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Everyman's Fourth Amendment: Privacy Or Mutual Trust between Government and Citizen

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"EVERYMAN" 'S FOURTH AMENDMENT: PRIVACY OR MUTUAL TRUST BETWEEN GOVERNMENT AND CITIZEN?

*Scott E. Sundby**

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INTRODUCTION

"[A] search against [the defendant's] car must be regarded as a search of the car of Everyman."

—Justice Robert Jackson¹

The Supreme Court's recent Fourth Amendment decisions have drawn increasingly sharp criticism from the legal academy. Article after article documents the Court's transgressions: how it has riddled the Warrant Clause with exceptions, has suffocated individual privacy through an all-encompassing reasonableness standard, and has extended unprecedented powers to law enforcement agencies.² If ever a united cry of warning has been made that a basic civil liberty was in danger, this chorus of law review laments is it.³

1. *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

2. For a representative sampler from among the substantial body of writing that exists, see, e.g., Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 Vand. L. Rev. 473, 475 (1991) ("Rather than mold a body of reliable fourth amendment law, the Supreme Court has created a makeshift solution[,] . . . render[ing] amorphous case-by-case, fact-specific adjudications, . . . [leaving the] law mired in confusion and contradiction." (footnote omitted)); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 201 (1993) ("[T]he [Supreme] Court has ignored or distorted the history of the Fourth Amendment"); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 Minn. L. Rev. 583, 587 (1989) ("[T]he entire course of recent Supreme Court fourth amendment precedent . . . is misguided and inconsistent with the spirit of the fourth amendment"); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. Rev. 1, 18 (1991) (describing Court's adherence to Fourth Amendment's warrant clause as "[l]ip service"); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. Rev. 1173, 1195 (1988) (critiquing the "distortion in the [Supreme] Court's fourth amendment balancing" tests); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of *Camara* and *Terry**, 72 Minn. L. Rev. 383, 383 (1988) ("Many of the court's present fourth amendment ills are symptoms of its failure to meet . . . basic challenges presented by the fourth amendment's text.").

The most persuasive voice urging calm is that of Professor Stuntz, who has provided alternative explanations more elegant than the Court's own reasoning as to why the Court's Fourth Amendment decisions should not be viewed with undue alarm. See William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan. L. Rev. 553, 587-89 (1992) (suggesting that group searches might be understood as implicit bargains with search targets where government has alternative investigation methods available or as searches that can be controlled by political checks); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 Va. L. Rev. 881, 897-912 (1991) (arguing that Court's decisions under Warrant Clause are more understandable if viewed within context of available remedies and a concern with after-the-fact bias by judges towards government in reviewing searches). For further discussion, see *infra* notes 221-225 and accompanying text.

3. If the impassioned nature of law review article and note titles is any reflection of the depth of the academy's frustration, even the uninitiated can quickly sense the concern by sampling some of the more dramatic titles inspired by the Court's Fourth Amendment decisions. See, e.g., Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 Val. U. L. Rev. 383 (1991); Daniel J. Capra, *Prisoners of Their Own Jurisprudence: Fourth and Fifth Amendment Cases in the Supreme Court*, 36 Vill. L. Rev.

Yet a curious thing has happened. Apart from this chorus of academics, an occasional civil liberties lawyer, and a disenchanting judicial dissenter or two, the warning largely has gone unheard and unheeded by both the judiciary and the public at large. The politician on the stump is far more likely to stir a crowd's passions by calling for an expanded "war on crime" than by suggesting that greater restrictions on law enforcement activities are necessary to preserve what, in the public's mind, are the rights of accused criminals. More and more, the scholarly critics appear to be an isolated band of constitutional purists, out of touch with reality, trying to form a protective circle around the dying ember of the Fourth Amendment based on the forlorn hope that, if jealously guarded, some day a new theoretical and political wind might again fan it to life.

Perhaps, though, the problem is in part with the critiques of the Court's Fourth Amendment decisions themselves. Generally, critics have assumed that the factors which the Court uses to measure Fourth Amendment reasonableness—privacy, intrusiveness, and government need—are the proper ones to be weighed in deciding whether a warrant is required or what level of suspicion must justify a search or seizure. Consequently, most arguments have coalesced along the lines that the Court has not properly measured the individual's expectations of privacy,⁴ that it has underemphasized the Warrant Clause's requirements of a warrant based on probable cause,⁵ or that it has struck the wrong balance of individual and government interests in deciding that a particular intrusion was "reasonable."⁶ Not surprisingly, therefore, proposed solu-

1267 (1991); Thomas Y. Davies, Denying a Right by Disregarding Doctrine: How *Illinois v. Rodriguez* Demands Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error, 59 Tenn. L. Rev. 1 (1991); Bradley W. Foster, Warrantless Aerial Surveillance and the Right to Privacy: The Flight of the Fourth Amendment, 56 J. Air L. & Com. 719 (1991); James F. Heuerman, Note, *Florida v. Bostick*: Abandonment of Reason in Fourth Amendment Reasonable Person Analysis, 13 N. Ill. U. L. Rev. 173 (1992); Craig S. Michalk, Case Comment, *Alabama v. White*, 110 S. Ct. 2412 (1990): The Supreme Court's Latest Attack on Fourth Amendment Protections Against Warrantless Searches, 16 T. Marshall L. Rev. 333 (1991); William R. O'Shields, Note, The Exodus of Minorities' Fourth Amendment Rights into Oblivion: *Florida v. Bostick* and the Merits of Adopting a Per Se Rule Against Random, Suspicionless Bus Searches in the Minority Community, 77 Iowa L. Rev. 1875 (1992); Victor C. Romero, Note, Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After *Immigration and Naturalization Service v. Lopez-Mendoza* and *United States v. Verdugo-Urquidez*, 65 S. Cal. L. Rev. 999 (1992); Christian J. Rowley, Note, *Florida v. Bostick*: The Fourth Amendment—Another Casualty of the War on Drugs, 1992 Utah L. Rev. 601.

4. See, e.g., Serr, *supra* note 2, at 600–01; James J. Tomkovicz, Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province, 36 Hastings L.J. 645, 735 (1985).

5. See, e.g., Bookspan, *supra* note 2, at 476; Silas J. Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am. Crim. L. Rev. 257, 272–73 (1984).

6. See, e.g., Tracey Maclin, Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?, 25 Am. Crim. L. Rev. 669, 674–75 (1988); Strossen, *supra* note 2, at 1176; Sundby, *supra* note 2, at 400–04.

tions have tended to focus on a more skilled and sensitive use of these factors rather than a disagreement with the factors themselves.⁷

The inability of these Fourth Amendment critiques to strike a responsive judicial or popular chord suggests, however, that their analyses are missing a more deeply rooted and fundamental problem by asking the wrong questions. What if the problem is not with judges improperly doing their Fourth Amendment sums but with the factors themselves? Might reliance upon privacy as the standard weight of the Fourth Amendment no longer provide, by itself, an adequate measure for assessing the propriety of government intrusions? Is making privacy the centerpiece of the debate over the "reasonableness" of a specific intrusion skewing the very values the Amendment is designed to protect?

These are but some of the questions that must be asked if the critique of the Court's current Fourth Amendment tack is not simply to degenerate into a shouting match over shades of reasonableness. What is *not* needed at this juncture is another effort to explain why the Court is being untrue to the Fourth Amendment of a past time when the Warrant Clause was king. Unless the current legal and verbal framework for identifying Fourth Amendment values can be reconfigured, the future appears to hold little more than a Cassandra-like existence for those who are dismayed by the Court's developing Fourth Amendment jurisprudence.

This Article makes an initial effort to reframe the Fourth Amendment debate by exploring how the Court's current metaphor for conceptualizing Fourth Amendment values, Justice Brandeis's famous image of "the right to be let alone," no longer fully captures the values that are at stake. The exploration begins with a brief examination in Part I of the Court's current reliance on privacy analysis and a reasonableness balancing test as the primary means for delineating Fourth Amendment protections. Part II looks at the social, doctrinal, analytical, and rhetorical reasons for why the current conceptualization of Fourth Amendment protections, especially a reliance on "the right to be let alone" as the Amendment's basic defining value, no longer adequately defines the proper limits on government intrusions.

In Part III, after looking at how particular images or metaphors, such as the First Amendment's marketplace of ideas, can influence public debate and the development of legal doctrine, I argue for a new metaphor for the Fourth Amendment to complement "the right to be let alone." Drawing upon the values underlying the Constitution and the Bill of Rights, I suggest that the animating principle which has been ignored in the current Fourth Amendment debate is the idea of reciprocal government-citizen trust. This idea is explored further by looking at how a number of the Court's recent Fourth Amendment decisions might differ

7. For a thoughtful attempt to recast the Court's current tests into a more rational and focused inquiry, see Slobogin, *supra* note 2.

if the Court focused not only on physical privacy but also on how government intrusions affect the underlying need for government-citizen trust.

In the Conclusion, I answer some questions that might arise from advocating the application of what appears to be such a lofty ideal—reciprocal government-citizen trust—to government intrusions intended to protect society from unlawful behavior. The reader will not be surprised, I suspect, to learn that the Article concludes with the lesson that as pressing as societal scourges such as drugs and crime may seem, we also must not lose sight of the long-term interest of maintaining a constitutional system that is built upon the foundation of government-citizen trust.

I. THE CURRENT FOURTH AMENDMENT: OF PRIVACY AND REASONABLENESS

In 1928, at a time when the courts were facing a wave of Prohibition Act cases not unlike the current flood of cases resulting from the war on drugs,⁸ the Court confronted a situation where federal prohibition officers had placed wiretaps on the phones of a suspected bootlegging ring without any pretense of obtaining a warrant.⁹ Adhering to a very literal reading of the Fourth Amendment,¹⁰ the Court in *Olmstead v. United States* held that the Amendment's protections did not apply because the placing of the wiretaps had not required the officers to physically trespass upon the defendants' premises.¹¹

The lasting legacy of *Olmstead*, however, would prove not to be the majority's holding, but a rather remarkable dissent by Justice Brandeis. Seizing the case as an opportunity to write a discourse on the need to look to the values underlying the Constitution when defining rights, Justice Brandeis concluded that

[t]he makers of our 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.¹²

Through this characterization of the Fourth Amendment's protections as not merely a listing of physical property items that deserve protection

8. See Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. Crim. L. & Criminology 471, 472 (1982).

9. See *Olmstead v. United States*, 277 U.S. 438, 456–57 (1928).

10. The Fourth Amendment provides:

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

U.S. Const. amend. IV.

11. See *Olmstead*, 277 U.S. at 464–66.

12. *Id.* at 478 (Brandeis, J., dissenting).

from government intrusion, but also as a means of reaching the far broader goal of conferring "the right to be let alone," Justice Brandeis articulated an underlying value in the form of privacy to which one could look for guidance in determining the Amendment's scope.

Although it would take forty years,¹³ Justice Brandeis's view of the Fourth Amendment became accepted by the Court in a later eavesdropping case, *Katz v. United States*.¹⁴ By declaring that "the Fourth Amendment protects people, not places,"¹⁵ the *Katz* Court effectively tied the Amendment's core meaning to the citizenry's "reasonable expectation[s] of privacy"¹⁶ and made it possible, at least conceptually,¹⁷ to extend the Amendment's scope to an array of government intrusions that otherwise would not fall within the Amendment's literal meaning.

Embracing privacy as the Fourth Amendment's core value, however, would have some unforeseen effects as well. One of the most significant effects related to the Court's interpretation of the Amendment's procedural protections. The Amendment's protections are found, of course, in its two clauses: the Warrant Clause's requirement that "no Warrants shall issue, but upon probable cause" and the Reasonableness Clause's more vaguely worded prohibition against "unreasonable searches and seizures."¹⁸

Traditionally, the Court had emphasized the Warrant Clause as the Amendment's "cardinal principle . . . subject only to a few specifically established and well-delineated exceptions,"¹⁹ and had used the Reasonableness Clause as a means of justifying those exceptions based on overriding necessities such as exigent circumstances.²⁰ Thus, even

13. The Court, in *Wolf v. Colorado*, had stated that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is at the core of the Fourth Amendment," 338 U.S. 25, 27 (1949), but it was not until *Katz v. United States* that privacy directly entered the Fourth Amendment as part of a legal test. See 389 U.S. 347, 351-52 (1967). The emerging influence of privacy analysis also could be seen in *Warden v. Hayden*, 387 U.S. 294, 300-07 (1967) (rejecting "mere evidence" rule) and *Schmerber v. California*, 384 U.S. 757, 766-72 (1966) (analyzing forcible blood tests under Fourth Amendment). See generally Note, *The Life and Times of Boyd v. United States* (1886-1976), 76 Mich. L. Rev. 184, 191-96 (1977) (documenting emergence of Fourth Amendment privacy doctrine).

14. 389 U.S. 347 (1967).

15. *Id.* at 351.

16. *Id.* at 360 (Harlan, J., concurring). Justice Stewart's majority opinion actually took great pains to declare that he was not changing the Amendment into a "general constitutional 'right to privacy,' . . . [because its protections] often have nothing to do with privacy at all." *Id.* at 350 (footnote omitted). That privacy would become the core value, however, was preordained by Justice Harlan's concurrence, which coined the "reasonable expectation of privacy" test, *id.* at 360, and became the prevailing standard.

17. For an argument that the Court has been using privacy analysis in a way that contracts the Fourth Amendment's applicability, see *infra* notes 28-39 and accompanying text.

18. U.S. Const. amend. IV.

19. *United States v. Ross*, 456 U.S. 798, 825 (1982) (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) and *Katz*, 389 U.S. at 357) (footnotes omitted).

20. See Sundby, *supra* note 2, at 386-87.

though in practice "these exceptions [to the Warrant Clause were] neither few nor well-delineated,"²¹ almost all Fourth Amendment analysis was channeled through the Warrant Clause's requirements of a warrant based upon probable cause of misconduct.

The Court's introduction of the notion of privacy into the Amendment as the means of defining the Fourth Amendment's *applicability*, however, also created an opportunity to redefine the nature of the Amendment's *protections*. After all, if privacy was relevant in determining whether the Amendment even applied, should not privacy also be important in deciding whether a government intrusion was reasonable under the Amendment?

The Court took this next step of extending privacy analysis in *Camara v. Municipal Court*²² and *Terry v. Ohio*.²³ These cases made a Fourth Amendment balancing test possible by formally recognizing privacy as the counterweight that could be placed on the other side of the scale against the government's interest in deciding whether a search was "reasonable." As a result, a warrant based upon traditional probable cause increasingly became but one option for the Court to choose depending upon how strong the individual's privacy interest was compared to the government's need for the intrusion.²⁴ Although still an important part of the Amendment, the conceptualization of the Fourth Amendment universe as revolving around the Warrant Clause gave way to a view that "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable" ²⁵ And with this change in the focus of the Amendment's protections, the door was opened for a variety of government intrusions that lacked individualized probable cause under traditional Warrant Clause analysis but could now be approved if the Court found that the government's need made the intrusion on privacy "reasonable."²⁶

The Court's embracing of the "right to be let alone" as the animating principle of the Fourth Amendment thus changed the nature of the Court's analysis in a most fundamental way by making privacy the lodestar for determining how and when the Amendment applied. But, intriguingly, a value that clearly was meant to liberate the Amendment from wooden categorizations of Fourth Amendment interests also turned out

21. Craig M. Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468, 1473 (1985); see also *id.* at 1473-74 (documenting over twenty exceptions).

22. 387 U.S. 523 (1967) (applying Fourth Amendment to housing inspections based on weighing of government's need against intrusion on privacy).

23. 392 U.S. 1 (1968) (applying Fourth Amendment to stop and frisks based on reasonable suspicion that individual was armed and dangerous).

24. The process of the Court's movement away from a Warrant Clause-centered analysis is more fully developed in Sundby, *supra* note 2, at 391-404 (tracing how *Camara* and *Terry* have changed definition and role of probable cause).

25. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

26. For a discussion of the Court's "special needs" test for departing from the Warrant Clause, see *infra* notes 171-186 and accompanying text.

to contain the seeds for the later contraction of Fourth Amendment rights. For what ultimately emerged was an Amendment that was privacy-bound, rising or falling in both scope and protection based upon how the notion of privacy fared in the Court and within society as a whole. And with the benefit of hindsight, a number of factors can now be identified that help explain why a Fourth Amendment founded almost exclusively upon the principle of privacy is in decline.

II. PRIVACY'S FAILURE AS GUARDIAN OF THE FOURTH AMENDMENT

The argument that formulating Fourth Amendment interests in privacy terms has undermined the Amendment's protections initially may seem counterintuitive. One can easily imagine how a Court in a different time might have taken the ideal of the "right to be let alone" and defined privacy in a way that would have led to a very different Fourth Amendment jurisprudence than that which exists today.²⁷ However, a coalescence of different factors—social, doctrinal, analytical, and rhetorical—has prevented the vision underlying Justice Brandeis's words from coming to pass. The "right to be let alone" no longer is capable of fully protecting Fourth Amendment values.

A. *Privacy in a Non-Private World*

Perhaps most fundamentally, a Fourth Amendment based upon expectations of privacy must contend with the changing nature of modern society. The very notion of a right to be left alone seems a bit tattered once placed in the context of contemporary life. Justice Brandeis spoke of the Fourth Amendment as guarding against unjustifiable intrusions upon the private life of the individual in part out of a concern for encroaching technology.²⁸ Even Justice Brandeis, though, could not have fully envisioned the world of the 1990s, where the difference between public and private largely has become blurred. Technological and communication advances mean that much of everyday life is now recorded by someone somewhere, whether it be credit records, banking records,

27. As one commentator has persuasively argued, the Warren Court's purpose in *Katz* was not to limit the Amendment to privacy, but to broaden overall protections. Its failure to articulate broader purposes, however, has allowed the expectations of privacy standard to take over the Amendment. See John B. Mitchell, What Went Wrong with the Warren Court's Conception of the Fourth Amendment?, 27 New Eng. L. Rev. 35, 47-53 (1992) (arguing Court failed to adequately connect *Katz* test to broader societal values); see also Lewis R. Katz, In Search of a Fourth Amendment for the Twenty-First Century, 65 Ind. L.J. 549, 563-75 (1990) (arguing with detailed analysis that Court has departed from *Katz*'s intended meaning).

28. See *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting) ("Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.").

phone records, tax records, or even what videos we rent.²⁹ We may want to be left alone, but we realistically do not expect it to happen in any complete sense. And perhaps it is worth noting that judges and legislators—the individuals who are primarily responsible for defining the boundary between public and private for the purposes of the Fourth Amendment—especially have seen what once were largely thought of as private affairs, like finances and marital matters, claimed as part of the public's "right to know."³⁰

The fact that it has become increasingly difficult to find a Walden Pond or "bee-loud glade" in today's world does not mean that privacy no longer has a role within the Fourth Amendment; indeed, it may support

29. See generally Fred W. Weingarten, *Communications Technology: New Challenges to Privacy*, 21 J. Marshall L. Rev. 735 (1988) (describing various technological advances in communications field and analyzing their impact on legal and public policy considerations regarding privacy); Jonathan P. Graham, Note, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 Tex. L. Rev. 1395, 1397 (1987) (proposing tort of violation of "information privacy"); David C. Esseks, Book Note, 87 Mich. L. Rev. 1624 (1989) (reviewing Richard F. Hixson, *Privacy in a Public Society: Human Rights in Conflict* (1987)). One might recall that during Judge Robert Bork's confirmation hearing for his nomination to the Supreme Court, a list of the videos he had rented recently was reported by the media. See Stephen Advokat, *Bork's Video Rentals Become Privacy Issue*, Chi. Trib., Nov. 20, 1987, § 7, at 106. The furor raised by the publication eventually led to the passage of the Video Privacy Protection Act of 1988, § 201(a), 18 U.S.C. § 2701 (1988); see also S. Rep. No. 599, 100th Cong., 2d Sess. 6 (1988), reprinted in 1988 U.S.C.C.A.N. 4341–45. (stating that Bork's embarrassment over publication of video rentals was impetus behind Act).

