendment's rigorous protections.

B. *CAMARA*: REASONABLENESS GETS A FOOT IN THE DOOR

In *Camara v. Municipal Court*,[24] the Court overruled its holding in *Frank* that the fourth amendment's full protections did not extend to housing inspections.[25] Writing for the majority, Justice White rejected the "rather remarkable premise" in *Frank* that because housing inspections were not criminal investigations, they were merely on the periphery of the fourth amendment.[26] He argued that inspection programs in fact went to the fourth amendment's central purpose of "safeguard[ing] the privacy and security of individuals against arbitrary invasions by government officials."[27] Given that purpose, the majority concluded that it would be anomalous to suggest that an individual enjoys full fourth amendment protection only when

22. *See id.* at 365.

23. *Id.* at 367. Justice Frankfurter argued that in modern times the regulatory need was of "far greater magnitude than the writers of these ancient inspection laws ever dreamed." *Id.* at 371-72.

24. 387 U.S. 523 (1967).

25. *Frank* suffered one close call prior to *Camara*. In Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960) (per curiam), a conviction similar to the one at issue in *Frank* was affirmed by an equally divided Court. *Id.* at 264. The *Camara* Court justified its reconsideration of *Frank* by observing that state and local governments had increased their use of inspections and at the same time "numerous decisions of this Court have more fully defined the Fourth Amendment's effect on state and municipal action." *Camara*, 387 U.S. at 525.

26. *Camara*, 387 U.S. at 531. The *Camara* majority clearly understood *Frank* as being founded upon fourth amendment principles, "carving out an additional exception to the rule that warrantless searches are unreasonable under the Fourth Amendment." *Id.* at 529. *Cf. supra* note 17 (noting the *Frank* majority's unclear determination of the relation between the fourth amendment and due process).

27. *Camara*, 387 U.S. at 528.

suspected of criminal conduct.[28]

Unshackling the fourth amendment from *Frank*'s restrictive reading of the amendment's purpose, however, was only the first step. The majority still had to address *Frank*'s perceived dilemma that application of the fourth amendment to administrative inspections would either dilute the amendment's protections or preclude blanket inspections altogether.[29] In deciding how to apply the amendment, the Court did not adopt a new mode of fourth amendment analysis. Rather, it chose to assess the government inspection program within the traditional warrant and probable cause framework. Justifying its choice, the Court explained that it had adhered consistently to the governing principle that "[e]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[30]

Having elected to continue its historical warrant clause emphasis, the necessity of modifying the clause's requirements to permit the housing inspections was evident. Traditional probable cause required facts sufficient to justify a reasonably cautious person in believing that another had committed or was committing a crime.[31] Whether a search or arrest was reasonable depended at a minimum upon a showing of individualized suspicion amounting to probable cause. The fourth amendment would have precluded the government's power to conduct area housing inspections, a power all agreed was necessary, if probable cause required a showing of specific violations for each inspection. Consequently, the *Camara* majority redefined probable cause: rather than requiring individualized suspicion,

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28. *Id.* at 530. The *Camara* majority conceded at most that:

> [A] routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. For this reason alone, *Frank* differed from the great bulk of Fourth Amendment cases which have been considered by this Court. But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral."

Id.

29. *See supra* notes 18-20 and accompanying text.

30. *Camara*, 387 U.S. at 528-29.

31. Specifically, probable cause controlled the definition of reasonableness by limiting valid government intrusions to cases in which facts existed "sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). *See generally* C. WHITEBREAD & C. SLOBOGIN, *supra* note 9, at 146-53.

probable cause was recast as standing for a broader concept of reasonableness based on a weighing of the governmental and individual interests.[32] Under the new definition, probable cause existed and the warrant clause was satisfied once the Court concluded that the area housing inspections, although lacking individualized suspicion, were "reasonable."[33] Probable cause, therefore, still served the formal function of a prerequisite for the issuance of a warrant, but its traditional requirement of particularized suspicion became merely one example of probable cause's meaning in a particular setting.[34]

Ironically, in redefining probable cause as a flexible concept,[35] the Court's effort to satisfy the warrant clause gave reasonableness a foot in the door as an independent factor in fourth amendment analysis.[36] Prior to *Camara* the warrant

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32. The Court explained:

> In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. . . .
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> . . . In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.

Camara, 387 U.S. at 534-35; *see also id.* at 534-39 (discussing flexibility of probable cause standard as applied to municipal inspection programs). This adaptation of the warrant and probable cause requirements was first advocated by Justice Douglas in his *Frank* dissent. *See* 359 U.S. at 383 ("The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought.").

33. *Camara*, 387 U.S. at 538. To fully satisfy the warrant clause, of course, an administrative warrant is required based on flexible probable cause.

34. The *Camara* majority provided the following example of how its newly defined probable cause would function in fourth amendment analysis:

> [I]n a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

Id. at 535.

35. The Court's new definition of probable cause thus provided at least a semantical solution to *Frank*'s dilemma of how to maintain a warrant clause emphasis while extending the amendment to include government intrusions lacking particularized suspicion.

36. The dissent quickly pointed out that the majority's balancing of governmental and individual interests mirrored Justice Frankfurter's reasoning in *Frank* as to why such inspections were reasonable. 387 U.S. at 554 (Clark, J., dissenting) ("It is interesting to note that the factors the Court relies upon are the identical ones my Brother Frankfurter gave for excusing warrants in *Frank v. Maryland*."). Given that the Court utilized the same criteria under

clause had dictated the meaning of the reasonableness clause. A search or arrest was reasonable only when a warrant based on probable cause issued. *Camara*, in contrast, reversed the roles of probable cause and reasonableness.[37] Instead of probable cause defining a reasonable search, after *Camara*, reasonableness, in the form of a balancing test, defined probable cause.[38] Allowing reasonableness to define probable cause expanded the range of acceptable government behavior beyond intrusions based on individualized suspicion to include activities in which the government interest outweighed the individual's privacy interests. Reasonableness, in the form of a balancing test, had finally gained entrance into fourth amendment analysis, albeit through the back door of the warrant clause.[39]

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either the *Frank* or *Camara* approach, the *Camara* dissent argued that the majority was simply adding a redundant procedural hurdle in the form of a search warrant:

> I ask: Why go through such an exercise, such a pretense? As the same essentials are being followed under the present procedures, I ask: Why the ceremony, the delay, the expense, the abuse of the search warrant? . . . I submit that the identical grounds for action elaborated today give more support—both legal and practical—to the present practice as approved in *Frank* . . . than they do to this legalistic facade that the Court creates.

Id. at 554-55.

37. Traditional probable cause was now an example of the "controlling standard of reasonableness," rather than its defining component. *Id.* at 539.

38. Justice White elaborated: "The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.*

39. The novelty of the majority's leap in redefining probable cause was hardly acknowledged. Indeed, its holding was cast as fulfilling the "historic purpose" behind the fourth amendment. *Id.* at 539. The new definition was spawned by way of an unstated analogy to administrative agency subpoenas of corporate records and a *cf.* citation to Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). *See Camara*, 387 U.S. at 539. The majority also invoked the subpoena analogy in *Camara*'s companion case, See v. Seattle, 387 U.S. 541, 545 (1967) (upholding administrative warrant requirement for fire inspection of business premises).

The administrative subpoena cases like *Oklahoma Press* do not provide the staunchest support for *Camara*. A surface similarity exists in that both are aimed at allowing administrative enforcement of regulations. The differences, however, are significant. First, the *Oklahoma Press* Court stressed that it was dealing with corporate papers and not an "actual search" and that corporations are subject to greater legislative control than individuals. 327 U.S. at 195, 209. *Camara*, in contrast, involved the physical inspection of a private residence. 387 U.S. at 525. Moreover, the *Oklahoma Press* majority justified its lax probable cause standard in part on the premise that fourth amendment protection against production of corporate papers was at best minimal and may not even apply. 327 U.S. at 208. The *Camara* Court, however, rejected similar

C. *TERRY:* ENTHRONING THE REASONABLENESS BALANCING TEST

Building upon *Camara*, the Court's decision in *Terry v. Ohio*[40] provided reasonableness an even greater role as an independent factor in fourth amendment analysis. Although in *Terry* the Court returned to the more familiar fourth amendment area of criminal investigations, the novelty of *Terry*'s setting—a police stop and frisk on less than probable cause—raised a number of parallels to *Camara*.[41] As in *Camara* the Court first had to decide whether the fourth amendment even extended to the government behavior at issue. Interpreting the fourth amendment's purpose expansively, the *Terry* Court rejected the state's argument that a stop and frisk was not a search and seizure under the amendment.[42] Instead, the Court ruled that the procedures involved not a mere "petty indignity" but a "serious intrusion upon the sanctity of the person."[43]

Having held that the fourth amendment applied to a stop and frisk, the difficult question of how to extend the amendment's protections remained. The legitimate need to conduct weapon frisks with less than traditional probable cause ruled out traditional warrant clause analysis.[44] Consequently, the Court was forced, as in *Camara*, to either adapt the warrant and probable cause requirements to a new situation or adopt an entirely new standard.

In making its choice, the *Terry* Court did not rely on the *Camara* adaptation of the warrant clause reflected in the flexible probable cause standard[45] but decided instead that the warrant clause simply did not apply to the police conduct at issue.

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reasoning in *Frank*, arguing that, "we cannot agree that the Fourth Amendment interests at stake in these inspections cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 387 U.S. at 530 (footnote omitted).

40. 392 U.S. 1 (1968).

41. The issue of stop and frisks had received extensive attention from commentators. *See* LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40, 40 n.4 (1968) (citing 48 articles, student notes, and books).

42. 392 U.S. at 16-17, 19.

43. *Id.* at 17; *see also id.* at 24-25 (even limited searches severely intrude on cherished personal security).

44. *See id.* at 24.

45. Professor LaFave has argued that *Terry* would have been more properly decided by using *Camara*'s flexible probable cause standard, although he concludes that the result would have been the same. LaFave, *supra* note 41, at 54-56.

Quick, responsive police action based upon the officer's on-the-spot observation of suspicious activity traditionally had not been, nor could it be as a practical matter, subject to the warrant requirement.[46] Because of these considerations and perhaps daunted by the prospect of redefining probable cause as a different level of suspicion, the majority decided that the reasonableness clause's "general proscription against unreasonable searches and seizures" should control.[47]

That decision posed an additional analytical problem for the Court. Because the Court had not previously relied upon reasonableness as an independent fourth amendment factor, it did not have a reasonableness test to utilize. As a result, the Court turned to its closest example of a reasonableness balancing test—the *Camara* definition of probable cause.[48] The Court explained that the reasonableness of the officer's stop and frisk should be judged by balancing the government's interests against those of the individual. The Court thus made *Camara*'s flexible definition of probable cause the very definition of reasonableness.[49]

The Court applied its balancing test to stop and frisks and, after weighing the competing interests, decided that stopping

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46. The Court explained:

> If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. . . . [W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.

Terry, 392 U.S. at 20.

47. *Id.*

48. Chief Justice Warren expounded:

> [T]o assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails. *Camara v. Municipal Court.*"

Id. at 20-21 (quoting 387 U.S. 523, 534-35, 536-37 (1967)).

49. Even in *Camara* the Court's flexible definition of probable cause had threatened to make probable cause simply a synonym for reasonableness. As with the Court's adoption of a flexible probable cause standard in *Camara*, *see supra* note 39, the *Terry* majority did not expressly acknowledge the adoption of a controlling reasonableness standard as an innovative step. Indeed, if one was unaware of the history leading up to *Camara* and *Terry*, one would assume that the balancing test was a long established mode of fourth amendment analysis. Justice Harlan, in contrast, expressly recognized that the Court

an individual and frisking for weapons was justified if "reasonable suspicion" existed that the suspect was armed and dangerous and that crime was afoot.[50] The Court's new standard of reasonable suspicion rested somewhere between traditional probable cause and no suspicion at all. *Terry*'s innovativeness, therefore, not only provided reasonableness and its balancing test a greatly enhanced role in fourth amendment analysis but also created a whole new benchmark of individualized suspicion.[51]

II. FAILING THE CHALLENGES OF FOURTH AMENDMENT INTERPRETATION: THE LEGACY OF *CAMARA* AND *TERRY*

Camara and *Terry* constituted innovative departures from a fourth amendment mentality that had restricted the amendment's coverage in the name of maintaining the warrant clause's rigorous protections. In this sense the Court's willing-

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was dealing with an "important new field of law." *Terry*, 392 U.S. at 31 (Harlan, J., concurring).

Given the paucity of cases upholding a general reasonableness approach to the fourth amendment, especially in the area of criminal investigations, *see supra* notes 9-14, it is not surprising that the Court was only able to cite directly to *Camara* and Elkins v. United States, 364 U.S. 206 (1960). *Elkins* provides little support, however, despite its language that "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Id.* at 222. The *Elkins* Court was focusing on the proper use of the exclusionary rule and not the appropriate role of probable cause within the fourth amendment. *Id.* at 208. Although the exclusionary rule is certainly entwined with broader fourth amendment considerations, the issue of whether the exclusionary rule should apply does not necessarily involve the same questions as the issue of whether a fourth amendment violation has occurred. Furthermore, the Court's reliance on *Camara*, a case with questionable pedigree itself, is curious in that *Camara* was, at least in form, a warrant clause and probable cause case even if it arguably had a rule of reasonableness holding at heart. *See supra* notes 37-39 and accompanying text.

50. *Terry*, 392 U.S. at 20-22.

51. Justice Douglas cast the lone dissenting vote, finding it "a mystery how [a] 'search' and . . . 'seizure' can be constitutional by Fourth Amendment standards, unless there was 'probable cause.' " *Id.* at 35. His dissent strongly reflected the Court's traditional view that the fourth amendment requirement of probable cause was the definition of a reasonable search or seizure under the fourth amendment and not simply a factor underlying a general reasonableness test. *See supra* notes 9-14 and accompanying text. Justice Douglas argued, therefore, that even if a warrant was excused because of exigent circumstances, probable cause was still required. *Terry*, 392 U.S. at 37. From Justice Douglas's viewpoint, "the compromise" between the government and individuals' interests had already been struck within the fourth amendment through "the rule of probable cause . . ., the meaning of [which] is deeply embedded in our constitutional history." *Id.* at 36 n.3, 37.

ness in *Camara* and *Terry* to face the unique fourth amendment problems posed by government activities like housing inspections and stop and frisks is admirable. Two decades later, however, it has become evident that those decisions came at a price. The combined effect of *Camara* and *Terry* is the major reason the Court has failed to meet the first challenge of defining a rational relationship between the warrant and reasonableness clauses that fulfills the amendment's purposes.

The Court's basic inability to agree on when to use a reasonableness standard instead of traditional probable cause evidences its failure in defining the relationship between the warrant and reasonableness clauses.[52] Since *Camara* and *Terry* introduced reasonableness as an independent factor in fourth amendment analysis, the Justices have continually exchanged charges that the Court's interpretation of the role of reasonableness is too broad or too narrow.[53] During the 1986-1987 Term alone, the Court was divided deeply in all four cases that raised the question of whether a reasonableness balancing test should apply.[54]

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52. The criticism that the Court cannot agree on when to use a reasonableness standard rather than traditional probable cause is not simply an observation of how the Court and the case law method operate. *See* Amsterdam, *supra* note 5, at 349-52 (acknowledging difficulty of developing consistent fourth amendment doctrine through case law method). It would be an entirely different situation if the Court, through a series of cases, explained the rule of reasonableness' role and why it applied to particular situations. Instead, the Court has been unable to agree on how the rule applies and why, resulting in the rule's expansion by default.

53. Compare, for example, the different justices' opinions in New Jersey v. T.L.O., 469 U.S. 325, 342-43 (1985) (searching student's purse reasonable under the circumstances); Michigan v. Long, 463 U.S. 1032, 1051 (1983) (searching passenger compartment reasonable to uncover weapons); Michigan v. Summers, 452 U.S. 692, 705 (1981) (allowing citizen to be detained while officers executed valid search warrant not unreasonable); Dunaway v. New York, 442 U.S. 200, 216 (1979) (searching suspect improper during pick up for questioning without probable cause); Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) (searching driver reasonable when policeman noticed large bulge under driver's jacket); United States v. Ortiz, 422 U.S. 891, 896-97 (1975) (searching motorists at Border Patrol checkpoints away from border unreasonable without probable cause).