30. Consider, for example, Justice Scalia's line of questioning during oral argument in the case of *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), in which the Court considered the constitutionality of drug testing of Customs employees up for promotion:

QUESTION [Justice Scalia]: . . . when we think of these privacy cases, I suppose every federal judge thinks of the annual financial disclosures that every federal judge has to file every year showing all income received by the judge and by his spouse and children. Now, is your position that that is invalid or is there—

. . . .

—some reason why that invasion of privacy, which is much greater because that goes to the entire public, whereas these tests [of the employees] just go to—are not published, of course. They don't become public.

. . . .

If you're asking me to decide this on the basis of whether it's a greater invasion of privacy that I should give a urine sample when I'm up for a promotion or a transfer versus whether I should publish my entire financial background every year, you're going to lose. [General laughter.]

MS. WILLIAMS [for petitioner]: That's right. That's why I would not make that argument. [General laughter.]

184 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, 1988 Term Supplement 803–04* (Philip B. Kurland & Gerhard Casper eds., 1990) [hereinafter *Landmark Briefs and Arguments*].

In addition to laws that require public disclosure of matters such as personal finances or campaign contributions, other processes, such as confirmation hearings and investigative reporting, result in close scrutiny of one's private life, as practically any politician, judge, or would-be judge of recent memory can attest.

all the more an argument for a stronger Amendment to protect what enclaves of privacy are left. But this requires thinking of privacy in general, abstract value terms, such that everyone, including the Court, would agree that "privacy" is a cherished principle.³¹ However, under the Court's current Fourth Amendment formulaic approach, privacy is not invoked as an overarching *value* but rather is used as a specific *fact* to assess whether and how the Fourth Amendment should apply to a given intrusion. Such an approach asks, for example, whether the individual has a "reasonable expectation of privacy" in a particular activity, and, if so, whether the government's need outweighs the scope of the privacy intrusion. Privacy is thus treated as a quantifiable fact that can be used to help resolve concrete legal disputes.

When used as a factual measure, reliance upon privacy as the centerpiece of Fourth Amendment rights actually creates the potential for less overall privacy protection. This is true most simply because as governmental and nongovernmental intrusions on privacy expand, the scope of what one reasonably expects to be private correspondingly becomes truncated. In other words, because the Court is not asking whether bank or phone records *should* be kept private (thus invoking privacy as a value), but, rather, whether we as a *factual* matter expect others to see and use those records³² (thus viewing privacy as a measurable fact), Fourth

31. Usually, though, when the Court starts speaking of privacy in lofty terms, it is an omen that the Court is about to explain why, despite privacy's cherished place, the search or seizure in question was permissible. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (noting that frisk was "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment," but proceeding to uphold frisk on less than probable cause); *Schmerber v. California*, 384 U.S. 757, 772 (1966) (upholding forcible blood test, but noting "[t]he integrity of an individual's person is a cherished value of our society").

32. For example, in *Smith v. Maryland*, 442 U.S. 735 (1979), the Court used factual privacy to find that no reasonable expectation of privacy exists in numbers dialed from one's home because

[t]elephone users . . . typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.

Id. at 743. In dissent, Justice Marshall viewed privacy as an independent value because "whether privacy expectations are legitimate . . . depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society." *Id.* at 750 (Marshall, J., dissenting); see also *United States v. Miller*, 425 U.S. 435, 442 (1976) (concluding that no reasonable expectation of privacy in bank records exists because "[t]he checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.").

Amendment protections will shrink as our everyday expectations of privacy also diminish.³³

Likewise, to the extent the Court attempts to guard Fourth Amendment privacy interests by looking to the degree of the government's intrusion on privacy (the more intrusive the invasion, the greater the government justification that is needed), the increased intrusions on our everyday privacy will make any particular government action seem less intrusive in comparison and thus require less of a justification.³⁴ If an individual's privacy is already largely abrogated, any additional privacy intrusions will appear to be only incremental by comparison.

The problem of how we use privacy to measure Fourth Amendment rights is compounded by technological advances that have enabled the government to invade privacy in a less physically intrusive manner. The Norman Rockwell scene of Officer Friendly patrolling Main Street while he whistles and twirls a nightstick has been replaced by drug-sniffing dogs, urinalysis spectrometers, unmanned drones, heat sensors, DNA testing, helicopter flyovers, and electronically tracked beepers. The question is whether such technological "advances" will be used to further privacy interests or to allow more incursions on the overall privacy of the citizenry.

Certainly, such technological and resource-efficient techniques are laudable to the extent they allow an *already* justified search to be conducted in the least intrusive fashion possible. The use of advanced techniques in this way serves privacy interests because a legitimate Fourth Amendment search that otherwise would be conducted at a greater intrusiveness level is in fact carried out at a lower level of intrusion. For example, where a legitimate need to search for weapons exists, a metal detector will promote the privacy interest by achieving the government's

33. Indeed, the Court has made explicit that increased government regulation can diminish the individual's Fourth Amendment privacy interest at stake. This reasoning creates the ironic situation that the government intrusion challenged under the Fourth Amendment can be responded to by pointing out how the government already greatly intrudes upon the individual. See, e.g., *National Treasury Employees Union*, 489 U.S. at 672 (holding that customs agents by nature of job and regulation have lesser expectations of privacy); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989) (holding that pervasiveness of regulation of railway employees "diminished expectation of privacy"); *California v. Carney*, 471 U.S. 386, 392 (1985) ("These reduced expectations of privacy [in vehicles] derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways."). But cf. *Donovan v. Dewey*, 452 U.S. 594, 608 (1981) (Rehnquist, J., concurring) (expressing doubts about pervasive regulation as justification for warrantless search).

34. The problem might be thought of in terms of a mathematical metaphor: if the numerator is the degree of the challenged government intrusion on privacy and the denominator is the degree of all intrusions on individual privacy, as the denominator of overall intrusions increases, the comparative value of the numerator's intrusion decreases.

objective without subjecting the individual to a patdown and an opening of packages.³⁵

The increasing tendency, however, is to use the lesser intrusion on privacy as part of the *justification* for a government search that otherwise would not be allowed.³⁶ As a result, the Fourth Amendment's balancing factors of privacy and the government's need for the intrusion become viewed as dependent variables on a sliding scale: minimizing the level of the privacy intrusion can help compensate for a weaker government justification, such as one lacking individualized suspicion.³⁷ Used in this analytical fashion, the government's ability to intrude in a less physically intrusive manner does not promote privacy interests but actually undermines the overall right to be free from government surveillance by expanding the scope of acceptable intrusions.³⁸ A physical search of a person for evidence of drug use while on the job, which normally would require individualized suspicion, now becomes permissible if the government uses minimally intrusive means (at least in a physical sense), such as blood or urinalysis tests.³⁹

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

36. The lesser level of intrusion of a frisk as compared to a full search, for example, was the Court's original entryway into the Reasonableness Clause. See *Terry v. Ohio*, 392 U.S. 1, 29-31 (1968).

37. See, e.g., *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451-52 (1990) (finding "objective" intrusion of sobriety checkpoint to be slight); *New York v. Class*, 475 U.S. 106, 118 (1986) (relying on "critical" issue of minimal intrusiveness to uphold entry into car to check Vehicle Identification Number). Justice Powell in particular was aware of how technological advances can skew Fourth Amendment inquiries, especially as to reasonable expectation of privacy analysis. He objected in several cases that "*Katz* measures Fourth Amendment rights by reference to the privacy interests that a free society recognizes as reasonable, not by reference to the method of surveillance . . . [Otherwise], privacy rights would be seriously at risk as technological advances become generally disseminated and available in our society." *Dow Chem. Co. v. United States*, 476 U.S. 227, 251 (1986) (Powell, J., concurring in part and dissenting in part); see also *California v. Ciraolo*, 476 U.S. 207, 223 (1986) (Powell, J., dissenting) ("Reliance on the *manner* of surveillance is directly contrary to . . . *Katz* . . .").

38. As Justice Brennan argued in objecting to the Court's use of minimal intrusion as a factor in justifying immigration checkpoints:

The Court's view that "selective referrals—rather than questioning the occupants of every car—tend to advance some Fourth Amendment 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 . . . Thus, minimization of intrusion only lessens the aggravation to Fourth Amendment interests; it certainly does not further those interests.

United States v. Martinez-Fuerte, 428 U.S. 543, 572 n.2 (1976) (Brennan, J., dissenting) (citation omitted).

39. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624-28 (1989) (relying in part on minimal intrusiveness of blood samples, breath tests, and urinalysis as factors in upholding drug and alcohol testing of railway employees under certain

By making privacy the central factor in the Fourth Amendment's equation, therefore, the Court unwittingly introduced a factor that, over the long term, resulted in an overall decline in the Amendment's protections. This situation will only worsen as the inevitable march of governmental regulation further blurs the notion of what is private and as technological advances enable the government to invade privacy in more pervasive, but physically less intrusive, ways.

B. *The Decline of Liberalism and Individual Rights*

Privacy has become problematic in Fourth Amendment doctrine not only because our factual sense of privacy has diminished but also because of a more general, growing skepticism about the assertion of individual rights.⁴⁰ Although a "counterrevolution" to the Warren Court's due process revolution has not occurred in the sense that the Court has overruled significant cases in a wholesale fashion, little doubt can exist that the original revolutionaries' muskets largely have been silenced. Recent Supreme Court rulings generally have been hostile to claims for new or expanded rights and have demonstrated an intention of curbing what are perceived to be the excesses of individual and group claims of constitutional rights. This trend is especially evident where the claimed right is against legislative use of power and where invalidating the action may result in the Court being perceived as activist and operating like a "superlegislature."⁴¹

circumstances); see also *Mozo v. State*, 632 So. 2d 623, 634-35 (Fla. Dist. Ct. App. 1994) (finding "technology . . . an unsteady gauge" in determining scope of privacy right under State Constitution, because if an "'ease of interception' standard were applied there would be virtually no [protected] private communications . . .").

40. One branch of this criticism is the traditional critique that the judiciary acts like a superlegislature when it creates constitutional rights. See generally Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990); Lino A. Graglia, *The Constitution and "Fundamental Rights,"* in *The Framers & Fundamental Rights* 86-101 (Robert A. Licht ed., 1992). A growing body of criticism, however, recently has focused on the perceived adverse impact of the assertion of rights upon an effort to build a working community of diverse viewpoints. The critique from this perspective is not so much directed at courts creating implied rights, but at how an overly individualistic, simplistic, and absolutist view of rights can impede efforts to develop a strong social fabric. See generally Mary A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991). Recent controversies over attempts to regulate hate speech, for example, have highlighted the potential tensions between a civil libertarian and an egalitarian or communitarian view of individual rights. Compare Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 *UCLA L. Rev.* 103, 173-74 (1992) (arguing that well-meaning efforts to suppress hate speech ultimately undermine principles of self-government) with Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 *Mich. L. Rev.* 2320, 2356-58 (1989) (advocating prohibition of hate speech directed at historically oppressed groups).

41. See generally Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 *Harv. L. Rev.* 43 (1989) (expressing disapproval of the Rehnquist Court's "majoritarian" approach to judicial review). For an overview of the Court's trend in the criminal procedure area, see Donald A. Dripps, *Beyond the Warren*

The significance of this retreat is particularly relevant for the Fourth Amendment because one area where the Court has demonstrated particular wariness in expanding rights is with the general constitutional right to privacy.⁴² Although the Fourth Amendment's privacy component has a unique heritage distinct from *Griswold v. Connecticut*⁴³ and its progeny, the prevailing notion, at least in the Supreme Court, that privacy interests have been pushed too far in barring democratically imposed limitations seems to have infused attitudes towards Fourth Amendment privacy issues as well. This skepticism of constitutional privacy claims is especially apparent where the challenged government intrusion is not the classic police-criminal suspect encounter, but involves planned government intrusions without individualized suspicion. This latter type of intrusion—such as a sobriety checkpoint or the taking of a urine sample—usually does not involve the vivid physical specter of a body search or the police bursting into the home. Consequently, arguments against the government intrusion will necessarily invoke policy and value arguments that resonate with general concerns over the government's right to impinge on an individual's privacy and autonomy, concerns that are currently in retreat on the broader constitutional landscape.⁴⁴

Whether a departure from focusing on individual rights is desirable is a complex question. The benevolent impulse to expand the scope of constitutional rights to enhance individual liberties might not necessarily produce beneficial long-term results. Persuasive arguments can be made that if every individual or group perceives itself as having rights to assert, what results is a logjam of conflicting rights, leaving the courts in the unenviable position of trying to resolve society's most difficult questions by declaring certain parties "winners" and the other parties the "losers."⁴⁵

Court and its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure, 23 U. Mich. J. L. Ref. 591 (1990); Tom Stacy, The Search for the Truth in Constitutional Criminal Procedure, 91 Colum. L. Rev. 1369 (1991).

42. See generally Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431, 1450 (1992) (noting that "[t]he current members of the Supreme Court are haunted by the specter of *Lochner v. New York* and the dreaded doctrine of substantive due process, of which *Griswold's* progeny, especially *Roe v. Wade*, are suspected of being the modern illegitimate descendants.").

43. 381 U.S. 479 (1965).

44. The discounting of privacy interests can be seen both in the initial determination of whether a reasonable expectation of privacy exists such that the Fourth Amendment even applies, see discussion *infra* Part III.D.1, as well as in the Court's balancing in cases such as *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451–53 (1990) (discounting "subjective" intrusion of checkpoints on motorists), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671–72 (1989) (stating that "operational realities" of employment diminish privacy expectations), and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989) (viewing employees' privacy interests as diminished because of nature of railway industry).

45. See generally Glendon, *supra* note 40, at 76–144 (discussing hazards of overly rigid focus on individual rights upon citizen's sense of social responsibility).

One can see the potential clash of rights in the Fourth Amendment area as individual claims of privacy increasingly are met by "countertalk" of a right to be free from crime.⁴⁶ And if resolving a clash of rights is simply a playing of each actor's rights card and deciding which right is more valuable, the government's card representing the citizenry's "right" to safety almost always will outweigh an individual's claim of a right to privacy, especially where the intrusion can be characterized as minimal. Consider, for example, how the rights cards compare when debating sobriety checkpoints: which right is greater, society's right to safe highways through the use of sobriety checkpoints or a right to be free from a brief thirty-second encounter with the police? Cast in this way, (and one can make the comparison even more skewed by suggesting that the individual's claimed right is in fact founded upon the "privilege" of driving), little doubt can exist as to which rights card will triumph.

The lesson for those concerned with Fourth Amendment protections is that playing the rights game as currently defined is bound to be a losing proposition except in the most egregious cases. I do not mean to say that individual liberties are no longer cherished principles, but simply that the dialogue is changing and that a claim that one has a right is the beginning and not the end of the legal conversation.⁴⁷ Whether captured in the gentler rubric of communitarianism or the more strident tones of a political argument that too many rights exist, the undeniable message is that those calling for greater protection of a "right" had better be prepared to explain how the protection benefits not only the individual claimant but all of society.

C. *The Move to a Reasonableness Balancing Test: Importing the Madisonian Dilemma into the Fourth Amendment*

If Fourth Amendment analysis had continued to rest primarily within the Warrant Clause and its traditionally rigid requirements of a warrant based upon individualized probable cause, the societal and doctrinal changes described earlier might not have had such a great ripple effect. But, as previously noted,⁴⁸ embracing privacy as the Fourth Amendment's defining concept also cracked the door open for greater use of a reason-

46. Consider, for example, President Clinton's argument in favor of broader police powers: "There are many rights [guaranteed by] our Constitution . . . [b]ut [victims] have certain rights we are letting slip away. They include the right to go out to the playground, and the right to sit by an open window; the right to walk to the corner without fear of gunfire; the right to go to school safely in the morning" Gwen Ifill, Clinton Asks Help on Police Sweeps in Public Housing, N.Y. Times, Apr. 17, 1994, at A1, A18.

47. A rethinking of landmark opinions similar to the one suggested by this Article is also occurring in other areas of constitutional law. Professor Seidman, for example, has made the provocative argument that *Brown v. Board of Education* and *Miranda v. Arizona*, although producing short-term gains, may have in the long run defused more promising reform movements. See Louis M. Seidman, *Brown* and *Miranda*, 80 Cal. L. Rev. 673, 680 (1992).

48. See generally *supra* Part I.

ableness balancing test by giving the Court an identifiable weight to balance against the government's interest.

The door has since been flung wide open, as the Court has made clear that the bottom-line Fourth Amendment test is whether the government intrusion is "reasonable" based upon a balancing of the government's need to engage in the intrusion against the individual's privacy interests.⁴⁹ This shift in focus from the Warrant Clause to a generalized reasonableness inquiry, in turn, has changed the nature of Fourth Amendment dialogue by gradually, but inevitably, fostering an increased deference to the government's judgment that the challenged intrusion is needed. This increased deference is not very mysterious once one compares the different nature of the inquiries that each clause requires.

When the Warrant Clause still ruled the Fourth Amendment,⁵⁰ the judicial inquiry was basically a factual one: did adequate individualized suspicion exist to establish probable cause, and, if so, was a warrant obtained or an adequate excuse shown? Even conceding that a judge's policy concerns may influence her factual findings, the government's ability to justify the intrusion depended upon external factors beyond its control, namely the specific facts surrounding the particular search or seizure.⁵¹ If undertaken without adequate individualized suspicion, a

49. Thus in *National Treasury Employees Union v. Von Raab*, the Court stated that while "as a general matter," a warrant based on probable cause is required, the longstanding principle [is] that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. . . . [O]ur cases establish that where a Fourth Amendment intrusion serves special government needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

489 U.S. 656, 665-66 (1989) (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619-20 (1989)); see also *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 342 n.8 (1985).

50. The gradual transition to a reasonableness-based Fourth Amendment inquiry can be traced back to the Court's decisions in *Camara v. Municipal Court* and *Terry v. Ohio*. See *supra* notes 22-26 and accompanying text (describing transition). Prior to that time, although not always a model of consistency, the Court generally had insisted that the Warrant Clause was the primary source of Fourth Amendment protections. See *Wasserstrom*, *supra* note 5, at 282-83 (describing how Court arrived at "conventional interpretation" that Warrant Clause is dominant clause).