One could even argue that the disagreement regarding the role of reasonableness began with *Terry* itself, when Justice Douglas refused to apply *Camara*'s balancing in assessing the constitutionality of stop and frisks. *See supra* notes 50-51 and accompanying text.

54. *See* Arizona v. Hicks, 107 S. Ct. 1149 (1987) (6-3 decision striking down search of stolen stereo on less than probable cause); Griffin v. Wisconsin, 107 S. Ct. 3164 (1987) (5-4 decision upholding warrantless search of probationer's home on less than probable cause); New York v. Burger, 107 S. Ct. 2636 (1987) (6-3 decision upholding warrantless searches of automobile junkyards for sto-

Although commentators have advanced many explanations as to why current fourth amendment analysis is in disarray,[55] they have overlooked the primary cause. The Court in *Camara* and *Terry* embraced the reasonableness balancing test in a manner that conceptually weakened probable cause and failed to provide any long-term guidance or limits for the future role of reasonableness. Given such analytical shortcomings, the Court's inability to meet the first challenge of fourth amendment interpretation was inevitable.

A. *CAMARA*: CHANGING THE NATURE AND ROLE OF PROBABLE CAUSE

Camara's analytical shortcoming was not the rejection of traditional probable cause in favor of a reasonableness standard.[56] Rather, the problem lies with the Court's decision to bring the reasonableness balancing test into fourth amendment analysis through the portal of probable cause. In its historical fourth amendment role, traditional probable cause defined reasonableness. After *Camara*, traditional probable cause presented only one type of probable cause, one way of demonstrating reasonableness.[57] Even conceding the necessity of reducing the dominance of traditional probable cause in fourth amendment analysis to bring housing inspections under the amendment, the holding did not need to take away an independent role for traditional probable cause and make it a function of reasonableness.[58] By doing so, the Court unnecessarily diluted the meaning of probable cause and weakened the amendment's privacy protections.

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len vehicles); O'Connor v. Ortega, 107 S. Ct. 1492 (1987) (5-4 decision upholding search of government employee's office on less than probable cause); *see also infra* note 73 (analyzing 1986-1987 Term cases).

55. *See, e.g.*, Amsterdam, *supra* note 5, at 350-51 (attributing lack of clarity in part to nature of Supreme Court's decision-making process); Bradley, *supra* note 2, at 1470-73 (noting the Court's rulings respond in part to exclusionary rule's applicability if violation found); Wasserstrom, *supra* note 9, at 257, 259-64 (arguing change in composition of Court has led to different treatment of fourth amendment issues).

56. If the housing inspections in *Camara* were to be brought under the amendment and remain effective, the Court could not have required traditional probable cause. *See supra* notes 31-32 and accompanying text.

57. *See supra* note 34 (use by *Camara* Court of home search for criminal evidence as an example of situation to which traditional probable cause would apply).

58. Conceptually, traditional probable cause no longer controlled the meaning of reasonableness but was one possible outcome after a weighing of various factors.

The Court made no effort to delineate the continuing role of traditional probable cause, even as part of the reasonableness balancing test, in fourth amendment analysis. The Court did not establish a presumption in favor of traditional probable cause or draw any clear lines regarding when it is absolutely required. The Court stated only that a police search of a home for criminal evidence was an example of when a balancing of governmental and individual interests would require traditional probable cause.[59] After *Camara*, traditional probable cause depended on an ill-defined balancing of governmental and individual interests. The reasonableness balancing test had pushed traditional probable cause off center stage and given it an uncertain supporting role.

Redefining probable cause to include government justifications independent of suspicious activity not only conceptually diminished the role of traditional probable cause in fourth amendment analysis but also diluted its meaning in a way that created a new receptiveness to government intrusions. The amendment provides probable cause as an example of the proper relation between the government's power of intrusion and citizens' privacy interests. Traditional probable cause defined a specific scenario required before a government intrusion was justified: the subject of the search or seizure must have acted suspiciously, and the government must have been aware of that behavior before the government, *in response*, could single the individual out for government action. Probable cause's responsive nature thus established a presumption against allowing government intrusions[60] by requiring that the government's intrusion be premised on a probability of wrongdoing. In the process probable cause also provided the individ-

59. *See supra* note 34.

60. Indeed, in Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court explained that

> the magistrate's scrutiny [under the warrant requirement] is intended to eliminate altogether searches not based on probable cause. The premise here is that *any* intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity.

Id. at 467 (emphasis in original). *See also* United States v. Martinez-Fuerte, 428 U.S. 543, 572 n.2 (1976) (Brennan, J., dissenting) ("Under the Fourth Amendment . . . the status quo is nonintrusion, for as a general matter, it is unreasonable to subject the average citizen or his property to search or seizure. Thus, minimization of intrusion only lessens the aggravation to Fourth Amendment interests; it certainly does not further those interests.").

ual "the right to be let alone"[61] because the government's power to intrude depended upon the individual's actions rather than the government's justification, enabling an individual to keep the government at bay by avoiding suspicious behavior.

After *Camara*, in contrast, the government could base probable cause on completely innocent activities.[62] As a result the fourth amendment no longer revolved around a concept that unambiguously emphasized both nonintrusion by the government and an individual's right to privacy. Changing probable cause's definition by eliminating its responsive nature subtly shifted the fourth amendment's orientation toward favoring government intrusions.

B. *TERRY:* CREATING THE REFUGE OF REASONABLE SUSPICION

Terry hastened traditional probable cause's conceptual fall from prominence in fourth amendment analysis. As in *Camara*, the *Terry* holding's difficulty lies not with its decision to modify probable cause's role in the analysis but with how it accomplished the accommodation to allow police stop and frisks.

Historically, the Court relied on the warrant clause to analyze the validity of searches or seizures based on individualized suspicion. Although exigent circumstances might permit the modification of the warrant requirement in the name of reasonableness, the analysis focused on whether a warrant based on probable cause was obtained. Any question over the adequacy of the suspicion revolved around probable cause as the center of the inquiry.[63]

In *Terry*, however, the Court spurned the warrant clause and traditional yardstick of probable cause, turning instead to the reasonableness clause and the balancing test appropriated from *Camara*. Under that approach the Court reached the standard of reasonable suspicion not by carving out an exception to probable cause based on exigent circumstances but by independently balancing under a reasonableness standard. The

61. Winston v. Lee, 470 U.S. 753, 758-59 (1985); New Jersey v. T.L.O., 469 U.S. 325, 362 (1985) (Brennan, J., dissenting).

62. *See, e.g., Martinez-Fuerte*, 428 U.S. at 546-55 (automobile checkpoints for illegal aliens); Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967) (housing inspections).

63. It is not at all clear that the Court would have even entertained an argument to modify probable cause prior to the *Camara* and *Terry* era. *See supra* notes 11, 18-20 and accompanying text. *But cf.* note 39 (Court redefined probable cause with little acknowledgement of change).

central inquiry had changed from whether an exception to probable cause was appropriate under the facts to what standard the Court should adopt to allow the government's intrusion.[64]

The change in focus from probable cause as the fourth amendment's primary definition of the proper level of suspicion to probable cause as a factor in a broader balancing test created the potential of a much greater role for reasonable suspicion.[65] Instead of carving out a narrow exception to probable cause, reasonable suspicion became a valid compromise standard that comports with the fourth amendment if the Court decides that, after balancing the interests, it is reasonable. The government no longer argues against a presumed starting point of probable cause but rather argues for reasonable suspicion as a reasonable accommodation of competing interests. Probable cause becomes merely one point on a continuum of reasonableness.

The Court's holding in *New Jersey v. T.L.O.*[66] demonstrates the attractiveness of using reasonable suspicion as a compromise position. In *T.L.O.* the Court debated the proper standard for allowing the search of a student. Lower courts' holdings had ranged from requiring probable cause to allowing searches without any suspicion at all.[67] The majority observed that lower courts had "struggled to accommodate" the students' privacy interests with the competing states' interests in providing a safe educational environment, a struggle sometimes resolved, in the majority's words, "by giving full force to one or the other

64. The *Terry* majority stated that "the notion" underlying probable cause remained "fully relevant." Terry v. Ohio, 392 U.S. 1, 70 (1968). Prior to *Terry*, probable cause was not only relevant, it was controlling. *See* Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. DAVIS L. REV. 595, 631-32 (1985) (criticizing the Court's balancing approach which "markedly diminishes fundamental, historically rooted, fourth amendment protection").

65. The potential misuse of reasonable suspicion is exacerbated by the laxness of the standard itself: " 'Police power exercised without probable cause *is* arbitrary. To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim.' " Amsterdam, *supra* note 5, at 395 (quoting the Amicus Curiae Brief of the NAACP Legal Defense Fund at 56-59, Terry v. Ohio, 392 U.S. 1 (1968) (No. 67-1161)); *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 889-90 (1975) (Douglas, J., concurring) (citing cases in which reasonable suspicion used as the "flimsiest of justifications"); *Terry*, 387 U.S. at 37 (Douglas, J., dissenting) (" 'probable cause' rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion' ").

66. 469 U.S. 325 (1985).

67. *Id.* at 332 n.2.

side of the balance."[68] The very idea of giving full force to only one side of the balance, however, suggests unreasonableness. Not surprisingly, given this characterization of how some lower courts resolved the issue, the *T.L.O.* majority adopted a compromise position of reasonable suspicion.[69]

The problem with the middle position of reasonable suspicion is that it invariably sounds reasonable because its essence is a compromise between the government's need to intrude and the individual's privacy interest. The standard's middle position between a suspicionless search and requiring probable cause appears to accommodate the interests of the government and the individual equally. The probable cause standard, on the other hand, when considered apart from the fourth amendment's underlying values, overemphasizes the individual's privacy interest because it holds the government to such a strict standard of justification. A court rejecting reasonable suspicion in favor of probable cause would seem to be focusing on only one side of the balance, and yet the very idea of balancing implies that each side has some merit.[70]

The majority's arrival at a reasonable suspicion standard in *Terry* through a balancing test independent of an inquiry grounded in probable cause thus set the stage for an expansive role for reasonable suspicion. At a minimum *Terry* placed probable cause in a much broader context of reasonableness. Indeed, considering *Camara* and *Terry* together, the reasonableness balancing test closes in on traditional probable cause from all sides. If the Court uses the warrant clause, the reasonableness balancing test controls the inquiry in the guise of flexible probable cause; traditional probable cause serves as only one example of probable cause. If the Court utilizes the reasonableness clause, the same balancing test controls, again precluding any independent role for traditional probable cause.

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68. *Id.*

69. *Id.*

70. The district court's adoption in Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986), of a reasonable suspicion standard for drug testing of firefighters shows a court striking a compromise between requiring no suspicion or adopting probable cause. "The state's interest will not be significantly impaired by the individualized reasonable suspicion standard. The standard is not unduly burdensome. . . . Further, the imposition of an individualized, reasonable suspicion standard rather than the more stringent probable cause standard is already a significant concession of deference to the state's legitimate interests." *Id.* at 1518; *see also* Everett v. Napper, 825 F.2d 341, 345 (11th Cir. 1987) (concluding reasonable suspicion is the "standard that has emerged" for urinalysis testing of public employees).

Through *Camara* and *Terry*, traditional probable cause surrendered the fourth amendment limelight to the broad inquiry of reasonableness.

C. *CAMARA* AND *TERRY*'S CONCEPTUAL CHANGES IN FOURTH AMENDMENT ANALYSIS COME TO FRUITION

The Court's apparent failure to recognize the potential import of its holdings in *Camara* and *Terry* heightened the impact of their conceptual changes in fourth amendment interpretation. Both cases significantly altered the traditional relationship between the reasonableness and warrant clauses, and yet the Court did not address their implications beyond the relatively discrete areas of housing inspections and stop and frisks.[71] That several of the Justices who have protested most vocally to expanding the reasonableness balancing test concurred in *Terry* and *Camara*—the cases which made the expansion possible[72]—best evidences the Court's failure to appreciate the implications

71. The *Camara* majority purported to invoke the balancing test for all fourth amendment inquiries, *see supra* notes 32-39 and accompanying text, but did not address the broad implications of subjecting every category of search or seizure to a weighing of government interests and individual privacy rights. The Court may have assumed that *Camara* would primarily be limited to administrative search cases, *see infra* notes 76-89 and accompanying text, or that appropriate limitations would develop in future case law. Neither assumption has proven to be valid. *See infra* notes 120-31 and accompanying text.

Although the *Terry* majority did not fully acknowledge the novelty of its approach, *see supra* note 49, its opinion did evidence an awareness of the need to proceed cautiously. The majority opinion began with an unusually detailed recitation of the facts giving rise to the case and specifically limited its holding to the facts presented. Terry v. Ohio, 392 U.S. 1, 4-8, 15-16 (1968). The majority dealt only with the constitutional propriety of the pat down, expressly declining to address whether an investigative stop alone on less than probable cause would be valid. *Id.* at 19 n.16. Moreover, when the majority did address the validity of the frisk, it emphasized with painstaking detail how officer McFadden had only patted down Terry's outer clothing and "confin[ed] his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons." *Id.* at 30. The Court further emphasized the narrowness of its holding in *Terry* by using the companion case, Sibron v. New York, 392 U.S. 40, 65 (1968), as a contrasting example of a police officer who had not formulated reasonable suspicion that the defendant was armed and had not carefully limited his pat down for weapons. *Terry*, 392 U.S. at 29.

72. Both Justices Douglas and Brennan, who drafted the flexible probable cause standard eventually adopted in *Camara*, later opposed a broadening of the reasonableness balancing test's scope. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 361-63 (1985) (Brennan, J., dissenting) (criticizing reasonableness standard as an unprecedented departure from fourth amendment standards); United States v. Brignoni-Ponce, 422 U.S. 873, 888 (1975) (Douglas, J., concurring) (opposing extension of *Terry* "suspicion" test to the stop of moving vehi-

of the changes at the time they were made.[73] The Court had unloosed reasonableness but seemed uncertain about where the

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cles). Justice Brennan in particular has argued that the "balancing test" that originated in *Camara* has been extended far beyond its intended scope.

One cannot help noting that the alarms being sounded are similar to the *Frank* Court's prophesies in opposing the application of the fourth amendment to inspections, *see supra* note 20. These concerns were dismissed by the *Camara* majority as unfounded:

> It has been suggested [by the dissent] that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a 'synthetic search warrant' and thereby to lessen the overall protections of the Fourth Amendment. But we do not agree. . . . [R]easonableness is . . . the ultimate standard.

387 U.S. at 538-39 (citation omitted); *see also* Wasserstrom, *supra* note 9, at 264 (stating *Terry* Court would not have approved of extensions of balancing test "made in its name").

73. The unrecognized implications of the *Camara* and *Terry* decisions have resulted in an ongoing tug-of-war over the role of reasonableness in which the Court allows the balancing test to expand at times and backs away at others. Compare, for example, the Court's decisions in Arizona v. Hicks, 107 S. Ct. 1149 (1987), and O'Connor v. Ortega, 107 S. Ct. 1492 (1987). In *Hicks* a police officer with reasonable suspicion that a stereo was stolen turned over the stereo components to record the serial numbers. Writing for the majority, Justice Scalia declared that searches and seizures can proceed on less than probable cause only if "the seizure is minimally intrusive and operational necessities render it the only practicable means." 107 S. Ct. at 1154. Justice Scalia found that these conditions were not met in the present case; consequently, the police officer's actions violated the fourth amendment. *Id.* at 1154-55.

The majority opinion engendered a strong dissent in which Justice O'Connor argued that because the officer's cursory inspection was the only means of detecting whether the stereo was stolen, the officer should be allowed to undertake such a minimal intrusion based on only reasonable suspicion. *Id.* at 1158. She concluded that the majority's "bright-line" rule would "severe[ly] damage . . . legitimate and effective law enforcement." *Id.* at 1160.

Before the death knell for a broad balancing approach could sound too loudly, however, the Court handed down its decision in *O'Connor*. A plurality in *O'Connor* held that a "reasonableness standard," rather than probable cause, applied to a government employer's search of an employee's office. 107 S. Ct. at 1502. Justice O'Connor, who wrote the dissenting opinion in *Hicks*, argued for the plurality that once it is determined that the fourth amendment applies, the first step is to balance the competing interests. *Id.* at 1499. Finding that a probable cause requirement "would impose intolerable burdens on public employers" and that the work place intrusion was " 'relatively limited,' " *id.* at 1502 (quoting *Camara*, 387 U.S. at 537), the plurality concluded that a reasonableness standard best satisfied competing government and individual interests. *Id.* The four dissenters maintained that the traditional warrant and probable cause requirements could be abandoned in favor of balancing only when no other practical alternative existed and that *O'Connor* was not such a case. *Id.* at 1511 (Blackmun, J., dissenting). The narrow view of balancing which had appeared to prevail in *Hicks* thus gave way to a much looser balancing standard in *O'Connor*, with strong disagreement regarding the proper situation for balancing. As *Hicks* and *O'Connor* well illustrate, the debate goes on.

new doctrine was going or how to constrain it. What was certain, however, was that each subsequent case would add to the controversy over the proper realm of probable cause and the reasonableness balancing test, further fracturing fourth amendment analysis.

The ultimate problem, of course, and the reason the rule of reasonableness has expanded inexorably, is that *Camara* and *Terry* did not place any inherent limitations on the rule. *Camara* equated probable cause with a reasonableness balancing test, and *Terry* extended the *Camara* balancing test to cases not covered by the warrant and probable cause requirements. Given the reasoning in *Camara* and *Terry*, efforts to preserve the role of traditional probable cause against encroachment by a reasonableness analysis must center on limiting the cases' holdings to the unique situations they presented. Attempts at such limitations, however, have proven illusory and unworkable, and have only exacerbated the Court's piecemeal approach to fourth amendment analysis.

1. *Camara* and Administrative Searches

Although the majority opinion in *Camara* expressly embraced reasonableness as the guiding value for all fourth amendment cases, *Camara* frequently has been characterized as limited to a genre of cases involving so-called administrative or regulatory searches.[74] Proponents of such a view apparently assume that by restraining *Camara*'s holding to administrative searches, they can salvage the role of traditional probable cause.

As an initial matter, characterizing *Camara* as an administrative search case ignores the holding's symbolic impact in recasting fourth amendment analysis in broad reasonableness concepts.[75] More basically, terms like administrative search or

74. *See, e.g.*, United States v. Ortiz, 422 U.S. 891, 896 (1975) (refusing to apply *Camara* standard to full-scale car searches at check points); Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973) (refusing to apply *Camara* standard to roving border searches). *See generally* LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 SUP. CT. REV. 1; Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement*, 69 CORNELL L. REV. 856 (1979); Note, *The Fourth Amendment and Administrative Inspections*, 16 HOUS. L. REV. 399 (1979).

75. *See supra* notes 57-62 and accompanying text. A review of the Supreme Court's decisions over the past decade reveals a pervasive reliance on *Camara*'s balancing principle, even in cases outside the realm of administrative searches. Thus, even if the specific holding in *Camara* is characterized as

inspection are neither self-defining nor self-limiting. Their expansion may ultimately result in fewer privacy protections for individuals.

The term *administrative search* typically describes inspections carried out according to a preexisting scheme established by statute or regulation.[76] Defining the term in that fashion, however, is simply descriptive and only begs the question of whether the government's justification is sufficient or whether individualized suspicion should be required. Routine or regulatory procedures may not pose a grave danger of forcible entries and searches, but they may raise a significant fourth amendment danger by allowing the government to "pr[y] more and more into [one's] private affairs"[77] on a regular basis. Simply describing a government activity as administrative, therefore, should not automatically lower the Court's fourth amendment guard.[78]

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limited to administrative warrant settings, its implications for a broader role for reasonableness have pervaded the Court's fourth amendment perspective. This effect was compounded when the Court later embraced the balancing test in *Terry*. *See, e.g.*, New York v. Class, 475 U.S. 106, 116-17 (1986) (using *Camara* standard to allow automobile search); United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (using reasonableness standard for airport customs searches for narcotics); New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (adopting *Camara* and *Terry* concepts in school searches); Michigan v. Long, 463 U.S. 1032, 1045-47 (1983) (adopting *Terry* standard in protective search of automobile interior and trunk); United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983) (using reasonableness test in allowing warrantless search of sailboat); Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (adopting reasonableness test for personal weapons search).

76. *See* C. WHITEBREAD & C. SLOBOGIN, *supra* note 9, at 267-68. Even this simple definition of what constitutes an administrative search is not universally accepted. For example, *T.L.O.*, the school search case, has been characterized as a regulatory search, *id.* at 291-93, although no regulations allowing a search were relied upon. The regulatory search characterization apparently stems from the fact that the school search was not in a street crime setting. *Id.* at 292. If all intrusions taking place outside a street crime setting are subject to an administrative search rationale, then *Camara*'s scope is especially broad.

77. Wyman v. James, 400 U.S. 309, 335 (1971) (Douglas, J., dissenting).

78. Justice Rehnquist aptly made the point in rejecting a similar rationale for upholding warrantless searches of stone quarries. Although concurring in the result, Justice Rehnquist did not find the majority's reliance on pervasive congressional regulation to be an adequate rationale:

> I do not believe, however, that the warrantless entry authorized by Congress in this case, § 103(a) of the Federal Mine Safety and Health Act of 1977, can be justified by the Court's rationale. The Court holds that warrantless searches of stone quarries are permitted because the mining industry has been pervasively regulated. But I have no doubt that had Congress enacted a criminal statute similar to that involved here—authorizing, for example, unannounced warrant-

The Court also has indicated that the administrative nature of a search may depend in part on whether the government's objective is penal, emphasizing the criminal punishment of specific acts, or regulatory, focusing on the enforcement of rules apart from penal sanctions.[79] For example, in *Almeida-Sanchez v. United States*,[80] Justice Powell labeled random searches for illegal aliens at a border checkpoint "administrative" based on the argument that the government undertook the searches "primarily for administrative rather than prosecutorial purposes."[81] Justice Powell cited the low rate of prosecution as the factor that differentiated border searches from random area searches, which he characterized as " 'fishing expeditions' for evidence to support prosecution."[82]

Even if the penal versus regulatory distinction could constrain the *Camara* Court's analysis, the government retains inordinate power to dictate which fourth amendment standard applies. If the government can conduct an administrative search to uncover criminal evidence so long as its use of the evidence will be primarily administrative or the search's abstract goal is regulatory, the government has tremendous leeway to engage in intrusions normally requiring traditional probable cause. Although the scope of the intrusion is exactly the same,[83] the government can, by simply classifying its purpose as

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> less searches of property reasonably thought to house unlawful drug activity—the warrantless search would be struck down under our existing Fourth Amendment line of decisions. This Court would invalidate the search despite the fact that Congress has a strong interest in regulating and preventing drug-related crime and has in fact pervasively regulated such crime for a longer period of time than it has regulated mining.

Donovan v. Dewey, 452 U.S. 594, 608 (1981) (Rehnquist, J., concurring).

79. *See* New York v. Burger, 107 S. Ct. 2636, 2650 (1987) (discussing regulatory and administrative purpose of statute allowing searches of junkyards); *see also* Michigan v. Clifford, 464 U.S. 287, 294-95 (1984) (distinguishing between administrative and conventional search warrants based on whether objective of search is criminal evidence); Michigan v. Tyler, 436 U.S. 499, 504-05 (1978) (discussing whether search's intent was administrative or criminal); Note, *supra* note 15, at 1128, 1131 (tracing Court's use of civil-criminal distinction as fourth amendment dividing line).

80. 413 U.S. 266 (1973).

81. *Id.* at 278 (Powell, J., concurring).

82. *Id.*; *see also Burger*, 107 S. Ct. at 2655 (Brennan, J., dissenting) (distinguishing purely administrative searches and searches used to obtain criminal evidence). *But see* United States v. Jackson, 825 F.2d 853, 873 (5th Cir. 1987) (Higginbotham, J., concurring) (questioning whether, given checkpoint's purpose, administrative warrant appropriate for illegal alien checkpoint).

83. *See generally* Note, *supra* note 15, at 1135-37 (attacking assumption that civil searches are less intrusive because criminal consequences are lack-

administrative and using nonpenal sanctions, circumvent the traditional probable cause requirement.[84] Moreover, even if the

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ing). An argument that the degree of intrusion is less for an administrative search must turn on the contention that the lack of criminal consequences lessens the subjective nature of the intrusion. This assumption is not necessarily true, *see infra* note 85 and accompanying text, nor valid once the issue focused upon is the individual's privacy interest. *See infra* notes 88-89, 155-56 and accompanying text; Note, *supra* note 15, at 1135-37.

84. In New York v. Burger, 107 S. Ct. 2636 (1987), for example, the state "inspected" automobile junkyards for stolen vehicles without a warrant or probable cause. *Id.* at 2639-40. The majority upheld the search even though the stolen property itself did not fall under the administrative scheme. *Id.* at 2651-52. The effect of the majority's reasoning, as the dissent noted, was to

> implicitly [hold] that if an administrative scheme has certain goals and if the search serves those goals, it may be upheld even if no concrete administrative consequences could follow from a particular search. This is a dangerous suggestion, for the goals of administrative schemes often overlap with the goals of the criminal law. Thus, on the Court's reasoning, administrative inspections would evade the requirements of the Fourth Amendment so long as they served an abstract administrative goal, such as the prevention of automobile theft. A legislature cannot abrogate constitutional protections simply by saying that the purpose of an administrative search scheme is to prevent a certain type of crime.

Id. at 2657 (Brennan, J., dissenting). The dissent also raised the "more difficult question" of

> whether a state could take any criminal conduct, make it an administrative violation, and then search without probable cause for violations of the newly created administrative rule. The increasing overlap of administrative and criminal violations creates an obvious temptation for the state to do so, and plainly toleration of this type of pretextual search would allow an end-run around the protections of the Fourth Amendment.

Id. at 2657 n.17.

The case of Abel v. United States, 362 U.S. 217 (1960), also demonstrates the potential abuse of an administrative–penal distinction. In *Abel* the FBI was unable to obtain sufficient evidence to arrest the defendant on espionage charges. *Id.* at 221. As an alternative the FBI contacted and cooperated with the INS in obtaining an administrative arrest warrant, issued by the district director of the INS, to hold Abel for deportation. *Id.* at 222. The INS agents conducted an extensive search in conjunction with the administrative arrest while FBI agents observed. *Id.* at 223, 225. The evidence obtained during the INS "administrative" search was later used to convict Abel on criminal charges. *Id.* at 225.

A majority of the Court upheld the INS search as an administrative search to establish deportability, finding no "bad faith" in the FBI's and INS's cooperation. *Id.* at 240. The four dissenters, in contrast, found that "[t]he distinction [between civil and criminal] is rather hollow here, where the proofs that turn up are in fact given in evidence in a criminal prosecution." *Id.* at 254 (Brennan, J., dissenting).

Although the debate in *Abel* mainly went to the fourth amendment's applicability to INS searches in the aftermath of *Frank*, the concerns are similar even if the fourth amendment now clearly applies. The government has the ability to circumvent more stringent fourth amendment protections by invok-

government's primary purpose is regulatory, penal sanctions often do attach when violations are found or the search is refused.[85]

Allowing the intrusion's purpose to govern the appropriate analysis can only encourage fourth amendment game playing, either through the creative use of administrative penalties or the invocation of regulatory purposes that overlap with penal goals.[86] For instance, a school system could justify testing students for drugs as part of a school medical examination and label the consequences, such as forced treatment, suspension, or expulsion, as nonpunitive measures aimed at helping the students. In contrast, if such testing was conducted solely to obtain evidence of criminal use of drugs, the procedure would run into the traditional probable cause requirement. By recasting the purpose, however, the government can now assert that the

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ing an administrative search label. For a general discussion of *Abel*, *see* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 255-58 (1966).

85. This problem of sanctions was actually noted by the *Camara* majority in rejecting the argument advanced in *Frank* that housing inspections were only at the periphery of the fourth amendment. Camara v. Municipal Court, 387 U.S. 523, 531 (1967). Moreover, the penalties resulting from an administrative search may be substantial. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1319(c)(1) (1982) (fines of up to $25,000 per day of violation or up to one year imprisonment or both); Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d) (Supp. 1985) (fines of up to $50,000 per day of violation or up to five years imprisonment or both). The Clean Water Act and the Resource Conservation and Recovery Act both make administrative searches essential to their enforcement structure. 33 U.S.C. § 1318; 42 U.S.C. § 6927. And in *Burger*, of course, the ultimate result of the administrative search was criminal prosecution for possession of stolen property. 107 S. Ct. at 2640.

86. One commentator has suggested that the manipulation of labels to avoid probable cause requirements has taken place in justifying the military's random urinalysis testing program:

> The random tests are generally justified as "inspections" under Military Rule of Evidence 313. These "inspections" purportedly determine the health, welfare, military fitness, good order, discipline and readiness of the targeted military units. In theory, if the primary purpose of the random sampling is to obtain evidence for use in a court-martial or non-judicial disciplinary proceeding, the sampling is not an "inspection," and the urinalysis results will be excluded. In practice, however, random sweeps are conducted precisely to ferret out drug users who will then be disciplined accordingly. Disobedience of an order to provide a sample for a random sweep is itself a prosecutable offense under the Uniform Code of Military Justice.

Abney, *Drug Abuse, Court-Martial, and Random Urinalysis—An Unworkable Combination*, 27 ARIZ. L. REV. 1, 4-5 (1985) (footnotes omitted). Although military inspections and searches pose unique problems, the potential for using labels to avoid fourth amendment problems is analogous. *See also infra* note 156 (difficulty of using government's purpose to guide fourth amendment analysis); *infra* note 178 (problem of using intrusiveness as basis for analysis).

testing is part of an administrative scheme subject to lesser fourth amendment standards.[87]

Finally, and perhaps most fundamentally, the penal–regulatory distinction misses *Camara*'s point that whatever the inspection's purpose, the intrusion still invades the individual's privacy.[88] Despite the terminology or sanctions the government chooses, it is still intruding without particularized suspicion. Allowing the search's administrative character to guide fourth amendment analysis, rather than the government's need for the intrusion, lets the administrative tail wag the dog. The Court, therefore, should treat the sanctions involved or the regulatory aspect of an inspection as secondary issues that come into play only once the Court answers the main question affirmatively: whether the government interest justifies a suspicionless intrusion.[89]

2. Limiting *Terry* by the Level of Intrusion

Attempts to limit expansive use of *Terry*'s reasonableness balancing have focused on the level of intrusiveness involved in the search or seizure. In *Dunaway v. New York*,[90] for example, the defendant was picked up for custodial interrogation, rather than formally arrested, because the police lacked probable cause to obtain a warrant.[91] Defending the legality of that conduct, the government argued that *Terry* had established "a multifactor balancing test of 'reasonable police conduct under the circumstances' " applicable to all seizures not qualifying as

87. *See supra* note 84; *cf.* National Treasury Employees Union v. Von Raab, 816 F.2d 170, 179 (5th Cir. 1987) (justifying urinalysis testing of employees because it "serves primarily the administrative function of assessing suitability" of job transfer). *But see* International Molders' & Allied Workers' Local 164 v. Nelson, 674 F. Supp. 294 (N.D. Cal. 1987) (describing as an "Orwellian attempt" INS's description of warrant allowing "work place raids" as "inspection warrant").

88. *See* Camara v. Municipal Court, 387 U.S. 523, 530-31 (1967). The majority opinion, however, did later rely on the fact that the search was not aimed at criminal evidence to justify finding the inspection to be "relatively limited." *Id.* at 537. *See generally* Note, *supra* note 15, at 1135-39 (arguing that civil–criminal distinction is "senseless" given privacy interests).

89. Thus the Court should examine whether an administrative warrant is required or whether the regulatory scheme is adequate only after first scrutinizing the government's purposes. Only if the Court finds the government's purpose sufficient to justify an intrusion, *see infra* notes 133-39 and accompanying text, should the means used become relevant. The same is true with the sanctions and penalties involved.

90. 442 U.S. 200 (1979).