As Telford Taylor's excellent historical look at the Amendment points out, the Court's emphasis on the warrant requirement arguably is at odds with how warrants were actually used and perceived at the time of the Bill of Rights. Taylor marshals a strong argument that since warrants bestowed immunity upon their holder, the Warrant Clause was meant to *limit* when warrants could issue and was not intended to encourage their use as the Court has assumed. See Telford Taylor, *Two Studies in Constitutional Interpretation* 28-29, 41-43 (1969). Whatever the wisdom of adhering to the historical understanding of the Warrant Clause, see discussion *infra* part III.D.4, the Court's twentieth-century interpretation clearly has revolved around the Warrant Clause's requirements.

51. In *Katz v. United States*, for example, all of the Justices seemed to agree that the government agents had acted "with restraint," but the Court steadfastly refused to sanction

search or seizure to which the Warrant Clause applied could not be redeemed through policy arguments as to why the intrusion should have been allowed anyway or by a broad appeal to societal approval of the government's actions. In other words, the need to reconcile the Madisonian dilemma that haunts most constitutional decisionmaking—that "democratic majorities enjoy the fundamental right to rule as they desire, while . . . individuals receive protection from majoritarian interference in particular spheres"⁵²—did not directly arise. The Warrant Clause unambiguously took the decision away from the sphere of majority rule and stated that no search could occur without meeting certain specific factual predicates.⁵³

This approach changed, though, once the Court began entertaining "exceptions" and modifications to the Warrant Clause that went beyond the immediate exigency requirements of a particular search or seizure. Now, policy judgments began to filter into the Fourth Amendment calculus. *Camara v. Municipal Court*⁵⁴ illustrates the change that occurs in the nature of the inquiry when one moves from a probable cause standard based on individualized suspicion to a standard that considers policy questions:

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.

. . . .

. . . [T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.⁵⁵

And once the express weighing of government and privacy interests had found a foothold in the Warrant Clause for so-called administrative searches as in *Camara*, it was only a matter of time before the

the search since it had not met the Warrant Clause's factual prerequisites. See 389 U.S. 347, 356–57 (1967).

52. David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 Nw. U. L. Rev. 641, 644 (1994).

53. For example, *Dunaway v. New York* recognized that the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.

442 U.S. 200, 213–14 (1979) (citation omitted).

54. 387 U.S. 523 (1967).

55. *Id.* at 535–37.

"reasonableness" balancing test would be applied to a variety of searches under the Reasonableness Clause as well.⁵⁶

This shift from a factual probable cause inquiry to a reasonableness analysis, in turn, started into motion two significant changes in Fourth Amendment analysis that will have a lasting impact. First, it has affected who—the citizen or the government—primarily controls the right to intrude. When factual probable cause is the core regulating device of government behavior, the Amendment is basically self-regulating because control over the government's ability to intrude rests primarily with the individual. So long as a person does not engage in behavior arising to probable cause of a criminal violation, individual privacy cannot be invaded. Once the analysis changes to the reasonableness test's balancing of a proffered government interest against an individual's privacy interest, though, the individual loses much of her ability to control the right to intrude. The focus now turns to policy judgments that may override the innocence of the individual's actions (such as driving a car or applying for a job promotion). Instead of focusing on the individual's actions, the Court will ask policy questions: How important is the governmental objective? How immediate is the problem being addressed? What is the best means for achieving the objective?⁵⁷ Consequently, if the intrusion gains judicial approval as being "reasonable," the individual can avoid the intrusion only by foregoing what is otherwise a legitimate activity.

The shift's second effect is to import the Madisonian dilemma into the Amendment. As noted earlier, under traditional Warrant Clause analysis, the facts upon which the government's justification rests are primarily historical (did the facts add up to probable cause? did exigent circumstances really exist?) and do not require an evaluation of a governmental policy judgment. Once the reasonableness inquiry is undertaken, though, the government's judgment that the particular intrusion is needed because of policy concerns becomes an integral part of the Fourth Amendment analysis. As a result, the Madisonian dilemma now arises, or at least appears to, of why the judiciary should invalidate an action found to be necessary by a democratically elected body or its appointed representatives. And the perceived dilemma is especially acute for the Fourth Amendment because the specter of an overstepping judiciary acting against the majority's desires is heightened when review of the government's decision is cast as only requiring that the intrusion be "reasonable." Not surprisingly, once framed in this manner and given

56. See generally, Gerald S. Reamey, When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law, 19 Hastings Const. L.Q. 295, 300-22 (1992) (tracing increasing role of reasonableness balancing test in Fourth Amendment cases); Sundby, *supra* note 2, at 397-414 (tracing how *Camara* and *Terry* changed nature of Fourth Amendment inquiry).

57. Indeed, the Court has frequently excused the vagueness of its reasonableness balancing test by stating that "there is 'no ready test for determining reasonableness.'" *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (quoting *Camara*, 387 U.S. at 536 (1967)); see also *New York v. Class*, 475 U.S. 106, 116 (1986) (same).

the magnitude of the type of societal problems that governmental intrusions will address—such as weapons possession, drunk driving, drug use, and gang activity—judicial review increasingly will defer to the government's judgment that the intrusion was necessary.⁵⁸

Although the propriety of such deference under the Fourth Amendment can and will be criticized,⁵⁹ the point to be made here is that the inevitable long-term effect of importing the Madisonian dilemma into the Amendment through a balancing test was to shift control from the individual over the "facts" justifying the government's power to intrude (by not engaging in behavior giving rise to probable cause) to the government's ability to forge a "reasonable" policy justification. This shift in control will continue so long as the legal formula continues to be cast as a weighing of the government's policy judgment on the need for the intrusion, to which the Court will be deferential, against the individual's privacy interest, which, as was described earlier, is contracting.

D. *The Quagmire of Reasonableness*

Besides altering the legal analysis used to decide a Fourth Amendment dispute, the shift to a reasonableness inquiry also creates an interesting rhetorical side effect that makes any ensuing Fourth Amendment critique more difficult.⁶⁰ Because the very notion of reasonableness embodies the idea of "balancing" competing interests, the tendency, so long as the government can put forward some legitimate

58. Such deference is evident in Chief Justice Rehnquist's approval of sobriety checkpoints, despite evidence that they were ineffective in deterring drunk driving. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453–54 (1990). The Chief Justice dismissed earlier Fourth Amendment cases requiring review of the effectiveness of a search or seizure in achieving the government objective as "not [being] meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Id.* at 453; see also *id.* at 453–54 (holding that "for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers."). In contrast, the Michigan Supreme Court on remand invalidated the stops under the State Constitution, because "Michigan [has not] completely acquiesced to the judgment of 'politically accountable officials' when determining reasonableness." *Sitz v. Michigan Dep't of State Police*, 506 N.W.2d 209, 224 (Mich. 1993); see also *infra* notes 221–225 and accompanying text.

59. See discussion *infra* Parts III.D.3 and D.4. See generally Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 *Hastings L.J.* 285, 293–95, 318–21 (1991) (criticizing *Sitz* Court's deference and arguing that such deference is not in accord with Fourth Amendment precedent).

60. For discussion of the importance of the rhetoric used to discuss legal issues generally and the Fourth Amendment specifically, see James B. White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* 28–48 (1985); James B. White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 *Sup. Ct. Rev.* 165.

reason for its actions, is to find that *some* intrusion is allowed, although perhaps not to the level the government would prefer. This is true because, although extreme images can be summoned up where all would agree that the government behavior was "unreasonable," such as the police goose-stepping down Main Street or listening in on family mealtime conversations through Orwellian devices,⁶¹ the vast majority of cases will involve both legitimate government and privacy interests, yielding no black or white "right" answers but only questions of which shade of grey is better.

As a result, a Fourth Amendment demilitarized zone ("DMZ") is created where it is difficult to challenge any particular holding or approach as jeopardizing Fourth Amendment values because the individual case is consumed within the larger context of reasonableness and is minimized by comparison to the extremes. Not surprisingly, most of the Court's Fourth Amendment opinions purport to strike a compromise by allowing the intrusion to proceed (thus acknowledging the legitimacy of the government's interest), while limiting the circumstances and means under which the intrusion can occur (and, therefore, in theory preserving some of the citizenry's privacy interest).⁶² Thus, while a warrantless search of a student's purse without probable cause at first might excite some concern under the Warrant Clause about government overreaching, once projected onto the wide-screen of reasonableness, it simply becomes a "school case" concerning student discipline, a far cry from the archetypal evil of a police state.⁶³ Any criticisms become entangled with the amorphous definition of what is "reasonable" and run the risk of sounding absolutist and ideologically rigid.

One of the challenges to those who believe that Fourth Amendment values are being eroded in a more serious manner is to move into this DMZ of reasonableness and persuasively argue, both to the public and the courts, why the Fourth Amendment is in jeopardy even though a police state is not on the immediate horizon. One must show why it is incor-

61. Likewise, if the balance were to shift to the other extreme and police efforts to control crime were so handcuffed that one could flaunt criminal activity while the police were forced to watch helplessly, then all would agree that privacy interests were being too strictly emphasized.

62. Both *Camara* and *Terry*, the cases that opened the door to the reasonableness test, were themselves carefully portrayed as compromise decisions between the government's argument that the Fourth Amendment did not apply at all and the petitioner's argument that a warrant based on traditional probable cause was required. For other examples, see cases cited *infra* notes 63-64.

63. The Court's "splitting the difference" approach is evident in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), which concerned searches of secondary school students. In describing how the lower courts had "struggled to accommodate" the competing government and student interests, the majority tellingly stated that some courts had resolved the struggle "by giving full force to one or the other side of the balance." *Id.* at 332 n.2. In contrast, the majority avoided giving "full force to one or the other side" by requiring reasonable suspicion as a middle point between probable cause and no suspicion at all. *Id.*

rect to dismiss the Court's string of recent decisions as simply further small swings of the reasonableness pendulum that involve discrete and difficult social problems like "bus cases," "drunk driving cases," "sensitive job cases," "train wreck cases," "helicopter cases," "garbage can cases," "drug lab cases," "school discipline cases," "factory survey cases," and so on.⁶⁴ Without such an explanation, criticisms of the Court's holdings simply will sound like an alarmist's call for an inflexible Fourth Amendment that ignores the Amendment's requirement of accommodating society's interests, in addition to the individual's, in striking the reasonableness balance.

III. A NEW FOURTH AMENDMENT METAPHOR: GOVERNMENT-CITIZEN TRUST

The Fourth Amendment as a privacy-focused doctrine has not fared well with the changing times of an increasingly non-private world and a judicial reluctance to expand individual rights. These developments necessitate that critics of the Court's analysis provide new, stronger justifications for why these protections are essential not only to the individual but also to the community. Stated more provocatively, scholars must address why, in a world plagued by terrorism, drug cartels, and drive-by killings, the Court's definition of "unreasonable searches and seizures" should not give deference to heightened law enforcement needs and advanced technological approaches that permit broad government surveillance.

Moreover, any alternative vision that hopes to be persuasive must recognize that the Court is not about to abandon its reliance on the Reasonableness Clause and completely reverse direction. It is far too late in the judicial day, and perhaps unwise, to call for a return to a Fourth Amendment analysis founded solely upon the Warrant Clause. If the only form in which the Fourth Amendment could apply to government intrusions was in the traditional Warrant Clause formulation of requiring a warrant based on probable cause, the Court likely would not have applied the Amendment to certain intrusions—the safety inspections at issue in *Camara*, for example—that now are covered by the Amendment.⁶⁵

64. See, e.g., *Florida v. Bostick*, 501 U.S. 429 (1991) (involving routine boarding of buses and asking passengers for permission to search baggage); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (involving sobriety checks of drivers); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (involving drug screening of employees holding sensitive positions); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (involving drug and alcohol testing of railway employees); *Florida v. Riley*, 488 U.S. 445 (1989) (involving helicopter surveillance of property); *California v. Greenwood*, 486 U.S. 35 (1988) (involving police searches of curbside trash); *United States v. Dunn*, 480 U.S. 294 (1987) (involving search of drug lab in barn); *T.L.O.*, 469 U.S. at 325 (involving searches by public school officials); *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984) (involving "factory surveys" to identify illegal aliens).

65. See Sundby, *supra* note 2, at 415–16 (discussing problems with requiring warrants based on traditional probable cause for every search and seizure). See generally Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 393–95

Consequently, the question that needs to be addressed in a post-*Camara* world is how the policy judgments are to be made where the Court's primary rubric is one of reasonableness and where notions of a warrant and probable cause must provide their own justification for applying to a government intrusion.

A. *The Power of the Metaphor*

A student of the Court's constitutional decisionmaking quickly becomes acquainted with balancing tests in all their various shapes and sizes: strict and rational; two-part, three-part, and four-part; unitary and sliding.⁶⁶ Such tests do provide some guidance to those needing to determine the constitutionality of their actions. We can be fairly confident that a court will look more carefully at legislative action under a strict scrutiny standard than when using a rational basis test. Yet, because the very process of weighing competing interests requires evaluative judgments, plenty of room remains for disagreement even where all agree on the stated test.⁶⁷ The malleability of even stringent standards, such as those requiring a compelling government interest or a "special" government need, for example, can be seen in the Court's tendency to almost always find a "special need" justifying departure from the Fourth Amendment's Warrant Clause requirement.⁶⁸

Despite the legal community's predilection for trying to capture a constitutional principle through a carefully formulated test, occasionally a metaphor or animating image emerges that captures the underlying

(1974) (discussing problems with a monolithic view of Fourth Amendment based only upon Warrant Clause). Of course, deciding how the Amendment should apply to administrative inspections presents its own interpretation problems. See Sundby, *supra* note 2, at 425-27 (arguing that *Camara*-type searches would be better analyzed under Reasonableness Clause than Warrant Clause).

66. See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 949-50 (1987) (discussing history and use of balancing in constitutional analysis).

67. The disagreement is in part because, as Professor David Faigman has argued convincingly, the balancing tests as currently used by the Court have a tendency to overemphasize the government's interests, see David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 Va. L. Rev. 1521 (1992), and to misuse empirical evidence, see David L. Faigman, "Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation, 139 U. Pa. L. Rev. 541 (1991).

68. The Court's quickness in dispensing with the Warrant Clause's requirements has been especially evident in cases involving searches for narcotics. See *California v. Acevedo*, 500 U.S. 565, 600 (1991) (Stevens, J., dissenting). Justice Stevens noted that since [1982] . . . , the Court has heard argument in 30 Fourth Amendment cases involving narcotics. In all but one, the government was the petitioner. All save two involved a search or seizure without a warrant or with a defective warrant. And, in all except three, the Court upheld the constitutionality of the search or seizure.

Id. (citations omitted).

essence of a constitutional value far better than the legal test.⁶⁹ One of the most notable examples is Justice Holmes's characterization of the First Amendment's Free Speech Clause as resting upon the belief that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."⁷⁰ Without the captivating image of the marketplace of ideas, one might question whether Justice Holmes's proffered legal test,⁷¹ written in dissent, would have gained the acceptance that it later did from the Court.⁷²

More fundamentally, the marketplace of ideas metaphor largely has driven both public debate over the proper role of the First Amendment and the Court's subsequent development of First Amendment jurisprudence. Although the metaphor is not itself a legal test or rule, it serves as

69. James Boyd White, who has constantly reminded us of the importance of language in understanding the law, notes that:

Despite its tone, and despite the way we often talk about it, the Constitution has no force except to the extent that it is invoked and used by individual Americans pursuing actual goals. Until used it is inert. Alone it can do nothing. . . .

The Constitution works by creating the occasions and warrants for making a certain set of claims, and in this respect it is like the other constitutions we are always making in our own lives.

James B. White, *When Words Lose Their Meaning*, 244–45 (1984). For an incisive look at how language can affect a court's ability to conceptualize issues and thus influence the outcome, see Denis J. Brion, *The Ineffable: Metaphor and the Prisonhouse of Language, in Flux, Complexity, and Illusion* 81 (Roberta Kevelson ed., 1993).

70. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For a fascinating account of how Justice Holmes evolved from a rather cramped view of the First Amendment as evidenced by his opinions in the 1919 Espionage Act cases to a view of the Amendment as embracing a "search for truth" metaphor, see G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 Cal. L. Rev. 391, 419–42 (1992).

71. After developing the metaphorical image of a marketplace of ideas, Justice Holmes then proposed the formal legal test that the voicing of opinions should not be "check[ed] . . . unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Abrams*, 250 U.S. at 630. Although Justice Holmes had earlier articulated a clear and present danger test, the reformulation presented in *Abrams* dramatically changed the tenor of the test's application. Whereas the earlier test had given ample room for government control of speech, the *Abrams* test was far more restrictive upon the government's power to suppress speech. See White, *supra* note 70, at 440–41 (noting that "[n]eedless to say, after Holmes's reformulation in *Abrams*, his conception of the First Amendment generally, and of the 'clear and present danger' test in particular, bore little resemblance to their counterparts in the 1919 Espionage Act cases").

72. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (expression of opinion may not be suppressed "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). The clear and present danger legal test itself, however, has been criticized as being more of a "literary device" than a legal test. See David A. Anderson, *Metaphorical Scholarship*, 79 Cal. L. Rev. 1205, 1208 n.20 (1991) (book review). See also *Pennekamp v. Florida*, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring).

the pictorial backdrop to the legal arguments surrounding free speech issues and prevents the hardening of First Amendment legal tests into black-letter rules that can be applied woodenly. Nor is it any accident that the marketplace image caught the American imagination, as it aptly embodies fundamental values underlying American society, such as beliefs in individualism and capitalism. In many ways, the marketplace metaphor became the mythological story behind the First Amendment so that any judicial result allowing suppression of an "idea" must be justified not only under a given legal test, but as being congruent with the story of the marketplace of ideas.⁷³

As noted earlier, the Fourth Amendment has had its own guiding image, that of the "right to be let alone—the most comprehensive of rights and the right most valued by civilized men."⁷⁴ As with the marketplace of ideas, this "right to be let alone" also has had a marked impact on the development of constitutional law, extending its influence not only over the Fourth Amendment⁷⁵ but also aiding in the eventual recognition of a distinct constitutional "right of privacy."⁷⁶ And, like the marketplace metaphor, the values represented by the "right to be let alone" are powerfully embedded within American society: images of individualism; the home as one's castle; and the desire for freedom from government interference that led the colonists to seek the New World.⁷⁷

73. This is not to say that the marketplace of ideas metaphor has been without its detractors, only that the metaphor has continued to influence and shape First Amendment debate despite such criticisms. See generally Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech: A Treatise on the First Amendment § 2.02 (1994) (discussing merits and criticisms of marketplace of ideas as metaphor for First Amendment); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L.J. 1 (arguing that marketplace of ideas is based on implausible assumptions).

74. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

75. See generally Note, *supra* note 13, at 196–203. In Justice Brandeis's view, the Fourth Amendment worked in tandem with the Fifth Amendment privilege against self-incrimination to protect the right to be left alone: "[E]very unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." *Olmstead*, 277 U.S. at 478–79.

76. In *Griswold v. Connecticut*, the Court relied upon the Fourth Amendment as one of the specific guarantees that creates a zone of privacy. See *Griswold*, 381 U.S. 479, 484–85 (1965). Justice Goldberg's concurrence specifically quoted from Justice Brandeis's dissent in *Olmstead*. See *Griswold*, 381 U.S. at 494 (Goldberg, J., concurring).