91. *Id.* at 203.

technical arrests.[92] In rejecting the state's argument, the *Dunaway* majority forcefully characterized *Terry* as a narrow exception to the general rule that probable cause applies.[93] The majority reasoned that the *Terry* Court applied the balancing test rather than the traditional probable cause standard only because the intrusion involved in a stop and frisk "fell far short of the kind of intrusion associated with an arrest."[94] Focusing on the intrusiveness of the conduct in question, the *Dunaway* Court held that probable cause rather than the balancing test in *Terry* applied because detention for custodial interrogation was as intrusive as a formal arrest.[95]

The reasoning of *Terry*, however, ultimately undermines any attempt to limit *Terry* by focusing on the level of intrusiveness. Despite the *Terry* Court's emphasis on the narrowness of its holding, *Terry*'s reliance on reasonableness as the fourth amendment's guiding value for all searches and seizures meant that the reasonableness balancing test lacked inherent limits. Stressing this point in his *Dunaway* concurrence, Justice White suggested that although *Terry* could be read as "an almost unique exception to a hard-and-fast standard of probable cause," other cases had made clear that reasonableness—"the balancing of competing interests"—was the key principle in fourth amendment analysis.[96]

The Court came closest to embracing the full implication of *Terry*—that the reasonableness balancing test governs all searches and seizures—in *New Jersey v. T.L.O.*[97] In *T.L.O.* the Court for the first time applied the reasonableness balancing

92. *Id.* at 213.

93. *Id.* at 209.

94. *Id.* at 212, 214; *see also* United States v. Ortiz, 422 U.S. 891, 896-97 (1975) (disallowing full-scale searches of cars at traffic checkpoints on less than probable cause); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (disapproving random stops and searches of cars). Both *Ortiz* and *Almeida-Sanchez*, however, raised the possibility that with adequate discretionary controls, car searches on less than traditional probable cause might be valid. *See Ortiz*, 422 U.S. at 896 n.3; *Almeida-Sanchez*, 413 U.S. at 279 (Powell, J., concurring).

Justice Stewart in his dissent in Michigan v. Summers, 452 U.S. 692, 706 (1981)) (Stewart, J., dissenting), read *Terry* narrowly, arguing that the stop in *Terry* was justified solely because the police officer also believed he was in danger. *Id.* at 707. According to Justice Stewart's reading of *Terry*, therefore, a stop solely to investigate crime, even with reasonable suspicion, would not be allowed. *See id.* at 710.

95. *See* 442 U.S. at 216.

96. *Id.* at 219 (White, J. concurring) (citing, e.g., *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

97. 469 U.S. 325, 341 (1985).

test to a full-scale search.[98] Upholding a principal's search of a student's purse on less than probable cause, Justice White argued that the probable cause requirement was not indispensible to a valid search. He asserted that the fourth amendment commands that searches and seizures be reasonable, and although both probable cause and the warrant requirement affect the reasonableness of a search, under some circumstances neither would be mandatory.[99] The *T.L.O.* majority thus viewed the reasonableness balancing test as "the rule rather than the exception"[100] and as not restricted to searches or seizures involving only minimal intrusion.[101]

The Court's struggle over the susceptibility of full-scale searches or seizures to balancing, illustrated by its conflicting views in *Dunaway* and *T.L.O.*, is further complicated by the administrative search cases like *Camara*. The housing inspections condoned in *Camara*, if not full-scale searches, certainly constitute far more than minimal intrusions. Some members of the Court have argued that the balancing in *Camara* searches should not extend to other intrusive searches because of the *Camara* Court's recognition that the probable cause standard governed, although it could be modified to account for the distinctive nature of administrative searches.[102] The difficulty

98. *Id.* at 337.

99. *Id.* at 341-43.

100. *Id.* at 352 (Blackmun, J., concurring) (characterizing majority's use of balancing test); *see also Project: Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal*, 74 GEO. L.J. 499, 514-15 (1986) (characterizing *T.L.O.* as adopting an "across-the-board use of the balancing test" for all cases). The plurality in Ortega v. O'Connor, 107 S. Ct. 1492 (1987), relied heavily on *T.L.O.* in justifying its use of a reasonableness balancing test in analyzing a full-scale search of an employee's office. *Id.* at 1495-98.

101. *See T.L.O.*, 469 U.S. at 337-38; *see also* Note, *supra* note 15, at 1133 (noting Court's abandonment of level-of-intrusiveness limit on use of balancing test in criminal investigations). The majority's position that the balancing test governs fourth amendment analysis has not gone unchallenged. The *T.L.O.* dissenters accused the majority of engaging in a "sizeable innovation in Fourth Amendment analysis." *Id.* at 358 (Brennan, J., dissenting). The dissenters stood by the position adopted in *Dunaway* that "all these cases allowing seizures on less than probable cause involved 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." *Id.* at 360.

102. For example, the dissenting justices in *T.L.O.*, most of whom concurred in *Camara*, distinguished *Camara* in part because "[i]n *Camara*, the Court held that the probable-cause standard governed . . ., [a]lthough the *Camara* Court recognized that probable-cause standards themselves may have to be somewhat modified to take into account the special nature of administra-

with this distinction is that the *Camara*-modified probable cause inquiry is the same balancing test adopted in *Terry* and used in *T.L.O.*[103] Indeed, the *Camara* majority demonstrated its balancing test by applying it to conventional criminal searches, concluding that the resulting balance required a warrant based on traditional probable cause.[104] The key point, of course, is not that the balancing test required probable cause for a full-scale criminal search, but that the *Camara* Court saw such searches as theoretically subject to balancing. At a minimum *Camara* presents significant difficulty for the argument that the reasonableness balancing test applies solely to minimally intrusive searches.

The Court's preoccupation with factors like administrative searches and levels of intrusion demonstrates that the Court has been unable to articulate a coherent and systematic view of when the reasonableness balancing test applies in relation to traditional probable cause. *Camara* and *Terry* planted the conceptual seeds for the rule of reasonableness to control all fourth amendment inquiries, yet the Court has continued to vacillate over whether to disavow or embrace a broad role for reasonableness. It has become evident that the Court should stop addressing the relationship between the reasonableness and warrant clauses in a piecemeal fashion and confront directly what their proper roles are in fourth amendment analysis.

III. MEETING THE FIRST CHALLENGE OF FOURTH AMENDMENT INTERPRETATION: A COMPOSITE MODEL OF THE FOURTH AMENDMENT

Defining the proper relationship between the reasonableness and warrant clauses presents a formidable task. Deciding when each clause should control is undeniably a decision about the proper balance between the government's power of intrusion and the citizenry's privacy right. The model chosen also

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tive searches." 469 U.S. at 360-61 (Brennan, J., dissenting) (citations omitted). The dissent also argued that the administrative search cases involved a lesser expectation of privacy in the areas inspected and were more minimal intrusions because the search's object was not criminal evidence. *Id.*

103. *See supra* notes 48-49 and accompanying text; *cf.* Note, *supra* note 15, at 1133 (noting that although balancing test was originally linked to civil searches, Court has extended it to criminal investigations).

104. *See supra* note 34.

will have significant secondary ramifications, such as influencing the Court's willingness to extend the amendment's scope.

One commentator, despairing over the increasing complexity of the fourth amendment's exceptions and categories, argued recently that the Court must either admit that the warrant and probable cause requirements are applied inconsistently and expressly adopt a comprehensive reasonableness test, or apply the warrant and probable cause requirements with full vigor and stop riddling them with exceptions.[105] Advocating an either–or choice between the reasonableness and warrant clauses is an understandable reaction to the frustration of trying to reconcile the Court's fourth amendment cases. Before such a choice is made, however, the Court must recognize the consequences of allowing either clause to dominate. Indeed, much of the Court's inconsistency can be understood as a back-and-forth reaction to the problems raised when either the warrant or reasonableness clause gains the upper hand.

A monolithic model would make the warrant clause the complete focus of fourth amendment analysis. A government search or seizure would always require probable cause, and only exigent circumstances would excuse the absence of a warrant.[106] The Supreme Court's case law prior to *Camara* and *Terry* came fairly close to adopting such an absolute position.[107]

A monolithic reading of the amendment, however, is difficult to justify textually because it makes the amendment's "unreasonable search or seizure" language at best descriptive and at worst redundant.[108] Moreover, exclusive emphasis on the warrant clause would ultimately cause the Court to curtail the fourth amendment's scope. If a warrant based on probable cause was required every time the fourth amendment applied, the Court would hesitate to bring government activities under

105. Bradley, *supra* note 2, at 1471-72.

106. *See* Amsterdam, *supra* note 5, at 393-94.

107. *See supra* notes 9-14 and accompanying text.

108. It now seems very unlikely that the debate over the proper relationship between the reasonableness and warrant clauses will be resolved through definitive historical evidence. One commentator has suggested that the drafters of the fourth amendment had no concrete conception of when warrants should or should not be issued but were willing to let such rules evolve. *See* Amsterdam, *supra* note 5, at 410-12. *See generally* J. LANDYNSKI, *supra* note 84, at 42-45 (discussing scope and meaning of fourth amendment in historical context); Wasserstrom, *supra* note 9, at 258-59 (outlining historical framework of the amendment). Such lack of original intent, however, should not preclude the attempt to craft a view of the fourth amendment that accommodates both government and privacy interests.

the amendment out of concern for frustrating important government needs.

The *Camara* majority, for example, brought housing inspections from the periphery of the fourth amendment into its full embrace only because traditional probable cause was not required.[109] Although the *Camara* dissent argued strenuously that the majority's administrative warrant approach would weaken overall fourth amendment protection, the dissent's solution provided less fourth amendment protection, not more.[110] Likewise in *Terry* the Court explained that one of its reasons for eschewing a rigid probable cause and warrant requirement in favor of a balancing test that considered the intrusion's scope as a central factor was that a balancing test allowed the fourth amendment to govern more police behavior.[111] In the long run, therefore, insisting upon a warrant based on traditional probable cause for every government search or seizure could result in fewer fourth amendment protections because the scope of government behavior governed by the amendment will be narrower.[112]

On the other hand, a sliding-scale model, placing complete emphasis on the reasonableness clause such that a reasonableness balancing test would apply to all searches and seizures, also poses significant problems. The model presents textual difficulties by failing to provide an independent role for the amendment's one concrete requirement of a warrant based on probable cause. Under the sliding-scale model, the Court could conclude that the fourth amendment never required a warrant based on probable cause as a prerequisite to a reasonable search or seizure.[113] Although the Court would probably not adopt

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109. Camara v. Municipal Court, 387 U.S. 523, 536 (1967).

110. *Id.* at 547-48 (Clark, J., dissenting). The dissent wanted to maintain *Frank*'s generalized due process approach. *Id.*; *see supra* notes 17, 32, 36.

111. The Court stated:

> In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.

Terry v. Ohio, 392 U.S. 1, 18 n.15 (1968).

112. *See generally* Amsterdam, *supra* note 5, at 393-95.

113. In contrast to the possibility of dispensing entirely with the warrant and probable cause requirements under the sliding-scale model, Justice Frankfurter explained that those requirements are, in fact, indispensable to fourth amendment analysis:

> One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the an-

such an extreme reading, the mere possibility illustrates how the sliding-scale model fails to account for the warrant clause's presence in the amendment's text.

Furthermore, the sliding-scale model breeds uncertainty because it removes the warrant and probable cause requirements as the controlling fourth amendment values. As a result the model allows the definition of reasonableness to drift without any direction except for the Court's momentary perceptions regarding the proper balance between governmental and individual interests. The Court judges every government intrusion on an ad hoc basis, balancing the competing interests involved. Because of this process, the sliding-scale model ultimately threatens privacy protections by taking away the amendment's sole restraint on the Court's definition of reasonableness—a warrant based on probable cause.[114]

Because both the monolithic and sliding-scale models have inherent problems,[115] an approach is needed that enables the clauses and their purposes to coexist in a manner that maintains the flexibility of the sliding-scale approach while retaining the monolithic model's predictability and strength of protections. This Article proposes that the Court adopt a composite model of the fourth amendment under which the warrant and reasonableness clauses have independent purposes but

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> swer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable." Words must be read with the gloss of the experience of those who framed them. . . . When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.

United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) (footnotes omitted); *see also* Chimel v. California, 395 U.S. 752, 768 (1969) (noting critical commentary of and Court's lessening reliance on *Rabinowitz*'s general reasonableness approach over the years).

114. As the Court observed in Coolidge v. New Hampshire, 403 U.S. 443 (1971): "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, [the fourth amendment] and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts." *Id.* at 455. *See generally* Amsterdam, *supra* note 5, at 390-95 (sliding-scale models lack certainty required for principled rules of law).

115. As is evident, both models have flaws: the monolithic model's all-or-nothing standard will result in the exclusion of certain government behavior from the amendment's coverage, while the sliding-scale approach runs the risk of degenerating into "one immense Rorschach blot." Amsterdam, *supra* note 5, at 393.

work in tandem to achieve the fourth amendment's broader purposes.[116]

A. THE COMPOSITE MODEL'S BASIC FRAMEWORK: INITIATORY AND RESPONSIVE INTRUSIONS

Meeting the fourth amendment's first interpretational challenge—delineating more precisely the relationship between the two clauses—must start with identifying where the reasonableness inquiry leaves off and the warrant clause's probable cause requirement begins. Currently, that intersection is a mystical one based vaguely on government purposes and levels of intrusion.[117] The proposed composite model suggests that the Court should base the demarcation point on whether the government is initiating the investigatory activity in the absence of any suspicious behavior, which the model calls an *initiatory intrusion*, or whether the government investigation is based upon particularized suspicion, which the model terms a *responsive intrusion*.

Basing fourth amendment analysis on the distinction between initiatory and responsive intrusions provides the warrant and reasonableness clauses with clearly defined roles. Respon-

116. The Court has, in fact, attempted to reach such a compromise position:

> The Government's argument to sustain the search here is simply that it was reasonable under the circumstances. But it is by now axiomatic that the Fourth Amendment's proscription of "unreasonable searches and seizures" is to be read in conjunction with its command that "no Warrants shall issue, but upon probable cause." Under our cases, both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, though in certain limited circumstances neither is required.

Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring); *see also* Ybarra v. Illinois, 444 U.S. 85, 101 (1979) (Rehnquist, J., dissenting) (describing Court's "current accommodation" of tension between warrant and reasonableness clauses). What is so striking and frustrating about the Court's characterization is the lack of guidance it provides in determining *how* the two clauses should be read in conjunction. *See infra* note 117 and accompanying text.

117. The Court uses the warrant clause and flexible probable cause to assess administrative and regulatory searches, but the boundary between the realm of administrative searches and the world of traditional probable cause and search warrants is hazy at best. *See supra* note 74 and accompanying text. Similarly, the Court has held that only certain governmental intrusions are subject to a reasonableness balancing test under *Terry*, but it has not drawn a clear line by applying the balancing test not only to limited and modest searches, but to full-scale searches as well. *See supra* notes 90-104 and accompanying text. Even the relation of *Camara*, supposedly a warrant clause case, to *Terry*, in theory a reasonableness clause case, remains cloudy, and they are frequently cited in tandem as justification for balancing in any particular case.

sive intrusions should be analyzed under the warrant clause. The analysis thus would focus on probable cause, which traditionally has meant that a government intrusion is justified only if the intrusion is in response to an individual's actions.[118] The reasonableness clause in turn should be the fourth amendment focus when the government is arguing that an initiatory intrusion is necessary because a responsive search would frustrate a vital government interest. This approach limits the reasonableness balancing test to the government's justification for dispensing with individualized suspicion to conduct the intrusion.

The proposed composite model provides several immediate advantages for fourth amendment analysis. Most fundamentally, it simplifies and makes more logical the basic relationship between the warrant and reasonableness clauses. It accomplishes this by focusing on the most distinctive difference between the two clauses—the probable cause requirement and its emphasis on the responsive nature of the government's intrusions. Basing the analysis on the distinction between initiatory and responsive intrusions avoids thorny problems like deciding what constitutes an administrative search or a limited or major intrusion. The distinction properly returns the fourth amendment's analytical focus to the government's justification and identifies a clear demarcation point between the two clauses.

The proposed composite model also restores the traditional definition of probable cause and reestablishes its prominence as a basic fourth amendment safeguard. Under the model, fourth amendment analysis has two inquiries: whether there is a sufficient governmental interest to justify an initiatory intrusion,[119] and, if there is not a sufficient government interest, whether the police had probable cause. Rather than allowing the reasonableness balancing test to control all fourth amendment analysis, the model limits the test's use to a specific fourth amendment inquiry—the propriety of an initiatory intrusion. As a result probable cause is no longer merely a relevant factor in determining reasonableness but again stands as an independent fourth amendment factor that defines when particular government intrusions are reasonable. Furthermore, because the model deals with initiatory searches, such as housing inspections, under the reasonableness clause, it eliminates the need to redefine or dilute probable cause. The model thus banishes

118. *See supra* notes 61-62 and accompanying text.

119. The appropriate standard for assessing the reasonableness of an initiatory intrusion is discussed *infra* Part IV.

flexible probable cause from the warrant clause, restoring probable cause's traditional meaning and thereby strengthening the warrant clause's protections.

Additionally, the composite model is textually justifiable. Unlike either the monolithic or sliding-scale models, the composite model provides each clause an independent role in fourth amendment analysis consistent with the amendment's language. By restoring probable cause's traditional meaning, the model allows probable cause to resume its historical role as the definitive standard for a certain class of government intrusions, those justified only when an individual's acts have given rise to suspicion. At the same time, the model permits the reasonableness clause to function in more than a subsidiary role qualifying the warrant clause's requirements. The clause plays an independent role in fourth amendment analysis, providing the reasonableness standard by which initiatory intrusions are judged.

Finally, while restoring probable cause's traditional meaning and role, the composite model retains the flexibility to accommodate situations in which a warrant based on traditional probable cause would frustrate a vital government interest. The model would bring needed government activities under the fourth amendment. The model's approach in reaching that result, however, is the opposite of the Court's method in *Camara* and *Terry*, in which the Court turned to flexible probable cause and a reasonableness balancing test for its solution. Instead of changing probable cause's meaning as in *Camara*, the model gives the reasonableness clause the discrete role of governing initiatory intrusions so that the amendment can accommodate government activities outside the realm of full-scale criminal investigations. At the same time, the model maintains an independent and strong presence for the warrant clause and its protections. By realigning *Terry* and *Camara* under the warrant and reasonableness clauses, the composite model will undo the cases' conceptual shortcomings while still achieving their goal of giving the fourth amendment an expansive scope.

B. *TERRY* UNDER THE WARRANT CLAUSE: REASONABLE SUSPICION BASED ON EXIGENT CIRCUMSTANCES

The police stop and frisk at issue in *Terry* provides the most obvious example of a situation in which a government's interest would not justify an initiatory intrusion but a requirement of probable cause would frustrate an important govern-

mental need: a frisk for weapons is normally not justified on a random basis, but requiring probable cause exposes the police to an unacceptable level of danger. To accommodate these procedures without undermining the structure of the fourth amendment and its protections, the composite model would reverse *Terry*'s analysis, which subjected the stop and frisk to a reasonableness balancing test.

Instead of relying on the reasonableness clause, the composite model would move the *Terry* stop and frisk conduct, as a responsive search, back under the warrant clause. Consequently, the analysis would focus on the warrant and probable cause requirements.[120] In accord with the Court's traditional fourth amendment case law,[121] only exigent circumstances would present an exception to the warrant clause requirements. In *Terry* the danger to the officer's safety would appear to satisfy the exigent circumstances rationale and thus probable cause would not be required.[122]

Treating *Terry* stop and frisks as exigent circumstances under the warrant clause, however, poses a new problem because the proposed exception now affects the probable cause requirement rather than just the warrant requirement.[123] To

120. Another alternative, of course, also exists: Justice Douglas's rejection in *Terry* of the standard of reasonable suspicion and retention of probable cause as the only valid standard. *See supra* note 51 and accompanying text.

121. *See supra* notes 9-14 and accompanying text.

122. *See* Terry v. Ohio, 392 U.S. 1, 23 (1967).

123. Part of the *Terry* Court's rationale in eschewing the warrant clause may have been because of the warrant clause's language, which states that "no Warrants shall issue, but upon probable cause." *See supra* note 4. Because the Court found probable cause inappropriate, it may have reasoned that the warrant clause could not apply, since by the clause's own terms no warrant can issue "but upon probable cause." *See* Griffin v. Wisconsin, 107 S. Ct. 3164, 3169-70 (1987) (judicial warrant cannot issue on less than probable cause). The *Camara* Court, of course, avoided this conceptual problem by modifying the definition of probable cause.

The *Terry* situation does present an added conceptual hurdle because the exigent circumstances affect both the warrant and probable cause. The composite model, however, views the essence of the warrant clause as probable cause's responsive nature and its emphasis on a particular level of suspicion. The model thus stresses the warrant clause as the starting point for analyzing all responsive intrusions and accepts the difficulty that, in rare instances, both the warrant and probable cause requirements may be modified.

Moreover, although the model modifies probable cause by allowing reasonable suspicion in certain cases, the modification is different than that present in the *Camara* decision. Whereas the *Camara* Court redefined probable cause as a broad balancing test, the model does not take away probable cause's essence, its responsive nature. Probable cause still serves, along with the warrant requirement, as the starting point for fourth amendment analysis. In this

avoid coming full circle back to initiatory intrusions and the reasonableness clause, the solution should preserve individualized suspicion but modify the level of suspicion to accommodate the exigency. The reasonable suspicion standard, with its objective nature and individualized focus, provides the logical alternative to probable cause when the facts necessitate an exception.[124]

If *Terry* was decided under the composite model, therefore, the ultimate standard for a stop and frisk would be the same, reasonable suspicion, except the reasoning would depend upon a warrant clause–exigent circumstances analysis rather than a reasonableness clause–balancing test analysis.[125] Although the model ends up with the same standard the Court arrived at in *Terry*, it yields several advantages worth the realignment of the fourth amendment inquiries.

Most importantly, characterizing the *Terry* standard for a stop and frisk as an exception under the warrant clause refurbishes probable cause's tarnished role in fourth amendment analysis. Instead of operating as a general compromise standard as it did in *Terry*, reasonable suspicion now operates only as a narrow exception to traditional probable cause. The analysis begins with probable cause itself, and any lesser standard of suspicion may be justified only as a limited exception based on emergency considerations. Thus, the model restores probable cause's primacy as the benchmark for individualized suspicion within the fourth amendment. In contrast, the *Terry* Court's reliance on a generalized weighing approach made probable cause simply an end point on a continuum of reasonableness, an analysis which ultimately allowed reasonable suspicion to become an attractive compromise away from the rigors of probable cause.[126]

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sense the model's modification of probable cause to reasonable suspicion is simply an extension of the long-accepted situation in which the warrant clause's requirement of probable cause still controls even though a warrant cannot issue because of exigent circumstances. *See supra* notes 9-14 and accompanying text; *cf. Griffin*, 107 S. Ct. at 3172 n.1 (Blackmun, J., dissenting) (warrant requirement applies even if reasonable suspicion rather than probable cause required); LaFave, *supra* note 41, at 54-56 (*Terry* stop and frisks analyzed under warrant clause and flexible probable cause). The basic premise is that it is better to have the principles of the warrant clause guide the analysis for responsive intrusions rather than resort to a broad reasonableness inquiry.

124. Although reasonable suspicion has its own definitional problems, *supra* note 65, it is the best alternative level of individualized suspicion to be defined.

125. *See supra* note 123.

126. *See supra* notes 63-70 and accompanying text.

The exceptions approach thus circumscribes the refuge of reasonable suspicion. By requiring exigent circumstances, the facts under which reasonable suspicion can supplant probable cause are narrowly limited, preempting the easy, middle ground of reasonable suspicion. Exigent circumstances would most likely exist when the safety of the public or law enforcement agents is endangered.[127] A *Terry* stop and frisk, therefore, would still pass constitutional muster. Beyond police and public safety, however, the likelihood that valid exigent circumstances exist would correspondingly diminish.[128]

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127. The exigent circumstances rationale brings *Terry*'s reasoning in line with the narrow scope some initially argued for after *Terry*. Justice Stewart in particular argued that *Terry* did not allow a stop without a reasonable belief that the defendant was armed and dangerous. *See* Michigan v. Summers, 452 U.S. 692, 706 (1981) (Stewart, J., dissenting). Others saw *Terry* stops as limited to situations in which violent crimes were suspected. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 888 (1975) (Douglas, J., concurring); LaFave, *supra* note 41, at 65-66 (discussing appropriate circumstances for *Terry* stops). Because of *Terry*'s broad reasonableness rationale, however, such limitations eventually gave way.

As with any approach that does not always require a warrant based on probable cause, the exigent circumstances test leaves open the potential for evading the warrant clause's requirement. The exigent circumstances rationale, however, tries to minimize the potential by narrowing the realm of justifications for making an exception and by placing the burden on the government to justify departure from requiring a warrant based on probable cause. *Cf.* People v. Ramey, 42 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (1976) (defining exigent circumstances as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence").

128. The most troublesome cases are those in which the intrusion's target arguably has a different expectation of privacy than the general public. For example, the Court possibly should treat students, parolees, and law enforcement officers differently under the warrant clause because of their different expectations of privacy. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 338-39 (1985) (student searches); Latta v. Fitzharris, 521 F.2d 246, 252 (9th Cir.) (warrantless search of parolee's home), *cert. denied*, 423 U.S. 897 (1975); Adrow v. Johnson, 623 F. Supp. 1085, 1090 (N.D. Ill. 1985) (strip search by corrections officer); *cf.* Hudson v. Palmer, 468 U.S. 517, 530 (1984) (no reasonable expectation of privacy in jail cell). Some of these cases could be resolved on an exigent circumstances rationale, allowing a reasonable suspicion standard to suffice. For instance, exigent circumstances probably would permit a search of arrestees entering a prison although only reasonable suspicion exists that they are smuggling weapons or drugs. The exigent circumstances focuses on the danger posed to other inmates and guards. *Cf.* Smith v. Montgomery County, 643 F. Supp. 435, 438-39 (D. Md. 1986) (strip searches of detainees justified by reasonable suspicion).

What about students at school or parolees, however, when exigent circumstances may not exist to justify a search, but arguably a lesser expectation of privacy is involved? A loosening of standards poses the danger of the fourth amendment degenerating into a vague balancing test. At the same time, the

Similarly, the exceptions approach to probable cause revives the fourth amendment's presumption against allowing government intrusions and better protects the privacy interests at stake. Probable cause would not depend upon factors such as the degree of intrusion but would vary only upon a showing of exigent circumstances. As a result the approach avoids the temptation to lessen fourth amendment standards and dilute its protections because an intrusion can be characterized as minimal or minor. In the process, the approach also strengthens the individual's right to be left alone because the threshold issue is whether exigent circumstances exist.[129] The degree of intrusion becomes relevant only in considering whether the means used were reasonable.

Treating reasonable suspicion as a narrow exception recognizes that the fourth amendment, through its probable cause requirement, has already struck the basic compromise between

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Court has increasingly recognized different levels of expectation of privacy and extended fourth amendment protections accordingly. *See generally infra* note 150 and accompanying text.

One potential solution is the adoption of the reasonable suspicion standard when a special relationship between the individual and government exists justifying an exception. For instance, a parolee's relationship to the government is so markedly distinct that the Court could identify and apply a lesser fourth amendment standard. *Latta*, 521 F.2d at 250. Similar arguments might apply to students in a public school setting or to military personnel. *See, e.g.*, *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring) (noting "special characteristics" of elementary and secondary schools justifying different treatment). Simply driving a car, with its diminished expectation of privacy, however, would not be sufficient to lower the required level of suspicion for a search or seizure because the individual does not acquire a special relationship with the government distinct from the general population simply by driving an automobile.

The special relationship test, of course, need not be adopted at all, and persuasive arguments can be made that probable cause should apply with full force to these situations. *See id.* at 357-70 (Brennan, J., dissenting). A special relationship test, however, appears to be the best alternative given the other option of leaving the warrant clause altogether and reverting to a general reasonableness inquiry. At least with the special relationship test, the nature of reasonable suspicion as an exception has been retained, as well as most of the advantages of an exceptions approach over a general reasonableness view.

129. *See supra* notes 60-62 and accompanying text. Elaborating on an individual's right to be left alone, Justice Brennan has contended that

> the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." That right protects the privacy and security of the individual unless the authorities can cross a specific threshold of need, designated by the term "probable cause." . . . [A] "balancing test" can[not] replace the constitutional threshold [of probable cause] with one that is more convenient for those enforcing the laws but less protective of the citizens' liberty.

individual privacy and the government's interest in enforcing the law for the community's protection.[130] And to the extent that certain intrusions are barred because probable cause and not reasonable suspicion is required, such is the cost of the fourth amendment: "[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."[131]

C. *CAMARA* AS AN INITIATORY SEARCH: REINING IN THE REASONABLENESS BALANCING TEST

Faced with a government intrusion that would be frustrated by requiring traditional probable cause, the *Camara* Court took the warrant clause and redefined probable cause to accommodate the unique nature of housing inspections.[132] The proposed composite model, in contrast, would treat housing inspections as initiatory searches and would ask whether such government intrusions, lacking individualized suspicion, are valid under the amendment's reasonableness clause. This approach avoids any need to tamper with probable cause's traditional definition.

Freeing *Camara* from the artificial bindings of administrative warrants and flexible probable cause allows a coherent overall fourth amendment framework to emerge that explains the relationship between the warrant and reasonableness clauses.[133] By exorcising flexible probable cause from the warrant clause, the model restrains the reasonableness balancing

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T.L.O., 469 U.S. at 361-62 (Brennan, J., dissenting) (citations omitted).

130. The Court has recognized the proposition that the fourth amendment has already struck the compromise between individual privacy and the government's law enforcement interests. In *Ybarra v. Illinois*, the Court stated: "The 'long-prevailing' constitutional standard of probable cause embodies 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'" 444 U.S. 85, 95-96 (1979) (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979)). Under *Terry*, probable cause is a factor bearing on reasonableness. The proposed composite model, on the other hand, views the warrant and probable cause requirements as qualified by reasonableness but as more than mere factors in determining reasonableness. *See* Wyman v. James, 400 U.S. 309, 341 (1971) (Marshall, J., dissenting).

131. Arizona v. Hicks, 107 S. Ct. 1149, 1155 (1987).

132. *See supra* notes 25-30 and accompanying text.

133. Justice Stevens in particular has argued that *Camara* has disturbed the "express purpose of the Warrant Clause." Michigan v. Clifford, 464 U.S. 287, 302 n.5 (1984) (Stevens, J., concurring); *see also* Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978) (Stevens, J., dissenting); Michigan v. Tyler, 436 U.S. 499, 512 (1978) (Stevens, J., concurring).

test to a particular class of cases, initiatory intrusions. Unless the Court determines that an initiatory intrusion is justified, the role of the reasonableness balancing test ends, and the inquiry shifts to the warrant clause's probable cause requirement. As a result probable cause no longer is subsumed under a broad rule of reasonableness but coexists as an independent factor within fourth amendment analysis. The model thus strikes a balance between the need for traditional probable cause to serve as a benchmark of fourth amendment protections and the necessity of maintaining flexibility by providing reasonableness with an independent role in fourth amendment analysis.

Removing initiatory searches from the warrant clause does lead to the loss of one protection provided by *Camara*: administrative warrants are no longer a presumed starting point. The Court's historical preference for a warrant led the *Camara* Court to rely on the warrant clause and created the need to modify probable cause's meaning.[134] Although a reasonableness clause analysis under the composite model does not preclude requiring a warrant,[135] the primary question is no longer whether the means chosen for conducting the search or seizure satisfy the warrant clause, but whether the means reasonably effectuate the goals of the initiatory search.

The loss of warrant protection under the composite model for initiatory searches is worth the price. The *Camara* Court emphasized the procedural warrant requirement to such an extent that it altered probable cause's meaning in the process. Procedural requisites for conducting an intrusion are undeniably important; however, the Court's first concern should be whether the government had sufficient justification for the intrusion. Requiring rigorous justification enhances the fourth amendment's protection of the individual's right to be left alone—" 'the most comprehensive of rights and the right most valued by civilized men' "[136]—and thus should be the amendment's priority. The *Camara* sacrifice of probable cause's responsive nature and its strong privacy protections to bring

134. *See supra* notes 31-34 and accompanying text.

135. A court, for example, could decide that the only valid way for an initiatory intrusion to proceed would be to obtain prior judicial approval. Unlike under *Camara*, however, the relevancy of the warrant rests not on the warrant clause itself, but on an independent reasonableness analysis. *See infra* note 192.