77. Justice Brandeis's dissenting opinion in *Olmstead* still stands as one of the most eloquent expressions of the values at stake:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Developments such as growing government regulation and expanding technological capacity, however, have robbed the "right to be let alone" of much of its power to control the legal discourse concerning the Fourth Amendment.⁷⁸ Invoking the right to be let alone in arguing against an automobile checkpoint or an urinalysis test likely will sound more like an appeal to some Wordsworthian utopia than a guiding principle for Fourth Amendment decisionmaking in the modern world. Thus, although privacy undoubtedly remains an essential American value, the concept no longer fully captures the Fourth Amendment's role as a meaningful regulator of government-citizen interactions.⁷⁹ What is needed is a look at what values are at stake beyond physical privacy interests and a way of expressing these values that impresses upon the public why seemingly mundane and almost distasteful Fourth Amendment issues, such as whether the Amendment protects garbage bags or urine specimens, hold importance for how the United States and its Constitution function.

Suggesting that the Fourth Amendment is founded upon values broader than the protection of physical privacy alone is not a novel proposition. Professor Amsterdam, in an article that has become a sacred text for Fourth Amendment worshippers, has observed that

[t]he ultimate question, plainly, is a value judgment. . . . [W]hether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.⁸⁰

Similarly, some judicial opinions will disapprove of a particular government practice because it "undermine[s] that confidence and sense of security in dealing with one another that is characteristic of individual rela-

Olmstead, 277 U.S. at 478.

78. See generally *supra* notes 27-64 and accompanying text (discussing why privacy does not adequately protect Fourth Amendment values).

79. This loss of persuasive power may be in part because privacy holds the potential for being construed in a variety of ways, both expansively and restrictively. Justice Black noted this potential in his *Griswold* dissent:

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunk in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures.

Griswold, 381 U.S. at 509 (Black, J., dissenting).

80. Amsterdam, *supra* note 65, at 403; see also Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents and Informers*, 1976 Am. B. Found. Res. J. 1193, 1209-11 (arguing for "value-oriented approach" to Fourth Amendment interpretation).

tionships between citizens in a free society,"⁸¹ or because the government intrusion imposes "risks [a person] should [not] be forced to assume in a free and open society,"⁸² or because the government's actions resemble practices commonly associated with Big Brother and totalitarian states.⁸³

Such statements, however, almost always are found in dissents. Though one may agree with the premise that it is the very concept of a "free society" which is at stake in these cases, when recited as a legal reason, it sounds a bit like pouting over the majority's result. Presumably the Justices in the majority also are fond of a "free society," so that without further elaboration the argument has the resonance of begging the question.⁸⁴ It would be as if Justice Holmes in his *Abrams* dissent had not founded his argument for a clear and present danger test upon the marketplace of ideas metaphor, but, instead, had proclaimed summarily that his approach was the only one consistent with speech in a free society. Instead of the captivating image of the marketplace of ideas and its animating idea that the best test for truth is intellectual testing rather than suppression, the opinion would have left us with the far less vivid invocation of the general ideals of a free society.

The task, therefore, is to proceed a step further and ask how the Fourth Amendment protects a "free society" beyond physical privacy interests. Or, as Professor John Mitchell, who also has thought of the Fourth Amendment in metaphorical terms, has stated the challenge, we must rethink the Amendment in terms of how it is "in keeping with some basic vision of America."⁸⁵ But what animating principle can capture the aspect of the Amendment that now is eluding the Court's treatment of Fourth Amendment issues?

81. *United States v. White*, 401 U.S. 745, 787 (1971) (Harlan, J., dissenting).

82. *Smith v. Maryland*, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting).

83. See *Florida v. Riley*, 488 U.S. 445, 466-67 (1989) (Brennan, J., dissenting) (quoting George Orwell, *Nineteen Eighty-Four* (1949)); see also *Illinois v. Gates*, 462 U.S. 213, 290 (1983) (Brennan, J., dissenting) (warning that majority's description of probable cause as "common sense" and "nontechnical" are "but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment").

84. Indeed, the majority's argument may well be that certain repressive measures are necessary to protect a free government against anarchy or lawlessness. See, e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989) (justifying suspicionless drug testing of Customs agents because otherwise "national interest in self-protection could be irreparably damaged").

85. Mitchell, *supra* note 27, at 41. In his provocative article, Professor Mitchell also argues, although for somewhat different reasons, that the Fourth Amendment's current metaphors have failed to define the Amendment's protections adequately. See *id.* at 42-44. Although this Article was written without the benefit of knowing Professor Mitchell's call for such a discussion, in many ways it is an attempt to meet his challenge of offering a specific vision of America that would help define the Fourth Amendment.

B. *Trust as a Constitutional Value*

Lacking the skills of a master phrase-turner like a Justice Holmes or a Justice Scalia, and at the risk of sounding like the Peter, Paul, and Mary of constitutional law, I would characterize the jeopardized constitutional value underlying the Fourth Amendment as that of "trust" between the government and the citizenry. This vision of the Fourth Amendment's purpose is founded upon the idea that integral to the Constitution and our societal view of government is a reciprocal trust between the government and its citizens.⁸⁶ Government action draws its legitimacy from the trust that the electorate places in its representatives by choosing them to govern. This mandate from the citizenry legitimizes government action, however, only if the citizenry's decision itself is an informed and free choice such that the government can claim that it has the true consent of the governed. To achieve this legitimizing mandate, therefore, the government itself must act so that it does not imperil the citizenry's ability to give its consent in an informed and free manner. Such governmental behavior will include trusting the People's ability to deal properly with information and materials that the government otherwise might ban as well as trusting the People to act responsibly and in accord with properly enacted laws and societal standards.

The first area of trust, of course, falls mainly within the purview of the First Amendment and the need to trust the citizenry to choose wisely in the marketplace of ideas.⁸⁷ It is the second area of trust—trust that the citizenry will exercise its liberties responsibly—that implicates the Fourth Amendment and is jeopardized when the government is allowed to intrude into the citizenry's lives without a finding that the citizenry has forfeited society's trust to exercise its freedoms responsibly.⁸⁸

Even a rudimentary comparison of democratic to totalitarian and anarchist states demonstrates the central role that government-citizen trust plays in a free society. Totalitarian regimes maintain power not through

86. Francis Fukuyama has utilized a similar notion of "reciprocal recognition" in an attempt to explain the rise of the modern liberal state. See Francis Fukuyama, *The End of History and the Last Man* 199–208 (1992).

87. The classic work on this view of the First Amendment is Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).

88. In the words of James Childress,

Liberal, pluralist democracy is primarily procedural. Its consensus about procedure . . . is the foundation for mutual trust at least in the political arena. Although this consensus does not have to be universal, it does have to be widespread . . . [M]utual trust, . . . politically defined, is the confidence in or reliance on others who are also committed to a way of conducting and resolving disputes about values; it is the expectation that they will generally comply with the outcomes even when they do not endorse them.

James F. Childress, *Civil Disobedience and Trust* 7 (1975). Although this Article's focus is on the trust relationship between government and citizen, how the Fourth Amendment is interpreted also affects the trust relationship between individuals. See Stone, *supra* note 80, at 1230–34 (discussing how use of informants affects how individuals will interact with each other).

the consent of the governed but by physical, economic, and psychological control over the populace. Such governments exercise control through a variety of means, but among the most essential is the use of the police power to reinforce the message that the government is superior and in control of the individual.⁸⁹ Measures such as identification checkpoints, random searches, the monitoring of communications, and the widespread use of informants not only are means of keeping track of the citizenry, but also act as continuous symbolic reminders that the citizenry is dominated by the government. Far from fostering trust, the government's actions convey a message of distrust in order to perpetuate control of the citizenry.⁹⁰

Likewise, societies besieged by civil unrest provide examples of the importance that the trust be reciprocal. While many factors may cause unrest, certainly one of the most prevalent is distrust of the government's willingness to listen to the dissidents' voices and respect their interests.⁹¹ When such distrust occurs, the disenchanting group will view the government as illegitimate and be inclined to look to means outside the formal political process to have its voice heard.⁹² In the best scenario, such actions will be peaceful acts of civil disobedience that will produce mean-

89. One of the most powerful literary portrayals of how totalitarian regimes operate is Václav Havel's collection of essays, *Václav Havel or Living in Truth* (Jan Vladislav ed., 1986) [hereinafter *Living in Truth*]. See also A. James Gregor, *Contemporary Radical Ideologies: Totalitarian Thought in the Twentieth Century 20-21* (1968) (describing characteristics of totalitarian states).

90. Cf. Childress, *supra* note 88, at 6 ("Trust implies freedom. It is impossible where there is absolute control over another person. When a person is 'under control,' he is not 'trusted' because he has no freedom to act differently.").

91. See Ralph W. Conant, *The Prospects for Revolution: A Study of Riots, Civil Disobedience, and Insurrection in Contemporary America 62-64* (1971) (finding that rioters of 1960s primarily were individuals who felt government was unlikely to respond to their concerns). One need only take a quick tour of international spots of unrest to confirm how feelings of exclusion can spawn unrest. See, e.g., Richard Bernstein, *Turmoil in China*, N.Y. Times, June 8, 1989, at A1 (noting "intensity of distrust" of government surrounding Tiananmen Square protests); Terry Greene, *Roots of Revolt: Poverty, Neglect Planted Seeds of Mexico's Zapatista Uprising*, Ariz. Republic, Feb. 6, 1994, at A1, A20 (describing how Zapatista rebels' "fundamental distrust of the government" has led to armed conflict with government); Tsegaye Tadesse, *Angolans, UNITA Locked in Talks on Conflict*, Reuters Ltd., Jan. 29, 1993 (discussing difficulty of reviving peace accords because "distrust ha[s] never been higher").

92. As the poet Robert Penn Warren explained in refusing to sign a statement in support of French military disobedience in Algeria, the question of whether to obey a law one views as unjust is dependent upon

his trust for orderly change. . . . If he trusts his society, and state, he knows that if he disobeys he violates the concept of law which is the guarantee of the right to protest; he knows that if he disobeys, he undercuts the basis of democratic society. This situation is posited upon his trust in his society and state. If he does not have this trust in the orderly process of self-rectification for the state and society, he may very well resort to disobedience.

Childress, *supra* note 88, at 9-10 (quoting Robert Penn Warren).

ingful change;⁹³ in the worst case, the disenfranchised will turn to terrorism and acts of violence.⁹⁴ Indeed, the process may become circular as acts of protest and rebellion provoke oppressive actions by a distrustful government. These measures, in turn, create greater resentment and distrust of the government among the populace and further fuel its discontent and unrest.⁹⁵

The above examples are not meant to suggest that the United States is on the verge of slipping into a cycle of totalitarianism and anarchy. They do suggest, however, that a crucial part of American democracy's staying power is the role of reciprocal government-citizen trust in fostering the confidence among all individuals that they have the opportunities and capabilities to participate meaningfully in society.⁹⁶ Individuals and groups who feel that the government is not recognizing their concerns and beliefs may otherwise perceive the government as lacking legitimacy, resulting in an increased sense of alienation and lack of confidence that the government will respond seriously to their needs.⁹⁷ The sustainability of our constitutional system of government is thus largely dependent upon ensuring that this reciprocal trust is maintained.

To think of the Constitution and, especially, the Bill of Rights as means of enhancing the legitimacy of government and society through acknowledgment of the citizenry's dignity and value requires some read-

93. Under the right circumstances, civil disobedience ultimately may enhance trust by causing the system to respond and accommodate those who feel disenfranchised. See *id.* at 13-14; Conant, *supra* note 91, at 16-21 (arguing that civil disobedience has role in democracy as means of stimulating change).

94. See Conant, *supra* note 91, at 7-10, 21-22 (tracing how civil disobedience escalates to rioting and insurrection if participants do not believe change will be forthcoming).

95. See *id.* at 36 (noting that "[government] overcontrol [sic] usually leads to increased frustration and conflict. People in the ghetto see the police as violent and strike back with increasing intensity which leads eventually to insurrectionist activities").

96. A primary focus of Critical Race Theory is on how controlling legal doctrine acts to exclude certain sectors of society from meaningful participation. See, e.g., Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 *Cornell L. Rev.* 1258, 1284-88 (1992) (arguing that First Amendment view premised upon marketplace of ideas "often make[s] matters worse").

97. Much of the rioting aftermath following the verdicts in the state trial of the officers charged with the unlawful use of police force on Rodney King has been attributed to the sense in the minority community that the criminal justice system discriminates against minorities. See, e.g., James H. Johnson, Jr. & Walter C. Farrell, Jr., *The Fire This Time: The Genesis of the Los Angeles Rebellion of 1992*, 71 *N.C. L. Rev.* 1403, 1404 (1993); Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 *Tul. L. Rev.* 2231, 2249-52 (1993); Jessica Crosby, *King Testimony a Catalyst for Blacks' Complaints of Police Bias*, *Wash. Post*, Mar. 12, 1993, at A3; Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, *Wash. Post*, May 12, 1992, at A4; Eva Paterson, *Desperate People Take It to the Streets*, *S.F. Chron.*, May 1, 1992, at A31; *The Product of Hateful Racism*, *Boston Globe*, May 2, 1992, at 18.

justment of traditional thinking about the Founders' purposes.⁹⁸ The time-honored story most often taught is that of a Lockean "rights" viewpoint: the Constitution was a social contract that preserved certain natural rights, such as the right to accumulate private property, while setting up the basic framework necessary for society to function.⁹⁹

In this context, "rights" become enclaves from government interference, and one simply reads down the Bill of Rights to identify where those enclaves exist: the right to say and think what one chooses, the right to associate with whom one desires, the right to practice one's religious beliefs free from government dictates, and on through the amendments one proceeds. Using this perspective, when one reaches the Fourth Amendment, Justice Brandeis's depiction of the Amendment's purpose as being the protection of the "right to be let alone" fits perfectly, identifying yet another enclave where the individual is free from government interference.

While it may be true that the Bill of Rights creates enclaves of individual freedom, such a vision captures only part of the reason why the Bill of Rights is so important. Of equal, if not greater, importance is the acknowledgment accompanying the granting of such rights that the recipient is someone deserving of the respect and dignity that comes with their bestowal and the trust that the right will be exercised responsibly. Although the Bill of Rights was in part born out of a distrust of the federal government, the Antifederalists also saw the document as outlining

98. The passage of the Bill of Rights primarily was an effort to satisfy Antifederalist concerns about an overreaching national government and, in this sense, is most properly characterized as an expression of distrust of the government. See generally Robert A. Rutland, *The Birth of the Bill of Rights, 1776-1791*, at 159-89 (Bicentennial ed. 1991) (tracing Bill of Rights as compromise agreed to by Federalists to obtain ratification). The underlying premise of the Constitution, however, was very much the idea that the government derived its power from the consent of the people and that obedience to the government depended upon the "pervasiveness of representational consent through all parts of the government." Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, 602 (1969). Indeed, Antifederalist fears of an overreaching federal government stemmed in part, as Professor Amar has noted, out of a concern that Congress would be too distant from the people to be able to rule by trust rather than force:

Anti-Federalists feared that the aristocrats who would control Congress would have an insufficient sense of sympathy with, and connectedness to, ordinary people. Unlike state legislators, 'lordly' men in Congress would disdain their lowly constituents, who would in turn lose confidence in the national government. In the end, the new government would be obliged to rule through corruption, force and fear—with monopolies and standing armies—rather than through mutual confidence. . . . [B]ecause of the attenuated chain of representation, Congress would be far less trustworthy than state legislatures.

Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1140 (1991).

99. See generally Glendon, *supra* note 40, at 47-75 (discussing origins of "the lone rights-bearer" as image of American constitutional rights).

"the fundamental principles of their political being."¹⁰⁰ Or, as one Antifederalist stated,

[T]hose rights characterize the man, essentially the true republican, the citizen of this continent; their enumeration, in head of the new constitution, can inspire and conserve the affection for the native country, they will be the first lesson of the young citizens becoming men, to sustain the dignity of their being. . . .¹⁰¹

The Antifederalists believed that reinforcing these virtues was especially crucial because "the real protection of liberty [lies] . . . not in property rights and commerce as such, but rather in those institutions that would promote the courage, independence, judgment and selflessness of the citizenry."¹⁰²

Nor was such an understanding limited to the Antifederalists' view of the Bill of Rights. The post-Revolution period saw the "basic conviction of orthodox eighteenth-century political science, that '*the Legislature has all the power, of all the people*,'"¹⁰³ give way to the "radical" idea that the power of the sovereign ultimately was seated in the people.¹⁰⁴ Radical writers increasingly questioned the traditional theory of "virtual representation," the idea that the people gave up their power to their representatives, arguing instead that " '[i]f power sufficient to control the Officers of Government is *not seated* in the people,' then the Revolution had been meaningless. 'Who have we . . . besides the people? and if they are not to be trusted with the care of their own interests who can?'"¹⁰⁵

The idea that self-government meant that the People were to be trusted with the power to govern themselves eventually found its voice in the Constitution as the "climax of a . . . momentous upheaval in the understanding of politics."¹⁰⁶ Both the Federalists and Antifederalists, despite their different notions of how a national government should be structured, premised their arguments on the idea that the People were

100. Herbert J. Storing, *The Constitution and the Bill of Rights*, in *The American Founding: Politics, Statesmanship, and the Constitution* 42 (Ralph A. Rossum & Gary L. McDowell eds., 1981).

101. *Id.* (quoting *Va. Independent Chron.*, June 25, 1788). This aspirational aspect of the Antifederalists' position "explains the affirmation of natural rights, the 'oughts,' the unenforceable generality of the state bills of rights and of many of the Antifederalists' proposals." *Id.*; see also Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 *Nw. U. L. Rev.* 74, 92 (1989) ("Anti-Federalist speeches and writings were shot through with a kind of ideal type of citizen: the model was the yeoman, the citizen of the 'middling' sort—the respectable, knowledgeable, frugal and public-spirited individual, who acts upon deliberation and cooperation . . .").

102. Rose, *supra* note 101, at 93.

103. Wood, *supra* note 98, at 381.

104. See *id.* at 374.

105. *Id.*

106. *Id.* at 594.

the sole source of the new government's legitimacy.¹⁰⁷ The government was to be one where "all government officials . . . were agents of the people,"¹⁰⁸ for government "'has of itself no rights; they are altogether duties.'"¹⁰⁹

This underlying conceptualization of government, when coupled with a society that was undergoing dramatic change, of which equality was "the most radical and most powerful ideological force let loose in the [American] Revolution,"¹¹⁰ was to reshape American society into one where the "goal of society and government" would be "the interests and prosperity of ordinary people."¹¹¹ Viewed against this political and societal background, the Constitution can be understood as part of a broader movement that transformed government rule from an aristocratic endeavor to one based upon a recognition of the citizenry as its source of power.¹¹² And, once understood in this way, the vesting of a right in the citizen becomes not only a shield against government power but also an act of governmental recognition of the citizen as a responsible individual in whom it places its trust.

This notion, that a constitutional right serves the dual purpose of protecting citizens against unwarranted government action and recognizing their legitimacy as societal actors, also can be seen in the development of what Professor Gordon Wood calls "democratized public opinion."¹¹³ According to Wood, the constitutional principle that citizens have the right of equal and individual participation helped to foster acceptance of the idea that truth was to be decided in the arena of public opinion.¹¹⁴ In this sense, it was a belief in equality and in the notion that every citizen's opinion is worthwhile, rather than the First Amendment

107. See *id.* at 471-565 (tracing evolving arguments of Federalists and Antifederalists and how they incorporated the idea of the People as sovereign).