136. New Jersey v. T.L.O., 469 U.S. 325, 361-62 (Brennan, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

housing inspections under the warrant clause improperly reversed the fourth amendment's priorities. The Court placed procedural safeguards over the need to maintain a high threshold for the government's justification.[137]

Moreover, dispensing with an administrative warrant in favor of requiring sufficient government justification may, in fact, provide more, not less, procedural protection. Justice Stevens, an ardent critic of *Camara*, has observed that

> an "administrative search warrant" does not satisfy the requirements of the Warrant Clause. Nor does such a warrant make an otherwise unreasonable search reasonable.
>
> A warrant provides authority for an unannounced, immediate entry and search. No notice is given when an application for a warrant is made and no notice precedes its execution; when issued, it authorizes entry by force. In my view, when there is no probable cause to believe a crime has been committed and when there is no special enforcement need to justify an unannounced entry, the Fourth Amendment neither requires nor sanctions an abrupt and peremptory confrontation between sovereign and citizen.[138]

Justice Steven's observation that an administrative warrant gives the government a power to intrude incommensurate with its justification illustrates vividly how procedural concerns can be elevated to such a degree that the reason for the intrusion is lost in the process. Under the composite model, in contrast, the threshold inquiry for initiatory intrusions focuses on the government's justification. The model then addresses procedural concerns by looking at their relationship to the achievement of the intrusion's goal.[139]

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137. *See* Jacobs & Strossen, *supra* note 64, at 632, 634 (court overemphasizing control of discretion in comparison to justification for search); Wasserstrom, *supra* note 9, at 308-09 (same); *cf.* Amsterdam, *supra* note 5, at 411 (recognizing difference between concerns over controlling discretion in conducting search and requiring adequate justification to conduct search).

138. Michigan v. Tyler, 436 U.S. 499, 513-14 (1978) (Stevens, J., concurring) (citation and footnotes omitted); *see also id.* at 513 n.2 ("[A] warrant is not simply a device providing procedural protections for the citizen; it also grants the government increased authority to invade the citizen's privacy.").

139. The Court has concentrated heavily on the issue of controlling the government's discretion in conducting the search. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 662 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976); Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973). The Court's overemphasis on the control of discretion, in comparison to scrutinizing the government's justification, occurs because the current approach makes the amount of control over discretion and the level of intrusiveness part of the reasonableness inquiry itself. Justice Brennan has observed how this effect turns the amendment on its head:

> The Court's view that "selective referrals—rather than questioning the occupants of every car—tend to advance some Fourth Amend-

IV. THE SECOND CHALLENGE OF FOURTH AMENDMENT INTERPRETATION: DEFINING THE MEANING OF REASONABLENESS

The composite model provides a systematic approach to fourth amendment analysis by establishing independent roles for the warrant and reasonableness clauses. After the model provides a distinct role for reasonableness, however, the second basic challenge of constructing a fourth amendment analysis arises: how to define reasonableness without undermining the amendment's basic protections. Even when analytical restraints such as the initiatory–responsive intrusion dichotomy limit reasonableness' role, a loose definition of reasonableness could overshadow the warrant and probable cause requirements. The proposed model must avoid the danger of formulating a reasonableness standard that readily allows validation of initiatory intrusions; it should require responsive intrusions as the norm.

The difficulty in defining a reasonableness balancing test derives from the term itself. The very notion of reasonableness suggests a concept incapable of specific definition, a concept left to case-by-case determination. The Court has justified the vagueness of its current balancing test by relying on the amendment's reasonableness language:

> The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions and very little that we might say here can usefully refine the language of the Amendment itself in or-

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> ment interests by minimizing the intrusion on the general motoring public," stands the Fourth Amendment on its head. The starting point of this view is the unannounced assumption that intrusions are generally permissible; hence, any minimization of intrusions serves Fourth Amendment interests. Under the Fourth Amendment, however, the status quo is nonintrusion, for as a general matter, it is unreasonable to subject the average citizen or his property to search or seizure. Thus, minimization of intrusion only lessens the aggravation to Fourth Amendment interests; it certainly does not further those interests.

Martinez-Fuerte, 428 U.S. at 572 n.2 (Brennan, J., dissenting).

The composite model, in contrast, reaches the issue of *how* the intrusion is carried out only once it is decided the intrusion is justified. The proposed model's approach parallels the traditional probable cause approach in which the discretion-controlling device, the warrant, is only issued *after* probable cause, and therefore the government's justification, is found.

der to evolve some detailed formula for judging cases such as this.[140]

As a result, the Court's analysis identifies the general factors involved—the government's interest, the degree of intrusion, and the level of privacy expectation—but then basically relies on the majority's sense of reasonableness to yield an answer.[141] The inquiry neither identifies a starting point—whether to assume that government intrusions are, or are not, valid—nor reveals how tightly the government measures must be drawn, stating only that they must be reasonable.[142]

The Court's general invocation of the fourth amendment's reasonableness language not only provides little meaningful guidance, it begs the question of what reasonableness *should* mean for the amendment's purposes. Balancing tests by their nature require normative judgments, and despite efforts to give

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140. Cady v. Dombrowski, 413 U.S. 433, 448 (1973) (citations omitted); *see also Almeida-Sanchez*, 413 U.S. at 283-84 (Powell, J., concurring).

141. *See generally* O'Connor v. Ortega, 107 S. Ct. 1492, 1499-1502 (1987) (discussing reasonableness analysis for search of state governmental employee's private office without warrant). The Court has frequently excused its imprecision by stating that "there is 'no ready test for determining reasonableness.' " New York v. Class, 475 U.S. 106, 117 (1986) (quoting Camara v. Municipal Court, 387 U.S. 523, 536 (1967)) (holding officer's reach into vehicle to uncover vehicle identification number not an unreasonable search).

Lest one think that the present reasonableness inquiry does not resemble a "Rorschach-like 'balancing test,' " *T.L.O.*, 469 U.S. at 358 (Brennan, J., dissenting), one need only read the Court's opinion in Wyman v. James, 400 U.S. 309, 313-24 (1971). The majority opinion discusses at length, in list-like fashion, a series of factors, *id.* at 318-24, in a manner which can justly be characterized as stream-of-consciousness balancing. Despite only the most vague interrelation of the eleven factors discussed, the Court concluded that if a warrantless search had occurred, it was reasonable. *Id.* at 318. Similarly, the recent *Class* opinion is dissatisfying because of its wide-ranging analysis of the factors to be weighed. 475 U.S. at 108-12. As the dissent points out, the majority's factors are important, but the majority never demonstrated how they applied to the case. *Id.* at 126 (Brennan, J., dissenting). *See generally* Note, *supra* note 15, at 1129-32 & nn.26-28 (discussing vagueness of Court's balancing approach).

142. Commenting on the vagueness of the Court's reasonableness balancing test, Justice Frankfurter contended:

> To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an "unreasonable search" is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response. . . . It is for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable.

United States v. Rabinowitz, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting).

them a scientific or mathematical thrust, they will invariably entail the weighing of individual judges' and Justices' values at some point in the process.[143] In some areas, however, the Court has developed descriptive guidelines of how strong the government interest must be and how narrowly drawn the means must be to achieve the ends. For example, the fourteenth amendment provides only that a state cannot "deny to any person the equal protection of the laws," and yet the Court has not simply relied on the individual judgements of the Justices as to what is equal. Rather, it has devised specific standards to apply in different contexts.[144] The Court has developed similar tests for due process[145] and freedom of speech,[146] terms that also are not self-defining. Similar Court-developed standards are needed for fourth amendment analysis.

A. THE NEED FOR A COMPELLING GOVERNMENT INTEREST–LEAST INTRUSIVE MEANS TEST

As a starting point, a structured balancing test should recognize the special nature of the government's justification for initiatory intrusions. With responsive intrusions the individual's suspicious conduct itself generates the government's justification for intruding. With initiatory intrusions, however, the government generates its own justification independent of the individual's actions, which may be entirely innocent. The difference between the source of the government's justification for initiatory and responsive intrusions suggests that initiatory intrusions pose unique dangers to the fourth amendment right

143. *See generally* Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 155-172 (1984) (criticizing the technocratic vision of the Burger Court which budgets rights instead of vindicating justice). Justice Brennan greeted the adoption of balancing tests in *T.L.O.* with opprobrium:

> All of these "balancing tests" amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive nihilism is merely a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences.

469 U.S. at 369-70 (Brennan, J., dissenting).

144. The Court has developed three tiers of scrutiny ranging from a strict scrutiny test to a rational basis test, depending on whether a suspect class is the target of the governmental classification. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 528-33 (3d ed. 1986) (standards for equal protection claims).

145. *See generally id.* at 350-60 (substantive due process tests).

146. *See generally id.* at 837-65 (balancing tests for free speech analysis).

to be left alone.[147] Because the initiatory intrusion's justification does not depend on suspicious behavior, individuals can avoid the intrusion only by foregoing innocent activities like driving a car, owning a home, or holding government employment.[148] In this sense initiatory intrusions take away the individual's right to be left alone and turn it over to a court's evaluation of the government's need to intrude.[149]

Consequently, a definition of what constitutes a reasonable initiatory intrusion must take into account the special danger such intrusions pose to individual privacy. The standard adopted must address three primary considerations: the fourth amendment's structure and objectives, the protections accorded other fundamental rights, and the policy concerns adhering to balancing tests generally. Taking these considerations into account, the standard that emerges as the soundest alternative to the Court's current vague balancing test is a single-tiered strict scrutiny standard based on a compelling government interest–least intrusive means test.[150]

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147. *See supra* notes 60-62 and accompanying text. The problem is sometimes phrased in terms of "presuming the guilt" of the intrusion's target. *See, e.g.*, Capua v. City of Plainfield, 643 F. Supp. 1507, 1517 (D.N.J. 1986) ("The City of Plainfield essentially presumed the guilt of each person tested [for drugs].").

148. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) (upholding routine automobile checkpoints for illegal aliens); Camara v. Municipal Court, 387 U.S. 523, 532 (1967) (requiring search warrants for housing inspections).

149. With responsive intrusions, on the other hand, the individual can preclude the government's power to intrude by avoiding suspicion-creating behavior.

150. Under the proposed composite model, the reasonableness balancing test governing initiatory intrusions also could be defined in terms of two-tiered scrutiny, rather than solely in terms of strict scrutiny. The second tier could embody the Court's intermediate scrutiny test which requires that the means bear a substantial relationship to an important governmental interest. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197, 204 (1976) (using intermediate scrutiny for gender classification); *cf. Ravin v. State*, 537 P.2d 494, 498 (Alaska 1975) (applying intermediate scrutiny to state marijuana regulation). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1083 (1978) (discussing intermediate level). Which level of scrutiny applies would depend on how great an expectation of privacy applies to the situation, a distinction the Court has increasingly recognized. For example, when the government activity impinges upon the home, the Court has held that the fourth amendment's protections are at their greatest. *See* Welsh v. Wisconsin, 466 U.S. 740, 748-49 (1984); Payton v. New York, 445 U.S. 573, 585, 587, 589-90 (1980). In other situations, however, such as automobile searches, the Court has held that the defendant has a diminished expectation of privacy, requiring readjustment of the fourth amendment calculus. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 662-63 (1979); South Dakota v. Opperman, 428 U.S. 364, 368 (1976) ("One has a lesser expec-

1. Deriving the Meaning of Reasonableness From the Fourth Amendment

The fourth amendment provides one example of what constitutes a reasonable search or seizure—a warrant based on probable cause. The warrant clause teaches that reasonableness does not occupy a middle position between the government and individual's interest but is oriented against allowing gov-

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tation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view."); Cady v. Dombrowski, 413 U.S. 433, 439-42 (1973). The other major area in which the Court has found a diminished expectation of privacy is commercial enterprises. *See, e.g.*, Dow Chemical v. United States, 106 S. Ct. 1819, 1827 (1986); Donovan v. Dewey, 452 U.S. 594, 598 (1981).

The difficulty with the Court's attempted fine-tuning of fourth amendment protections to reflect the level of expectation of privacy involved is that privacy expectation has become just another ill-defined factor in the Court's fourth amendment reasonableness analysis. In *Opperman*, for example, the Court upheld automobile inventory searches because of the lowered expectation of privacy due to the public nature of cars and automobile travel. 428 U.S. at 367-68. Yet as the dissent stressed, the inventory search in question did not involve items in public view or relating to the public nature of travel, but the closed compartments of a locked car. *Id.* at 386-87 (Marshall, J., dissenting).

A similar failure to correlate the expectations of privacy analysis with the actual facts of the case occurred in New York v. Class, 475 U.S. 106 (1986). The *Class* majority relied on the lack of expectation of privacy in a car's Vehicle Identification Number (VIN), which can be seen through the windshield. *Id.* at 118-19. Even if the majority was correct about the lack of a reasonable expectation of privacy in the VIN, however, the actual search in question involved an entry of the car, a situation in which an expectation of privacy, albeit a diminished one, does exist. *Id.* at 124 (Brennan, J., dissenting). The majority thus relied on an expectation of privacy *unrelated* to the actual area searched.

Different expectations of privacy should guide the reasonableness inquiry, rather than simply serve as another factor with an ill-defined role. Using the two-tiered approach, the Court would subject intrusions involving areas with a high expectation of privacy, such as entries of the home or searches of the person, to the compelling government interest test. The Court would assess intrusions involving a diminished expectation of privacy, such as those involving commercial premises, under the substantial government interest test. Rather than simply adding a diminished expectation of privacy as a factor to consider in determining the reasonableness of the search, the diminished expectation of privacy actually helps structure the Court's fourth amendment analysis.

If a compelling government interest test is seen as too inflexible, therefore, a two-tiered approach based on expectations of privacy provides the best alternative. Although the pristine quality of a one-standard test for reasonableness is lost, the additional test still would provide more guidance to the courts' inquiry and yield greater protection than the present free-for-all balancing test. In addition, the demarcation point between the reasonableness and warrant clauses is maintained because the threshold question is still whether an initiatory search is justified or whether a responsive search is the only justifiable intrusion.

ernment intrusions and toward protecting individual privacy. The government's burden of having to prove probable cause to obtain a warrant even when pursuing the extremely important objective of crime detection evidences that orientation.[151] Requiring the government to stay its hand in criminal investigations until the individual's actions give rise to probable cause sets a high benchmark by which to judge and compare the reasonableness of *any* search or seizure. The warrant clause's high standards for criminal investigations thus provide an appropriate guide for interpreting the reasonableness clause.

Using the warrant clause's requirements for criminal investigations to advocate a compelling government interest test under the reasonableness clause at first may seem counterintuitive.[152] After all, many of the governmental activities to which the test would apply—housing inspections for example[153]—ap-

151. *See supra* notes 9-14 and accompanying text.

152. Members of the Court on occasion have spoken in terms of a "compelling government interest" or the need to show "exceptional circumstances" as part of the balancing formula. *See, e.g.*, O'Connor v. Ortega, 107 S. Ct. 1492, 1506 (1987) (Blackmun, J., dissenting) (asserting that "special needs" must be shown before warrant requirement is abandoned); New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring) (discussing state's compelling interest in assuring that schools meet educational obligations); *id.* at 351 (Blackmun, J., concurring) (referring to "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impractical"). The Court may be coalescing around a special needs test. *See* Arizona v. Hicks, 107 S. Ct. 1149, 1154 (1987); *O'Connor*, 107 S. Ct. at 1502. *But see Hicks*, 107 S. Ct. at 1159 (O'Connor, J., dissenting) ("The test is whether these law enforcement interests are sufficiently 'substantial,' not, as the Court would have it, whether 'operational necessities render [a standard less than probable cause] the only practicable means of detecting certain types of crimes.' " (citation omitted)).

If the Court adopts and strictly applies a standard that a warrant and probable cause be abandoned "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable," *O'Connor*, 107 S. Ct. at 1500 (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring)), the Court's standard would begin to reflect the stringency of the proposed compelling interest–least intrusive means test. Even if the Court formally embraces such a standard for when the balancing is allowed, however, the balancing test itself remains vague and unwieldy. *See supra* notes 140-42, and *infra* notes 172-79 and accompanying text. The Court already has expressed disagreement over how a special needs test should be applied. *See O'Connor*, 107 S. Ct. at 1511 (Blackmun, J., dissenting).