108. *Id.* at 598.

109. *Id.* at 601 (quoting Thomas Paine). In his Virginia report denouncing the Alien and Sedition Acts, James Madison made a similar statement noting that in the United States, unlike England, "[the] people, not the government possess the absolute sovereignty." James Madison, Report on the Virginia Resolutions, 1799-1800, in IV *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 546-53, 561-80 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1836).

110. Gordon S. Wood, *The Radicalism of the American Revolution* 232 (1992); see also *id.* at 233 ("The 'Spirit of Equality' . . . brought 'democratic dignity' to even 'the arm that wields a pick or drives a spike.'" (citations omitted)).

111. *Id.* at 8.

112. See *id.* ("The Revolution brought respectability and even dominance to ordinary people long held in contempt and gave dignity to their menial labor in a manner unprecedented in history . . ."). The extent to which egalitarianism would alter America, however, was largely unanticipated by the Founders who had envisioned equality as a means of "building a classical republic of elitist virtue." *Id.* at 369. Instead, many of the Founders felt towards the end of their lifetimes that the egalitarian experiment had only fostered commercialism and anti-intellectualism. See *id.* at 365-69.

113. *Id.* at 364.

114. See *id.* at 347-69 (describing how "public opinion" developed from democratic ideas of Founders and ultimately went even further than the Founders had anticipated).

itself, that created a marketplace of ideas. Without such an active belief in "democratized public opinion," Justice Holmes never would have had a marketplace to protect.

The need for a government to recognize the human dignity of its citizenry can be convincingly argued on historical and philosophical grounds.¹¹⁵ However, one need not travel back to ancient Greece to make the argument because contemporary concerns highlight the continued need for such government recognition. Perhaps the most vivid example is the Supreme Court's decision in *Brown v. Board of Education*¹¹⁶ to abandon the "separate but equal"¹¹⁷ doctrine not because the "tangible"¹¹⁸ factors associated with education were unequal, but because such segregation "generates a feeling of inferiority as to [minority children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹¹⁹ The *Brown* Court correctly saw what the *Plessy v. Ferguson*¹²⁰ Court had not:¹²¹ that the Equal Protection Clause in part embodies the intangible value of giving full and equal respect to the individual and not simply the provision of the same "tangible" resources.¹²² A similar shift in judicial sensitivity to the implications of

115. For the most articulate recent examination of the role of human dignity in the formation of governments, see Fukuyama, *supra* note 86, at 204-06. By drawing upon the Greek notion of "thymos," which, roughly translated, means the desire or spirit for recognition, see *id.* at 162, and then tracing the concept through various philosophers, especially Hegel, Fukuyama makes the argument that such a desire is "the primary motor driving human history." *Id.* In particular, Fukuyama sees the desire for recognition as playing the pivotal role in the notion of popular self-government:

In what way can we say that modern liberal democracy "recognizes" all human beings universally?

It does this by granting and protecting their *rights* Recognition becomes *reciprocal* when the state and the people recognize each other, that is, when the state grants its citizens rights and when citizens agree to abide by the state's laws.

Id. at 202-03.

116. 347 U.S. 483 (1954).

117. *Id.* at 488 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

118. *Id.* at 493.

119. *Id.* at 494.

120. 163 U.S. 537 (1896).

121. In *Plessy*, the Court stated:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

163 U.S. at 551.

122. Although Justice Harlan's dissent in *Plessy* was still riddled with racist statements, see, e.g., *id.* at 559 ("The white race deems itself to be the dominant race . . . [and] I doubt not, it will continue to be for all time . . ."), the opinion did recognize that "[t]he arbitrary separation of citizens, on the basis of race, . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution." *Id.* at 562. Because Justice Harlan recognized this dimension of constitutional rights, he asked the critical question that the majority ignored:

a law beyond its mere formal application can be seen in *Loving v. Virginia*.¹²³ Before *Loving*, the Court had approved laws banning interracial relationships because "[t]he punishment of each offending person, whether white or black, [was] the same."¹²⁴ In *Loving*, the Court recognized that such laws violate equal protection because "'[d]istinctions between citizens solely because of their ancestry' . . . [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.'"¹²⁵

A government-citizen trust metaphor in the context of the Fourth Amendment is consistent with the Court's recognition in cases such as *Brown* and *Loving* that rights are not simply enclaves of protection from government interference but also affect the citizen's view of his or her role in society. This recognition currently is absent from the Court's Fourth Amendment doctrine, which frames the issue as a binary choice between antagonistic interests—the government's law enforcement needs and the individual's privacy interest. But concentrating solely on the immediate factual dispute, such as the government's immediate need for a urine specimen or to look in garbage cans, overlooks the long-term values concerning the government's role in the constitutional framework that are also implicated.¹²⁶ Only by recasting the overarching Fourth Amendment question in terms of whether the government intrusion is

What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?

Id. at 560.

123. 388 U.S. 1 (1967).

124. *Pace v. Alabama*, 106 U.S. 583, 585 (1883).

125. *Loving*, 388 U.S. at 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) (first alteration in original). In *McLaughlin v. Florida*, 379 U.S. 184 (1964), the Court struck down a criminal law that punished only interracial cohabitation, but found it unnecessary to reach the issue of criminalizing interracial marriages. See *id.* at 195–96.

126. See *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 655 (1989) (Marshall, J., dissenting) (expressing opinion that "the Framers would be appalled by the vision of mass governmental intrusions upon the integrity of the human body that the majority allows to become reality" through approval of drug-testing of railway employees).

Warnings against the danger of focusing on the short-term crisis at the expense of long-term constitutional interests have been voiced by a number of great Justices:

History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, and the Red scare and McCarthy-era internal subversion cases, are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.

Id. at 635 (citations omitted). In the words of Justice Brandeis, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). And as Justice Holmes reminds us:

justified in light of government-citizen trust can the Court begin to place the Fourth Amendment's purpose in a larger context that finds mutual benefits from the Amendment for both the government and the citizen.

C. *The Metaphor of Trust as the Fourth Amendment's Guiding Principle*¹²⁷

Proposing the idea of government-citizen trust as a central value for the Fourth Amendment has several immediate up-front liabilities. First, the notion of trust sounds, and is in many ways, so simple, so nonlegalistic, and so nonphilosophical, that it risks being dismissed as not sufficiently grounded in legal-political theory. Indeed, the temptation is to gussy up the metaphor of trust by wrapping it in fancier verbal packaging, perhaps calling it "instrumental privacy," or "Fourth Amendment republicanism," or "communitarian search and seizure."¹²⁸

Yielding to such a temptation, however, would be unwise because part of the purpose in developing a constitutional metaphor is to provide an easily accessible value that can highlight the underlying issues of a constitutional debate over a particular problem. Republicanism and communitarian schools of thought undoubtedly can help explicate why such values are or should be important to American constitutional thought. If the more immediate purpose, however, is to highlight for the public as well as the legal community why certain developments are of Fourth Amendment concern beyond their impact on privacy, then it is the basic value of trust that best captures what is at stake and that can best influence future Fourth Amendment dialogue.

Advocating government-citizen trust as a guiding metaphor of the Fourth Amendment also is vulnerable to the criticism that it reflects an unrealistic world view: the concept of trust seems to offer little assistance to the police officer confronted late at night with a dangerous-looking individual or to a neighborhood overrun with drug dealers. One is re-

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

The challenge, though, as evidenced by the fact that the above quotations are all from dissenting opinions, is in articulating the long-term interests such that they are accounted for in the Court's constitutional decisionmaking.

127. Technically, the idea of government-citizen trust is more accurately described as a metonymy—using one concept to stand for another—rather than as a metaphor. See generally Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* 144-45 (1992) (discussing differences between metaphor and metonymy).

128. I am not sure what each of these would fully connote, but they do sound scholarly. Indeed, for those of a philosophical bent, one could call it an "Hegelian Fourth Amendment," given that the approach's underlying principle of trust and recognition has much in common with Hegel's view of liberalism. See Fukuyama, *supra* note 86, at 199-208.

minded of the Supreme Court's reversal of the Ninth Circuit's ruling that the constitutional guarantee of a right to counsel includes the right to a "meaningful attorney-client relationship," italicizing the Ninth Circuit's phrase several times in the opinion, as if to scold the lower court for trying to bring "I'm OK, you're OK" pop psychology into judicial decisionmaking.¹²⁹

One must keep in mind, however, the metaphor's purpose in this context. Using trust as one of the Fourth Amendment's driving principles is not meant to be a specific rule of police behavior to be carried around with the officer's *Miranda* card. Rather, the metaphor helps frame the debate over Fourth Amendment issues in a way that keeps decisions from devolving into what appear to be only disagreements over factual privacy issues, such as the frequency of use of navigational airspace at different altitudes.¹³⁰ By casting the issues in a broader context of the relationship between government and citizen, the implications of a particular ruling can be ferreted out.

This broadening of perspective is especially crucial because Fourth Amendment issues increasingly do not concern unexpected police-suspect street encounters where the police need fast and ready rules, but involve searches and seizures based on a preexisting legislative or administrative plan.¹³¹ Employee drug-testing, sobriety checkpoints, immigration roadblocks, "factory surveys," flyovers, inventory searches, and safety inspections are all examples of ongoing government programs based on reviewable rules and standards, rather than of unanticipated police-individual encounters.¹³² These types of government intrusions create a par-

129. *Morris v. Slappy*, 461 U.S. 1, 10, 13 (1983). The majority continued, "No authority was cited for this novel ingredient of the Sixth Amendment . . . , and of course none could be. No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney . . . that the Court of Appeals thought part of the Sixth Amendment." *Id.* at 13-14.

130. See, e.g., *Florida v. Riley*, 488 U.S. 445, 450-52 & n.2 (1989) (speculating on number of helicopter flights in Pasco County); *id.* at 454-55 (O'Connor, J., concurring) (same).

131. Professor Amsterdam suggested that the value judgment of whether a search impermissibly curtails freedom consistent with a free society "is a perfectly impossible question for the Supreme Court to put forth as a test of fourth amendment coverage . . . because, in the first and most important instance, the fourth amendment speaks to the police and must speak to them intelligibly." Amsterdam, *supra* note 65, at 403. The types of searches and seizures that are the primary concern of this Article, in contrast, are not the classic unexpected street police-citizen encounters but part of a plan or program that easily could be reviewed in advance. See also Mitchell, *supra* note 27, at 46 (arguing that "planned programs of governmental intrusions" could be judicially reviewed in light of their relationship to a proposed "basic vision of America" standard).

132. The benign label of 'administrative search' is used to describe many of these intrusions, but they have great potential for abuse if the government is allowed to piggyback nonadministrative objectives on top of them. See *United States v. Soyland*, 3 F.3d 1312, 1316 (9th Cir. 1993) (Kozinski, J., concurring in part and dissenting in part) (arguing that court should look at whether Border Patrol was using administrative searches for illegal aliens as vehicle for also conducting searches for drugs).

ticularly fertile opportunity for a reviewing court to articulate Fourth Amendment principles that are not shaped by exigency concerns, but, instead, allow a reasoned assessment of an ongoing governmental scheme of intrusions. In this sense, Fourth Amendment judicial review likely would resemble a court's First Amendment review of hate speech codes¹³³ or government restrictions on a convicted criminal's account of his exploits.¹³⁴

It is the need for the Fourth Amendment to respond to these "initiatory intrusions"—those situations where the government is initiating the intrusion rather than responding to some suspicious behavior by the individual (*i.e.*, a "responsive intrusion")¹³⁵—that most persuasively supports adoption of the trust metaphor. For as the Court's Fourth Amendment pronouncements increasingly have moved outside the classic "cops and robbers" fact pattern and into the public policy arena, so have the Amendment's implications for government-citizen relations. And once it is recognized that the Court's decisions in these "new" search and seizure cases have far-reaching effects beyond simply addressing impingements on privacy, a "new" Fourth Amendment can be fashioned that will account for the broader value of government-citizen trust which is in the balance. Ultimately, the message that must be conveyed is that the Fourth Amendment is not just for the criminally accused anymore, but is a civil right that affects us all. If no adjustment is made, approval of government intrusions will continue out of short-term concerns without acknowledgement that the constitutional weave is being altered in a fundamental way.

D. *The Metaphor at Work: Searches, Seizures, and Reasonableness*

The ultimate question, of course, is how government-citizen trust might operate in practice as an animating principle of the Fourth Amendment. One might again turn to the First Amendment, the motherlode of legal metaphors,¹³⁶ to obtain some sense of how the process might work. As with metaphors like "the wall of separation" between church and state or "the marketplace of ideas," the result usually is not to create a new legal test for the courts to apply, but to establish a starting point that reflects the basic values at stake. "The wall of separation" between church and state, for instance, does not by itself resolve specific issues of government entanglement in religious affairs. To the extent it

133. See *Doe v. University of Mich.*, 721 F. Supp. 852, 868 (E.D. Mich. 1989) (invalidating university rule prohibiting certain types of stigmatizing speech).

134. See, e.g., *Simon & Schuster, Inc. v. Crime Victims Bd.*, 112 S.Ct. 501 (1991) (invalidating statute requiring publishing proceeds from convicted person's account of crime to be used to compensate victims).

135. See Sundby, *supra* note 2, at 418-21 (proposing model of Fourth Amendment based on whether intrusion is initiatory or responsive).

136. See Bosmajian, *supra* note 127, at 49-198 (devoting final seven chapters of discussion of legal metaphors almost entirely to First Amendment metaphors).

remains a central image, though, it begins Establishment Clause debates with a general presumption of wariness about state involvement in religious matters,¹³⁷ a wariness that not only will affect the tenor of the legal system's inquiry, but also will shape the public's perception of what issues are at stake in the larger arena of public debate.

Similarly, incorporating a government-citizen trust metaphor into Fourth Amendment doctrine would not take on the shape of a formalized legal factor or test, but would strengthen the current judicial analysis by liberating it from an analysis that focuses on privacy and reasonableness primarily in terms of physical intrusiveness. The proposed metaphor would serve as a starting point, extending the analysis to recognize concerns of citizen trust and government legitimacy. As with any new approach, several criticisms are possible. However, an explanation of how the metaphor would function in practice demonstrates the comparative strength of a revised doctrine.

Perhaps it is instructive that the Justice who first framed the reasonable expectation of privacy test, Justice Harlan, later objected to the Court's "substitution of words for analysis. . . . Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society."¹³⁸ Justice Harlan, however, did not propose a more precise expression of his concerns beyond stating that the Court should ask whether the intrusion is consistent with "our system of government, as reflected in the Constitution."¹³⁹ The following look at the Court's reasonable expectation of privacy analysis suggests that the metaphor of reciprocal government-citizen trust might help the Court escape Justice Harlan's criticism of substituting words for analysis.

1. *Deciding When the Amendment Applies: Why Garbage Matters.* — In the ensuing quarter of a century since adoption of the reasonable expectation of privacy test, the Court has attempted to decide whether and to what degree a reasonable expectation of privacy exists in a wide variety of situations, ranging from secret agents to urine samples to hovering helicopters. In these cases, the Court gives the appearance of proceeding on the assumption that the inquiry is merely a factual issue to be determined objectively from the evidence. Hence, whether or not a helicopter hover-

137. See generally *id.* at 73–94 (discussing how wall metaphor has affected judicial debate over Establishment Clause issues). Even where the wall has been attacked as an inappropriate metaphor for Establishment Clause decisions, it has served as a common basis for discussion of what the proper role of the First Amendment should be in regulating state-religion intertwining. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 106–07 (1985) (Rehnquist, J., dissenting) (arguing that "wall of separation" metaphor should be "frankly and explicitly abandoned"); see also Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. Pa. L. Rev. 555, 555–56 (1991) (attacking wall metaphor as "an image untrue to both life and law" that has led to distorted view of religion clauses).

138. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

139. *Id.*

ing at 400 feet violates a reasonable expectation of privacy is viewed as an "empirical" question to be resolved by debating FAA regulations, frequency of overflights, and other factors.¹⁴⁰ Lost to express discussion are the profound policy implications for government-citizen relations that inhere in whether the police can deliberately take a helicopter and hover over one's backyard.¹⁴¹ One finds the plurality treating the case almost as if it were a property nuisance question, focusing on factors such as whether the helicopter blades created "undue noise, . . . wind, dust, or threat of injury."¹⁴²

Indeed, the Court's opinions in this area often have an air of unreality to them. In trying to resolve the "factual" issue of whether a reasonable expectation of privacy exists, one finds the Court hypothesizing policemen peering over fences as they ride atop double-decker buses,¹⁴³ turning to Blackstone's definitions of what constitutes a curtilage,¹⁴⁴ debating whether an aerial camera was powerful enough to discern small items like a class ring dropped in the snow,¹⁴⁵ discussing "the role a barn plays in rural life,"¹⁴⁶ and discoursing on public mores concerning the act of urination.¹⁴⁷ This factual myopia would be entertaining if it were not for the larger policy questions that the Court is ignoring or, more likely, addressing only indirectly by using the factual privacy inquiry as its proxy.

To see just how far afield the Court has strayed, it is instructive to imagine compiling the Court's holdings concerning when the Fourth Amendment applies or, more accurately, does not apply into an *"Accidental Tourist's Guide to Maintaining Privacy Against Government Surveillance."*¹⁴⁸ The advice would be rather astonishing:

To maintain privacy, one must not write any checks nor make any phone calls. It would be unwise to engage in conversation with any other person, or to walk, even on private property, outside one's house. If one is to barbecue or read in the back-

140. See, e.g., *Florida v. Riley*, 488 U.S. 445, 450-51 (1989) (resolving question of whether individual has reasonable expectation of privacy from police overflights of backyard by deciding who bore burden of proof on frequency of nonpolice helicopter flights at altitude of 400 feet).

141. Justice Brennan did conclude his *Riley* dissent by observing that the police surveillance technique under debate—helicopter flyovers—was one of the methods described in George Orwell's *Nineteen Eighty-Four*. See *id.* at 466-67 (Brennan, J., dissenting).

142. *Id.* at 452.

143. See *California v. Ciraolo*, 476 U.S. 207, 211 (1986). In a case set in Santa Clara, California, Chief Justice Burger suggested that, despite a 10 foot fence, the defendant may not have had a subjective expectation of privacy because the backyard still would have been observable by "a citizen or a policeman perched on the top of a truck or a two-level bus." *Id.*

144. See *United States v. Dunn*, 480 U.S. 294, 300 n.3 (1987).

145. Compare *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 n.5 (1986) with *id.* at 243 (Powell, J., concurring in part and dissenting in part).

146. *Dunn*, 480 U.S. at 307 (Brennan, J., dissenting).

147. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989).