153. A housing inspection generally involves only those areas in which a hazard may occur and also does not carry the stigma associated with a criminal investigative intrusion. The government is not breaking down doors but often is trying to help in a paternalistic manner. To extend one Justice's metaphor, when the government conducts an administrative search, it often acts as a friend and not an accuser: "The caseworker is not a sleuth but rather, we

pear relatively minor when compared to searches or seizures in the criminal context.[154] Such a high standard is not counterintuitive, however, once it is recognized that the fourth amendment's threshold concern is with the intrusion *itself* and not with the intrusion's scope or the government's motivation. As the Court has recognized: "It is not the breaking of . . . doors, and the rummaging of . . . drawers, that constitutes the essence of the offence; but it is the invasion of [the individual's] indefeasible right of personal security, personal liberty and private property."[155] From the citizen's perspective, an intrusion is occurring even if the government's purpose is supposedly benevolent.

Even once the analysis is properly focused on the intrusion itself as the primary fourth amendment concern, it may seem logical that the more benign the government's purpose, the weaker the government's justification to intrude needs to be. In fact, the opposite is true. The fourth amendment's strictness in requiring a warrant based on probable cause when pursuing the important task of criminal investigation argues for as high a standard when the government is not uncovering criminal evidence. When the government intrudes for a noncriminal or benign purpose, its need to intrude is less urgent than when it intrudes for criminal investigatory purposes. Consequently, even when the government purports to assist the citizen, the individual's privacy interests should predominate, and the Court should scrutinize the government's justification strictly.[156]

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trust, is a friend to one in need." Wyman v. James, 400 U.S. 309, 323 (1971) (upholding visits to AFDC recipients).

154. The Court's ambivalence over fourth amendment protections in which caretaking functions are involved also is evident in the automobile inventory cases. In both *Opperman* and *Cady*, the majority opinions raised the possibility that the inspections of the cars were not even fourth amendment searches because the government's objective was not to uncover criminal evidence. *Opperman*, 428 U.S. at 370 n.6; *Cady*, 413 U.S. at 442. Because the government's actions in these contexts might be characterized as minor or benevolent, one may hesitate to subject them to constitutional scrutiny at all.

155. Mapp v. Ohio, 367 U.S. 643, 646-47 (1961) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

156. The fact that an intrusion has a benign purpose or that its scope is minor should be secondary to the government's need to intrude. Moreover, caution is advised when the government uses labels such as benevolent or nonpunitive. As Justice Brandeis warned, "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are benign." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *cited in Wyman*, 400 U.S. at 343. Administrative and regulatory searches, although characterized as benignly motivated, in fact often involve severe consequences if the search is refused or a violation is found. In al-

The Court's treatment of the distinction between misdemeanors and felonies for fourth amendment purposes provides an appropriate analogy to support a strict standard for government justification under the reasonableness clause. Intuitively, one might say that the more serious the suspected offense, the greater the protections that the fourth amendment should provide. Yet, the Court has held the opposite to be true. The police must get an arrest warrant for misdemeanors in cases when they would not need one for a felony arrest.[157] The police also can enter a home without a warrant based on exigent circumstances for a felony but generally cannot do so for a misdemeanor.[158] Upon reflection these holdings make sense because they recognize that the more minor the suspected criminal offense, the less urgent the government's need to intrude and the greater the care that should be required before the police can invade an individual's home or interfere with an individual's liberty.

Similarly, when the government searches for noncriminal purposes, the court should require at least as great a government justification for the intrusion as that required when the

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lowing home visitations by social workers, for example, the *Wyman* majority relied in part on the premise that the social worker's visits were the acts of a "friend" desiring to assist the individual. 400 U.S. at 323. Yet if the recipient refused these visits by the "friend," the government cut off assistance, *id.* at 340 (Marshall, J., dissenting), a consequence which hardly can be called benign. Moreover, because the job required the social worker also to look for violations of the law, the "friend" was in fact part sleuth. *Id.* at 339. As the dissent observed, "[a] paternalistic notion that a complaining citizen's constitutional rights can be violated so long as the State is somehow helping him is alien to our Nation's philosophy." *Id.* at 343.

In the end, to make the fourth amendment's applicability turn on the benevolence of the government's purpose or whether criminal sanctions are involved would only encourage game playing in characterizing the intrusion. *See supra* notes 76-89 and accompanying text; *cf. infra* note 178 (noting parallel problem of what perspective to use in determining level of intrusiveness). Thus, when the government lacks an urgent need to intrude, the individual's privacy interest should predominate over the Court's concern for secondary matters such as the scope of the intrusion.

157. United States v. Watson, 423 U.S. 411, 418-24 (1976) (no arrest warrant required for felony arrest in public area, although warrantless arrests for misdemeanors allowed only when offense committed in officer's presence).

158. Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) ("[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense . . . . A home entry [absent exigent circumstances] should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed."). *See also T.L.O.*, 469 U.S. at 378-79, 379 n.21 (Stevens, J., dissenting) (degree of government intrusion must be proportional to severity of the suspected violation).

government searches for criminal evidence. That justification, of course, is probable cause. The proposed compelling government interest–least intrusive means test best approximates the probable cause requirement in terms of stringency when the government argues that individualized suspicion would thwart the objective of its search.

2. Treating the Fourth Amendment as a Fundamental Right

The Court has recognized that the fourth amendment's protections are "basic to a free society" and "implicit in the concept of ordered liberty."[159] It has granted the amendment preferred status[160] within the Bill of Rights and stressed that the rights of privacy and personal security "are to be regarded as of the very essence of constitutional liberty; and . . . the guaranty of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen."[161] Adopting a strict scrutiny standard would fully bestow preferred status upon the fourth amendment as a fundamental right and in the process would yield a more structured reasonableness inquiry.

The Court's recognition of the fourth amendment as a fundamental right supports according the amendment the same protections provided other fundamental rights. Indeed, the composite model draws the compelling government interest-least intrusive means test from the Court's balancing tests designed to protect other fundamental rights.[162] The Court requires strict scrutiny for the constitutional right of privacy,[163] for example, which rests on the premise that "a certain private sphere of individual liberty will be kept largely beyond the reach of government."[164] Because of the fundamental nature of the right to privacy, the Court has ruled that the state may not

159. Wolf v. Colorado, 338 U.S. 25, 27 (1949) (applying the fourth amendment to states because right is "fundamental").

160. L. TRIBE, *supra* note 150, at 565.

161. Harris v. United States, 331 U.S. 145, 150 (1947) (quoting Gouled v. United States, 255 U.S. 298, 304 (1921)).

162. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 144, at 367, 531, 541. *See generally* Carey v. Population Servs. Int'l., 431 U.S. 685-86 (1977); Loving v. Virginia, 388 U.S. 1, 11 (1967).

163. In Roe v. Wade, 410 U.S. 113, 152 (1973), the Court stated that "only personal rights that can be deemed 'fundamental' . . . are included in this guarantee of personal privacy." *See also id.* at 155; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 144, at 418 & n.3.

164. Thornburgh v. American College of Obst. & Gyn., 106 S. Ct. 2169, 2184 (1986).

act unless it can show that it has "a compelling" need for government interference.[165] Even when a compelling governmental interest exists, any government action may sweep no further than necessary to achieve the government's legitimate objective.[166] The right to privacy addresses the same concerns as the fourth amendment; the amendment, in fact, constitutes one of the components of the right of privacy.[167]

If the broad privacy right is entitled to heightened protections, the fourth amendment has an even stronger claim for such protections. The fourth amendment's privacy interest has a much longer constitutional lineage,[168] and its privacy protections are easily extracted from the amendment's language.[169]

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165. Roe v. Wade, 410 U.S. at 155.

166. *Id.* California has an express right to privacy in its constitution, CAL. CONST. art. I, § 1, which is protected by a compelling government interest test. *See, e.g.*, Long Beach City Employees Ass'n v. City of Long Beach, 41 Cal. 3d 937, 943-44, 719 P.2d 660, 663, 227 Cal. Rptr. 90, 93 (1986) (city must justify employee polygraph testing that infringed on privacy right with compelling public interest); People v. Stritzinger, 34 Cal. 3d 505, 511, 668 P.2d 738, 742, 194 Cal. Rptr. 431, 435-36 (1983) (requiring psychotherapist to testify in criminal prosecution implicated defendant's privacy right, so compelling state interest was required); City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 131-34, 610 P.2d 436, 440-42, 164 Cal. Rptr. 539, 543-45 (1980) (compelling interest test required to justify regulation restricting house residents to related people); White v. Davis, 13 Cal. 3d 757, 761, 533 P.2d 222, 224-25, 120 Cal. Rptr. 94, 96-97 (1975) (compelling interest required for privacy right violation by undercover police who compiled dossiers on professors and students at university).

167. In *Roe v. Wade*, the Court recognized that the right to privacy had fourth amendment roots:

> [T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967), Boyd v. United States, 116 U.S. 616 (1886); *see* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.

Roe v. Wade, 410 U.S. at 152 (some citations omitted); *see also* Whalen v. Roe, 429 U.S. 589, 599 n.24 (1977); Griswold v. Connecticut, 381 U.S. 479, 484 (1965). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 144, at 737-38.

168. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 144, at 734-35 ("The oldest constitutional right to privacy is that protected by the fourth amendment's restriction on governmental searches and seizures.").

169. Bowers v. Hardwick, 106 S. Ct. 2841, 2853 (1986) (Blackmun, J., dissenting) (" 'The right of the people to be secure in their . . . houses,' expressly guaranteed by the Fourth Amendment, is perhaps the most 'textual' of the various constitutional provisions that inform our understanding of the right to privacy . . . ."). The Court in the early case of Boyd v. United States, 116 U.S. 616 (1886), invoked natural law concepts in discussing the basis of the fourth

The generalized privacy right, in contrast, is of relatively recent vintage and is drawn from the penumbra of the Bill of Rights, of which the fourth amendment itself constitutes a key part.[170] Most importantly, the privacy interests at stake with initiatory intrusions under the fourth amendment are of equal magnitude and thus deserve similar protection.[171]

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and fifth amendments: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his *indefeasible right* of personal security, personal liberty and private property." *Id.* at 630 (emphasis added).

Justice Brandeis, in particular, "advocate[d] a wide reading of the fourth amendment in order to insure that government did not intrude into the privacy of the individual." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 144, at 684. According to Justice Brandeis, the makers of the Constitution

> 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.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *see also* Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (amendment's "basic purpose . . . is to safeguard the privacy and security of individuals"); Mapp v. Ohio, 367 U.S. 643, 656 (1961) (fourth amendment creates a "right to privacy, no less important than any other right carefully and particularly reserved to the people").

170. The first case, decided in 1925, involved the right to make decisions concerning child rearing and education. *See* Pierce v. Society of Sisters, 268 U.S. 510, 521-26 (1925) (holding compulsory public school attendance violates fourteenth amendment). Modern privacy analysis was not used, however, until the landmark 1973 case of Roe v. Wade, 410 U.S. at 118-32. The fourth amendment privacy interest, in contrast, was officially recognized by the Court in 1886. *See Boyd*, 116 U.S. at 630 (finding compulsory production of papers within the spirit of the fourth and fourteenth amendments). The generalized constitutional right to privacy has met a fair amount of resistance lately. *See, e.g., Bowers*, 106 S. Ct. at 2846 (refusing to extend privacy right to homosexual sodomy). *See generally* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 931-32 (1973) (arguing that constitutional right to privacy has nothing to do with right to abortion).

171. The argument that the fourth amendment privacy right should be accorded the same *level* of protection given to the general right to privacy is not intended to transform the amendment itself into a general privacy right. Although the model would clarify and strictly define the fourth amendment's method of analysis, the amendment's scope would remain the same. Consequently, the proposed composite model cannot be criticized in the same sense as Katz v. United States, 389 U.S. 347 (1967) (holding some electronic surveillance without warrant constitutes search and seizure). In *Katz* the Court first held that the fourth amendment protects reasonable expectations of privacy. *Id.* at 354-55. *Katz*'s extension of coverage caused Justice Black to contend that the Court had "made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy." *Id.* at 373 (Black, J., dissenting). The proposed model, in contrast, would not affect the fourth amendment's scope because it would not even ap-

3. Balancing Tests and the Fourth Amendment

The nature of the interests balanced in the fourth amendment context heightens the need for a rigorous standard for testing the reasonableness of initiatory searches. The Court's current balancing test appears to fairly accommodate the competing interests: "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order."[172] The difference in the nature of the individual and government interests, however, makes the balancing test naturally favor the government's interest over the individual's privacy interest. The governmental interests—saving lives, catching illegal aliens, stopping the flow of illegal narcotics—are tangible and visible benefits that will stand out in the balancing process. The privacy interests, on the other hand, are much less tangible and pale in comparison. After all, what price is a small intrusion on one's time and space given the enormity of the government's interests?[173]

One flaw in the current balancing test that leads to a skewing of interests in favor of the government is the test's failure to consider that the intrusion in question will not be an isolated intrusion. Ours is a society in which the government, especially as technology advances, has increasingly intruded upon its citizens' lives to achieve goals deemed desirable.[174] As a result an intrusion cannot be considered in a vacuum; the balancing test should account for the intrusion's *cumulative* effect on the individual's right to be left alone.[175] The Court's present balanc-

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ply until the Court determined that a reasonable expectation of privacy existed.

172. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

173. *See* Tribe, *supra* note 143, at 157-59, 161 (noting costs always appear weightier than intangible benefits in a cost-benefit calculus); *see also T.L.O.*, 469 U.S. at 361 (Brennan, J., dissenting) ("Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil."); Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since* Camara *and* See, 61 CALIF. L. REV. 1011, 1012-14 (1973) (commenting on difficulty of balance); Jacobs & Strossen, *supra* note 64, at 625-27 & n.136 (outlining flaws in Court's fourth amendment balancing test); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971) (noting difficulty of valuing intangible benefits).

174. Indeed, it was the increase in government regulation and inspection that in part led the *Camara* Court to reexamine its holding in *Frank*. *See* Camara v. Municipal Court, 387 U.S. 523, 525 (1967).

175. Justice Douglas eloquently noted the danger:

ing test makes no such effort to accommodate a holistic view of the government's proposed action, which is one of the "sins" of balancing tests generally:

> That leads to [another] sin that . . . the current Court is committing—profoundly, frequently, and with devastating effect: the sin of overlooking the constitutive dimension of government action, including judicial action. That is, the Court is thinking of the actions challenged before it purely in terms of the effects they will have out there in the world in demonstrable ways, and not in terms of what they *say* about who and what we are as a people and how they help to constitute us as a nation.[176]

Until the Court modifies its present balancing test to accommodate the "constitutive dimension" of its holdings, the number and types of government actions deemed reasonable will escalate and overwhelm the privacy interests at stake.

The potential for the cumulative effect of the Court's decisions to engulf the privacy interest is compounded by another "sin" of balancing tests—"the tyranny of small decisions":

> There is [another sin] I would call . . . inviting "the tyranny of small decisions," a lovely phrase coined some time ago by the economist Alfred Kahn. He used the phrase to describe the fallacies of those economists and managers who tend to look down at their feet to figure out how far they've gone and where they're heading. It's not a very illuminating view. They may think they've taken but a short step from where they were just a moment ago; it's no surprise that, by the time they realize it, they've departed a remarkable distance from their first premises.[177]

Given the Court's tendency to gauge reasonableness by its previous decisions, this danger of progressive movement away from original premises is especially great in the fourth amendment area. For example, without the benefit of precedent, a court may react to customs officials boarding a pleasure boat on

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> The bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent. It touches everyone's life at numerous points. It pries more and more into private affairs, breaking down the barriers that individuals erect to give them some insulation from the intrigues and harassments of modern life. Isolation is not a constitutional guarantee; but the sanctity of the sanctuary of the *home* is such—as marked and defined by the Fourth Amendment . . . .

Wyman v. James, 400 U.S. 309, 335 (1971) (Douglas, J., dissenting) (footnote omitted).

176. Tribe, *supra* note 143, at 165. Moreover, what may be lost in the balance, overwhelmed by the perceived present needs, are the very values that gave rise to the amendment: "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts." Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

177. Tribe, *supra* note 143, at 162 (footnote omitted).

the open seas without any suspicion of wrongdoing as overly intrusive. Given the benefit of precedent's approval of increasingly more intrusive searches, however, a court could easily conclude that the intrusion is reasonable because "while not minimal, [it] is limited."[178] The next case in turn will have the suspicionless boarding of boats to rely on in gauging whether an intrusion is reasonable.

A compelling government interest–least intrusive means test would help alleviate the dangers of the present reasonableness balancing test. It adds symbolically to the individual's side of the balancing scales by declaring the privacy interest fundamental and emphasizing the magnitude of the government in-

178. United States v. Villamonte-Marquez, 462 U.S. 579, 593 (1983). Trying to determine the level of intrusion is itself a suspect exercise. Perhaps the most illustrative example is the secondary referral at issue in United States v. Martinez-Fuerte, 428 U.S. 543 (1976). In *Martinez-Fuerte* all cars passed through a roadblock to check for illegal aliens. In a relatively small number of cases there was a further diversion of motorists over to a secondary inspection area; neither reasonable suspicion nor probable cause was required for diversion, with some evidence that the authorities made referrals largely on the basis of Mexican ancestry. *Id.* at 560.

The majority rejected the argument that the secondary referrals were too intrusive to allow without individualized suspicion, concluding that "[t]he objective intrusion of the stop and inquiry . . . remains minimal. Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature." *Id.* Indeed, the Court suggested that the selective referrals actually enhanced fourth amendment interests to the extent that they "minimiz[ed] the intrusion on the general motoring public." *Id.*

The majority's conclusion that the secondary referral did not involve greater intrusiveness, even if based largely on apparent Mexican ancestry, demonstrates a one-dimensional view of intrusiveness. The majority's conclusion is not only susceptible to challenge on the grounds that being singled out is genuinely frightening and upsetting, *id.* at 572-73 (Brennan, J., dissenting) but also ignores the offensiveness and indignation of being singled out and detained on the basis of ethnic origin when one's acts are innocent. *Id.* at 573. Thus, the individual may not be frightened but still feel subjectively intruded upon because of the very fact that his conduct is innocent and yet he is being detained and questioned. *Id.* at 571 ("[C]heckpoints . . . detain thousands of motorists, a dragnet-like procedure offensive to the sensibilities of free citizens.").

The Court's inability to agree on the level of intrusiveness involved in a case is also evident in New York v. Class, 475 U.S. 106 (1986). The majority and dissent arrived at markedly different conclusions over the degree of intrusiveness, mainly because they used different reference points. The majority found that an officer's entry to examine the Vehicle Identification Number on the dashboard was a minimal intrusion compared to a full-scale search. *See id.* at 118-19. The dissent, on the other hand, compared the officer's actual entry into the car with the intrusiveness of an "ordinary traffic stop" and found the officer's actions far from minimally intrusive. *Id.* at 129 (Brennan, J., dissenting).

terest necessary before an intrusion is justified. Additionally, the strict scrutiny standard avoids the possibility of government intrusions slipping by based on a characterization of the government's purpose as benign or of the intrusion's scope as minor.[179] Instead, the compelling government interest–least intrusive means test establishes a high standard across the board for all intrusions and in the process recognizes that all intrusions implicate the citizenry's privacy interest.

B. IMPLEMENTING THE COMPELLING GOVERNMENT INTEREST–LEAST INTRUSIVE MEANS TEST

The compelling government interest–least intrusive means test would narrow the realm of initiatory intrusions primarily to situations in which the government can demonstrate that lack of immediate action endangers the public's safety. An emphasis on safety restricts initiatory intrusions to those with sufficient import to justify intrusions on the individual's privacy interest: when the need to act immediately without particularized suspicion is great because the dangers of waiting for suspicion to form are so grave. Moreover, safety dangers are more tangible and less susceptible to manipulation than other broad governmental interests.[180] In contrast, initiatory intrusions that are simply more efficacious in achieving an important governmental purpose will not satisfy the compelling government interest–least intrusive means test. As a result the test returns the fourth amendment's orientation to responsive intrusions and probable cause as the norm.

An examination of the Court's decision in *United States v. Villamonte-Marquez*[181] demonstrates the shift in orientation that the adoption of the compelling government interest–least

179. *See supra* notes 156, 178.

180. *See, e.g.*, City of Palm Bay v. Bauman, 475 So. 2d 1322, 1324-26 (Fla. Dist. Ct. App. 1985) (justifying police drug testing program in part because of need to maintain "credibility and public confidence"); *see also* Note, *supra* note 15, at 1145 (advocating limiting balancing test primarily to situations that pose immediate physical danger). Although few would contest the importance of public confidence in the police, this type of government objective clearly can be achieved by less intrusive means, and no immediate danger is posed or is inevitable if the initiatory intrusion is not undertaken. Indeed, the rationale easily applies to most government employees, even law professors at state institutions. Note that it is a different matter when the government interest alleged is that the government employee, if on drugs, poses an immediate danger to the public. *See Bauman*, 475 So. 2d at 1324, 1326. Law professors, at least, would then be exempt.

181. 462 U.S. 579 (1983).

intrusive means test would cause in the Court's current reasonableness test. In *Villamonte-Marquez* the Court addressed random boarding of vessels by customs officials to examine various documents. The majority developed a grocery list of government interests allegedly furthered by the document laws, including the regulation of various trades, the collection of duties and customs, and the regulation of imports and exports.[182] The document laws, for example, assisted the government "in the prevention of entry into this country of controlled substances, illegal aliens, prohibited medicines, adulterated foods, dangerous chemicals, prohibited agricultural products, diseased or prohibited animals, and illegal weapons and explosives."[183] The majority, focusing on the government's interests and the intrusion's scope, concluded that given the important governmental objectives and the limited intrusion of boarding the vessel, the search and seizure was reasonable.[184]

Under the compelling government interest–least intrusive means test, the *Villamonte-Marquez* search would fail. Under that test, the analysis would have focused on whether effective means short of an initiatory intrusion existed to prevent threatened immediate harm.[185] Because the government could

182. *Id.* at 591. The Court explained the government interests served by the document laws:

> These documentation laws serve the public interest in many obvious ways and respondents do not suggest that the public interest is less than substantially furthered by enforcement of these laws. They are the linchpin for regulation of participation in certain trades, such as fishing, salvaging, towing, and dredging, as well as areas in which trade is sanctioned, and for enforcement of various environmental laws. The documentation laws play a vital role in the collection of Customs duties and tonnage duties. They allow for regulation of imports and exports . . . .

Id.

183. *Id.*

184. *Id.* at 592.

185. To this extent the test would resemble that used when the government has a legitimate interest in curtailing speech but must use the least intrusive means available. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 144, at 873. The use of the qualifier "effective" is not meant to open up a whole new panorama of debate but rather simply to convey the notion that any alternatives used to show that the initiatory intrusion is not the least intrusive means must be feasible. Such a qualifier would allay fears that "[t]he logic of . . . elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." United States v. Martinez-Fuerte, 428 U.S. 543, 556 n.12 (1976).

Before ultimately settling on a "reasonable means" analysis, the Court actually flirted with adopting a least intrusive means requirement for the fourth amendment. *Compare* United States v. Place, 462 U.S. 696, 709 (1983) (least restrictive means) *with* United States v. Sharpe, 470 U.S. 675, 686-87 (1985)

have guarded against the overwhelming list of evils prevented by strict enforcement of the document laws without resorting to initiatory searches to examine the ship's documents,[186] immediate random investigation was not warranted. Random stops and searches may provide better detection, but that will be true in almost any situation. Any extra difficulty caused by prohibiting an initiatory intrusion is simply the fourth amendment's cost of protecting against unnecessary intrusions; law enforcement interests should intrude on privacy interests only to the minimal extent necessary.[187]

The compelling government interest–least intrusive means test best maintains the norm of nonintrusion and protects the privacy interest when initiatory searches are involved. Although the strict scrutiny standard has acted as a virtual death blow in certain areas, such as equal protection,[188] such a stringent standard would not eliminate initiatory searches under the fourth amendment. Whereas it is very difficult to imagine a legitimate race-based classification,[189] situations do arise when a compelling need justifies an initiatory search. Although certain initiatory searches presently approved would

(only reasonable means required) *and Villamonte-Marquez*, 462 U.S. at 591 n.5 (same). *See generally* Jacobs & Strossen, *supra* note 64, at 628 n.143 (discussing Court's use of least intrusive means test). In any case the availability of alternatives remains central, although not determinative, to the Court's analysis when reviewing government procedures. For example, in Delaware v. Prouse, 440 U.S. 648 (1979), the majority rejected random stops of cars in part because less intrusive alternatives, "both those in use and those that might be adopted," were available. *Id.* at 659; *see also* New York v. Class, 475 U.S. 106, 118 (1986); United States v. Jackson, 825 F.2d 853, 873 (5th Cir. 1987) (Higginbotham, J., concurring) (suggesting availability of less restrictive alternatives directly relevant to whether administrative warrants should issue).

186. The *Villamonte-Marquez* dissent, for instance, pointed to the availability of uniform identification procedures and use of ship-to-shore radio for tracking documentation and registration procedures. 462 U.S. at 609 (Brennan, J., dissenting). Justice Brennan proceeded to argue that, given the less intrusive alternative, "[i]t is unseemly at best for the Government to refrain from implementing a simple, effective, and unintrusive law enforcement device, and then to argue to this Court that the absence of such a device justifies an unprecedented invasion of constitutionally guaranteed liberties." *Id.*

187. *Cf.* United States v. Leon, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting) ("[T]he Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. . . . Understood in this way, the Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government.").

188. L. TRIBE, *supra* note 150, at 1000.

189. *But see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294-99 (1978) (addressing "benign" classifications based on race).

fail under a higher standard, other government intrusions would receive continued approval.

For example, the initiatory intrusions involved in *Camara* would satisfy the compelling governmental interest–least intrusive means test. In contrast to *Villamonte-Marquez*, the Court in *Camara* properly focused on whether less intrusive means short of a suspicionless inspection could achieve the government's objectives regarding housing inspections. The *Camara* Court, albeit through a flexible probable cause analysis, stressed the special need for random initiatory searches as part of a housing inspection scheme. Emphasizing that the abatement of dangerous conditions protected public safety, the Court argued that limiting the government's generalized power of inspection would gravely impede its ability to guard against health and safety dangers.[190] The Court therefore focused on the need for preventive measures as the only means available to avert immediate dangers to the public.

Similarly, the compelling government interest–least intrusive means test would likely justify the weapon detection procedures used before boarding airplanes. Given the uniqueness of an airplane and its isolation from law enforcement agents once in the air, screening passengers for weapons prior to boarding is arguably the only effective detection procedure available. Prior to boarding, the opportunity to observe passengers to form suspicion regarding whether an individual is armed is extremely limited.[191] Thus, in both the housing and airplane boarding contexts, the government's need to protect the public's safety is

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190. Exploring the government's need to conduct initiatory searches in the housing context, the Court contended:

> The public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. . . .
>
> "Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials . . . ."

Camara v. Municipal Court, 387 U.S. 523, 537 (1967) (quoting Frank v. Maryland, 359 U.S. 360, 372 (1959)).

191. *See generally* United States v. Davis, 482 F.2d 893 (9th Cir. 1973) (addressing reasonableness of airport screening procedures).

simply so great that, despite the fundamental privacy interests at stake, waiting until the circumstances would justify a responsive intrusion is too dangerous.[192]

C. THE BOTTOM LINE ON REASONABLENESS AND THE STRICT SCRUTINY STANDARD

In the end no bright line or per se rule emerges for analyzing initiatory searches. The proposed strict scrutiny standard basically is a refinement of the Court's present reasonableness test of weighing the government's interest against the intrusion on the individual's privacy interest. Reasonableness still hinges on a balancing test conducted by a court.

In contrast to the Court's present analysis, however, the compelling government interest standard unambiguously reorients fourth amendment analysis toward protection of the individual's privacy interest. The test also guards against the cumulative erosion of privacy by "minor" intrusions, a danger for which the present general weighing process does not account. Moreover, although not a per se rule, the reasonableness inquiry is more precisely guided and makes agreement on an intrusion's validity easier. All things considered, it should be easier for the Court to attain a consensus when the question is whether the government has shown a compelling government interest, rather than when the question is whether the

192. Once the government demonstrates that the circumstances justify an initiatory intrusion under the compelling government interest–least intrusive means test, the actual means used to conduct the intrusion must also intrude on the privacy interest as minimally as possible. For example, a weapon-screening process may be a valid initiatory intrusion, *supra* note 191, but it still must be carried out in the least intrusive manner that is feasible. Because a metal detector could be used to screen all passengers, a frisk would be unreasonable by comparison. *Cf.* Wilkinson v. Foust, 639 F. Supp. 518, 531 (D. Conn. 1986) (finding mass searches at Ku Klux Klan meetings unnecessarily intrusive).

The least intrusive means test also would require the Court to ensure that the government means do *in fact* further the government interest. The Court's present scrutiny of how tightly the means serve the ends is often lax. In New York v. Class, 475 U.S. 106 (1986), for example, Justice Brennan commented:

> I find the Court's holding particularly disturbing because none of the factors the Court relies upon—the lack of reasonable expectation of privacy in the [vehicle identification number], the officers' observing respondent commit minor traffic violations, the government's interest both in promoting highway safety and in shielding officers from danger, and the allegedly limited nature of the search that took place—gave the police any reason to search for the VIN.

Id. at 130 (Brennan, J., dissenting).

government's intrusion is reasonable.[193]

Finally, the strict scrutiny standard brings the definition of reasonableness in line with the level of protection illustrated by the warrant clause. Unless an initiatory intrusion can satisfy a standard comparable in justification to probable cause—the compelling government interest–least intrusive means test—the Court will find the intrusion unreasonable. By using probable cause to define the reasonableness standard, the proposed approach brings the analysis full circle from *Camara*. *Camara* used the reasonableness balancing test to define probable cause, which weakened probable cause's role. The proposed approach, in contrast, uses probable cause as an illustration of reasonableness, strengthening individual privacy rights. The reversal in definitional techniques encourages an expansive view of the fourth amendment's domain while jealously guarding the privacy rights under its protection.

CONCLUSION

The Court's fourth amendment caselaw is marked by a continuing struggle to craft a coherent relationship between the broad command against "unreasonable searches and seizures" and the specific rule that "no warrant shall issue, but upon probable cause." The Court's effort to introduce a reasonableness balancing test in the *Camara* and *Terry* cases has proved unworkable. The cases expanded the fourth amendment's scope, but in the process they traded away an independent role for probable cause in favor of an ill-defined balancing test. As a result the first challenge of fourth amendment interpretation—defining a logical relationship between the reasonableness and warrant clauses—has gone unmet.

The proposed composite model meets that challenge by realigning the *Camara* and *Terry* holdings under the reasonableness and warrant clauses. The realignment allows an orderly and sensible relationship to emerge between the two clauses without having to change probable cause's meaning, define an

193. The consensus might not reflect the individual judge's or Justice's view of what is reasonable but might be reached only as the basis of whether the legal standard of a compelling government interest had been met. This result may in fact be a positive sign of the achievement of one of the model's purposes: the forging of a sufficiently structured fourth amendment analysis so that an intrusion's validity no longer depends upon an individual jurist's view of what is reasonable but reflects broader values that are consistently applied. *See generally* Note, *supra* note 15, at 1144-45 (arguing more precise methodological approach needed for fourth amendment balancing).

administrative search, or determine whether an intrusion is minor, modest, or major. Instead, whether the reasonableness or warrant clause applies depends upon whether the intrusion is an initiatory or responsive intrusion. By making the responsive characteristic of probable cause the fulcrum between the two clauses, the composite model reestablishes the prominent role of probable cause within the fourth amendment.

Because the proposed composite model introduces an independent role for the reasonableness clause, the second challenge of fourth amendment interpretation arises—how to define reasonableness. The model requires that the government prove a compelling government interest and demonstrate that an initiatory intrusion is the least intrusive means reasonably available. Although a high standard, it reflects the treatment that the Court gives to other fundamental rights, such as the constitutional right to privacy, of which the fourth amendment is a part. Moreover, the standard is comparable in strictness to the warrant clause's probable cause requirement, which reflects the degree of fourth amendment protections intended for privacy rights. Finally, the standard implements the norm of nonintrusion founded in the fourth amendment and illustrated by the probable cause requirement. Absent compelling government justification, individuals have the right to be left alone, especially in a society in which an increasing array of minor intrusions can cumulatively erode the individual's sphere of privacy.