148. With apologies to Anne Tyler, *The Accidental Tourist* (1985).

yard, do so only if surrounded by a fence higher than a double-decker bus and while sitting beneath an opaque awning. The wise individual might also consider purchasing anti-aerial spying devices if available (be sure to check the latest Sharper Image catalogue). Upon retiring inside, be sure to pull the shades together tightly so that no crack exists and to converse only in quiet tones. When discarding letters or other delicate materials, do so only after a thorough shredding of the documents (again see your Sharper Image catalogue); ideally, one would take the trash personally to the disposal site and bury it deep within. Finally, when buying items, carefully inspect them for any electronic tracking devices that may be attached.¹⁴⁹

The Court's decisions finding such a limited reasonable expectation of privacy in society, an expectation so limited that Justice Powell was moved in exasperation to state that "families can expect to be free of official surveillance only when they retreat behind the walls of their homes,"¹⁵⁰ might be explained by several factors. Perhaps privacy intrusions have become so great that a majority of the Justices is factually correct in holding that the citizenry reasonably does not expect, even if it might have the desire, to be free from surveillance while walking in the woods or driving the city streets.¹⁵¹ Maybe the Court is influenced by the fact that the privacy interests they are examining in these cases are not

149. See *California v. Greenwood*, 486 U.S. 35 (1988) (holding no legitimate privacy interest exists in garbage left on curbside); *Dow Chem. Co.*, 476 U.S. at 227 (holding that use of sophisticated aerial mapping camera does not implicate Fourth Amendment); *California v. Ciraolo*, 476 U.S. 207 (1986) (holding that no legitimate privacy interest exists against aerial surveillance of fenced-in backyard); *Oliver v. United States*, 466 U.S. 170 (1984) (holding that no legitimate privacy expectation exists in private property outside curtilage); *United States v. Knotts*, 460 U.S. 276 (1983) (holding that no interference with legitimate privacy interest exists where police monitored electronic signals from beeper located inside car); *Smith v. Maryland*, 442 U.S. 735 (1979) (holding that no legitimate privacy interest exists in numbers dialed from one's phone); *United States v. Miller*, 425 U.S. 435 (1976) (holding that no legitimate privacy interest exists in microfilm copies of checks); *United States v. White*, 401 U.S. 745 (1971) (holding that no legitimate privacy interest exists in conversations that are electronically recorded by undercover police).

150. *Ciraolo*, 476 U.S. at 225 n.10 (Powell, J., dissenting). Even retreating inside may not be sufficient as illustrated by the particularly alarming case of *Mozo v. State*, 632 So. 2d 623, 624 (Fla. Dist. Ct. App. 1993), where police with a store-purchased scanning device monitored cordless phone calls from an apartment complex "hoping to come across some kind of illegal activity." *Id.* at 624. Although the state court was able to invalidate the behavior based on a state privacy right basis, the court noted that such behavior might escape Fourth Amendment scrutiny. See *id.* at 631-34 (finding state privacy right broader than Fourth Amendment); see also *United States v. Smith*, 978 F.2d 171, 177 (5th Cir. 1992) ("If, as some experts predict, we are moving inexorably toward a complete cordless telephone system, the decision as to whether cordless telephone conversations are protected by the Fourth Amendment may ultimately determine whether *any* telephone conversation is protected by the Fourth Amendment.").

151. A recent study by Professors Slobogin and Schumacher, however, strongly suggests that, as an empirical matter, the Court's decisions often are not in accord with public perceptions. See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look*

those of Farmer McGregor raising corn in the back forty or tending sheep in the barn, but involve activities like the cultivation of marijuana and the running of an amphetamine laboratory.¹⁵² Or it is possible that in deciding what a "reasonable" expectation of privacy is, the Court is defining reasonableness to include the need for effective law enforcement.¹⁵³

Whatever the reasons behind the Court's holdings, it is worthwhile to ask whether the quarrel is best directed not at the *Katz* reasonable expectation of privacy test itself, but at what the test does not address. The real shock in reading the cases is not the realization that an airplane flying overhead might allow glimpses into the privacy of one's backyard, but that the Court has found that a police decision to spy on one's backyard from an aircraft absent any suspicion is *outside* the Fourth Amendment altogether.¹⁵⁴ And this is the *Katz* test's failure as currently used: it does not require consideration of the consequences if the Court concludes that no reasonable expectation of privacy exists, namely, that power is being given to the government to engage in an activity unrestrained by notions of probable cause or even reasonableness.¹⁵⁵

In contrast, if the reasonableness of society's expectations were also seen as including a concern for government-citizen trust, the Court might not become bogged down in questions of how much wind and dust a helicopter churns up hovering at 400 feet. Rather, the Court would have to address the crucial question lurking behind the privacy rhetoric: is the government's action inconsistent with trusting the citizenry to behave in a lawful and responsible fashion? If the reply is affirmative, then the intrusion should only be allowed if it can satisfy the Fourth Amendment's requirements under the Warrant or Reasonableness Clauses.

The difference in approach can be seen by examining *California v. Greenwood*,¹⁵⁶ where the Court found that no reasonable expectation of

at "Understandings Recognized and Permitted by Society," 42 Duke L.J. 727, 740-42 (1993).

152. Tracey Maclin has argued that the Court, "if pushed," would acknowledge legitimate privacy interests in many cases; however, "[t]he Court assumes that these intrusions will only happen to individuals [engaged in criminal activity]. Thus, a majority of the Court trusts the police to target the 'right' people." Tracey Maclin, Justice Thurgood Marshall: Taking the Fourth Amendment Seriously, 77 Cornell L. Rev. 723, 745 (1992).

153. See Bookspan, *supra* note 2, at 495 (attributing "definitional limitations" on what constitutes search in part to "a desire to allow more aggressive police investigative methods to root out crime").

154. See *Ciraolo*, 476 U.S. at 224 (Powell, J., dissenting) (criticizing majority's use of *Katz* test for "fail[ing] to acknowledge the qualitative difference between police surveillance and other uses made of the airspace").

155. Professor Mitchell refers to this failure as the problem of the Court's not "contextualizing" the meaning of *Katz* in the broader context of "some basic vision of America." See Mitchell, *supra* note 27, at 40-47.

156. 486 U.S. 35 (1988).

privacy exists in garbage left for collection outside the curtilage of the home. Viewed from a privacy angle, the case almost seems silly. Do I have a great privacy interest in the Hefty bag full of fruit rinds and coffee grinds that I groggily haul out in the early morning, stubbing my toe on the curbside in the process? Of course not, and just asking the question would seem to provide the answer.

It may be surprising, therefore, to learn in what detailed fashion the Court grappled with the issue. The majority felt compelled to depict a world where no garbage bag is safe, heavily footnoting how "animals, children, scavengers, snoops, and other members of the public" have gained access to garbage in the past.¹⁵⁷ The majority also later made reference to what vaguely sounds like an explanation of a contractual relationship between garbager and garbagee.¹⁵⁸ Not to be outdone, the dissent at one point personified the noble Hefty trash bag, finding it able to "testify eloquently to the eating, reading, and recreational habits of the person who produced it."¹⁵⁹

After reading *Greenwood*, one cannot help but feel that the Court did not engage in a vigorous debate over "a right of privacy in trash" because it truly was concerned about the homeowner's expectations upon depositing the trash can at the curb. Rather, a far more important principle was at stake, but the *Katz* test as it was being used was unable to ferret it out. As a result, the Court was led into a surreal discussion over the importance of trash to American society.

This indirect attempt to resolve the most important principle of the case would not be necessary if the issue were debated with the added element of government-citizen trust. Instead of speculating about animals and scavengers getting into trash cans, the Court would confront directly the much larger and more important question of whether government agents going through trash cans looking for evidence of wrongdoing is consistent with a constitutional system based on government-citizen trust.

Approached from this perspective, the answer might be quite different. Imagine, for example, if someone returned from an overseas visit and told of how government officials regularly examined the contents of trash cans to maintain control over the citizenry. Most people would react strongly to such government behavior, but not because the individual has an overarching privacy interest in his or her garbage. The reaction would arise because of what is revealed about the government-citizen relationship where the government has the power to engage in an intrusion like the searching of one's garbage without any need to justify its actions.

157. See *id.* at 40 & nn.2-4.

158. See *id.* at 40 ("Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so.").

159. *Id.* at 50 (Brennan, J., dissenting).

This example is not to suggest that the sifting through of Mr. Greenwood's trash is but one short step from totalitarianism, but rather that broader values are at stake when the Court says that such searches in the future need never be justified under the Fourth Amendment. The government may very well have a compelling and legitimate justification for its actions far different from a desire to spy on the populace, but that justification should be examined in the light of a broader Fourth Amendment doctrine. Without such a perspective, the Court's message is that whatever an intrusion's connotations for the government's trust of a citizen, the intrusion need not be justified so long as it does not unduly impinge upon one's physical privacy. The early morning banging of the trash cans becomes the same whether one looks out the window and sees a bored sanitation worker or a police officer searching for criminal evidence. Does the Fourth Amendment really not see the difference?

2. *Seizures and the Right to Locomotion: Identifying Reasonable People.* — For similar reasons, the metaphor of government-citizen trust would bring far more candor to the Court's inquiries concerning whether a "seizure" sufficient to trigger the Fourth Amendment's protections has occurred. The Court's current approach is to ask whether "taking into account all the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"¹⁶⁰ As reasonable as the reasonable person test might sound in the abstract, the Court's implementation has suffered from an unreality similar to that of the reasonable expectations of privacy test.

Under current judicial decisions, our *Accidental Tourist's* guidebook would have to warn:

Travel is a considerable problem. One should be aware that law enforcement officers may stop someone and ask permission to look in his luggage even if the traveler has not acted in a fashion that would provoke articulable suspicion of wrongdoing. This is true whether traveling by land, air, or sea. If approached, the innocent traveler should not be alarmed but should state to the officer that he or she has no desire to converse and has other, more important appointments to keep. Although this might strike the traveler at first as rude and abrupt, and perhaps a bit frightening if the questioner is armed, the Supreme Court has made clear that the Fourth Amendment is not for the timid. Consequently, the wise traveler should carry a copy of the Fourth Amendment and display it to the questioner and thus avoid any unnecessary discourse. It is this writer's fervent hope that travel agents soon shall issue copies of the Fourth

160. *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

Amendment as standard procedure when writing airplane, bus, or train tickets.¹⁶¹

An optimist who reads the Supreme Court's decisions finding that no seizure had occurred might focus on the inherent courage to stand up to authority that the Court presupposes in the citizenry. A passenger seated on a bus that is about to depart, for instance, apparently is sufficiently steeped in constitutional courage that he is capable of telling gun-toting police who have singled him out for questioning that he wishes to be left alone.¹⁶² Likewise, the American pioneer's anti-authoritarian spirit presumably has become so ingrained that workers as reasonable persons will feel free not to cooperate as they watch a large number of law enforcement agents conduct a surprise "survey" at their factory. The survey, incidentally, involved agents blocking the exits, asking pointed questions as they systematically moved down the aisles, handcuffing those they suspected of being illegal aliens, and then leading them away to waiting vans.¹⁶³

Like the expectation of privacy cases, the Court is able to reach these conclusions by treating the reasonable person's reactions as a factual question. And, as with the expectation cases, the majority's "factual findings" often seem oblivious to reality.¹⁶⁴ For example, in the "factory survey" case, the majority suggested that it was pretty much an ordinary workday for most workers at the factory despite the sudden appearance of fifteen to twenty-five law enforcement agents and the fact, casually noted by the Court, that "the surveys did cause some disruption, including the efforts of some workers to hide."¹⁶⁵

The problem with the Court's analysis is not its assessment of the reasonable person's reaction in these situations, an assessment that would probably be futile to dispute given that no clear way exists to disprove the majority's "findings."¹⁶⁶ The mistake is in treating the question primarily

161. See generally Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 Cornell L. Rev. 1258, 1300 (1990) ("In the unrealistic world of *Mendenhall*, the average citizen feels free to ignore a police officer who has approached her.").

162. Cf. *Bostick*, 501 U.S. at 431-32, 437 (remanding for determination of whether seizure occurred when uniformed officers boarded bus, approached defendant without any articulated basis of suspicion, and requested defendant to consent to search).

163. See *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210, 210 (1984). The majority noted without any sense of irony that, "[w]hile the surveys did cause some disruption, including the efforts of some workers to hide, the record also indicates that workers were not prevented by the agents from moving about the factories." *Id.* at 218.

164. See *id.* at 226 (Brennan, J., concurring in part and dissenting in part) ("[W]hat is striking about today's decision is its studied air of unreality.").

165. *Id.* at 218.

166. But cf. Slobogin & Schumacher, *supra* note 151, at 738-39 (presenting data on public's perception of intrusiveness of various police procedures).

as a factual inquiry rather than as a broader issue implicating the proper role of the government in conducting "stops" and "surveys."¹⁶⁷

Freed from imponderable psychological assessments of the reasonable person's freedom to resist government questioning, the focus properly turns to how such behavior accords with notions of government-citizen trust.¹⁶⁸ The difference in such a changed focus can be seen in how one looks at the "right to locomotion" and its idea that a citizen should be free to move about without government interference. As Professor Tracey Maclin has explained, this traditional right has been seriously downgraded through the Court's emphasis on privacy because the right to locomotion is generally exercised in public where one has little privacy expectation.¹⁶⁹ However, if the government triggers the Amendment's protections by acting in a manner not in accord with trust of the citizen, then police behavior interfering with the right to locomotion, such as randomly questioning individuals about criminal behavior or asking to search luggage, would now require justification under the Amendment's substantive provisions.

The idea of trust and its relation to the government encounter's purpose might lead to a logical division between different types of encounters, as, for example, the New York Court of Appeals has developed as a matter of state law. "Benign" or "public service" types of inquiries and generalized "requests for information" by government officials, because they do not greatly implicate trust of the citizenry, might require only an "objective, credible reason" to question an individual.¹⁷⁰ But be-

167. Part of the reason for the Court's air of unreality may be that, as with reasonable expectation of privacy inquiries, the Court is attempting to handle policy questions indirectly through the veil of a purportedly factual decision. See Maclin, *supra* note 161, at 1301.

168. One explanation of the difference in opinion between the United States Supreme Court and the Florida Supreme Court in *Bostick* is that the Florida Supreme Court directly recognized the broader implications of the police practices under scrutiny:

The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers—in short a *raison d'être*—is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains . . . and check identification, tickets, ask to search luggage—all in the name of 'voluntary cooperation' with law enforcement—to the shocking extent that just one officer . . . admitted that during the previous nine months, he, himself, had searched in *excess* of three thousand bags! In the Court's opinion, the founders of the Republic would be thunderstruck.

Bostick v. State, 554 So. 2d 1153, 1158 (Fla. 1989) (quoting *State v. Kerwick*, 512 So. 2d 347 (Fla. Dist. Ct. App. 1987)), *rev'd sub nom. Florida v. Bostick*, 501 U.S. 429 (1991).

169. See Maclin, *supra* note 161, at 1328–30.

170. See *People v. De Bour*, 352 N.E.2d 562, 571–72 (N.Y. 1976) (requiring at least "some objective credible reason" for "minimal intrusion of approaching [an individual] to request information"); *People v. Hollman*, 590 N.E.2d 204, 212 (N.Y. 1992) (reaffirming *De Bour* as a matter of state law, despite contrary U.S. Supreme Court holdings, as necessary "to protect the individual from arbitrary or intimidating police conduct").

cause a more intensive stop focusing on an individual's potential criminality—such as a request to search an individual's luggage—directly implicates trust concerns, it might be justified only if reasonable suspicion existed.

Whatever form the substantive scheme might eventually take, the key improvement would be that the Court would directly address the policy implications of whether a government intrusion is within the Amendment's scope. Courts would still give considerable leeway to police-citizen encounters to accommodate the wide variety of police functions that exist beyond investigating crime, but government actions directed at investigating whether an individual has not obeyed the law now would be firmly within the Fourth Amendment's fold. The question would then arise as to what the government must demonstrate to justify the intrusion.

3. *Choosing Between the Warrant and Reasonableness Clauses and Determining Reasonableness.* — The final significant impact of introducing government-citizen trust as a defining value would be in influencing how the Fourth Amendment's provisions operate once a court finds that the Amendment applies. The Court currently has developed a framework that consists of two steps. First, it decides whether to analyze an intrusion under the Warrant or Reasonableness Clause. The Court has struggled to find the proper fulcrum between the two clauses, but currently asks whether a "special governmental need" exists that justifies departure from the Warrant Clause.¹⁷¹ Once the proper clause is selected, the Court then engages in the corresponding analysis, looking either under the Warrant Clause at whether a warrant based upon probable cause was obtained and whether any exceptions exist, or, if under the Reasonableness Clause, whether the intrusion was reasonable after weighing the individual's privacy interests against the government's need to intrude.¹⁷² Crucial to both steps of the inquiry, therefore, is how one assesses the government's proposed need for the intrusion. The need will be used both to justify departure from the Warrant Clause and to argue that the intrusion is reasonable.

Despite its stated preference for the Warrant Clause, the Court has been quick to find a "special need" justifying departure.¹⁷³ Such willingness to find a "need" might not be too surprising if one considers the magnitude of the social problems that the government can place on its

171. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665–66 (1989).

172. See generally *supra* Part I. If the search is deemed "administrative," the analysis technically remains within the Warrant Clause. The analysis is basically the same as under the Reasonableness Clause, however, because the Court defines probable cause for such searches by using the reasonableness balancing test. See *supra* notes 54–56 and accompanying text. Some "pure" administrative searches, however, may be less troubling if they are not focused on uncovering wrongdoing. See *infra* note 188.

173. See generally *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 639–40 (Marshall, J., dissenting) (tracing expansion of "special needs" test by Court).

side of the ledger. How can anyone possibly discount the importance of the war on drugs,¹⁷⁴ the integrity of the educational system,¹⁷⁵ or the saving of lives?¹⁷⁶ With a little imagination, even the lowly Vehicle Identification Number can be made to sound as if it is crucial to civilized society.¹⁷⁷

Missing in the Court's consideration of the "special need" to move from the Warrant Clause into the reasonableness analysis, however, is an express evaluation of how switching clauses also has "special costs." Without such express consideration, the move is especially easy since the reasonableness test still will provide some potential protections for what is currently the primary focus of the Amendment—privacy. This is true because the Court's reasonableness analysis expressly takes into account privacy interests. The Court is thus relieved when choosing between the clauses from making an all-or-nothing choice between protecting privacy and allowing the government intrusion.¹⁷⁸

Moreover, because the current focus is on privacy, the Court in assessing the government's "special need" need not attach any special significance to the fact that the intrusion, from the citizen's viewpoint, is by the government rather than a non-government entity. A privacy interest in giving a urine sample can be diminished by pointing out that providing such a sample is a common medical procedure.¹⁷⁹ A privacy interest in one's backyard can be downplayed by noting that passengers on a com-

174. See *Von Raab*, 489 U.S. at 668 ("[Illicit narcotics are] one of the greatest problems affecting the health and welfare of our population.").

175. See *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) ("Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.").

176. See *Skinner*, 489 U.S. at 607 (noting fatalities, injuries, and property damage from train accidents in which alcohol or drug use was contributing cause).

177. See *New York v. Class*, 475 U.S. 106, 111-12 (1986) (discussing a number of "laudable governmental purposes" served by the vehicle identification number, including the logical deduction that because vehicle identification numbers help identify stolen autos, and because stolen autos proportionately are involved in greater number of accidents, "the [vehicle identification number] safeguards not only property but also life and limb").

178. See *T.L.O.*, 469 U.S. at 337 ("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.").

179. See *Skinner*, 489 U.S. at 626-27 (minimizing intrusiveness of urine testing, noting that "[t]he sample is also collected in a medical environment . . . , and is thus not unlike similar procedures encountered often in the context of a regular physical examination"). How the focus on privacy can blur the private-government distinction also can be seen in the oral argument of the *Von Raab* case:

QUESTION [Justice Blackmun]: You surely have had a physical examination.

MS. WILLIAMS [for petitioner]: Yes, indeed, Your Honor.

QUESTION [Justice Blackmun]: Did you find [giving a urine sample] demeaning in that respect?

MS. WILLIAMS: No, but nobody came into the toilet with me to watch to see whether this, indeed, was my urine. . . .

mercial aircraft might glance out of the window while munching on their peanuts.¹⁸⁰ A privacy interest in one's employment space can be lessened by positing the overbearing boss constantly overseeing one's work or an office with a steady flow of visitors.¹⁸¹ Privacy is treated as a unitary concept that is equally invaded whether it be by canine,¹⁸² homeless person,¹⁸³ tourist,¹⁸⁴ fellow employee,¹⁸⁵ or law enforcement agent.

A look beyond privacy, though, reveals that switching to the Reasonableness Clause from the Warrant Clause does cause the loss of an important Fourth Amendment value—the special guaranty of traditional probable cause that an intrusion will take place only where an individual's actions give rise to a belief that she has breached the trust that she is law-abiding. Indeed, one way to think of traditional probable cause is as a constitutional mechanism requiring the government to trust the citizenry: only articulable reasons to believe that the trust has been violated will justify an intrusion. This quality is lost, of course, when the government is allowed to engage in an initiatory intrusion without individualized suspicion: the individual becomes powerless to avoid the intrusion other than by foregoing what is otherwise a legal activity.¹⁸⁶

Additionally, relying on government-citizen trust as a defining value recognizes that a government intrusion has special implications for the Fourth Amendment. From this perspective, a difference in kind does exist between voluntarily giving a urine sample for medical purposes and the government demanding a sample for urinalysis because it wishes to randomly check whether its citizens are obeying the law. The former context does not remotely implicate the government-citizen relationship, whereas in the latter setting, the intrusion's very purpose is the govern-

QUESTION [Justice Blackmun]: Well, I probably am embarrassed because of my relationship with the medical profession, but I wonder a little bit about this super sensitivity about blood tests and urine collection.

Landmark Briefs and Arguments, *supra* note 30, at 813.

180. See *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986) (“Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.”).

181. See, e.g., *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987) (“[S]ome government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable.”); *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210, 218 (1984) (minimizing intrusion of Immigration and Naturalization Service agents by suggesting that “[o]rdinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers’ voluntary obligations to their employers”).

182. See, e.g., *California v. Greenwood*, 486 U.S. 35, 40 n.2 (1988).

183. See *id.* at 40 n.3.

184. See *Ciraolo*, 476 U.S. at 213–14.

185. See *O'Connor*, 480 U.S. at 717–18.

186. In theory, the Court still could conclude upon applying the reasonableness test that traditional probable cause is required, but has yet to do so in any case where the Court has found a special need justifying departure from the Warrant Clause.

ment's assertion of its power over the citizenry to ensure that the law is not being violated.¹⁸⁷

Infusing government-citizen trust into the Fourth Amendment calculus, therefore, adds an extra dimension to the Court's decision over which fork to take in the Fourth Amendment road. If probable cause is understood as a means of effectuating trust of the citizenry, then the government's proffered "special need" that is to substitute for probable cause (Probable Cause Nutrasweet, if you will) must also account for why the targeted citizenry cannot be trusted to obey society's rules. This accounting better reflects what the government is requesting when it asks for relief from the strictures of probable cause—the right to treat a citizen as rule-breaker even in the absence of a fair probability that the citizen is not obeying the law.

Looked at in this light, a court's reasonableness determination normally would require two findings beyond the current inquiry.¹⁸⁸ First, because the starting presumption would be that the citizenry should be trusted absent evidence of wrongdoing, the government would have to affirmatively prove the existence of a serious problem that justified the government's breaching its trust to those subjected to the intrusion. For example, where the government wanted to randomly test employees for drug use, the burden would be on the government to demonstrate that

187. This point was stressed by the petitioner's counsel in *Von Raab* in response to a question suggesting that little difference existed between giving a urine sample during a doctor's visit and giving a government mandated sample in a controlled setting.

MS. WILLIAMS: Well, I think my clients . . . who are standing before this collection site do not confuse what they are about to do with a visit to the doctor. It is not the same. The atmosphere is an adversarial, punitive atmosphere. It is not a trusting, confidential one that we have come to expect in a visit to the doctor which is the most these employees would ever have to do for their employer in a fairly limited way.

Landmark Briefs and Arguments, *supra* note 30, at 814; see also *O'Connor*, 480 U.S. at 730 (Scalia, J., concurring) (rejecting idea that frequent entries of fellow employees or boss vitiates Fourth Amendment protections). According to Justice Scalia,

It is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place—and indeed, even though his landlord has the right to conduct unannounced inspections at any time.

Id.; see also *Ciraolo*, 476 U.S. at 224 (Powell, J., dissenting) (objecting that "the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the airspace"); Mitchell, *supra* note 27, at 41–42, 50–51 (arguing for recognition that government searches have a special quality because they impinge upon one's sense of personal security).

188. Where the proposed intrusion did not greatly implicate trust concerns (like a housing inspection), the Court might retain the current inquiry's focus on privacy. The primary area of concern for the proposed greater scrutiny is where the underlying government purpose is to ferret out wrongdoing. See, e.g., *New York v. Burger*, 482 U.S. 691, 716 (1987) (administrative inspection ultimately aimed at uncovering criminal selling of stolen auto); see also *Sitz v. Department of State Police*, 506 N.W.2d 209, 224 (Mich. 1993) (distinguishing between administrative searches and those "with the primary goal of enforcing the criminal law").

an actual problem existed that justified requiring the intrusion's subjects to forfeit their right to be trusted. Asked in this fashion, the Court could not, as it did in *National Treasury Employees Union v. Von Raab*, simply point to a general societal problem with drugs and claim a symbolic need for the testing of Customs agents although no evidence existed that the targeted group was engaged in drug use.¹⁸⁹

Second, because probable cause would now be understood as a means of protecting the citizenry's right to be trusted, the government also would have to show as part of its special need why reliance on probable cause would defeat its purposes.¹⁹⁰ The Court's present approach approximates a loose rational basis standard: if the intrusion arguably advances the government interest, the Court will not second-guess the government's judgment. Consequently, in cases like *Von Raab* and *Michigan Department of State Police v. Sitz*, the majority was willing to approve the challenged suspicionless intrusions even though they had little noticeable impact on the societal problem beyond that which conventional reliance on individualized suspicion had produced, and perhaps had even been counterproductive.¹⁹¹

But if trust is used as a guiding value, then the deference should not be to the government's judgment as to the "need" for the particular intrusion, but to the Constitution's judgment that the citizenry is to be trusted to act in an informed and responsible manner. The burden of justification would rest with the government to show that the intrusion substantially furthered the government's goal beyond conventional enforcement means. After all, if the justification in foregoing probable cause is that reliance on trust would defeat the attainment of a compelling government interest, the justification falls away if the alternative is no

189. See generally *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 683 (1989) (Scalia, J., dissenting) (stressing that government not only had failed to produce evidence of drug abuse by Customs agents, but had not cited "*even a single instance* in which any of the speculated horrors actually occurred" (emphasis in original)); see also *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 477 (1990) (Stevens, J., dissenting), (arguing that lack of proof regarding efficacy of sobriety checkpoints led to conclusion that "[t]his is a case that is driven by nothing more than symbolic state action—an insufficient justification for an otherwise unreasonable program of random seizures").

190. This inquiry should not be confused with whether reliance on probable cause would make achievement of the goal more difficult, for "the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways." *United States v. Leon*, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting). Rather, the inquiry should focus on where preventive measures, such as housing inspections or airport weapons screening, are the only effective means available to avert immediate dangers to the public. See generally Sundby, *supra* note 2, at 444-46.

191. See *Von Raab*, 489 U.S. at 674-75 ("The mere circumstance that all but a few of the employees tested are entirely innocent . . . does not impugn the program's validity. . . . Where . . . the possible harm . . . is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the . . . goal."); see also *Sitz*, 496 U.S. at 453-54. In *Sitz*, the dissent noted the existence of statistical evidence which suggested that the net effect of sobriety checkpoints on traffic safety was "infinitesimal and possibly negative." 496 U.S. at 460 (Stevens, J., dissenting).

more effective.¹⁹² Similarly, a proposed intrusion's slight impact on privacy no longer could be used to help justify an intrusion on less than probable cause because the degree of privacy invasion would become relevant only after the government had proved that waiting for probable cause to develop entailed an unacceptable risk.¹⁹³

Although perhaps coming from a surprising quarter of the law for a Fourth Amendment argument, the Court's recent Takings Clause case, *Dolan v. City of Tigard*,¹⁹⁴ is instructive on the difference that such a view of the government's evidentiary obligation can make. The issue in *Dolan* was the proper standard of review to determine when conditions placed upon a landowner who wishes to make improvements amount to an unconstitutional taking. The Court rejected a "reasonable relationship" test because it "seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny,"¹⁹⁵ and instead adopted a standard that required "the city [to] make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."¹⁹⁶ The Court refused to defer to the city's general findings that the petitioner's commercial expansion would create more traffic and thus would justify requiring the petitioner to build a bike path. Instead, it reversed because "[t]he findings of fact that the bicycle pathway system 'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand." . . . [T]he city must make some effort to quantify its findings"¹⁹⁷

A comparison of *Dolan* to cases like *Von Raab* or *Sitz* might lead us to ask why the Court demands from the government a more exacting empir-

192. At a minimum, any intrusions outside the proven justification—such as searching for drugs during an immigration check—would not be allowed because the added dimension of the intrusion would lack the underlying findings for abandonment of individualized suspicion. See *United States v. Soyland*, 3 F.3d 1312, 1315–20 (9th Cir. 1993) (Kozinski, J., concurring in part and dissenting in part) (arguing that court should examine whether immigration officials were exceeding proper bounds of searches for illegal aliens); cf. *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1247 (9th Cir. 1989) (striking down program rewarding airport security agents for finding drugs and money because program "effectively transform[ed] a limited check for weapons and explosives into a general search for evidence of crime").

193. Under the Court's current approach, the brevity of an intrusion is itself a factor that may help to justify the search. See *Sitz*, 496 U.S. at 451 ("[T]he weight bearing on the [individual's side of the] scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight.").

194. 114 S. Ct. 2309 (1994).

195. *Id.* at 2319.

196. *Id.* at 2319–20.

197. *Id.* at 2322 (quoting *Dolan v. City of Tigard*, 854 P.2d 437, 447 (Or. 1993) (dissenting opinion) (quoting *City of Tigard Planning Comm'n Final Order No. 91-09 PC at 24* (1991))). Using a similar rationale, the Court also struck down the city's claim of a recreational easement along the floodbasin part of the petitioner's land. The Court found the city had not shown a "reasonable relationship" between the easement and the increased runoff that the petitioner's new building would create. See *id.* at 2321.

ical showing to justify the building of a bike path on private commercial property than to justify a program of blanket suspicionless searches and seizures of individuals.¹⁹⁸ Nor is the comparison completely lacking in irony, as the *Dolan* majority's justification for a heightened standard of review was that it "saw no reason why the Takings Clause . . . , as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."¹⁹⁹ After *Dolan*, the Fourth Amendment arguably is now the poor relation who longingly eyes the evidentiary neighborhood where the Takings Clause lives.

In the end, what is being sought is a Fourth Amendment inquiry requiring the government to demonstrate either that the citizen has forfeited her right to be trusted through misbehavior (*i.e.*, through a showing of traditional probable cause), or that, if probable cause is to be dispensed with, trusting the citizenry is simply too costly given the immediacy and importance of the government interest. A classic example of the latter would be weapons screening at airports, which was instituted in response to a recurring problem with skyjackings. The opportunity to observe passengers for suspicious behavior prior to boarding is extremely limited, and once in the air, the plane is effectively isolated from law enforcement personnel. Given these factors, the only realistic means of preventing a serious danger to passenger safety is to dispense with individualized suspicion and screen all passengers for weapons.²⁰⁰ Adding trust into the Fourth Amendment equation would not eliminate intrusions based on less than probable cause, but it would make clear that the burden rests with the government to demonstrate affirmatively why the presumption of trust should not apply.

4. *Who Should Decide: The Role of Judges, Juries, and Legislators.* — An emphasis on reciprocal government-citizen trust would revitalize the probable cause requirement as the centerpiece of the Amendment's protections. Because the starting assumption is that the citizen is to be trusted unless the government shows otherwise, the notion of what is reasonable becomes intertwined with the idea of individualized suspicion. The approach also would reinforce the Court's oft-stated preference for prior judicial review, since the goal would be to preclude the intrusion until the government has provided satisfactory justification. But a question remains: is such a reemphasis on the Court's traditional Warrant Clause preference desirable in light of the Amendment's historical distrust of warrants (because they cloaked their executor with absolute im-

198. The city in fact had made some effort to calculate the increased traffic that the petitioner's expansion would produce, but the Court found the city had not shown how these calculations were "reasonabl[y] relate[d]" to the need for the bicycle path easement. See *id.*

199. *Id.* at 2320.

200. See Sundby, *supra* note 2, at 445-46 (discussing how airport weapons screening comports with Fourth Amendment values).

munity from trespass suit)²⁰¹ and given the flexibility that is gained with a free-floating reasonableness standard?

In fact, some have argued that we should come full circle by resuscitating the colonial understanding that warrants based on probable cause were a device to be limited and instead rely upon a reasonableness standard not unlike that used in tort law.²⁰² Proponents of this view argue that not only would adoption of an all-encompassing reasonableness standard be more in accord with the historical understanding of the Warrant Clause, but also that it would bring harmony to the Fourth Amendment by eliminating the need for the Court to adapt the Warrant Clause's requirements to a variety of situations.²⁰³ In a recent article, Professor Akhil Amar has suggested a complete housecleaning, leaving Fourth Amendment issues to be decided in civil jury trials under a broad reasonableness standard.²⁰⁴ This approach, he argues, is in accord with the historical lesson that "juries, not judges, are the heroes of the Founders' Fourth Amendment story."²⁰⁵

Apart from the numerous procedural and substantive changes that would be required before such an approach would work,²⁰⁶ past experience strongly suggests that a generalized one-size-fits-all constitutional standard does not have the desired settling effect. As the evolution of the constitutional rules governing confessions and the right to counsel well

201. See Akhil R. Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 774 (1994).

202. Although the proposals differ from each other significantly, this basic approach can be found in Amar, *supra* note 201, at 800-11 (advocating reliance on civil damages instead of exclusionary rule); Bradley, *supra* note 21, at 1481-91 (discussing how model based purely on reasonableness would operate); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49, 58 (arguing that exclusionary rule is a less effective and more costly deterrent device to illegal searches than tort law).

203. See Amar, *supra* note 201, at 800; Bradley, *supra* note 21, at 1488.

204. See Amar, *supra* note 201, at 800. Although much of what follows disagrees with Professor Amar's solution to Fourth Amendment ills, particularly the use of civil jury trials to implement the Amendment's protections, I do not intend to take away from his persuasive highlighting of "the mess." Indeed, his thesis that the Fourth Amendment must be thought of not as a criminal procedure right but in the context of the whole Constitution, see *id.* at 758-60, complements much of this Article's basis for interpreting the Amendment. See *supra* text accompanying notes 100-115 (arguing for trust metaphor based on broader understanding of the Constitution and Bill of Rights).

205. *Id.* at 771. In an interesting and thoughtful piece focusing on the Fourth Amendment as a "societal right," Professors Thomas and Pollack also have advocated the use of juries to decide Fourth Amendment violations. See George C. Thomas III & Barry S. Pollack, *Saving Rights From a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. Rev. 147, 169-80 (1993).

206. Because Professor Amar's reasonableness standard is placed primarily in the hands of the jury and supplants the exclusionary rule, his proposal requires a host of changes, including recognizing direct governmental liability, defining how punitive damages should work, and changing the right to attorney fees where nominal damages are awarded. See Amar, *supra* note 201, at 811-16. Because Professor Bradley's reform does not include the abolishing of the exclusionary rule, his model would not be subject to the same criticism.

illustrates, a vague standard that must be frequently applied simply creates too many opportunities for conflicting holdings and eventually gives rise to a call for more specific rules and guidance.²⁰⁷ Reliance upon jury verdicts may obscure some of the open conflict, but one can easily imagine inconsistent verdicts soon leading to calls by police, legislatures, and lower courts for more judicial guidance.²⁰⁸

But even assuming that such an approach would bring peace and harmony to Fourth Amendment doctrine, it is necessary to ask whether the Court's twentieth-century embrace of the Warrant Clause's protections can be justified as more than an accidental doctrinal U-turn that should be corrected. As Professor Carol Steiker and others have noted, the greatest difficulty with relying solely upon a historical view that warrants were disfavored is that "[o]ur colonial forebears could not have predicted the sheer numbers of law enforcement agents at work today, the breadth of their operational mandate, or their pervasive authoritarian presence."²⁰⁹ Perhaps even more compellingly, the Founders could not have foreseen the technological and regulatory reach of government intrusions that exists today. The government's ability to now conduct large-scale drug testing of employees and to annually stop millions of vehicles at immigration checkpoints are but two examples of how administrative searches allow "government officials [to] routinely invade the privacy and

207. Consider, for example, that the prophylactic rule of *Miranda* largely resulted from the ambiguity of the Court's voluntariness test:

Given the Court's inability to articulate a clear and predictable definition of "voluntariness," the apparent persistence of state courts in utilizing the ambiguity . . . to validate confessions of doubtful constitutionality, and the resultant burden on its own workload, it seemed inevitable that the Court would seek "some automatic device by which the potential evils of incommunicado interrogation [could] be controlled."

Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 102-03 (quoting *Walter V. Schaefer, Suspect and Society* 10 (1967)). Likewise, part of the Court's rationale in *Gideon v. Wainwright*, 372 U.S. 335 (1963), was that the Court's case-by-case approach for deciding if the defendant was entitled to counsel had "been a continuing source of controversy and litigation in both state and federal courts." *Id.* at 338. Although placing primary responsibility on the jury may eliminate some of the confusion, primarily because one would not know the jury's reasoning, Professor Amar acknowledges that an overarching judicial regime of some Fourth Amendment doctrine defining reasonableness would be necessary. See Amar, *supra* note 201, at 817.

208. Professor Amar expressly retains a role for the judiciary to continue "build[ing] up doctrine," acknowledging that certain cases may involve "unjustified jury insensitivity" or implicate other constitutional values. See Amar, *supra* note 201, at 817.

209. Carol S. Steiker, *Second Thoughts about First Principles*, 107 Harv. L. Rev. 820, 830-38 (1994); see also Wasserstrom, *supra* note 5, at 290-94 (commenting on dramatically different nature of law enforcement during colonial times). Moreover, although it appears clear that the Warrant Clause's immediate purpose was to curtail the abuses of the general warrant, Professor Wasserstrom has made a strong argument that a Warrant Clause preference for all searches is not inconsistent with the broader historical view of judicial restraints being placed on executive searches and seizures. See *id.* at 283-94.

property of countless millions; hardly anyone escapes their clammy grasp."²¹⁰

Yet, these types of searches would be extremely difficult to give over to juries under a broad reasonableness standard, because they are not concrete factual disputes or blatant abuses of power for which juries are better suited as decisionmakers. The case, for example, that Professor Amar gives as illustrating the jury as hero is *Wilkes v. Wood*,²¹¹ where the jury awarded large damages because King George III's ministry issued a general warrant and undertook a massive search for those who had published a pamphlet highly critical of the ministry.²¹² This is the easy case, though, where the plaintiff was himself a hero (" 'Wilkes and Liberty' became a rallying cry for all those who hated government oppression"),²¹³ and the government played to perfection the role of the dastardly villain with the handlebar moustache.

But what of the case where the government behavior is far more subtle or the plaintiff far less appealing? It truly is asking the jury to be heroic to expect them to account for overarching constitutional principles when asked, say, to award damages because an overly eager official tried to detect drugs beyond whatever "administrative" objective the official was charged with carrying out.²¹⁴ The task becomes Herculean if the jury also is expected to decide such crucial Fourth Amendment principles when drugs were actually found.²¹⁵

210. *United States v. Soyland*, 3 F.3d 1312, 1316 (9th Cir. 1993) (Kozinski, J., concurring in part and dissenting in part) (questioning whether border patrol was exceeding its proper mandate by looking for contraband in addition to illegal aliens). Professor Amar does make the legitimate point that, "[a] broader search is sometimes better—fairer, more regular, more constitutionally reasonable—if it reduces the opportunities for official arbitrariness, discretion and discrimination." Amar, *supra* note 201, at 809. The need to control discretion through procedural regularity, however, should be reached only once the government has shown the need for the intrusion in the first place. Allowing procedural regularity to serve as part of the search's justification is in essence to let the government argue that the need for the intrusion need not be as compelling because the citizenry can be assured that everyone else is undergoing the same less-than-compelling intrusion.

211. 98 Eng. Rep. 489 (1763).

212. See Amar, *supra* note 201, at 772 & n.54.

213. *Id.* at 772 n.54.

214. See *United States v. Santa Maria*, 15 F.3d 879, 882 (9th Cir. 1994) (marijuana improperly found by border patrol agents who searched for drugs because statutory power was only for preventing entry of illegal aliens); see also *Soyland*, 3 F.3d at 1316; *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1245-46 (9th Cir. 1989) (invalidating program encouraging airport security personnel to look for contraband other than weapons).

215. See Steiker, *supra* note 209, at 850-51 (citing notable examples of juries, especially if racial issues were involved, that refused to acknowledge police misbehavior). Given that one of the Court's reasons for adopting the exclusionary rule was the failure of civil damages as a remedy for police misbehavior, see *id.* at 849-50, one could predict that giving these issues to the jury is in effect returning to the common law rule that even a search on a hunch would be permitted so long as it "proved right— . . . ex post success apparently was a complete defense." Amar, *supra* note 201, at 767.

At bottom, the difficulties these type of cases would pose for juries are but one way of raising the more fundamental question of what values the Fourth Amendment protects. A jury applying a reasonableness standard undoubtedly would be able to defend the Fourth Amendment where the government acts outrageously. But, perhaps, it is the subtle acts of power and control, rather than the overt displays of government power, that have the more lasting and pernicious effects on the fabric of government-citizen relations.²¹⁶ As Judge Kozinski has colorfully observed, "Liberty—the freedom from unwarranted intrusion by government—is as easily lost through insistent nibbles by government officials who seek to do their jobs too well as by those whose purpose it is to oppress; the piranha can be as deadly as the shark."²¹⁷

One is also reminded of Václav Havel's story of the greengrocer who is required to place in his window a sign with the slogan, "Workers of the world, unite!" The sign, which all commercial establishments are required to put out and to which few pay conscious attention, may be mundane in the greengrocer's everyday life, but Havel powerfully portrays how isolated mundane acts when taken together create a

panorama that everyone is very much aware of. This panorama, of course, has a subliminal meaning as well: it reminds people where they are living and what is expected of them. It tells them what everyone else is doing, and indicates to them what they must do as well, if they don't want to be excluded, to fall into isolation, alienate themselves from society, break the rules of the game, and risk the loss of their peace and tranquility and security.²¹⁸

It is this long-term collective influence of what might otherwise appear to be isolated or mundane events that increasingly is at stake when government intrusions are approved without probable cause. Asking a jury in a *post hoc* setting to identify and apply Fourth Amendment values that transcend any particular fact pattern is to leave the Amendment's protections to piecemeal enforcement largely dependent upon the appeal of a particular plaintiff. As with First Amendment cases, where the disputed speech often is of an unpopular nature,²¹⁹ the only realistic prospect for the Fourth Amendment to provide meaningful protection

216. See Sundby, *supra* note 2, at 439–40 (noting failure of Court to account for cumulative effect of intrusions).

217. \$124,570 *U.S. Currency*, 873 F.2d at 1246.

218. Václav Havel, *The Power of the Powerless*, in *Living in Truth*, *supra* note 89, at 36, 41, 51.

219. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (defendant convicted of desecrating American flag); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (convicted defendant was leader of Ku Klux Klan); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (Jehovah's Witness refused to salute American flag).

against the vast array of government intrusions rests in a judiciary sensitive to both privacy and trust concerns.²²⁰

This need to account for broader values is also why heightened independent judicial review of the government's reasons for a proposed intrusion is essential rather than deference to the government's judgment of the need for an intrusion. It is tempting to suggest that if a certain search technique is too oppressive, especially if it involves a group search such as group drug testing or sobriety checkpoints,²²¹ the political process will provide the cure by "throw[ing] the rascals out."²²² But one is less sanguine if it is understood that the very problem with such searches is that they undermine the informed and free individual participation upon which "the cure"—the political process—is premised.²²³

To use a First Amendment analogy, even with majority support, we would not allow censorship of a nonobscene book. Whatever the current majority's view of the book, consensual government requires that each individual has the right of access to information and differing views. Likewise with the Fourth Amendment, although a search might have majority approval, perhaps even majority approval of the group that is being subjected to the search,²²⁴ the search is still individual in that it casts aside the assumption for that particular member of the group that she is

220. As something of a compromise, Professors Thomas and Pollack argue that the jury should decide the Fourth Amendment violation issue and the judge should determine suppression issues. See Thomas & Pollack, *supra* note 205, at 175; cf. Steiker, *supra* note 209, at 851 (arguing for exclusionary rule "[f]or the same reasons that we have turned to judges to enforce the anti-majoritarian provisions of the First and Fourteenth Amendments").

221. See, e.g., William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, *supra* note 2, at 588 ("The likeliest explanation for giving greater leeway to group stops is that politics provides an adequate remedy for overzealous police action; groups of drivers [for example], unlike the solitary suspect, can protect themselves from overzealous police tactics at the polls.").

222. *Id.* at 588.

223. This objection is apart from the criticism that some groups will be more effective than others at using the political process. See *id.* at 589 (acknowledging that because "some groups can protect themselves better than others . . . judicial review must be preserved where there is a high likelihood of impermissible discrimination").

224. Government officials, for example, defended efforts to control crime in low-income housing projects through random warrantless searches of apartments on the basis that a majority of housing project tenants supported the measures as a necessary step to reduce crime. See, e.g., Michael Kramer, *Clinton's House Rules*, *Time*, May 9, 1994, at 55. It is perhaps instructive that after the blanket sweeps were ruled unconstitutional, see *Pratt v. Chicago Housing Authority*, 848 F. Supp. 792 (N.D. Ill. 1994), the government formulated an approach that was more precisely tailored in its scope yet designed to reduce gun-related violence. The plan included a greater law enforcement presence, tenant patrols, searches of vacant apartments and public areas, and consent searches. See Clinton Administration Outlines Public Housing Search Policy, 55 *Crim. L. Rep.* 1114 (1994); Lloyd Cutler, *Letter to the Editor, Gun Sweeps and Tenants' Rights*, *N.Y. Times*, Apr. 25, 1994, at A14. Although the response itself was not entirely noncontroversial, see Tracey Maclin, *Public Housing Searches Ignore the Constitution*, *Christian Sci. Monitor*, May 24, 1994, at 19 (arguing that mandatory consent-to-search lease clauses would be

an individual who can be trusted to exercise her liberties responsibly.²²⁵ And if one accepts the idea that the long-term legitimacy of the government is dependent upon all citizens having the belief that the government draws its power to govern from their consent, then that belief is undermined, both symbolically and in very real terms, when the government acts in a manner that belies a trust of the citizen to act responsibly.

CONCLUSION: THE COSTS OF CIVIL LIBERTIES

This Court has gone far toward accepting the doctrine that civil liberty means . . . that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

—Justice Robert Jackson²²⁶

Few have captured as vividly as Justice Jackson the tension between protecting rights and knowing that some will abuse those rights and act irresponsibly. The First Amendment is the constitutional shelter for progressive visionaries, but it is also the refuge of those who preach hatred. And while the Fourth Amendment erects a barrier from government intrusion for those who wish to live peacefully, it is also a barrier behind which the drug smuggler will try to hide. As Justice Jackson suggested, the question is at what point the short-term danger is so great that it must take precedence over the right to liberty.²²⁷

unconstitutional), the response does demonstrate that barring high-profile blanket searches may actually encourage a more efficient long-term plan for targeting crime.

225. As Justice O'Connor has observed:

Fourth Amendment rights have at times proved unpopular; it is a measure of the Framers' fear that a passing majority might find it expedient to compromise Fourth Amendment values that these values were embodied in the Constitution itself Legislators by virtue of their political role are more often subjected to the political pressures that may threaten Fourth Amendment values than are judicial officers.

Illinois v. Krull, 480 U.S. 340, 365–66 (1987) (O'Connor, J., dissenting) (objecting to majority's extension of exclusionary rule's good faith exception to reliance on statutes).

226. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

227. One of the most dramatic portrayals of this tension occurred during the oral argument in the *Pentagon Papers* case, *New York Times Co. v. United States*, 403 U.S. 713 (1971).

THE COURT [Justice Stewart]: But let me give you a hypothetical case. Let us assume that when the members of the Court go back and open up this sealed record, we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of 100 young men whose only offense had been that they were 19 years old, and had low draft numbers. What should we do?

MR. BICKEL [for the *New York Times*]: Mr. Justice, I wish there were a statute that covered it.

Currently, the answer to that question for the Fourth Amendment is answered under the rubric of reasonableness, which, as I have argued, is incompletely measured through the weights of privacy and the government need for the intrusion. The pressing needs of an immediate crisis almost always will seem to justify a government intrusion, short of random full-scale house searches, in light of the privacy invasion. Looked at in isolation, it is better to have the shoreline of one's island of privacy partially eroded by government surveillance than to have the entire island overrun by barbarians.

A "suicide pact," however, may arise not only from the inability to eradicate the short-term danger, but also through the undermining of the long-term principles that provide the sustainability of a government dependent upon the trust of its people.²²⁸ Indeed, while Justice Jackson sounded the haunting warning of enforcing liberties so rigidly that they become a suicide pact, he also was acutely aware, in part because of his Nuremberg experiences, of the long-term dangers attendant to not protecting the citizen's independence from the government. Writing in the rather mundane context of a search of a bootlegger, Justice Jackson was led to observe:

[The Fourth Amendment's protections], I protest, are not mere second-class rights but belong in the catalog of indispensable

THE COURT [Justice Stewart]: Well there isn't, we agree—or you submit—so I'm asking in this case, what should we do?

MR. BICKEL: I'm addressing a case which I am as confident as I can be of anything, Your Honor will not find that when you get back to your chambers. It's a hard case. I think it would make bad separation of powers law, but it's almost impossible to resist the inclination not to let that information be published, of course.

THE COURT [Justice Stewart]: . . . I'm posing a case where the disclosure of something in these files would result in the death of people who were guilty of nothing.

MR. BICKEL: You're posing me a case, of course, Mr. Justice . . .

. . . .

. . . in which the chain of causation between the act of publication and the feared event—the death of these 100 young men—is obvious, direct, immediate—

THE COURT [Justice Stewart]: That's what I'm assuming in my hypothetical case.

MR. BICKEL: I would only say, as to that, that it is a case in which, in the absence of the statute, I suppose most of us would say—

THE COURT [Justice Stewart]: You would say the Constitution requires that it be published, and that these men die? Is that it?

MR. BICKEL: No. No, I'm afraid I'd have—I'm afraid my inclinations of humanity overcome the somewhat more abstract devotion to the First Amendment, in a case of that sort.

71 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 239–40 (Philip B. Kurland & Gerhard Casper eds., 1975).

228. Cf. P.S. Elder, Sustainability, 36 McGill L.J. 831, 832 (1991) (examining, within context of environmental law, role of law towards "[meeting] the needs of the present without compromising the ability of future generations to meet their own needs" (quoting Our Common Future: The World Commission on Environment and Development 43 (1987))).

freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.²²⁹

It is tempting to dismiss Justice Jackson's words as an overwrought warning that has little place in the United States where, if anything, the popular view is that the courts have given too much leeway to the criminal element at the expense of law enforcement. Before engaging in such a quick dismissal, however, it may be worthwhile to mull over Justice Jackson's words a bit further.

First, consider whether the law enforcement techniques under scrutiny do not have the potential if abused to resemble the archetypal image of an authoritarian regime that exercises control over the citizenry through methods such as demands for identification at the police barrier.²³⁰ The Supreme Court alone, whose docket reflects but a fraction of law enforcement activities, has recently had before it cases involving the random demand for identification papers of workers in their workplace,²³¹ the random request to search baggage of those traveling on mass transportation,²³² the random boarding of vessels to demand papers,²³³ the random stopping of vehicles at checkpoints to investigate the violation of immigration laws,²³⁴ the random stopping of vehicles at checkpoints to investigate the violation of traffic sobriety laws,²³⁵ the random sniffing of schoolchildren for drugs by police dogs,²³⁶ and the drug testing of federal employees solely because they are seeking promotion or

229. *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting).

230. One commentator has strung together the Court's decisions to 'make' an imaginary World War II propaganda film about an enemy nation where the police are engaged in the activities that the Court has approved, such as dog sniffs, helicopter overflights, and the like. See Mitchell, *supra* note 27, at 35-36.

231. See *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984).

232. See *Florida v. Bostick*, 501 U.S. 429 (1991). The state courts that had considered the employed tactics expressly analogized the techniques to those associated with dictatorial regimes. See *supra* note 168.

233. See *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

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

235. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

236. See *Doe v. Renfrow*, 451 U.S. 1022 (1981) (Justice Brennan, dissenting from denial of cert.) (involving assistant principal who, accompanied by police-trained German shepherd, dog handler, and uniformed police officer, carried out 2 1/2 hour search in which dogs were led up and down aisles of classrooms sniffing students as they sat at their desks).

transfer to certain positions.²³⁷ If the perspective is expanded beyond the formalities of the judicial docket to other forums,²³⁸ concerns over law enforcement-citizen interactions, especially in the minority community, become increasingly great.²³⁹

As important as any privacy intrusion that may result from these activities, however, is the underlying message that is sent when such activities are given judicial approval: despite the absence of any wrongdoing, the government may assume that the citizen has violated the law and undertake measures to confirm that assumption. The most basic premise of reciprocal government-citizen trust is thus turned into a unilateral proposition that the individual citizen must trust the government to use its intrusion power wisely, but the government need not reciprocate in its trust of the individual to obey the law. Fortunately, the government generally has exercised its growing power in a nonabusive fashion, but the Fourth Amendment requires that primary control over future use of the power be placed in the citizenry and not in the government's discretion.²⁴⁰

237. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). This list logically should also include those cases where, because the Court held that the government intrusion does not constitute a "search" within the meaning of the Fourth Amendment, the intrusion does not require any suspicion. The list thus would also include police activities such as flyovers by helicopters and airplanes, the use of pen registers, inspections of a bank's copies of personal checks, or snooping in someone's garbage. See *supra* notes 140-153 and accompanying text.

238. And as Justice Jackson noted in *Brinegar v. United States*, the courts will confront only a fraction of all unlawful searches because there will be many law enforcement intrusions upon "innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

239. An ever expanding body of literature, drawing upon both statistical and anecdotal evidence, has highlighted the tension between police and minority communities, especially in the area of street encounters. See, e.g., James M. Doyle, "It's the Third World Down There!": The Colonialist Vocation and the American Criminal Justice System, 27 *Harv. C.R.-C.L. L. Rev.* 71 (1992); Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 *Fordham Urb. L.J.* 621, 625 (1993) (discussing patterns and anecdotal evidence of police harassment of African-American men); Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 *Yale L.J.* 214, 224 (1983) (stating that police sometimes assert that suspect's race contributes to their decision to detain him); Maclin, *supra* note 152, at 747 n.110 (drawing upon number of sources to brilliantly show how Justice Scalia's invocation, in *California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991), of the proverb that "the wicked flee when no man pursueth" to show that avoidance of police indicates guilt, has little application to black youth who may have many alternative reasons for avoiding police); Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 *How. L.J.* 567 (1991) (examining how African-Americans are subjected to widespread warrantless searches and seizures).

240. As the Michigan Supreme Court noted in departing from the United States Supreme Court's deference to legislative judgment: "[I]t is not the genius of our system that the constitutional rights of persons shall depend for their efficacy upon legislative benevolence. Rather, the courts are charged with the solemn obligation of erecting around those rights, in adjudicated cases, a barrier against legislative or executive invasion." *Sitz v. Michigan Dep't of State Police*, 506 N.W.2d 209, 224 (Mich. 1993).

In a time when violence abounds, arguing in defense of the symbolic message of the Fourth Amendment may strike some as naive at best and misguided at worst. But a lesson is being taught when schoolchildren are subjected to acts such as random searches by drug-sniffing dogs²⁴¹ or when the very law enforcement agents responsible for enforcing the law are made to undergo random testing.²⁴² The lesson is that, despite responsible individual behavior, the government has the power to exercise its judgment and discard trust of the individual in the name of a perceived greater good. It is this discarding of trust, however, that in the long run jeopardizes the greater good by upsetting the reciprocal government-citizen trust that forms the foundation of a legitimate government. This principle currently finds little voice in Fourth Amendment analysis, but, with proper development, it can help forge a safeguard in a changing world that not only protects individual privacy but also sustains the government-citizen balance that is the cornerstone for our democracy.

241. See, e.g., *Doe v. Renfrow*, 451 U.S. 1022 (1981) (Brennan, J., dissenting from denial of cert.). As Justice Stevens perceptively noted in a different case while dissenting from the possibility of student searches based upon trivial violations of school regulations,

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth.

New Jersey v. T.L.O., 469 U.S. 325, 385-86 (1985) (Stevens, J., concurring in part and dissenting in part).

242. Justice Scalia was acutely aware of the lesson being taught by the majority's approval of drug testing of customs officials:

Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting).