

Redefining What's "Reasonable": The Protections for Policing

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ABSTRACT

How should the Constitution govern police surveillance and investigations? Once, the formal rules were clear, even if not faithfully observed: searches and seizures required probable cause and a warrant. Today, however, the Supreme Court has said that many forms of police activity need only be "reasonable." But what is required to ensure that policing is "reasonable"? This question has become all the more pressing and perplexing as policing has shifted from a reactive, investigative approach that centers on suspicion that a particular person has committed a particular crime to a more programmatic, deterrent approach that relies on searching and seizing people without any suspicion of wrongdoing. In numerous contexts today—among them the use of drones, stop and frisk, bulk data collection, DNA testing, and a myriad of other controversial activities—the government justifies warrantless and often suspicionless surveillance by applying a mushy reasonableness balancing test. Courts, commentators, politicians and police all are at a loss to know precisely what is, or should be, required.

This Article argues that matters can be simplified greatly by focusing not on the policing technique at issue, but on the protections that ensure against the use of arbitrary police discretion. Whatever else the Fourth Amendment safeguards, there is widespread agreement that it is a protection against arbitrary and unjustified government intrusion. Policing has a binary nature to it. Policing agencies engage in two types of searches: (1) They investigate, based on individualized suspicion ("cause") to believe a person has committed a crime; and (2) they engage in suspicionless searches that seek, in a programmatic or deterrent way, to curb a social problem and prevent criminal conduct. The categories themselves are not, nor are they meant to be, airtight. Rather, what is clear are the protections necessary to safeguard liberty in each of the two circumstances. In every instance, government must be prepared to answer the question of why it has singled out a particular individual or group for attention. In the context of investigative, suspicion-based searches, the re-

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quirement of probable cause performs this function. It explains why the police are searching one person, not another. But cause makes no sense with regard to programmatic or deterrent searches—such as airport security or sobriety roadblocks—where there is no “suspect,” and thus no suspicion. Here, instead, the safeguard is generality—either we are all searched, or who gets searched is decided in a truly random or otherwise indiscriminate way. And if the government wants to search a subset of the population, standard Equal Protection Clause analysis, which typically is ignored in the area of policing, provides the proper rubric for asking whether singling out one group, but not another, is justified.

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INTRODUCTION

When it comes to regulating policing—from the beat cop to the National Security Agency—the Supreme Court is flailing.¹ Not that anyone else is doing much better. Courts and commentators, mayors and presidents, civil libertarians, police chiefs, and spymasters alike cannot come to any kind of consensus as to how the enigmatic text of the Fourth Amendment is supposed to apply to new enforcement challenges, policing strategies, and technologies. Controversy over these issues undoubtedly reflects variant political agendas, but the turmoil runs deeper. People are simply at a loss to understand how the Constitution governs present-day policing.

It wasn't always this way. The formal rules were once clear, even if not always faithfully observed.² Searches and seizures were said to

¹ For the purposes of this Article, "policing" refers to the exercise of force or surveillance in order to deter crime or apprehend violators. Some understand intelligence gathering as a separate endeavor altogether, but the distinction is problematic. First, as this Article's discussion of the "primary purpose" doctrine makes clear, it is not always possible to distinguish between "ordinary law enforcement" and other societal needs. Second, it is increasingly clear that there is a spillover between intelligence agencies and law enforcement agencies. See ATT'Y GEN., THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS (2008), <http://www.justice.gov/sites/default/files/ag/legacy/2008/10/03/guidelines.pdf>.

² See *infra* Part I, regarding the claims in this paragraph.

require probable cause and a warrant. If a police officer wanted to stop or search someone, he had to have a good reason. And preferably, that officer would have obtained prior approval from a judicial officer. But then lesser standards such as “reasonable” and “articulable” suspicion crept into the law, sometimes substituting for probable cause. Today, the Supreme Court frequently states that suspicion is not an “irreducible requirement,”³ meaning that the government can search and seize with nary a reason to suspect wrongdoing. Warrants have been dispensed with pretty much altogether.⁴ Instead, we are told, searches need only be “reasonable.” But what makes them so?

The problem finds its root in the beguiling phrasing of the Fourth Amendment, which seems to require warrants and probable cause and yet, simultaneously, does not. The first clause establishes “[t]he right of the people to be [free from] unreasonable searches and seizures.”⁵ The second demands that “no Warrants shall issue” except those supported by probable cause and describing with particularity what is to be searched or seized.⁶ But in prescribing the criteria a warrant must meet *if* issued, the text does not dictate that a warrant *must* issue. Can the government simply dispense with obtaining warrants before the fact—and thus do away with any *ex ante* showing of “probable cause”—so long as its actions are not deemed “unreasonable” after the fact?

Today, we are confronted with the insuperable problem of discerning what it means for a search or seizure to be “reasonable.”⁷ Whether the issue is DNA testing, stop-and-frisk, foreign intelligence data collection, administrative searches of businesses, DUI and drug-trafficking roadblocks, or one of myriad other aspects of modern-day policing, it is increasingly difficult to say what the government must do or demonstrate before intruding into citizens’ lives. All that the Supreme Court has provided by way of guidance is a growing litany of vague and indeterminate phrases and legal tests.⁸ Commentators of

3 United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); *see also, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822, 828 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

4 *See infra* Part I.A.

5 U.S. CONST. amend. IV.

6 *Id.*

7 The problems of determining what constitutes a “search” or “seizure” are equally as great, but this Article does not address them. *See, e.g.*, United States v. Jones, 132 S. Ct. 945 (2012) (fractured Court applying varied methodologies to determine if long-term GPS tracking is a “search”).

8 For example, under *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000), courts are told to distinguish searches that fulfill the “special needs” of government from those whose “primary purpose” is “ordinary law enforcement,” although the Supreme Court itself has proven

every ideological stripe treat the doctrine of the Fourth Amendment with derision, but little in the way of a workable solution has been proposed to take its place.⁹

The problem is exacerbated because the very nature of policing has shifted from a reactive crime-solving model towards intelligence gathering, regulation, and deterrence.¹⁰ "Cause," once the *sine qua non* of policing, makes little sense in this deterrent context. In addition, breakneck technological advances have changed the nature of law enforcement, leaving us struggling to define what is permissible and what is not. It is hard to know what to do with a doctrine that, until recently, did not differentiate the search of a cell phone from that of a cigarette package.¹¹

What is needed is precisely what we do not have: considered, coherent rules. Police work is essential to protect citizens from threats both foreign and domestic, but it also involves intrusive surveillance and uninvited force. Mushy tests and unsettled doctrine do little to give guidance to policing officials or to protect the liberties of the people. The stakes here are extremely high, as is evident by the public anger over the National Security Administration (NSA) disclosures¹² and political battles over stop-and-frisk.¹³

unable to do so. See *Ferguson v. City of Charleston*, 532 U.S. 67, 86–87 (2001) (Kennedy, J., concurring in the judgment) (explaining the flaws in the majority's interpretation of *Edmond*'s "primary purpose" holding). The doctrine in this area asks whether an intrusion is "minimal" and whether the government interest is "substantial," yet courts apparently view the nature of intrusions very differently than those who are subjected to them. See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 737–42 (1993) (empirical study demonstrating that there is little relationship between the Court's evaluation of these intrusions and the way that citizens view them); *infra* Part I.A.4 (explaining the Court's balancing test).

⁹ See *infra* Part I.C.

¹⁰ See EMILY BERMAN, BRENNAN CTR. FOR JUSTICE, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS 7–25 (2011), <https://www.brennancenter.org/sites/default/files/legacy/AG-ReportFINALed.pdf> (describing the changing role of the FBI with respect to intelligence gathering); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 262–70, 277 (2011) (detailing the government's increased use of dragnet searches); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1871–75 (2015); Christopher Slobogin, *Government Dragnets*, 73 L. & CONTEMP. PROBS. 107, 107–09 (2010) (listing large-scale, contemporary problems that the Fourth Amendment is meant to address).

¹¹ See *Riley v. California*, 134 S. Ct. 2473, 2484–85 (2014) (declining to extend *United States v. Robinson* to cell phone searches); *United States v. Robinson*, 414 U.S. 218, 223–24 (1973) (concluding that searching the contents of a defendant's cigarette packet pursuant to an arrest for a traffic offense was reasonable).

¹² See, e.g., Heather Kelly, *Protests Against the NSA Spring Up Across the U.S.*, CNN (July 5, 2013, 12:24 PM), <http://edition.cnn.com/2013/07/04/tech/web/restore-nsa-protests>.

¹³ See, e.g., Daniella Diaz, *Chris Christie: I Would Bring Back Stop-and-Frisk*, CNN (Sept.

Consider for a moment the possibility that the doctrine has complicated things far more than is necessary—and that this all could be, and in fact is—much simpler than it appears. That amidst of all this chaos, it is possible to identify relatively simple rules. That, at least, is the argument of this Article.

Policing has a binary nature to it—a division both natural and intuitive. When policing agencies police, they do one of two things: (1) they investigate, and (2) they seek, in a programmatic or regulatory way, to curb a social problem.¹⁴ The first of these is familiar; it's what most policing dramas on television are about. There is an offense that someone has committed or is about to commit. And there is a suspect, whom the police are trying—through leads, evidence, and the like—to find. The second category is familiar too: people experience it every time they fly. Airport security is not designed to track down or gather intelligence on the person we already think has the bomb. It is designed to discourage people from bringing bombs on airplanes in the first place. The same is true of housing inspections, drunk-driving roadblocks, or immigration checkpoints. These searches are “regulatory” or “programmatic” or “deterrent” in that they address a problem on a systemic level rather than focusing on individual suspicion.

To be clear, the categories themselves are not, nor are they meant to be, airtight. The two types of searches may have overlapping effects. Drunk-driving roadblocks, for example, primarily exist to deter people from driving while inebriated, but they also catch people currently driving drunk and send them to jail. By the same token, if police investigate enough individual crimes and catch enough criminals, investigatory work will have a deterrent effect on others.

But something critical separates these two searches, a fact that receives insufficient attention in the doctrine given that it is—in a sense—everything. Investigative searches occur with some modicum of “cause.” To say that there is a “suspect” means there is suspicion. One category of searches, in other words, is *suspicion-based*. On the other hand, many of the searches policing officials engage in today are *suspicion-less*. This is the hallmark of programmatic, or deterrent, searches. They are not aimed at a suspect but at a broad body of the

8, 2015, 12:06 PM), <http://www.cnn.com/2015/09/08/politics/2016-election-chris-christie-stop-and-frisk/index.html>; Christopher Mathias, *Mayor Bill De Blasio Breaks with Progressives over Stop-and-Frisk Legislation*, HUFFINGTON POST (Nov. 13, 2014, 6:28 PM), http://www.huffingtonpost.com/2014/11/13/right-to-know-act_n_6154856.html.

¹⁴ See *infra* Part II.

people—perhaps all of us—to prevent even the contemplation of offending.

Paying attention to this single distinguishing characteristic—whether a search is suspicion-based or suspicion-less—is essential because it allows those formulating and applying the doctrine to focus in a clear-headed way on what matters: the *protections* necessary to safeguard constitutional liberty. The doctrine tends to want to classify cases along various lines such as the nature of the government's intrusion, or its reason for intruding.¹⁵ But the real goal of the doctrine should be ensuring that there are protections in place to safeguard the constitutional interests of the targets of policing.¹⁶ The only reason to categorize searches is to illuminate the appropriate protections in various circumstances. And to that extent, only two categories matter: suspicion-based and suspicion-less searches.

Start from the following proposition: the Fourth Amendment exists to protect individual liberty, and in particular—for present purposes—to prevent arbitrary and unjustified searches and seizures. The Fourth Amendment may well do more—it may ban some sorts of searches and seizures altogether—but it must at least do this much. For centuries, courts and commentators have said that preventing arbitrary and unjustified searches and seizures is the primary evil against which the Fourth Amendment is aimed.¹⁷ No search is reasonable unless the government can provide an adequate answer to the target's question: "Why me? Why have I been singled out for this unwelcome attention?" Even if the government is allowed to "search" and "seize" in given situations, it surely cannot pick the subjects of its attentions in a wholly arbitrary, malevolent, or discriminatory way.

Note how this purposive approach—defining adequate protections based on a need to avoid unjustified and arbitrary enforcement—fits with the two categories of searches. For investigative searches, the existence of "cause"—of suspicion—distinguishes in a relatively straightforward way when searching is warranted and when it is not. Before the police go into someone's house to investigate a crime, they must have a reason—cause—to distinguish that person from his neighbor. But requiring a showing of cause as a means of avoiding government arbitrariness makes no sense with regard to programmatic searches, because these searches are by definition suspicionless. How can there be "cause" when there is no suspect and

¹⁵ See *infra* Parts I.A.3–4.

¹⁶ See *infra* notes 190–91 and accompanying text.

¹⁷ See *infra* note 189 and accompanying text.

thus no suspicion? In these situations, the safeguard instead must be something different. And that different protection is: generality. Either everyone is searched, or who gets searched must be decided in a truly random or otherwise nondiscriminatory way—in a manner that eliminates arbitrariness or uncabined discretion.

The relevant question in each case, then, is what kind of search is occurring, and thus which of these protections is necessary to prevent government arbitrariness—cause, or generality. That is the core of the argument here. Each search must be looked at and the question answered: Is the government investigating, based on suspicions about a particular suspect, in which case it makes sense to rely on a showing of cause as a protection? Or is it a search that proceeds in the absence of any cause—suspicionless—and thus the safeguards of generality kick in? The question in every case has to be: Is there a protection in place to avoid government arbitrariness?

Ultimately, as Part III explains, this approach will require some refinement, but as a first cut it is a huge advance on the present, confused state of the doctrine. Using this approach we can see that what to do about matters such as stop-and-frisk, bulk data collection, DNA testing and the like are much less complicated than they have appeared. Either the search is suspicion-based—and thus sufficient cause must be present—or it is not, and an alternative safeguard against arbitrary and unjustified searching must be present. It is this last bit—the appropriate safeguard in the absence of cause—that the doctrine most frequently overlooks or gets wrong.

Part I describes the collapse of the warrant and probable cause model, and the widespread confusion that has occurred in its wake. Part I.A shows how the Supreme Court’s “special needs” doctrine, which arose out of the collapse of the warrant and probable cause model, cannot be applied coherently. Part I.B describes the very real-world toll of this confusion in terms of lost liberty and even life. Part I.C explains that although scholarly commentary properly critiques the doctrine, it has failed to offer a workable alternative.

Part II then demonstrates that if one focuses on the need to avoid arbitrariness—on the justification the government must have for searching or seizing any particular person—most of present-day confusion can be eliminated. Whether a search is justified depends not on the kind of search being employed, but on the protections that serve in that situation to guard against arbitrary and unjustified government conduct. As this Part explains, the Supreme Court once knew, but has since forgotten, that policing and its protections were binary, and that

very different approaches are required for suspicion-based and suspicionless searches.

Part III then turns to the hard questions: Are suspicion-based searches ever permissible in the absence of probable cause; and under what circumstances may suspicionless searches target an identifiable subset of the population? As to the latter, Part III.A argues that Equal Protection doctrine, not that of the Fourth Amendment, should govern these "subpopulation" searches. As to the former, Part III.B argues that *Terry v. Ohio*, permitting stops and frisks on less than probable cause may have been sensible law, but it has been abused beyond comprehension, as the statistics of stop-and-frisk and racial profiling make clear. The answer is to return *Terry* to its original roots, permitting investigative detention only if police can specify—with articulable facts—what specific crime is being committed. Finally, Part III.C suggests that some searches on less than probable cause (or without warrants) may be permissible as applied to particular groups—kids, government workers, and convicts—that have a special relationship to the state.

The question of what sorts of policing intrusions are "reasonable" is one of the most challenging of our day. We face very real threats to our security, but we also face overblown or overstated threats, the reaction to which is an equally great threat to our liberty. Courts are only going to be so good at sorting these out—surely less good than those on the front line of protection. But what courts can do is what they historically have done: insist on clear safeguards to avoid arbitrary, unjustified, malevolent, or discriminatory policing.

I. DOCTRINE LOST

In its 1967 decision in *Katz v. United States*, the Supreme Court stated that searches conducted without a warrant based upon probable cause were *per se* unreasonable.¹⁸ *Katz* was a path-breaking decision for its ruling on what defined a "search" for Fourth Amendment purposes, but this statement about warrants and probable cause was altogether unremarkable. Whatever the actual practice of policing officials, for much of the latter twentieth and early twenty-first centuries courts treated the *Katz* warrant and probable cause standard as the presumptive norm. Today, though, the Court frequently dispenses with warrants and even probable cause, stating that searches and

¹⁸ *Katz v. United States*, 389 U.S. 347, 354–57 (1967).

seizures need only be “reasonable.”¹⁹ This Part chronicles the collapse of the doctrinal model based on warrants and probable cause, its replacement with a mushy “reasonableness” standard, and the very real-world consequences of that shift.

A. (De)Evolution of the Doctrine

1. The Breach

The breach in the doctrinal warrant and probable cause model occurred in the early 1960s, in two cases, *Camara v. Municipal Court of San Francisco* and *Terry v. Ohio*.²⁰ *Camara* favored the targets of government searches, and is discussed in the next Part. *Terry*, on the other hand, radically undermined the protections of the Fourth Amendment. It also presented a problem of undeniable difficulty.

On Halloween afternoon in 1963, Detective Martin “Mac” McFadden was walking his usual beat in downtown Cleveland on the lookout for shoplifters when he observed John Terry and a companion pacing back and forth peering into a small jewelry store window.²¹ Eventually a third man joined them.²² Believing the men to be casing the store for a stick-up, Detective McFadden approached them and asked their names.²³ When someone “mumbled something,” McFadden grabbed Terry, spun him around, and patted him down for weapons.²⁴ McFadden found a .38 revolver on Terry and another on one of his companions, Richard Chilton.²⁵

Whether the weapons charges leveled against two of the men would stick depended on whether Detective McFadden’s actions violated the Fourth Amendment. As a doctrinal matter, it was going to be no easy feat to establish that McFadden had acted lawfully. It could have been argued that McFadden’s actions did not constitute a “search” or “seizure” at all. But the Chief Justice, writing for the Court, declined to go down this road, remarking that “it is nothing less than sheer torture of the English language to suggest that a careful

¹⁹ See *infra* notes 37–50 and accompanying text.

²⁰ *Terry v. Ohio*, 392 U.S. 1 (1968); *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967).

²¹ *Terry*, 392 U.S. at 5. At oral argument, Terry’s lawyer informed the Court that McFadden had admitted he was not sure if the men were looking into a jewelry store or airline office. Oral Argument at 03:07, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), http://www.oyez.org/cases/1960-1969/1967/1967_67.

²² *Terry*, 392 U.S. at 6.

²³ *Id.* at 6–7.

²⁴ *Id.* at 7.

²⁵ *Id.*

exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.'"²⁶ Alternatively, one could have acknowledged that it was a search, but deem it entirely justified by probable cause.²⁷ The difficulty, though, was probable cause of what? "Store windows," the Court recognized, "are made to be looked in."²⁸

Still, in the fraught environment of 1968, there was little chance the Justices would let Terry walk. Public indulgence in the Warren Court's defendant-friendly decisions²⁹ had crumbled in the face of rising crime rates and inner-city violence in the mid-1960s.³⁰ As the ghettos burned, Richard Nixon and George Wallace ran presidential campaigns attacking the Justices for being soft on crime.³¹ In the *Terry* opinion, the Justices were forced to walk an incredibly fine line between the increasing use—and apparent misuse—of stop-and-frisk authority, and the public's clamor to let the police do what was necessary to control crime.³²

Stuck between a doctrinal rock and a hard place of deep public dissatisfaction, the *Terry* Court abandoned the warrant and probable

²⁶ *Id.* at 16.

²⁷ Earl Dudley, Jr., who was the Chief Justice's law clerk assigned to the *Terry* case, has said the original draft of the opinion resolved the case on this ground. See Earl C. Dudley, Jr., *Terry v. Ohio, the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 894 (1998).

²⁸ *Terry*, 392 U.S. at 23; *accord id.* at 36 (Douglas, J., dissenting) ("[T]he crime here is carrying concealed weapons; and there is no basis for concluding that the officer had 'probable cause' for believing that *that* crime was being committed." (emphasis added)).

²⁹ Between 1961 and 1966 the Warren Court guaranteed that states could not use unlawfully obtained evidence against a defendant at trial, see *Mapp v. Ohio*, 367 U.S. 643, 643 (1961); it granted all indigent criminal defendants the right to counsel, see *Gideon v. Wainwright*, 372 U.S. 335, 335 (1963); and it required that interrogated persons be read and understand their right to remain silent and right to an appointed lawyer, see *Miranda v. Arizona*, 384 U.S. 436, 437 (1966).

³⁰ See Steven Pinker, *Decivilization in the 1960s*, in 2 HUMAN FIGURATIONS: LONG-TERM PERSPECTIVES ON THE HUMAN CONDITION 3 (2013) (describing the surge in violence that characterized the 1960s); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1447–50 (2004) (arguing that *Terry* was influenced by public desire for law and order following the turbulent 1960s); see generally Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59 (discussing the evolution of constitutional doctrine as a response to racial crisis during and after the Warren Court).

³¹ See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 276–77 (2009) (describing how crime factored into the 1968 presidential election); *Nixon Links Court to Rise in Crime*, N.Y. TIMES, May 31, 1968, at 18.

³² See David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975, 977–81 (1998) (providing an overview of the social context at the time of *Terry*).

cause model, concluding that “the conduct involved in this case must be tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures.”³³ As for defining what was reasonable, the Court held there was “no ready test” other than to balance “the need to search [or seize] against the invasion which the search [or seizure] entails.”³⁴ Applying this test, the Court held that an officer could conduct a brief investigatory stop so long as he could articulate specific facts that would lead a reasonable person to believe that the individual had committed or was about to commit a crime.³⁵ The officer would then be permitted to conduct a limited search for weapons so long as he reasonably believed the suspect was armed and dangerous.³⁶

2. *The Fallout*

Despite the Court’s best efforts, *Terry*’s rationale proved difficult to cabin, and soon the Court was sanctioning many searches based on less than probable cause (and without warrants).³⁷ In cases following *Terry*, the Court required only “reasonable suspicion” for, inter alia, pulling over cars near the border and checking occupants’ immigration status;³⁸ stopping and questioning travelers in airports who were thought to be smuggling drugs;³⁹ rifling through the personal belongings of kids in schools;⁴⁰ searching government employees at their workplace;⁴¹ and entering the private homes of probationers.⁴² The

³³ *Terry*, 392 U.S. at 20.

³⁴ *Id.* at 21 (alteration in original) (quoting *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 536–37 (1967)). *Camara* was a breach of a very different sort. Superficially, *Camara* did require probable cause and a warrant. See *infra* Part II.B (discussing the dilemma at issue in *Camara*).

³⁵ *Terry*, 392 U.S. at 21.

³⁶ *Id.* at 27.

³⁷ The *Terry* Justices attempted to limit their holding to the “quite narrow question” of “whether it is *always* unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest.” *Id.* at 15 (emphasis added).

³⁸ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 879–82 (1975) (finding that the strong government interest in policing its borders outweighed the intrusion on the individual).

³⁹ See *United States v. Sokolow*, 490 U.S. 1, 7–10 (1989) (approving the DEA’s use of a drug courier profile as the basis of reasonable suspicion for a stop); see also Jodi Sax, Note, *Drug Courier Profiles, Airport Stops and the Inherent Unreasonableness of the Reasonable Suspicion Standard After United States v. Sokolow*, 25 LOY. L.A. L. REV. 321, 348 n.240 (1991) (collecting cases that suggest the reasonable suspicion standard leads to significantly more innocent travelers being stopped than ones carrying drugs).

⁴⁰ See *New Jersey v. T.L.O.*, 469 U.S. 325, 341–43 (1985) (holding that a vice principal had “reasonable grounds” for searching a high school freshman’s purse for cigarettes).

⁴¹ See *O’Connor v. Ortega*, 480 U.S. 709, 725–26 (1987) (upholding a reasonable suspicion-based search of an employee’s desk).

Justices took to saying, in words remarkable to those familiar with the *Katz* model, that "'probable cause' is not an irreducible requirement of a valid search."⁴³ The Court also permitted searches with no individualized suspicion at all—employees and students were drug tested;⁴⁴ drivers were stopped at DUI checkpoints;⁴⁵ arriving ships were searched for contraband;⁴⁶ and prisoners were strip-searched⁴⁷—all without any prior indication that the person searched had done anything wrong.⁴⁸

In the wake of *Terry*, the challenge the Supreme Court faced—and ultimately failed—was to define clearly when the warrant and probable cause model applied, and when the reasonableness model was enough. For a long time, the Court maintained that the warrant and probable cause model was paramount.⁴⁹ But as the "exceptions" to the traditional model piled up, the Court began to describe the Fourth Amendment as merely a guarantee that "searches and seizures be reasonable," without referencing the need for a warrant or probable cause.⁵⁰

3. *The Incoherent "Special Needs" Doctrine*

Eventually, the Supreme Court came to define the boundary between the warrant-and-probable-cause and reasonableness models

⁴² See *Griffin v. Wisconsin*, 483 U.S. 868, 875–76 (1987) (finding that the needs of the probationary system justified departing from the probable cause and warrant requirements).

⁴³ *T.L.O.*, 469 U.S. at 340; see also, e.g., *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) ("But the Fourth Amendment imposes no irreducible requirement of such suspicion.").

⁴⁴ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 822 (2002) (upholding drug testing for students enrolled in extra curricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 646 (1995) (upholding drug testing for student athletes); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 634 (1989) (upholding drug testing for federal railroad employees); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 679 (1989) (upholding drug testing for immigration officials).

⁴⁵ *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (approving the use of drunk driving roadblocks).

⁴⁶ *United States v. Villamonte-Marquez*, 462 U.S. 579, 593 (1983) (holding that customs officials may board vessels without suspicion).

⁴⁷ *Bell v. Wolfish*, 441 U.S. 520, 558–60 (1979) (authorizing the practice of strip searching prisoners after seeing outside visitors).

⁴⁸ *E.g.*, *id.* at 588 (allowing strip searches of all inmates, regardless of whether there was probable cause to believe the inmate was concealing contraband).

⁴⁹ See, e.g., *Dunaway v. New York*, 442 U.S. 200, 211–12 (1979) ("The narrow intrusions involved in [*Terry*] were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the 'long-prevailing standards' of probable cause" (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949))).

⁵⁰ *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985); see, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

with reference to a doctrine generally referred to as “special needs,” though the special needs test has proven incapable of coherent application. The idea of special needs found its genesis in Justice Blackmun’s concurring opinion in *New Jersey v. T.L.O.* In *T.L.O.*, the Court held that a high school assistant principal acted reasonably in searching a freshman’s purse upon “reasonable grounds” (but not probable cause) to believe that she had cigarettes in her bag, so long as the scope of the search was “reasonably related to the objectives.”⁵¹ Concurring, Justice Blackmun indicated he would allow the traditional standards to be suspended “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable”⁵² Justice Blackmun’s “special needs” test soon was embraced as the sine qua non of searches without probable cause.

It seems at times that there are as many “special needs” as there are cases approving government searches. Indeed, the phrase “special needs” is used here as a catchall—as a technical matter, the Court calls many of the searches or seizures lumped under this rubric by independent names, such as “administrative searches” or “border searches.”⁵³ Some cases find a special need where the government has unique authority, such as in schools and workplaces, or over individuals on supervised release.⁵⁴ Others claim such a need in supervising “closely regulated industr[ies],”⁵⁵ but what industries are included

⁵¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 345–47 (1985).

⁵² *Id.* at 351 (Blackmun, J., concurring in the judgment).

⁵³ The Court considers highway checkpoints, stops near the border, and administrative searches all to be separate, additional exceptions to the probable cause and warrant standard. *See Edmond*, 531 U.S. at 37–39. But the distinction is without a real difference; each ostensibly is based on the idea of a reduced expectation of privacy. *Id.* at 37; *New York v. Burger*, 482 U.S. 691, 702 (1987); *T.L.O.*, 469 U.S. at 351; *see also* Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419, 420–23 (2007) (detailing the Court’s schizophrenic treatment of suspicionless searches).

⁵⁴ *See Bd. of Educ. v. Earls*, 536 U.S. 822, 829–31 (2002) (noting that the government is responsible for health, safety, and discipline in public schools); *United States v. Knights*, 534 U.S. 112, 120 (2001) (recognizing a special government interest in searching probationers, who are presumably “more likely than the ordinary citizen to violate the law”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) (“Fourth Amendment rights . . . are different in public schools than elsewhere”); *O’Connor v. Ortega*, 480 U.S. 709, 732 (1987) (Scalia, J., concurring in the judgment) (finding special needs in government workplaces). In the prison context, the Court has cited the unique penological interests of correctional institutions to justify searches without cause. *See Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510, 1516–17 (2012); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

⁵⁵ *See, e.g., Burger*, 482 U.S. at 703–08 (designating automobile junkyards and vehicle dismantlers businesses as closely regulated businesses); *Donovan v. Dewey*, 452 U.S. 594, 602–03

within that category is extremely difficult to pin down.⁵⁶ Often, it seems, all that is required to deem a need "special" is simple expediency.⁵⁷

All the Court can seem to say with certainty is what a "special need" is *not*—"ordinary crime control"—yet even this exclusionary test has proven incapable of coherent application.⁵⁸ In *City of Indianapolis v. Edmond*, the Court held drug interdiction checkpoints to be invalid,⁵⁹ although it had previously upheld use of such checkpoints for immigration (in *United States v. Martinez-Fuerte*)⁶⁰ and drunk driving (in *Michigan Department of State Police v. Sitz*).⁶¹ The *Edmond* Court stated that because the "primary purpose" of the narcotics checkpoints was "to uncover evidence of ordinary criminal wrongdoing," there was no special need.⁶² But as the dissent in *Edmond* pointed out, the drunk drivers in *Sitz* were arrested, and the people caught transporting illegal aliens in *Martinez-Fuerte* were sent to jail.⁶³

(1981) (recognizing coal mining as a heavily regulated industry); *United States v. Biswell*, 406 U.S. 311, 315 (1972) (extending the exception to firearms dealers).

⁵⁶ See Jodi C. Remer, *The "Junking" of the Fourth Amendment: the Closely Regulated Industry Exception to the Warrant Requirement*, 25 AM. CRIM. L. REV. 791, 809 (1987) (explaining how the standards for the closely regulated business exception are "vague and difficult to apply").

⁵⁷ See *Earls*, 536 U.S. at 828–29 (finding a warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures" (quoting *Vernonia*, 515 U.S. at 653)); *Ortega*, 480 U.S. at 732 (Scalia, J., concurring in the judgment) (reasoning that the government "needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes"); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976) (allowing suspicionless roadblock stops because "the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"); see also *Skinner v. Ry. Labor Excs.' Ass'n*, 489 U.S. 602, 620–21 (1989) (approving toxicology tests of railroad employees to "assure that the restrictions [on drug and alcohol use] are in fact observed" (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987))). *Martinez-Fuerte*, *supra*, predates the "special needs" terminology but has afterwards been cited as a special needs search. See *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665, 668 (1989) (citing *Martinez-Fuerte*, 428 U.S. at 557, among cases establishing the special needs exception).

⁵⁸ See Butterfoss, *supra* note 53, at 422–23 (describing the Court's flailing attempts to distinguish "special" needs and noting that the Court has in various cases defined ordinary, non-"special" needs as "searches motivated by a 'law enforcement purpose,' 'general crime control purposes,' . . . an 'intent to aid law enforcement efforts,' . . . an 'investigatory police motive,' . . . a purpose to 'discover evidence of criminal wrongdoing,' . . . and searches 'in any way related to the conduct of criminal investigations.'"); *id.* at 434 (describing the confusing and ad hoc manner in which the Court has applied the special needs test).

⁵⁹ *City of Indianapolis v. Edmond*, 531 U.S. 32, 41, 44 (2000).

⁶⁰ *United States v. Martinez-Fuerte*, 428 U.S. at 543, 556–57 (1976).

⁶¹ *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447, 455 (1990).

⁶² *Edmond*, 531 U.S. at 40–42.

⁶³ *Id.* at 50 n.2 (Rehnquist, J., dissenting) (citing *Martinez-Fuerte*, 428 U.S. at 552).

In *T.L.O.*, the student was prosecuted in juvenile court.⁶⁴ Just a year after *Edmond*, in *Ferguson v. City of Charleston*, the Court fractured seriously over what the “primary purpose” holding of *Edmond* even meant.⁶⁵ Lower courts’ interpretations of the “primary purpose” test are all over the map.⁶⁶

4. Turning ‘Reasonableness’ into a Balancing Test

As the Court continued to struggle to distinguish searches that further an “ordinary law enforcement purpose” (and thus require a warrant and probable cause) from those that address a “special need” (and thus do not), the entire warrant-plus-probable-cause model appeared at risk of dying. In the 1999 Supreme Court case *Wyoming v. Houghton*, Justice Scalia announced a new approach to the Fourth Amendment: any search that was not contemplated by the framers when they drew up the Bill of Rights (in that case, the search of a vehicle passenger’s purse) was to be adjudged “under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”⁶⁷ The majority adopted this balancing approach in *Maryland v. King*, holding that no cause was necessary for what was plainly an investigative search serving “ordinary law enforcement” purposes—the collection of DNA samples from arrestees to compare to records in a cold case database.⁶⁸ Dissenting virulently, Justice

⁶⁴ *New Jersey v. T.L.O.*, 469 U.S. 325, 329–30 (1985).

⁶⁵ *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); see *id.* at 86–87 (Kennedy, J., concurring in the judgment) (disagreeing with the majority’s distinction between “immediate” and “ultimate” law enforcement objectives in interpreting *Edmond*).

⁶⁶ *Compare Mills v. District of Columbia*, 584 F. Supp. 2d 47, 56–57 (D.D.C. 2008), *rev’d and remanded*, 571 F.3d 1304 (D.C. Cir. 2009) (approving a system of checkpoints outside of high-crime neighborhoods because the goal was deterrence, not “mak[ing] arrests” or “detect[ing] evidence of ordinary criminal wrongdoing”), *with Mills v. District of Columbia*, 571 F.3d 1304, 1311–12 (D.C. Cir. 2009) (holding that the distinction between ordinary law enforcement and special needs does *not* turn on whether the goal is evidence-gathering or deterrence, but rather whether the objectives are criminal versus regulatory). *Cf. People v. Jackson*, 782 N.E.2d 67, 71–72 & n.2 (N.Y. 2002) (rejecting roadblocks with purposes including general crime control but lacking a clear primary purpose, and explicitly avoiding a decision as to whether it would be lawful if the asserted primary purpose was to *prevent*, rather than investigate, carjacking and taxi robbery); see also *City of Overland Park v. Rhodes*, 257 P.3d 864, 871, 875 (Kan. Ct. App. 2011) (Atcheson, J., dissenting) (deeming a DUI checkpoint designed to “educat[e] the public as a whole as far as the effects of alcohol on their driving” impermissible because, while a primary purpose cannot be ordinary law enforcement, it cannot be too *far* from ordinary law enforcement either).

⁶⁷ *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999).

⁶⁸ *Maryland v. King*, 133 S. Ct. 1958, 1966 (2013).

Scalia said that until that moment it had been “categorical” that searches for evidence of crime required some showing of cause.⁶⁹

Today, the Court is well on its way to turning the question of what is “reasonable” under the Fourth Amendment into a generalized and uncabined balancing test. Balancing tests are frequently derided as notoriously subjective and indeterminate; they often require weighing incommensurables.⁷⁰ But this balancing test is particularly pernicious.

There is no reason to believe the Justices—or lower courts—have the capability to assess either side of the balance, let alone compare the two. Survey evidence suggests their ability to distinguish a “minimal” government intrusion into individual privacy and security from a serious one bears little relationship to how the populace view these intrusions.⁷¹ The Court’s fitness to determine the other side of the balance—which government interests are sufficiently important to justify the intrusion—is similarly dubious. Isn’t the very point of having elected legislative bodies precisely to decide which interests are worth pursuing and which are not?⁷²

In reality, the Court’s idea of “balancing” is illusory—the test is rigged such that the government almost always wins.⁷³ When the

⁶⁹ *Id.* at 1980 (Scalia, J., dissenting).

⁷⁰ See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972–73 (1987) (discussing the problem of valuing and comparing interests at stake); Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669 (1988) (criticizing the balancing test for being skewed in favor of government interests).

⁷¹ See Jeremy A. Blumenthal, Meera Adya & Jacqueline Mogle, *The Multiple Dimensions of Privacy: Testing Lay “Expectations of Privacy,”* 11 U. PA. J. CONST. L. 331, 341–43 (2009); Slobogin & Schumacher, *supra* note 8, at 737–42.

⁷² See Aleinikoff, *supra* note 70, at 984–86 (arguing that the institutional role of the Court countenances against balancing). The Court also doesn’t seem to care if there is any factual basis for the government’s asserted interest. See Pieter S. de Ganon, Note, *Noticing Crisis*, 86 N.Y.U. L. REV. 573, 596–98 (2011) (describing the Court’s discussion of a drug “crisis” and “epidemic” in cases upholding school drug testing with no evidence in the record (quoting Petition for Writ of Certiorari at 3 and Brief for the Petitioner at 18, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (No. 94-590))).

⁷³ See Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 106–07 (1991) (criticizing the Court’s willingness to “exaggerate the state’s interests . . . and to trivialize the individual’s interests”); see also *Wyoming v. Houghton*, 526 U.S. 295, 306 (1999) (noting that reasonableness balancing must consider “practical realities” that “mitigate in favor of the needs of law enforcement”); *United States v. Montoya de Hernandez*, 473 U.S. 531, 558 (1985) (Brennan, J., dissenting) (criticizing “the Court’s studied effort” to turn reasonableness balancing into “a process ‘in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales’” (quoting *United States v. Sharpe*, 470 U.S. 675, 720 (1985) (Brennan, J., dissenting))).

Court weighs the government's and individual's competing interests, it almost always compares the overarching goal of the search scheme against a single individual's privacy interest.⁷⁴ *Sitz*, for example, weighed the intrusion on the "average motorist" against the "magnitude of the drunken driving problem [and] the States' interest in eradicating it."⁷⁵ Similarly, in *Board of Education v. Earls*, the Court compared the intrusion a single student felt in giving a urine sample to the school district's interest in curbing drug use among all students in the district.⁷⁶ On the rare occasion in which the Court has compared apples to apples (rather than an apple to an orchard), the government still usually wins.⁷⁷

More mystifying still are the cases in which the government loses. In *Chandler v. Miller*, the Court invalidated a Georgia law—passed by politicians—subjecting candidates for public office to drug tests.⁷⁸ The law may have been purely symbolic, and was struck as such,⁷⁹ but so too was the drug testing of Customs Service employees that the Court upheld in *National Treasury Employees Union v. Von Raab*.⁸⁰ *Ed-*

⁷⁴ There are, of course, a few exceptions. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 879–83 (1975) (weighing the state's interest in preventing illegal immigration against the interests of "the residents of these and other areas [in freedom from] potentially unlimited interference with their use of the highways," even acknowledging that the intrusion on any one individual was "minimal").

⁷⁵ *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451–52 (1990).

⁷⁶ *Bd. of Educ. v. Earls*, 536 U.S. 822, 831–32 (2002). In *Earls*, the Court seemingly relied on the fact that impact of getting caught is minimal (students aren't prosecuted), *id.* at 833, despite the fact that the *Sitz* Court quite clearly said the nature of the intrusion was to be measured by the impact on an *innocent* person. *Sitz*, 496 U.S. at 452.

⁷⁷ Usually the subject is deemed to have a "reduced expectation of privacy." That makes sense in some contexts—schools, for example—but the Court's justification for distinguishing one group from another is often bizarre. See *Earls*, 536 U.S. at 831–32 (holding that athletes and students in extracurricular activities have lesser privacy interests than other students because those activities "require occasional off-campus travel"); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (finding that student athletes have lesser expectations of privacy because, *inter alia*, they voluntarily submit to "maintain[ing] a minimum grade point average"); see also *People v. Butorac*, 3 N.E.3d 438, 448 (Ill. App. Ct. 2013), *appeal denied*, 5 N.E.3d 1125 (Ill. 2014) ("[M]otorists have a higher expectation of privacy than do boaters, because automotive transportation is 'basic, pervasive, [and] often necessary,' while boating is 'more commonly associated with recreation than necessity.'" (second alteration in original) (quoting *Schenekl v. State*, 30 S.W.3d 412, 416 (Tex. Crim. App. 2000))); *State v. McKeen*, 977 A.2d 382, 388 (Me. 2009) (Silver, J., dissenting) (scorning the majority's attempt to distinguish between the privacy interests of automobile and ATV drivers by likening an ATV to a "toy" and holding that people "choosing to operate that toy ha[ve] limited liberty interests").

⁷⁸ *Chandler v. Miller*, 520 U.S. 305, 308–09 (1997).

⁷⁹ *Id.* at 321–22.

⁸⁰ *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 683 (1989) (Scalia, J., dissenting) (quoting the Commissioner of Customs as saying that the Customs is "largely drug-free"

mond itself, the seminal case banning the use of roadblocks for “ordinary law enforcement,” is hard to fathom. Responding to the pleas of residents whose neighborhoods had become drug markets and seeds of gun violence,⁸¹ the Indianapolis police—working alongside the federal Drug Enforcement Administration and local prosecutors—set up roadblocks at which driver’s licenses and vehicle registrations were checked, while drug dogs sniffed for signs of contraband.⁸² The community’s need seemed obvious; the roadblock in *Edmond* caught far more violators than other roadblocks the Court had approved, was no more intrusive, and—one hopes—deterred many from transporting narcotics into troubled neighborhoods. Yet the Court still invalidated Indianapolis’s roadblock.⁸³ If intrusions and government needs are what matter, *Edmond* is Exhibit A of the Court’s inability to make sense of its own special needs test.

B. *The Wages of Confusion*

This is not mere doctrinal confusion: it takes a real toll on people’s lives.⁸⁴ The inability to make sense of the Fourth Amendment in today’s world has the practical result of causing vastly more police intrusion, widespread violations of constitutional rights, and racial profiling. Making matters worse, there is good evidence that these intrusions are simply inefficacious, making it doubly difficult to justify these troubling costs.

1. *Lowered Cause = More Intrusions + Lower Efficacy*

Under the reasonableness approach, the cause threshold for governmental intrusions is lowered, which means far, far more intrusions, and far fewer that turn anything up. People are being stopped at breathtaking numbers. For example, in New York, over an eight-year period, police conducted 4.4 million *Terry* stops, and performed frisks

and that the “extent of illegal drug use by Customs employees was not the reason” for the program).

⁸¹ Rodger Birchfield, *Roadblocks Will Feature Drug Dogs*, INDIANAPOLIS STAR, Sept. 22, 1995, at E1.

⁸² R. Joseph Gelarden, *19 Suspects Nabbed in I-65 Drug Roadblock*, INDIANAPOLIS STAR, Aug. 14, 1998, at A1.

⁸³ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 49–51 (2000) (comparing the Indianapolis roadblocks’ 9% hit rate with the 0.12% chance of finding illegal aliens in *Martinez-Fuerte* and 1.6% hit rate in *Sitz*).

⁸⁴ See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) (“Criminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy.”).

during more than half of those stops.⁸⁵ In the six months from July to December 2013, Newark police stopped nearly one in every ten residents.⁸⁶ In two districts in Los Angeles, there were more stops than there were residents.⁸⁷ Drug interdiction is constantly underway on highways, aboard interstate busses, and in airports.⁸⁸ In one case, a single narcotics officer boarded eight hundred interstate busses in one year.⁸⁹ A sheriff's officer in Jacksonville reported that 1500 Greyhound passengers were searched weekly (or over 75,000 annually).⁹⁰

The lowered cause standard has allowed racial profiling to run rampant. In the mid-1990s, along I-95 in Maryland, African Americans represented only 17% of drivers violating the traffic code, yet accounted for a whopping 72% of the stops.⁹¹ The U.S. Department of Justice found similar practices in New Jersey.⁹² More than half of

⁸⁵ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013). Defenders of stop-and-frisk point to the reduced crime rates New York City has experienced since the early 1990s, when stop-and-frisk rose to prominence. See Daniel Bergner, *Is Stop-and-Frisk Worth It?*, ATLANTIC (Apr. 2014), <http://www.theatlantic.com/features/archive/2014/03/is-stop-and-frisk-worth-it/358644/>. But it is dubious whether stop-and-frisk policing is responsible for the drop in crime—many studies have found that other factors, such as reduced lead exposure in low-income communities, and a drop in birth rates after *Roe v. Wade*, may be the driving forces. See David F. Greenberg, *Studying New York City's Crime Decline: Methodological Issues*, 31 JUST. Q. 154, 155, 181–83 (2014); Steven D. Levitt, *Abortion and Crime: Who Should You Believe?*, FREAKONOMICS (May 15, 2005, 11:44 AM), <http://freakonomics.com/2005/05/15/abortion-and-crime-who-should-you-believe/>. Additionally, criminologist Franklin E. Zimring has shown that “hot spot” policing—focusing resources on catching repeat offenders—has had an impact on reducing crime rates. See John Tierney, *Prison Population Can Shrink When Police Crowd Streets*, N.Y. TIMES (Jan 25, 2013), <http://www.nytimes.com/2013/01/26/nyregion/police-have-done-more-than-prisons-to-cut-crime-in-new-york.html>.

⁸⁶ NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA 23–24 (2014), http://naacp.3cdn.net/443b9cbc69a3ef1aab_ygfm66yd7.pdf.

⁸⁷ IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT 9, 31 (2008).

⁸⁸ See, e.g., *United States v. Avery*, 137 F.3d 343, 346–47 (6th Cir. 1997); *United States v. Weaver*, 966 F.2d 391, 392–93 (8th Cir. 1992); *United States v. Hooper*, 935 F.2d 484, 500 (2d Cir. 1991); *United States v. Condelee*, 915 F.2d 1206, 1208–09 (8th Cir. 1990); see also *Ohio v. Robinson*, 519 U.S. 33, 35–36, 40–41 (1996); *Florida v. Bostick*, 501 U.S. 429, 431–32 (1991); *United States v. Tate*, 745 F. Supp. 352, 356 (W.D.N.C. 1990); *United States v. Chandler*, 744 F. Supp. 333, 334 (D.D.C. 1990); *United States v. Moya*, 561 F. Supp. 1, 3–4 (N.D. Ill. 1981), *aff'd*, 704 F.2d 337 (7th Cir. 1983), *vacated and remanded*, 464 U.S. 979 (1983).

⁸⁹ *United States v. Drayton*, 231 F.3d 787, 791 (11th Cir. 2000), *rev'd*, 536 U.S. 194 (2002).

⁹⁰ Tia Mitchell, *Drug Agents Prowl City Bus Stations*, FLA. TIMES-UNION (Oct. 20, 2002), http://jacksonville.com/tu-online/stories/102002/met_10741892.shtml.

⁹¹ David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 280–81 (1999).

⁹² See *State v. Soto*, 734 A.2d 350, 353 (N.J. Super. Ct. Law Div. 1996) (discussing expert testimony that blacks were 4.85 times more likely to be stopped than whites on one stretch of highway); N.J. SENATE JUDICIARY COMM., INVESTIGATION OF RACIAL PROFILING AND THE

the 4.4 million people stopped in New York were black and nearly one-third were Latino.⁹³ Ten percent were white.⁹⁴ In Boston, blacks represent one quarter of the population but made up nearly two-thirds of street-based police encounters from 2007 until 2010.⁹⁵ Customs agents have historically strip-searched and x-rayed black women at notably higher rates than others, and found less.⁹⁶

Another consequence of the lower stop threshold is that people are pressured to accede to police searches. *Terry* only allows a "stop" for investigative purposes; once they stop people, police can, and often do, ask if they can search them. The Supreme Court has said such consent must be "voluntary" under the "totality of the circumstances,"⁹⁷ but the evidence suggests this standard is meaningless in application. A 1999 study of Ohio motorists subjected to consent searches revealed that almost none of the 90–95% of subjects who consented knew of the right to refuse consent, and those few who knew the law were skeptical that an officer would actually take no for an answer.⁹⁸ (As it happened, they were right.⁹⁹) Consent rates are

NEW JERSEY STATE POLICE 17–18 (2001) ("[T]he minority arrest rates for troopers involved in the *Soto* appeal were: 63%, 80%, 79%, 84%, 100%, 90%, 84% and 92%.").

⁹³ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013)

⁹⁴ *Id.* at 559; see also Sean Gardiner, *Stop-and-Frisks Hit Record in 2011*, WALL ST. J., Feb. 14, 2012, at A21 (noting that, in 2011, 87% of the nearly 700,000 people stopped by NYPD were either black or Hispanic). But see Decio Coviello & Nicola Persico, *An Economic Analysis of Black-White Disparities in NYPD's Stop and Frisk Program* 14–17 (Northwestern U. NBER, Working Paper No. 18803, 2013) (suggesting that high correlation of "police pressure," or number of stops per resident per year, with race might actually be caused by police allocating manpower disproportionately to poorer neighborhoods, as opposed to targeting neighborhoods based solely on racial makeup).

⁹⁵ Evan Allen & Travis Andersen, *Evans Defends Boston Police After ACLU Report on Racial Bias*, BOS. GLOBE (Oct. 8, 2014), <http://www.bostonglobe.com/metro/2014/10/08/aclu-charges-boston-police-engaged-racially-biased-tactics-police-call-report-inaccurate/Zev3p7jvRVQ2loKSWncu2H/story.html>.

⁹⁶ See, e.g., U.S. GEN. ACCOUNTING OFFICE, U.S. CUSTOMS SERVICE: BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS 10 (2000), <http://www.gao.gov/archive/2000/gg00038.pdf> (explaining that in many cases "those types of passengers who were more likely to be subjected to more intrusive personal searches were not more likely, or even as likely, to be found carrying contraband," and noting that, in 1998, black women were nine times more likely than white women to be x-rayed after being frisked or patted down, but were less than half as likely to be carrying contraband.)

⁹⁷ *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

⁹⁸ Illya D. Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police-Citizen Encounter* 242, 275 (Oct. 1999) (Ph.D. dissertation, Rutgers University) (on file with UMI Microform).

⁹⁹ Of the six people who refused to be searched, the police searched half of them anyway. *Id.* at 282.

similar in other jurisdictions.¹⁰⁰ People consent if they have nothing to hide, and thus should not fear the police; they consent if they have everything to hide and are buying themselves a one-way ticket to years in prison.¹⁰¹ There is even evidence suggesting the police *know* consent is not really voluntary—one judge likened officer training to “the training sales people receive in getting people to agree to buy things they do not want.”¹⁰² And as with profiling generally, minorities are asked for consent at appreciably higher rates than whites.¹⁰³

What’s even more damning is that the vast majority of these intrusions—“voluntary” or not—are yielding no evidence. Drug Enforcement Agency (DEA) officers who stopped six hundred people in the Buffalo airport also admitted they had arrested just ten—a return rate of below 2%.¹⁰⁴ The NYPD found a weapon in 1.18% of frisks and a gun in just 0.12%—no more than might be produced by pure

¹⁰⁰ In Los Angeles, for example, out of the 36,612 pedestrians who were asked for consent to search, only 36 people refused. L.A. POLICE DEP’T, ARREST, DISCIPLINE, USE OF FORCE, FIELD DATA CAPTURE AND AUDIT STATISTICS AND THE CITY STATUS REPORT (2006). Studies in Illinois, Arizona, and New Jersey reported consent rates of 86–91%. See ROBIN S. ENGEL ET AL., TRAFFIC STOP DATA ANALYSIS STUDY: YEAR 1 FINAL REPORT 171 (2007), http://www.azdps.gov/About/Reports/docs/Traffic_Stop_Data_Report_2007.pdf (Arizona); PUB. MGMT. RES. & LITE, DEPALMA, GREENBERG & RIVAS, LONG-TERM COMPLIANCE AUDIT, CIVIL NUMBER 99-5970 (MLC) 17 (2005), <http://www.nj.gov/lps/monitors-report-13.pdf> (New Jersey); ALEXANDER WEISS & DENNIS P. ROSENBAUM, ILLINOIS TRAFFIC STOPS STATISTICS STUDY 2008 ANNUAL REPORT 11 (2008), <http://www.idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2008/2008%20Illinois%20Traffic%20Stop%20Summary.pdf> (Illinois).

¹⁰¹ See *United States v. Arvizu*, 534 U.S. 266, 271–72 (2002) (describing consent search of vehicle that turned up over 100 pounds of marijuana); *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1223–24 (9th Cir. 2007) (describing consent given by driver who was found with 15 kilograms of cocaine in his car).

¹⁰² Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 209 n.191 (quoting *State v. George*, 557 N.W.2d 575, 581–82 (Minn. 1997) (Tomljovich, J., concurring)).

¹⁰³ See NORTHWESTERN UNIV. CTR. FOR PUB. SAFETY, ILLINOIS TRAFFIC STOPS STATISTICS STUDY: 2007 ANNUAL REPORT 11 (2007), <http://www.dot.state.il.us/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2007/2007%20Illinois%20Traffic%20Stop%20Summary.pdf> (showing that Illinois consent searches of minority drivers occurred at about 2.5 times the frequency of searches of whites); DWIGHT STEWARD & MOLLY TOTMAN, DON’T MIND IF I TAKE A LOOK, DO YA?: AN EXAMINATION OF CONSENT SEARCHES AND CONTRABAND HIT RATES AT TEXAS TRAFFIC STOPS 9 (2005), http://static.prisonpolicy.org/scans/racial_profiling_report_full.pdf (reporting that, out of over 500 law enforcement agencies in Texas, three out of five requested consent to search Black or Latino drivers following a traffic stop more frequently—usually more than 50% more frequently—than they did White drivers); PETER VERNIERO & PAUL H. ZOUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 23 (1999), http://www.state.nj.us/lps/intm_419.pdf (finding that in some instances 80% of the consent searches were minorities).

¹⁰⁴ *United States v. Hooper*, 935 F.2d 484, 500 (2d Cir. 1991) (Pratt, J., dissenting).

chance.¹⁰⁵ In the first half of 2012, Philadelphia police stopped 215,000 pedestrians, 76% of them minorities, and recovered just 3 guns.¹⁰⁶ Baltimore police made 123,000 stops and 494 frisks in 2012 and found evidence of something illegal in just 20 of them: 9 guns, 10 drug possessions, and 1 knife.¹⁰⁷ A canine unit in Illinois conducted 252 “sniffs” over an 11-month period and gave a positive alert triggering a search for drugs about half the time.¹⁰⁸ 74% of the time no measurable quantity of drugs were found.¹⁰⁹ One officer testified he boarded about 100 buses a year, but of the thousands of bus passengers subjected to delay and intrusion, only 7 were arrested.¹¹⁰ And numerous studies show that, in all manner of contexts, minorities are stopped more often than others but the “hit rate”—the level at which they are found carrying contraband—is lower, indicating that profiling is baseless.¹¹¹

2. *Searches Without Cause = More Dragnets*

The number of situations in which the cause requirement is dispensed with altogether means the government has far more opportunity to stop and search its citizens. Checkpoints are increasingly present along highways, drug tests in schools are commonplace, and widespread surveillance is omnipresent.¹¹² Most of the NSA’s surveil-

¹⁰⁵ Report of Jeffrey Fagan, Ph.D. at 63–65, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034) [hereinafter Fagan Report], http://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf (“Accordingly, the NYPD stop and frisk tactics produce rates of seizures of guns or other contraband that are no greater than would be produced simply by chance.”); see also *Floyd*, 959 F. Supp. 2d at 574 (“Because guns were seized in only 0.1% of stops, it is difficult to draw meaningful inferences from the statistics regarding gun seizures.”).

¹⁰⁶ Alex Wigglesworth, *ACLU: Philly Police Stop-and-Frisk Problems Persist*, METRO NEWS (Mar. 19, 2013), <http://www.metro.us/local/aclu-philly-police-stop-and-frisk-problems-persist/tmWmcs—e2mwUa35niYk/>.

¹⁰⁷ NAACP, *supra* note 86, at 24.

¹⁰⁸ Radley Balko, *Illinois State Police Drug Dog Unit Analysis Shows Error Rate Between 28 and 74 Percent*, HUFFINGTON POST (Mar. 31, 2012, 3:27 PM), http://www.huffingtonpost.com/2012/03/31/drug-dog-illinois-state-police_n_1376091.html.

¹⁰⁹ *Id.*

¹¹⁰ *United States v. Flowers*, 912 F.2d 707, 710 (4th Cir. 1990).

¹¹¹ See, e.g., AYRES & BOROWSKY, *supra* note 87, at 1, 5, 7–8; NORTHWESTERN UNIV. CTR. FOR PUB. SAFETY, *supra* note 103, at 12; STEWARD & TOTMAN, *supra* note 103, at 51–52; VERNIERO & ZOUBEK, *supra* note 103, at 66, 69–70. But see Coviello & Persico, *supra* note 95, at 1–2 (finding no evidence of bias against blacks in NYPD officers’ stop decisions on average, as measured by arrest rates, but finding considerable disparities in arrest rates by race across precincts).

¹¹² See, e.g., Thom Patterson, *Data Surveillance Centers: Crime Fighters or ‘Spy Machines?’*, CNN (May 26, 2014), <http://www.cnn.com/2014/05/26/tech/city-of-tomorrow-video-data-surveillance/> (reporting on Oakland’s use of central surveillance facilities that aggregate data from

lance of Americans was justified by the government as a “reasonable” special need.¹¹³

Pretext is a real problem when cause is abandoned. Reasonableness permits “administrative” searches without cause, so police use them to conduct criminal investigations, or simply to troll. The Eleventh Circuit has had to chastise local police forces at least three times (twice the Orange County Sheriff’s Office) for using SWAT teams to conduct “administrative” searches.¹¹⁴ In each of these raids the police were investigating crimes—not really looking for regulatory violations.¹¹⁵ Now there are roadway checkpoints to inspect vehicle safety, check seatbelt and car seat compliance, and to “educate” motorists about safe driving habits, but also to send people to jail when the stops turn up something criminal—often drugs.¹¹⁶

In conducting dragnet searches without cause, law enforcement officials single out groups without clear justification. The FBI and local police forces target Muslim communities for enhanced surveillance.¹¹⁷ Supposedly “random” bag searches are conducted at NY subway stations: Jangir Sultan, an American of Kashmiri descent, was

cameras around the city); Slobogin, *supra* note 10, at 108, 121 (describing government surveillance systems and data mining programs).

¹¹³ See U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 36–41 (2006), <http://www.justice.gov/sites/default/files/opa/legacy/2006/02/02/whitepaperonnsalegalauthorities.pdf> (arguing that the NSA activities serve the special need of national security).

¹¹⁴ See *Berry v. Leslie*, 767 F.3d 1144, 1153–54 (11th Cir. 2014) *vacated on reh’g en banc sub nom*, *Berry v. Orange County*, 771 F.3d 1316, *dismissed as moot*, 785 F.3d 553 (11th Cir. 2015); *Bruce v. Beary*, 498 F.3d 1232, 1243–48 (11th Cir. 2007); *Swint v. City of Wadley*, 51 F.3d 988, 999 (11th Cir. 1995).

¹¹⁵ There is debate among the lower courts about the *degree* to which pretext can motivate an administrative (suspicionless) search. Compare *Beary*, 498 F.3d at 1242 (explaining that “some suspicion of wrongdoing” does not invalidate an administrative search, but suggesting that “direct criminal suspicion of wrongdoing” might), with *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 198 & n.7 (5th Cir. 2009) (stating that an “administrative search cannot be pretextual” but that “[a]n officer’s suspicions about criminal wrongdoing do not . . . render an administrative inspection pretextual”), and *United States v. Thomas*, 973 F.2d 1152, 1155–56 (5th Cir. 1992) (holding that administrative searches “do not violate the Constitution simply because of the existence of a specific suspicion of wrongdoing”). As the facts of each of these cases illustrate, however, in practice pretextual dragnet searches, permissible or not, happen all the time.

¹¹⁶ See *Robinson v. Bratton*, No. 14-CV-2642 SLT LB, 2014 WL 3496460, at *2 (E.D.N.Y. July 8, 2014) (stopping drivers for a “vehicle safety search”); *Sheridan v. State*, 247 S.W.3d 481, 482, 512 (Ark. 2007) (checking for seat belts, car seats, and drivers’ licenses); *City of Overland Park v. Rhodes*, 257 P.3d 864, 869 (Kan. Ct. App. 2011) (educating motorists about DWI laws).

¹¹⁷ See Complaint, *Raza v. City of New York*, 13-CV-3448 (E.D.N.Y. June 18, 2013) [hereinafter *Raza Complaint*], https://www.aclu.org/sites/default/files/assets/nypd_surveillance_complaint_-_final_06182013_1.pdf (describing the targeted surveillance of Muslim Americans by the New York Police Department).

searched 21 times in 3 years. An expert estimated the probability of this occurring randomly at one in 165 million.¹¹⁸ Passengers traveling on ships weighing over 100 tons must submit to random searches of their luggage, but those on smaller ships do not.¹¹⁹ DNA is taken from certain arrestees but not the rest of us, though there is no demonstrated correlation between unsolved crimes and arrestees.¹²⁰

C. *Scholars Have No Solution*

Scholars have focused on the Supreme Court's move to a reasonableness model in two waves. The first wave was largely conceptual, seeking to clear up doctrinal categories. The second wave turned its attention more on the ill effects of the Court's reasonableness approach. While that scholarship is uniformly valuable in targeting the problem, and understandably critical, ultimately none of the proposals for change are likely to be adopted, or get us where we need to go.

1. *The First Wave*

Early reactions to the Supreme Court's reasonableness balancing sought to regain clarity by shoehorning the doctrine into one box or another: some scholars pushed for strict adherence to the warrant and probable cause model, while others argued for an all-out shift to reasonableness balancing, with no fixed cause requirements.¹²¹ Scholars plainly did not believe the Court's halfway house was habitable.¹²²

A number of scholars viewed *Terry* and all that followed as an outright mistake, the consequences of which could be rectified only by returning to a pre-*Terry* presumptive probable cause and warrant

¹¹⁸ See Complaint, *Sultan v. Kelly*, 09-CV-00698 (E.D.N.Y. Feb. 19, 2009), http://www.nyclu.org/files/SultanvCityofNewYorkComplaint2-19-09_0.pdf.

¹¹⁹ *Cassidy v. Chertoff*, 471 F.3d 67, 84 (2d Cir. 2006).

¹²⁰ Cf. JEREMIAH GOULKA ET AL., RAND CORP., TOWARD A COMPARISON OF DNA PROFILING AND DATABASES IN THE UNITED STATES AND ENGLAND 20 (2010), http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR918.pdf (explaining that resources would be much better spent collecting more crime scene DNA profiles than offender profiles).

¹²¹ See, e.g., Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 518–22 (1995) (framing the debate as a choice between a preference for warrants and probable cause, as articulated by Justice Frankfurter, and an approach guided by the prohibition against general warrants, as described by Telford Taylor and shared by Justice Rehnquist); Jennifer Y. Buffaloe, Note, “*Special Needs*” and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529, 529–32 (1997) (analyzing the special needs exception in light of those two choices).

¹²² At least one author wrote that either model was acceptable so long as the Court picked one and stuck with it. See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471–72, 1501 (1985).

standard.¹²³ Although these theories were attractive in their simplicity, they posed problems both interpretive and practical. As a matter of text, the Fourth Amendment only requires that searches and seizures be “reasonable,” which seems to undercut the argument that warrants and probable cause always are essential.¹²⁴ More important, these theories were largely unresponsive to the practical policing needs of the late twentieth century. Taken literally, they would rule out airport security and drunk-driving checkpoints, and ban most administrative searches.

On the other end of the spectrum, some scholars argued for junking the warrant and probable cause model altogether and replacing it with a sliding-scale reasonableness model where cause varied with each individual circumstance the police encountered.¹²⁵ But the impact of moving to a sliding balancing test, full stop, was entirely predictable and equally unpalatable¹²⁶—one need only look at what has gone wrong in the real world since the Court moved in this direction. Balancing provides little guidance for officers, and its malleability means the Court can always find a reason for the government to win.¹²⁷ Most fundamentally, for some kinds of searches—home searches, for example—dispensing with the security of a warrant and probable cause was difficult for even the most pro-policing of theorists to justify.

¹²³ See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 419–20 (1974) (making the pragmatic argument that, without warrants and probable cause, the police could construct a story to justify a stop ex post, opening the door to arbitrariness and discrimination); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 522–23 (1991) (recommending permitting searches on less than probable cause only in cases involving extreme exigency or presenting “the most minimal potential for abuse and unnecessary intrusion”); Clancy, *supra* note 121, at 632 (in favor of disallowing suspicionless searches unless the government can overcome the “normative value of individualized suspicion”); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1 (1994) (advocating for a system requiring probable cause).

¹²⁴ See Amsterdam, *supra* note 123, at 410 (arguing that “reasonableness” should be interpreted in light of the framers’ concern about general warrants and writs).

¹²⁵ See Amar, *supra* note 84, at 757–59, 805–08 (arguing that reasonableness should be an open inquiry wherein cause and judicial authorization are just two nondispositive factors among others, such as whether the police action in question has a disparate impact on certain communities).

¹²⁶ See Ronald J. Bacigal, *Dodging a Bullet, but Opening Old Wounds in Fourth Amendment Jurisprudence*, 16 SETON HALL L. REV. 597, 597–98, 619–22 (1986).

¹²⁷ *Id.* at 598, 621.

2. *The Second Wave*

By the twenty-first century, scholars' focus shifted to the real-world effects of policing, which was being inadequately governed by the Court's mushy reasonableness balancing. These scholars, too, called for a doctrinal change, aimed at the looming problems caused by the Court's approach.¹²⁸ The problem is that, although their descriptions of the problem became increasingly apt, their prescriptions tended toward the unrealistic.

a. *Ducking the Question*

Much recent scholarship avoids the problem of defining what is "reasonable" at all, typically by seeking solutions in the political process.¹²⁹ While there is merit to turning to the political process,¹³⁰ courts will still need to adjudicate the constitutionality of whatever that process comes up with.¹³¹ Doing so requires a doctrine sufficient to the task.¹³²

¹²⁸ See, e.g., Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 6–7 (2011); Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1389, 1396 (2003).

¹²⁹ See Dan M. Kahan & Tracey L. Meares, Foreword, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153–54 (1998) (urging deference to a community's own decisions on how to police itself); John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 205–06 (2015) (proposing that courts move from regulating policing directly—first order rules—to urging legislative bodies to enact laws that regulate the police—second order rules); Slobogin, *supra* note 10, at 130–36 (applying political process theory à la John Hart Ely to policing). Richard Worf, who deserves credit for a thoughtful article working through process theory as applied to policing, is of the view that presently most judicial review of policing decisions is strict scrutiny. Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 105 (2007). The common wisdom, however, is that the Court's review is akin to rational basis across the board. See, e.g., Primus, *supra* note 10, at 256–57; Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 199–200 (1993). The Justices themselves concede the deference they believe should be afforded police officers. See, e.g., *Ornelas v. United States*, 517 U.S. 690, 699 (1996). But see Kahan & Meares, *supra*, at 1166–67 (seeking recourse in the political process because, in the authors' view, the Supreme Court's doctrine is overly stringent in prohibiting communities from experimenting with crime-control tactics such as curfews, gang-ordinances, and checkpoints).

¹³⁰ See, in that regard, Friedman & Ponomarenko, *supra* note 10.

¹³¹ See Sherry F. Colb, *A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures*, 102 MICH. L. REV. 889, 902–03 (2004) (noting that courts must not "abdicate[e]" their "affirmative obligation" to protect Fourth Amendment rights even "[i]f Congress does a smashing job of protecting privacy").

¹³² Rachel Harmon argues that traditional Fourth Amendment doctrine overlooks other areas of law and practice—for example, liability doctrine and police union activities—that have great impact on what the police do. Her work is primarily to set out a research agenda. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 797–99 (2012).

b. Fixing the Categories

A number of other scholars understand that Fourth Amendment search and seizure doctrine needs to be fixed, but the greatest shortcoming of this scholarship is that increasingly it asks courts to answer impossible questions, or adopt fanciful solutions. Intriguing work by Harcourt and Meares is a marker for all that is right and yet problematic about the second wave of scholarship.¹³³ Harcourt and Meares are deeply troubled by the discretion accorded police, the result of which is much arbitrary or racially biased policing.¹³⁴

What Harcourt and Meares propose to do about the problem is turn almost everything into a checkpoint, at which everyone—or some random subset of everyone—is searched.¹³⁵ But their solution suffers from two serious problems. First, other than when there is probable cause, their solution would eliminate the safeguard of individualized suspicion for a large number of searches altogether.¹³⁶ Second, and more important, their solution is farfetched. They would have society set acceptable baseline hit rates, require widespread use of checkpoints, and then somehow compensate *ex post* everyone who was searched at a checkpoint that falls below the specified measure of productivity.¹³⁷ This is so unlikely to ever be adopted that it could be suspected that their motive was to demonstrate—in a fairly dramatic way—all that is wrong with policing and the Supreme Court’s failure to regulate it.

At the other end of the extreme sits Eve Primus, who believes the Court went astray when it conflated dragnet searches—truly suspicionless searches of large groups of people, such as at an airport—and special subpopulation searches—e.g., searches of schoolchildren,

¹³³ Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 811, 815, 854–55 (2011).

¹³⁴ See *id.* at 854–55.

¹³⁵ Thus, except when there is a probable cause to search an identifiable suspect, they would require every fifth or tenth (or twentieth, and so on) person who walked by an officer stationed at a neighborhood street corner to be stopped and frisked. See *id.* at 851, 866–67.

¹³⁶ Harcourt and Meares, however, do not view the checkpoint searches they propose as “suspicionless,” as they believe all suspicion ultimately can be quantified, even if it is *ex post*. Thus, if ten out of 200 people stopped have contraband, the revealed “suspicion” level, they say, was 5%. They refer to this as “group-based” suspicion. *Id.* at 813–14, 848–50.

¹³⁷ *Id.* at 851, 866–68. Because Harcourt and Meares would require checkpoints to meet a certain threshold hit-rate in order to stay operative, checkpoints would likely converge on certain communities, creating singling-out problems. See Cynthia Benin, Note, *Randomizing Immigration Enforcement: Exploring a New Fourth Amendment Regime*, 88 N.Y.U. L. REV. 1735, 1753–58 (2013) (predicting that Harcourt-and-Meares-style immigration checkpoints would impose a disproportionate burden on border communities and on people of certain ethnicities).

which operate on a lower but non-negligible cause standard—into one conglomerate called “administrative” searches.¹³⁸ While Primus is right to diagnose severe doctrinal confusion,¹³⁹ her solutions suffer from familiar problems. First, she would require proof that a cause-based standard is “inadequate” before allowing recourse to a generalized search, or “dragnet,” thereby forcing most searching into the cause category.¹⁴⁰ But society may be moving toward regulatory policing for valid reasons, such as the ready availability of effective technologies. Second, her solution is unworkable. How are courts to judge the inadequacy of cause-based drunk-driving patrols before permitting government to use checkpoints, and why is it the role of a court to patrol such an implementation choice in the first place? It is difficult to see the Supreme Court ever signing off on such a notion.

Finally there is Scott Sundby, who, way back in 1988, came close to identifying the real problem, urging the Court to separate “initia-tory” searches (in which there is no cause) from “responsive” searches (for which there is).¹⁴¹ But in order to achieve doctrinal coherence, Sundby argued that *Terry* was justifiable based on the “exigency” of officer and public safety, and that any exigent circumstance involving public or police safety would justify lowering the cause level.¹⁴² While exigency may be a good reason to excuse a warrant, allowing exigency to lower the cause threshold is an invitation to precisely the sort of abusive stop-and-frisk that became so widespread following Sundby’s article. And for searches with no cause at all, Sundby would have courts apply strict scrutiny, though he provides little explanation of how he gets there.¹⁴³

These commentators are surely correct that the Supreme Court has, in the face of evolving technology, pressing new problems, and changing policing tactics, lost its way in defining what is “reasonable.” But their solutions tend to match the doctrine in complexity, and for the most part have little chance of being adopted in the real world.

¹³⁸ Primus, *supra* note 10, at 255–60.

¹³⁹ Primus’s own categories also suffer from great confusion, but in fairness, the Supreme Court has not given her good clay to model. For example, Primus calls the search in *Burger* a dragnet when it was almost certainly cause-based. *Id.* at 263; *see infra* note 233 and accompanying text (pointing out it is unclear how police arrived at Burger’s junkyard that day).

¹⁴⁰ Primus, *supra* note 10, at 310–12. As explained *infra*, there is nothing in the Fourth Amendment to suggest cause is the only way, or indeed always the best way, to prevent arbitrary intrusions. *See infra* Part II.D.2.

¹⁴¹ Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 418–20 (1988).

¹⁴² *Id.* at 422–25.

¹⁴³ *Id.* at 431.

There is a simpler fix at hand, one that is not so very far from existing doctrinal rules. It turns out it would take remarkably little for the Supreme Court to make a good start at cleaning up this existing—and pernicious—mess.

II. TWO TYPES OF PROTECTIONS FOR TWO TYPES OF SEARCHES

As Part I makes clear, the Supreme Court has lost its way in defining the meaning of Fourth Amendment reasonableness. Once, it knew. In *Brown v. Texas*, the Supreme Court held that the police cannot, absent cause, stop a person and require identification.¹⁴⁴ The decision was unanimous. Chief Justice Warren Burger, hardly a noted civil libertarian, authored the opinion. *Brown*—decided in 1979—set out a rule both simple and undoubtedly correct:

[T]he Fourth Amendment requires [*either*] that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or* that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.¹⁴⁵

Two kinds of protections, applicable in two very different circumstances. One, relying on cause, when suspicion is present. The other, kicking in when the search was not suspicion-based.

In the years that followed, this basic insight was lost. It is time to regain it.

A. A Puzzling Problem

Bruce v. Beary involved a seemingly tricky problem, one that has split the circuits and goes to the root problem here. The question in *Bruce* was whether it is permissible for government officials to conduct an administrative search, i.e., one without cause, although they in fact possess some evidence of criminal wrongdoing.¹⁴⁶ The Auto Theft Unit of the Orange County, Florida, Sheriff's Office had searched William Bruce's auto body repair shop, seizing virtually everything on the property.¹⁴⁷ Bruce, whom the officers believed to be trading in stolen property, ultimately had all charges tossed out by a state

¹⁴⁴ *Brown v. Texas*, 443 U.S. 47, 52–53 (1979).

¹⁴⁵ *Id.* at 51 (emphasis added).

¹⁴⁶ See *Bruce v. Beary*, 498 F.3d 1232, 1244–48 (11th Cir. 2007) (surveying other circuits' approaches to limiting the scope of administrative searches).

¹⁴⁷ *Id.* at 1238.

judge.¹⁴⁸ The impetus for the search was a report to the police that a vehicle purchased from Bruce might have been stolen.¹⁴⁹ As the Eleventh Circuit noted, the information the police received “did not rise to the level of probable cause that would have supported application for a warrant.”¹⁵⁰ Lacking probable cause to get a warrant, officers of the Auto Theft Unit decided to conduct a warrantless “administrative search” of Bruce’s premises—which they did in a SWAT-style raid.¹⁵¹

The fact that there was some cause, but not probable cause sufficient to support a warrant, created a seeming conundrum. The Supreme Court has approved suspicionless administrative searches.¹⁵² On the other hand, the *Brown* Court indicated that if there was probable cause to search the salvage yard, the officers would have been required to obtain a warrant.¹⁵³ So, may officers conduct a warrantless administrative search if there is some suspicion, but not enough to add up to probable cause?

A divided panel ultimately approved of the officers’ ability to conduct a warrantless administrative search under these circumstances, but the judges were plainly unhappy about the situation.¹⁵⁴ The majority eventually concluded that, because the officers had a little suspicion—but not too much—an administrative search was fine.¹⁵⁵ Still, the judges were nonplussed. Under the Supreme Court’s rules, administrative searches are allowed of any “pervasively regulated” business, yet “[i]n this era of the pervasive regulation of most businesses” this would “invest law enforcement with the power to invade

¹⁴⁸ The Orange County state attorney dropped all criminal charges against Bruce after a Florida Court found no probable cause for seizure or retention of Bruce’s property. *Id.*

¹⁴⁹ *Id.* at 1235–36.

¹⁵⁰ *Id.* at 1242. The *Bruce* court overturned a grant of summary judgment for the Sheriff and officer defendants, concluding that the SWAT-style execution of the search—if the facts proved true—violated the Fourth Amendment, *id.* at 1247–48, and that there was evidence the search may have been pretextual, *id.* at 1242–43 n.19.

¹⁵¹ *Id.* at 1236.

¹⁵² See, e.g., *New York v. Burger*, 482 U.S. 691, 703 (1987) (upholding the constitutionality of warrantless inspections of vehicle-dismantling businesses); *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 537 (1967) (approving housing inspections by municipal health and safety officials).

¹⁵³ See *Bruce*, 498 F.3d at 1241–42.

¹⁵⁴ See *id.* at 1241 (“We share our sister circuits’ concern that the administrative search exception not be allowed to swallow whole the Fourth Amendment.”).

¹⁵⁵ See *id.* at 1242 (contrasting the “objectively reasonable basis” for suspicion based on a criminal complaint with “direct criminal suspicion”); see also *id.* at 1250 (Carnes, J., concurring) (“The reason I cannot join the majority opinion is its hand-wringing dicta suggesting that otherwise valid administrative searches may not be permissible if there is too much basis for suspecting that evidence of a crime will be found during the search.”).

the privacy of ordinary citizens.”¹⁵⁶ This was “cause for general alarm.”¹⁵⁷

Concurring, Judge Edward Carnes thought the majority’s concerns absurd: “The theme of . . . the majority opinion seems to be that when it comes to administrative searches a little suspicion is okay, but a lot is not.”¹⁵⁸ He refused to join the majority’s “hand-wringing” opinion, which “defies logic.”¹⁵⁹ “[T]his,” Judge Carnes wrote, “is one area covered by Mae West’s observation that: ‘Too much of a good thing is wonderful.’”¹⁶⁰

Judge Carnes seems to have a point: Why would a random administrative search based on *no* cause be fine, but one with *some* cause (albeit not probable cause) be worrisome? As Judge Carnes put it, “[T]he more basis for believing a crime has been committed and that evidence of it can be found, the more justification there is for the search.”¹⁶¹

Right?

B. *Two Old Chestnuts*

Wrong. A primary purpose of the Fourth Amendment is to prevent arbitrary policing, and Judge Carnes’s position invites just that. (The Fourth Amendment may well do more—e.g., limit excessively intrusive searches—but it must at least prevent arbitrary government searching.¹⁶²) In order to see how Judge Carnes’s seemingly sensible position is nonetheless wrong, it is instructive to look back at two iconic Supreme Court search cases, both decided before the doctrine got away from the Justices. Initially, each of these decisions appears quite odd; on reflection, however, they together have something important to teach about the Fourth Amendment’s protections against arbitrary policing.

1. *Camara’s Dilemma*

In 1967, the year before *Terry* even was decided, the Justices confronted a dilemma—not dissimilar from that which the *Bruce v. Beary* court struggled with—involving housing inspectors.¹⁶³ The issue arose

¹⁵⁶ *Id.* at 1241, 1248 (majority opinion).

¹⁵⁷ *Id.* at 1241.

¹⁵⁸ *Id.* at 1250 (Carnes, J., concurring).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See *infra* text accompanying notes 189–91.

¹⁶³ *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967).

because some homeowners were unwilling to allow inspectors to enter their personal castles to check for unsafe wiring and the like without a warrant.¹⁶⁴ But how could the inspectors get a warrant given that the Fourth Amendment says “no Warrants shall issue, but upon probable cause?” Most housing inspections—and most safety inspections of businesses—are periodic: you get inspected when it is your turn, not when there is reason to believe you’ve done something wrong.¹⁶⁵

In *Camara v. Municipal Court*, the Justices concluded that warrants were necessary for administrative searches, but in reaching this conclusion they were forced to redefine the entire notion of what it means to have “probable cause.” The validity of the search was to be decided by balancing the need for the housing inspection against the intrusion of the housing inspector.¹⁶⁶ The former was great; the latter small.¹⁶⁷ In light of this balance, the Court held there is “probable cause” (the quotes are the Court’s) whenever the inspectors can show a magistrate the need for a search of the homes in a given area based on some set of criteria, including “the passage of time” since the last inspection, “the nature of the building,” (e.g., apartment houses), or “the condition of the entire area.”¹⁶⁸

If, heretofore, “probable cause” meant individualized suspicion that someone had done something wrong—and that is what it had meant—this new definition was odd indeed.

2. *Prouse: Misery Loves Company*

Equally perplexing was the logic of the decision in *Delaware v. Prouse*, a seminal 1979 case involving an automobile stop.¹⁶⁹ The officer in *Prouse* stopped a car for a license and registration check.¹⁷⁰ Approaching the car, the officer smelled marijuana, and then saw it in plain view.¹⁷¹ *Prouse* was arrested for illegal possession.¹⁷² The prob-

¹⁶⁴ *Id.* at 526 & n.1.

¹⁶⁵ *See id.* at 526 (describing the inspection as a “routine annual” inspection in accordance with the San Francisco Housing Code).

¹⁶⁶ *Id.* at 535 (“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.”).

¹⁶⁷ *See id.* at 537 (weighing the public interest in preventing dangerous housing conditions against the impersonal and untargeted intrusion).

¹⁶⁸ *Id.* at 538.

¹⁶⁹ *Delaware v. Prouse*, 440 U.S. 648, 650 (1979).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

lem arose because the police officer had absolutely no reason to stop Prouse in the first place.¹⁷³

The Supreme Court held the stop invalid, relying on the three-part test from *Brown v. Texas*—in many ways, the model for much of today’s “reasonableness” balancing:

Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.¹⁷⁴

The Justices were quick to concede that the State had a “vital interest” in making sure that drivers were properly licensed and cars were registered and safe to drive.¹⁷⁵ But they were not so sanguine about the intrusion that these “random” stops entailed.¹⁷⁶ Such a stop reflects an “unsettling show of authority,” interferes with “freedom of movement,” and can be inconvenient and time consuming. It can create “substantial anxiety.”¹⁷⁷

What really seemed to tilt the Court toward throwing out Prouse’s conviction, though, was the third part of the balancing test: the Justices doubted the efficacy of such stops.¹⁷⁸ “It seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed.”¹⁷⁹ Wouldn’t it be better, they asked, to stop people whose driving is erratic or whose vehicles seem to have a problem? Surely it would be more effective to find unlicensed drivers among those who commit traffic violations than by “choosing randomly from the entire universe of drivers.”¹⁸⁰ For this reason, the stop at issue in *Prouse* was held invalid—“[i]n terms of actually discovering unlicensed drivers or deterring them from driving,” it seemed insuffi-

173 As the officer explained, “I saw the car in the area and wasn’t answering any complaints, so I decided to pull them off.” *Id.* at 650–51.

174 *Brown v. Texas*, 443 U.S. 47, 50–51 (1979); see *Prouse*, 440 U.S. at 658–59 (considering the three *Brown* factors in determining the stop’s reasonableness).

175 *Prouse*, 440 U.S. at 658.

176 *Id.* at 657.

177 *Id.*

178 *Id.* at 659–60.

179 *Id.*

180 *Id.*

ciently productive "to qualify as a reasonable law enforcement practice under the Fourth Amendment."¹⁸¹

It was just at this moment, though, that the *Prouse* Court took its own odd turn, holding that its ruling "does not preclude the State of Delaware or other States from developing" alternatives, one of which is "[q]uestioning of *all* oncoming traffic at roadblock-type stops."¹⁸²

If the problem with the spot check in *Prouse* was that it was too intrusive to motorists, in light of how unlikely it was to turn up a violation, wouldn't checkpoints be worse? Even larger numbers of people would be inconvenienced, with the same small chance of finding violations. Justice Rehnquist, dissenting from the Court's ruling in *Prouse*, was caustic in pointing out the illogic: "Because motorists, apparently like sheep, are much less likely to be 'frightened' or 'annoyed' when stopped en masse" a patrol officer can "stop *all* motorists on a particular thoroughfare, but he cannot . . . stop *less* than all" of them.¹⁸³ This, he concluded, "elevates the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence."¹⁸⁴

C. Back to First Principles

The logic in *Prouse* and *Camara* does seem odd until one puts it into the perspective of one of the central purposes of the Fourth Amendment: avoiding arbitrary police intrusions into our lives. While there are many things controversial about the Fourth Amendment, this is not one of them. The Fourth Amendment may well do more than prevent arbitrary government policing. For example, cases rely on the "reasonableness" language to bar excessively intrusive searches.¹⁸⁵ But no one disputes the role the amendment plays, and was intended to play, in preventing government arbitrariness.

There are two "paradigm" cases that led to the framing of the Fourth Amendment: Britain's Wilkesite controversies and the American fight against Writs of Assistance.¹⁸⁶ Arguing against the Writs of

¹⁸¹ See *id.* at 657, 659–60 (finding its "incremental contribution to highway safety" insufficient to justify the stop under the Fourth Amendment).

¹⁸² *Id.* at 663 (emphasis added).

¹⁸³ *Id.* at 664 (Rehnquist, J., dissenting). (Coincidentally, the case immediately after *Prouse* in the official reports is called *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979)).

¹⁸⁴ *Prouse*, 440 U.S. at 664 (Rehnquist, J., dissenting).

¹⁸⁵ See *Winston v. Lee*, 470 U.S. 753, 759, 763–66 (1985) (holding that a "compelled surgical intrusion" into a suspect's chest to uncover a bullet was unreasonably intrusive even upon probable cause); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (striking down Tennessee's law authorizing use of deadly force on an "unarmed, nondangerous" fleeing suspect).

¹⁸⁶ See The Honorable M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. REV. 905, 921 (2010) ("[T]he mischief that gave

Assistance in 1761, James Otis put his finger on the problem, stating that permitting general searches invites “[e]very man prompted by revenge, ill humor, or wantonness to inspect the inside of his neighbor’s house . . . one arbitrary exertion will provoke another”¹⁸⁷ Across the pond, condemning the general warrants used to search John Wilkes’s property, Chief Justice Pratt—later Lord Camden—condemned the “discretionary power given to messengers to search wherever their suspicions may chance to fall.”¹⁸⁸

It has long been a common consensus that the Fourth Amendment guards against the evil of arbitrary government rummaging in people’s lives. Judges and scholars of the Fourth Amendment have said the like, over and over and without dissent.¹⁸⁹ The Justices in *Prouse* reminded readers that “[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials . . . ‘to safeguard the privacy and security of individuals against arbitrary invasions.’”¹⁹⁰ The Justices said the same thing ten years earlier in

birth to the Fourth Amendment was the oppressive general search, executed through the use of writs of assistance and general warrants. The lesson from this mischief is that granting unlimited discretion to customs agents and constables inevitably leads to incursions on privacy and liberty”). For a fuller description of paradigm cases, see JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 15–18 (2005).

¹⁸⁷ James Otis, *Speech Against the Writs of Assistance* (Feb. 24, 1761), in 1 JOHN WESLEY HALL, JR., *SEARCH AND SEIZURE* 8 (2d ed. 1991).

¹⁸⁸ *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 498 (KB).

¹⁸⁹ See, e.g., *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 621–22 (1989) (“An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents.”); *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (stating that any cause standard lower than “probable cause” “would be to leave law-abiding citizens at the mercy of the officers’ whim or caprice”); *id.* at 180 (Jackson, J., dissenting) (insisting that Fourth Amendment rights are “in the catalog of indispensable freedoms” because “[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government”); *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949) (“The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in ‘the concept of ordered liberty’”; *Amsterdam*, *supra* note 123, at 417 (“A paramount purpose of the fourth amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures.”); Clancy, *supra* note 121, at 623 (“[F]or the framers, the ‘good’—the core value [of the Fourth Amendment]—was individualized suspicion, which limited arbitrariness at all levels of government, not just at the lowest level of those executing the search or seizure.”); Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 255, 264 (1961) (“All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained.”); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969).

¹⁹⁰ *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979) (footnote omitted) (quoting *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 312 (1978)).

Camara—in almost the same words: “The basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”¹⁹¹

As both the *Prouse* and *Camara* Courts made clear, the sine qua non of official arbitrariness is allowing officers unfettered “discretion” to search whenever the whim strikes. For example, the harm of a warrantless search in *Camara* was to “leave the occupant subject to the discretion of the official in the field.”¹⁹² Similarly, the spot check at issue in *Prouse* represented the “kind of standardless and unconstrained discretion” that is “the evil the Court has discerned” in insisting that officer discretion be “circumscribed.”¹⁹³

In light of the evil the *Prouse* and *Camara* decisions were guarding against, the seeming illogic of the decisions slips away.

Although the *Prouse* Court’s checkpoint seems to be a greater intrusion than the spot check, the Court explained that its solution addressed the real threat to Fourth Amendment rights: the danger of making “the individual subject to unfettered governmental intrusion every time he entered an automobile.”¹⁹⁴

Similarly, the *Camara* Court’s definition of “probable cause” is aimed directly at avoiding official whim or worse. True, the government did not have “cause” as to any individual homeowner. But if an area was dilapidated, or had not been searched in a long time, or had a particularly tricky set of structures, those factors would both supply a reason for the administrative search, and be sufficient to cabin officer discretion.¹⁹⁵

D. Two Types of Searches

Once we see that in *Prouse* and *Camara* the Justices were putting in place safeguards to prevent arbitrary policing (and its siblings: unjustified and discriminatory policing), it also becomes evident that there are two very different kinds of searches, requiring two equally different kinds of protections. Which protection is appropriate depends on what kind of search the government is conducting. Keeping

¹⁹¹ *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528 (1967).

¹⁹² *Id.* at 532.

¹⁹³ *Prouse*, 440 U.S. at 661.

¹⁹⁴ *Id.* at 662–63.

¹⁹⁵ See *Camara*, 387 U.S. at 538 (holding that standards for inspection “may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area”); *id.* at 539 (“Such an approach . . . best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy.”).

clear on this simple point would eliminate much of the confusion of recent cases.

Most of the time when people think about policing they have in mind the sort of thing they see on television—what one might call “investigative” policing, based on suspicion of criminality. The police are after a particular suspect for a particular crime (even one that has not happened yet). The police may know the suspect, but in many cases they are trying to track him (or her) down based on some kind of lead. They engage in a variety of activities we might call searches, from taking fingerprints or DNA samples to busting down the door of a suspect’s house (hopefully with a warrant). What matters for present purposes is that in each of these searches, the government has some modicum of suspicion aimed at a particular person: what the Court refers to as “individualized suspicion.”

But much of policing today is something very different—what can be called “deterrent” or “regulatory.”¹⁹⁶ Policing officials aren’t trying to catch a particular suspect; they are trying in a generalized way to prevent crime from happening.¹⁹⁷ And what is of central import with regard to these activities is that they are suspicion-*less*. Consider airport security: it is not just that we put the TSA officers there to look for a bomb in a suitcase (though assuredly they are). Instead, we spend an untold fortune on such elaborate security in the hope that people will simply leave their agents of destruction at home.¹⁹⁸ Similarly with drunk-driving roadblocks. If a drunk wanders through, the police are going to get him (or her) off the road. But the real reason for the roadblocks—and the publicity that accompanies them—is to discourage people from getting behind the wheel of a car in the first place.¹⁹⁹ Studies suggest this sort of suspicionless, deterrent policing is successful.²⁰⁰

¹⁹⁶ See Friedman & Ponomarenko, *supra* note 10, at 1871–75 (discussing the shift from investigative to deterrent police practices.).

¹⁹⁷ There are other sorts of regulatory goals as well: for example, police officers can require a driver to get out of a car they have stopped to check for weapons. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (per curiam) (upholding such practice).

¹⁹⁸ Programmatic searches may focus on proactive law enforcement as well as deterrence. That is, we do not suspect anyone of drunk driving or airplane bombing, but we do not want to wait until we develop cause, so we search everyone.

¹⁹⁹ RANDY W. ELDER ET AL., WASH. REG’L ALCOHOL PROGRAM, EFFECTIVENESS OF SOBRIETY CHECKPOINTS FOR REDUCING ALCOHOL-INVOLVED CRASHES 266–67 (2002), <http://www.wrap.org/pdfs/2010TIPElderCDCPaper.pdf> (“Although sobriety checkpoints remove some drinking drivers from the road, their primary goal is to deter driving after drinking by increasing the perceived risk of arrest.”).

²⁰⁰ See *id.*

The *Camara* Court focused on this very distinction between suspicionless and suspicion-based policing when it required search warrants for administrative housing searches, but refashioned “probable cause” to make them work.²⁰¹ The Justices observed that “the public interest demands that all dangerous conditions be prevented and abated,” but pointed out that “[m]any such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexperienced occupant himself.”²⁰² And so the Court concluded that “[w]here considerations of health and safety are involved, the facts that would justify an inference of ‘probable cause’ to make an inspection are clearly different from those that would justify such an interference where a criminal investigation has been undertaken.”²⁰³

Once again, to be perfectly clear, any given search can further both these functions, investigative and deterrent, which is why the focus on whether there is suspicion is so important. Indeed, the very thing wrong with the *Edmond* “primary purpose” test is its inability to distinguish if a search is primarily for ordinary crime control purposes or something else.²⁰⁴ A drunk-driving roadblock may deter drunk driving (if properly publicized) but those caught will be punished. And one function of criminal punishment is deterrence of crime generally.²⁰⁵

What matters—what we’ve been driving toward—is that once one focuses on the fact that some searches are based on suspicion, and some are suspicionless, it becomes clear that each sort of search requires a very different set of protections against arbitrariness. Indeed, the otherwise perplexing text of the Fourth Amendment makes sense in this light: “probable cause” is the appropriate safeguard in suspicion-based, investigative searches, but the “reasonableness” clause necessarily must govern suspicionless, programmatic searches.²⁰⁶ Where the Supreme Court should be focusing, instead of trying to dis-

201 See *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 537–38 (1967) (emphasizing the need for preventive housing inspections).

202 *Id.* at 537.

203 *Id.* at 538 (quoting *Frank v. Maryland*, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting)).

204 See *supra* notes 62–66 and accompanying text.

205 See Robert Apel, *Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence*, 29 J. QUANTITATIVE CRIMINOLOGY 67, 68–69 (2013).

206 Programmatic searches are not a novel invention. The Whiskey Excise Act of 1791, passed the same year the Fourth Amendment was ratified, allowed for programmatic searches of ships entering American ports and registered whiskey distilleries. See Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1305–06, 1308 (2010).

cern if the “primary purpose” is a “special need” or “ordinary law enforcement,” is on whether a search is suspicionless or suspicion-based, and then asking what is the appropriate protection for each sort of search.²⁰⁷

Stated crisply: the Court should be focusing on the differing protections necessary to guard against government arbitrariness when there is and is not cause. Classifying a search as “ordinary law enforcement” or “administrative” or “special needs” has proven impossible, even for the Justices. By contrast, it is very easy to tell whether a search is based on suspicion or is suspicionless and to figure out what related protection will work (or not) to prevent arbitrary, unjustified, or discriminatory policing.

1. *Avoiding Arbitrariness I: Warrants and Probable Cause*

In suspicion-based searches, the Constitution is quite clear as to what protections are necessary to prevent arbitrary or unjustified or discriminatory searches: probable cause and warrants.²⁰⁸ Probable cause is a level of suspicion sufficient to justify the government in invading one individual’s person or property, rather than another’s.²⁰⁹ Warrants require someone other than the police to decide if that cause exists, and they limit the scope of the search.²¹⁰ If the police do, in fact, have probable cause to suspect someone of something, then the police action is not arbitrary (or discriminatory, or unjustified): they have a sufficient reason for searching.²¹¹

2. *Avoiding Arbitrariness II: Generality (or Randomness)*

When suspicion-less searches are at issue, however, the protection has to be something quite different: it is that the searching must be

²⁰⁷ Again, this Article does not speak to the question of what constitutes a “search” or “seizure,” although we are skeptical that balancing is the solution there either.

²⁰⁸ Some argue that the Warrant Clause is not intended to mandate warrants, but only to put terms on their usage in order to avoid the evils of general warrants. See TAYLOR, *supra* note 189, at 45–47; Amar, *supra* note 84, at 771–76. But as Anthony Amsterdam persuasively argues, we also have a clear indication of what the Framers, having specified what is required for the issuance of warrants, thought was appropriate when suspicion-based investigative searches were occurring. See Amsterdam, *supra* note 123 at 396–99.

²⁰⁹ See *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).

²¹⁰ See *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 532–33 (1967) (describing the protections provided by the warrant requirement).

²¹¹ But see Sherry F. Colb, *Stopping a Moving Target*, 3 RUTGERS RACE & L. REV. 191, 206–07 (2001) (noting that under *Whren v. United States*, 517 U.S. 806 (1996), an officer may choose to follow a driver based on discriminatory motives, wait for the driver to violate a traffic law, and pull him over).

general, not selective.²¹² The protection cannot be “cause,” because by definition these regulatory, deterrent searches are happening without cause. They are meant to dissuade criminal action before it is contemplated or taken. In this situation, generality fills the hole. This is exactly what the *Prouse* Court said: an officer cannot arbitrarily pull over drivers for license checks; the police instead have to set up a checkpoint so they are not picking and choosing.²¹³ Ditto *Camara*: “cause” to conduct housing inspections has to be something other than individualized suspicion; it is instead something about the area to be searched. But then all like places in the area must be inspected.²¹⁴

Of course, searching everyone can get prohibitively expensive, but there is an alternative: a truly random search. In *Prouse*, Justice Blackmun joined in the Court’s decision but wrote separately to point out it was not necessary to stop every car at a checkpoint.²¹⁵ It would be perfectly fine to stop every fifth car or every tenth car.²¹⁶ What matters is ensuring that the police are not picking and choosing based on some potentially illegitimate basis.²¹⁷

While randomness can help bring down the cost of a regulatory search, and is often appropriate as a substitute for generality, there are two important reasons to prefer (at least in some instances) searching everyone rather than a random subset. The first value of a universal search is that if it affects enough people, the political process itself will act as an additional safeguard of our liberty.²¹⁸ Although

²¹² See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (holding that stopping an automobile to check the driver’s license and registration violates a driver’s Fourth Amendment rights unless conducted in a manner free from individual discretion).

²¹³ *Id.* at 661, 663.

²¹⁴ *Camara*, 387 U.S. at 536–38.

²¹⁵ *Prouse*, 440 U.S. at 663–64 (Blackmun, J., concurring).

²¹⁶ See *id.* at 664.

²¹⁷ See *id.* at 663–64 (noting that the majority opinion does not foreclose spot checks “that do not involve the unconstrained exercise of discretion”).

²¹⁸ See Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1733–45 (2014) (explaining political process theory and its applicability to searches and seizure affecting large groups that have access to the legislature); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 588 (1992) (“Fourth Amendment regulation is usually unnecessary where large numbers of affected parties are involved. Citizens can protect themselves in the same way that they protect themselves against most kinds of government misconduct—they can throw the rascals out.”); Worf, *supra* note 129, at 115 (“[S]o long as there is *significant* spreading of costs . . . the theoretical possibilities of different preferences, concentrated costs, and collective action problems do not justify the costs of judicial review . . .”); Akhil Reed Amar & Vikram David Amar, *A Dialogue on Why Mandatory DNA Tests Are Different from Mandatory Drug Tests for Fourth Amendment Purposes*, FINDLAW (May 17, 2002), <http://writ.news.findlaw.com/amar/20020517.html> (contending that mandatory drug testing policies that affect only a “hand-

reliance on the political process alone ought not immunize searches from judicial control, the further the cost of police searching is spread, the more society can be comfortable knowing that people think the effort is appropriate and worthwhile.²¹⁹ Airport security is a good example. While people may grumble about the lines, there is no widespread call to stop doing it. However, when the TSA started to use x-ray machines that were too revealing of people's bodies, there was an immediate outcry and the practice was stopped.²²⁰ There, the public deemed the intrusion too great given the payoff. When searches are truly general, the decision about legitimate government interests and minimal intrusions rests where it should, at least initially: with the public.

Similarly, if searches are general, the cost imposed on government to perform them provides an additional guarantee they are worth it. Think here about automobile inventory searches. When the police seize a car, they sometimes "inventory" its contents, ostensibly to be safe (it could have a bomb in it) and to be sure the owner does not falsely claim to have had all the family jewels in it.²²¹ The Supreme Court has approved such searches, but its decisions waver on the question of discretion: Must the police inventory every car, and do so thoroughly, or can they pick and choose?²²² The answer should be clear by now: if there is discretion, the police may use it to search cars arbitrarily, or worse yet, to seize them on pretext so they can search them. If the exercise in inventorying cars is really worth the candle,

ful" of schools pose Fourth Amendment problems, but a mandatory nationwide DNA testing program that affected every voter and was approved by Congress would not).

²¹⁹ See Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 209–10 (concluding that political process should govern where a community has internalized the burden of law enforcement techniques); Worf, *supra* note 129, at 120 (arguing that courts should defer to legislative judgments about search and seizure practices that affect society as a whole).

²²⁰ See FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 826, 126 Stat. 11, 132 (codified as amended at 49 U.S.C. § 44901 (2012)) (prohibiting the TSA from using body scanners that do not incorporate privacy filters); Ron Nixon, *Unpopular Full-Body Scanners to be Removed from Airports*, N.Y. TIMES (Jan. 18, 2013), <http://www.nytimes.com/2013/01/19/us/tsa-to-remove-invasive-body-scanners.html> (reporting that the TSA would remove the controversial body scanners from airports).

²²¹ See *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976) (explaining the inventory car search as a response to these concerns).

²²² See Wayne R. LaFare, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 451–53 (1990) (discussing the inventory search standard and explaining the Court's inconsistencies); see also *Colorado v. Bertine*, 479 U.S. 367, 376–77 (1987) (Blackmun, J., concurring) (emphasizing that inventory searches should only be permissible where officer discretion is absent).

then, absent cause to focus on a particular car, the police should have to inventory all of them. If police fail to do so, one questions the justifications offered in the first place for inventorying cars, absent cause related to a specific car.²²³ After all, might not any given un-inventoried car have a bomb or jewels in it?

3. A Note on "Hit Rates"

In its special needs "reasonableness" cases, the Supreme Court uses a three-part test, one part of which asks how effective the search is at achieving the government's stated interest.²²⁴ In cases like *Sitz* involving drunk-driving roadblocks or *Edmond* involving drug interdiction roadblocks, the Justices discuss efficacy in terms of the "hit rate," meaning the number of vehicles in which violations were found.²²⁵ But recall that the hit rate in *Sitz* was very low: below 2%, and one might expect a similarly low rate from a checkpoint like that authorized in *Prouse*.²²⁶ Yet, those low hit rates were sufficient for the Court.

In truth, and *contra* the way the Supreme Court looks at things, in suspicionless searches we should be content with low hit rates, while in suspicion-based searches we should expect a higher one. If officers are conducting searches ostensibly based on "probable cause," and rarely coming up with anything, we can logically conclude they either are not very good at discerning probable cause, or are not really relying on it in the first place. But because suspicionless searches are about deterrence, it should not bother us if those searches do not often find guilty people. Indeed, it might encourage us. As the mayor said in *Edmond*, if publicity around the program was successful, they might catch only a few people at the roadblocks precisely because the

²²³ This distinction explains the difference in outcome in two Ninth Circuit DNA-testing cases. In *Friedman v. Boucher*, the court held that the forcible taking of a DNA sample of a pre-trial detainee "as an aid to solve cold cases," without suspicion or statutory authority, was unconstitutional. *Friedman v. Boucher*, 580 F.3d 847, 851, 858 (9th Cir. 2009). In *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012)—which was later taken en banc and replaced with a short per curiam opinion, post-*Maryland v. King*, with the same result—the Ninth Circuit upheld a California DNA-testing statute for all felony arrestees. The court noted that, unlike in *Friedman*, the testing in *Haskell* was conducted under statutory authority, rather than "at the whim of one deputy district attorney"; it was "programmatic and applie[d] to all felony arrestees," and did not "single[] out one individual"; and there were safeguards to protect against misuse of the information. *Id.* at 1056–57.

²²⁴ See *supra* text accompanying note 174, at 656–57, 659–61.

²²⁵ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 35, 41–42 (2000) (finding the roadblock unreasonable despite an overall hit rate of approximately 9%); Mich. Dep't of State Police v. *Sitz*, 496 U.S. 444, 453–55 (1990) (discussing the effectiveness of drunk-driving roadblocks).

²²⁶ See *Sitz*, 496 U.S. at 455 (reporting a hit rate for DUI arrests of 1.6%).

roadblocks are working at deterring the prohibited activity.²²⁷ Of course, the failure of our ability to rely on hit rates for suspicionless searches means we must look for alternate safeguards.

E. The Necessity of Alternate Safeguards

The Supreme Court's "special needs" analysis had one thing going for it, at least on paper: the Court said departures from the warrant and probable cause model were permissible only when there were "other safeguards" in place to provide a "constitutionally adequate substitute for a warrant."²²⁸ That recognizes the necessity of just the sort of thing described here: that there are protections in place sufficient to guard against arbitrary or unjustified searching.

In practice, however, the Justices and lower courts show little awareness of what they are safeguarding. The "safeguards" they identify—when they remember to identify them at all—often fail to secure the protection against arbitrary enforcement that motivated the Fourth Amendment.²²⁹

This problem is evident in the Supreme Court's decision in *New York v. Burger*.²³⁰ *Burger* was a case very much like *Bruce v. Beary*, only the Supreme Court failed to see or acknowledge the problem that at least gave the judges in *Bruce* pause. In *Burger*, police searched a junkyard as part of an ostensibly administrative search. The owner immediately admitted that he was operating illegally, i.e., without the required registration or license, but the administrative inspectors—who also happened to be NYPD officers—searched the entire junkyard, and Burger ultimately was convicted for dealing in stolen vehicles.²³¹

²²⁷ See *Birchfield*, *supra* note 81, at E1 (quoting former Mayor Stephen Goldsmith as acknowledging that the roadblocks may not catch a lot of offenders, but they may "'deter people from engaging in activity that could land them in jail'").

²²⁸ *New York v. Burger*, 482 U.S. 691, 711 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985).

²²⁹ See *supra* notes 186–91 and accompanying text; see also, e.g., *United States v. Castelo*, 415 F.3d 407, 411 (5th Cir. 2005) (noting that authorization of suspicionless commercial truck stops were limited to trucks "operating on a state highway"); *In re Morgan*, 742 A.2d 101, 107 (N.H. 1999) (finding an "adequate substitute for a warrant" in the fact that only "certain law enforcement officers and prosecutors" could execute suspicionless searches of pharmacies). Often courts fail to consider alternative safeguards at all. See, e.g., *United States v. Knights*, 534 U.S. 112, 121–22 (2001); *O'Connor v. Ortega*, 480 U.S. 709, 719–27 (1987); *Int'l Bhd. of Elec. Workers, Local 1245 v. Skinner*, 913 F.2d 1454, 1460–64 (9th Cir. 1990); *Harmon v. Thornburgh*, 878 F.2d 484, 485 (D.C. Cir. 1989).

²³⁰ *Burger*, 482 U.S. at 691.

²³¹ *Id.* at 693–95.

The *Burger* Court upheld the warrantless administrative search, but its discussion of alternate “safeguards” showed no sensitivity to Fourth Amendment values. The Court concluded the warrantless search was fine, because the statute only allowed searches by daylight, put junkyard owners on notice that they would be searched, and limited the scope of the search to records and vehicles.²³² People probably do prefer the government show up to inspect their businesses by day rather than by night, and may appreciate that officers can’t go searching through their lunch sacks. But *none* of that deals with the problem of arbitrariness. None of it keeps officers from picking and choosing what businesses to search, based on whim, caprice, or flat out malevolence.

Studied carefully, the search at issue in *Burger* was suggestive of the very sort of arbitrariness we should care about. The *Burger* majority said: “It was unclear from the record why, on that particular day, Burger’s junkyard was selected for inspection.”²³³ But it brushed aside this all-important question and moved on. We know it was not because Burger’s junkyard was selected, a la *Camara*, pursuant to a list of registered junkyards—after all, Burger was not registered.²³⁴ And we can thus guess at the answer: because the police had a tip. There is nothing wrong with tips, but if the search of Burger’s junkyard was suspicion-based (rather than suspicionless), either the police had probable cause, and should have gotten a warrant, or they had a tip that did not amount to probable cause, and they should not have searched in the first place.

Which brings us back to the *Bruce* case. The answer to the question posed in *Bruce* is that a search based on *some* cause, but not *probable* cause, is illegitimate.²³⁵ A truly random or general search on no cause is fine, as is a targeted search based on probable cause.²³⁶ Both work to eliminate arbitrary policing. Allowing ostensible “administrative” searches on less than probable cause, however, is to invite arbitrariness and gut the probable cause requirement of any purchase.

The courts have lost sight of one of the primary harms against which the Fourth Amendment guards, and have become confused about what police agencies may and may not do. But it is not compli-

²³² *Id.* at 711–12.

²³³ *Id.* at 694 n.2.

²³⁴ *Id.* at 726 (Brennan, J. dissenting).

²³⁵ Subject to some potential narrow exceptions. *See infra* Part III.B.

²³⁶ *See, e.g.,* *Bruce v. Beary*, 498 F.3d 1232, 1242 (11th Cir. 2007).

cated. Either the police must have sufficient cause to search a particular individual (individualized suspicion), or the government must do it to all citizens—or a truly random subset. In this way we avoid arbitrariness, discrimination, whim or caprice.

F. Return to the Doctrine

How much does this distinction between suspicion-based and suspicionless searches, and the concomitant safeguards, require changing the doctrine? On the one hand, surprisingly little. With relatively minor adjustment, the Supreme Court could get back on track. It is only in recent years that the Court has strayed from its initial, largely correct understanding that what mattered were the protections for government searches, not some abstract distinction between “special needs” and “ordinary law enforcement.”

To be clear, this idea of appropriate protections says little about some areas of controversy. It is agnostic as to remedies, and in particular as to whether the exclusionary rule is appropriate.²³⁷ Similarly, it does not touch questions about the proper contours of the warrant requirement.²³⁸

At the same time, focusing on the appropriate protections for various searches helps illuminate the direction in areas that have proven difficult. Take the NSA’s bulk data collection, the source of enormous legal and political controversy. In reality, the question is not so complicated. Bulk collection involves two searches: gathering the information for the database, and then searching that database with certain phone numbers, or “selectors.”²³⁹ Assuming that the initial collection is a search—courts are in disagreement about this—it is plain such a collection is suspicionless, and if it is constitutional then the necessary protection is that everyone’s data be gathered.²⁴⁰ On the other hand, searching the database is suspicion-based—or should be, as not everyone is searched—and thus before searching the government should have to make a sufficient showing of cause before a judge.²⁴¹

²³⁷ For what it is worth, we are adamant that some effective remedial scheme is necessary to prevent arbitrariness.

²³⁸ Again, though, because preventing arbitrariness is a primary goal of the Fourth Amendment, we have a preference for warrants. Still, there will be times—mostly, if not exclusively, in exigent circumstances—when obtaining them is impossible or makes no sense.

²³⁹ See *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 797 (2d Cir. 2015).

²⁴⁰ See, e.g., *Klayman v. Obama*, 957 F. Supp. 2d 1, 30 (D.D.C. 2013) (holding that both initial collection and subsequent queries are both Fourth Amendment searches), *rev’d*, 800 F.3d 559 (D.C. Cir. 2015) (per curiam).

²⁴¹ See *Clapper*, 785 F.3d at 798.

Still, difficult questions will remain. As Part III makes clear, although they require somewhat greater attention, these are but subsets of suspicion-based and suspicionless searches.

III. HARD(ER) CASES

One value of viewing "reasonableness" through the lens of the protections that are afforded is that it helps clarify the hard questions. Each hard case is a subset of the two types of searches this Article has discussed: suspicion-based (investigative), and suspicionless (programmatic or deterrent). As should be clear by now, searches fall into one of these two categories, and the protection for each is different. For suspicion-based searches the protection is cause: probable cause. For suspicionless, it is generality or randomness of searches.

The obvious questions that arise are: first, whether, and under what circumstances, a policing agency can conduct a suspicionless search of only a *subset* of the population; and second, whether a cause-based investigative search is ever permissible on less than *probable* cause. An example of the first question is collecting and testing DNA samples only of arrestees and convicts, but not the population at large; the clear example of the second is stop-and-frisk. This Part addresses these questions in turn. It also asks whether the answers to those questions might vary for some unique target groups, such as students.

Although these questions are harder, they are not all necessarily all that difficult if one keeps one's eye on the ball of preventing government arbitrariness.

A. Subpopulation Searches (and the Equal Protection Clause)

Every passenger who boards a commercial flight is searched.²⁴² And yet, if you stop and think about it, that is not necessarily a universal search. Only those who fly on planes are searched. Is it justifiable for the government to subject only those who board aircraft to this kind of regularly imposed search, but not those who ride buses or trains?

Programmatic searches often are aimed only at subpopulations. Welfare recipients must take drug tests, while those who do not require government assistance are excused.²⁴³ In the terror war, the

²⁴² See 49 U.S.C. § 44901(a) (2012).

²⁴³ See *Lebron v. Sec'y, Fla. Dep't of Children & Families*, 710 F.3d 1202, 1211–13 (11th Cir. 2013) (striking down state mandatory drug testing of welfare recipients); cf. *Peery v. Chicago Hous. Auth.*, No. 13-cv-5819, 2014 WL 4913565, at *11, 12 (N.D. Ill. Sept. 30, 2014) (finding

government maps Muslim neighborhoods, but not others.²⁴⁴ Roadblocks are placed at one location, not on every road, and may stop only certain kinds of vehicles.²⁴⁵ Student athletes, but not all students, may be subjected to mandatory drug tests.²⁴⁶ In some jurisdictions, only sex offenders are subjected to mandatory DNA tests.²⁴⁷ This presents a serious question as to when such lines and distinctions are acceptable.

The key point advanced here is that for subpopulation searches, the primary constitutional protection is the Equal Protection Clause. This is a third, and critical, protection for government searches. That the Equal Protection Clause ought to govern here should come as no surprise: the very function of the Equal Protection law is to address government action that treats people differently by putting them into different groups, or classes.²⁴⁸ Relying instead on Fourth Amendment doctrine to answer these questions—or some odd variant of Equal Protection designed especially for policing—courts have made a hash of determining whether subpopulation searches are valid or not.²⁴⁹

It is worth noting at the outset how well the doctrinal structure of the Equal Protection Clause is suited to addressing the Fourth Amendment's concern regarding arbitrariness in the context of subpopulation searches. Whenever the government conducts a search or seizure, the germane question, asked out of a concern about arbitrary treatment, is "why me?"²⁵⁰ For suspicion-based searches, that ques-

no state action but suggesting that, alternatively, drug testing was permissible because all low-income housing applicants, not only those receiving government assistance, were tested).

²⁴⁴ See Raza Complaint, *supra* note 124, at 1 (detailing the NYPD's targeted surveillance of Muslim Americans).

²⁴⁵ See *Wagner v. Swarts*, 827 F. Supp. 2d 85, 91, 95 (N.D.N.Y. 2011) (evaluating the reasonableness of motorcycle checkpoints erected outside a motorcycle rally).

²⁴⁶ See *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 974–75 (Ind. 2002) (upholding a school drug testing policy that applies to all students participating in athletics and certain extracurricular activities).

²⁴⁷ See *People v. Wealer*, 636 N.E.2d 1129, 1130–31 (Ill. App. Ct. 1994) (upholding a statute requiring DNA samples only from sex offenders).

²⁴⁸ See *Loving v. Virginia*, 388 U.S. 1, 10 (1967).

²⁴⁹ The problem is that—as others have observed—we have hived the Fourth Amendment off from the rest of constitutional law. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 263 ("Profiling issues have been left primarily to pedestrian laborers in the field of criminal procedure . . ."); Amar, *supra* note 84, at 758–59; William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1016 (1995) ("Constitutional law courses ignore Fourth and Fifth Amendment doctrine, and criminal procedure courses return the compliment."); see also Pamela S. Karlan, *Race, Rights and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2001–02 (1998) (explaining that the Court addresses racial discrimination in policing without reference to the Equal Protection Clause).

²⁵⁰ See Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurispru-*

tion is answered by focusing on the level of cause—probable or otherwise.²⁵¹ Cause serves to single out those deserving of closer scrutiny.²⁵² But for suspicionless searches of subpopulations, there is no individualized cause.²⁵³ Rather, the “why me?” question is answered by asking if there is a good reason to treat the members of one *group* differently than others. Whether one wants to refer to the doctrine as emanating from the “reasonableness” clause of the Fourth Amendment, or from the Equal Protection Clause, the point is that Equal Protection principles provide the right basis for evaluating subpopulation searches.

This section begins by looking at searches in which the government chooses targets on the basis of what would be a suspect classification under the Equal Protection Clause. Then, we turn to the same question when no suspect classification is at issue.

1. *Race and Other Suspect Classifications*

Suppose the government decided that as part of airport security it was going to search more thoroughly those who appeared to be of Arab or Muslim descent. There are some, particularly in the aftermath of September 11th, who argued this should be our policy.²⁵⁴ But would it be constitutional?

a. *Race in Suspect Descriptions*

To answer this question, we need to look first at some policing cases that involve suspicion-based rather than suspicionless searches. This is necessary in order to see what a bungle courts have made of familiar constitutional anti-discrimination protections in the policing context. Outside policing, it is well settled that when race is the explicit basis of government action, the Equal Protection Clause *always* mandates the application of strict scrutiny.²⁵⁵ There is no reason this

dence, 96 COLUM. L. REV. 1456, 1486–87 (1996) (identifying a “targeting harm” of being illegitimately selected for governmental intrusion in the form of a search or seizure).

²⁵¹ See *id.* at 1458.

²⁵² See *id.*

²⁵³ See, e.g., Primus, *supra* note 10, at 256 (explaining that administrative searches do not require probable cause or a search warrant).

²⁵⁴ See, e.g., Paul J. Browne, *NYPD’s ‘Muslim Mapping’ Saved Lives*, N.Y. POST (Apr. 20, 2014, 9:27 PM), <http://nypost.com/2014/04/20/nypds-muslim-mapping-saved-lives/>; Michael Kinsley, *When Is Racial Profiling Okay?*, WASH. POST (Sept. 30, 2001), at B07 (“[T]oday we’re at war with a terror network that just killed 6,000 innocents and has anonymous agents in our country planning more slaughter. Are we really supposed to ignore the one identifiable fact we know about them?”).

²⁵⁵ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 220 (1995).

basic principle should differ just because the government actor is the police. That is the central point of this section and it should apply no matter the type of search in which the government is engaging.

We begin with *Brown v. City of Oneonta*, and what plainly began as a suspicion-based, investigative search.²⁵⁶ In *Oneonta*, a man wielding a knife assaulted a woman in bed in the early hours of the morning. She did not see her assailant's face.²⁵⁷ However, from his arm and hand she believed he was African-American.²⁵⁸ She may have told police he was young, based on the speed with which he crossed the room.²⁵⁹ At some point, the police concluded he had cut his hand.²⁶⁰ And so the police set out to find a young, black man with a cut on his hand.²⁶¹ This was a search for a particular suspect, who had committed a particular crime.

The problem was how the search was executed. Oneonta, population 14,000, had less than 500 black residents, and a nearby college campus with another few hundred black students.²⁶² The police began a sweep, stopping as many black men as they could find, insisting that they show their hands.²⁶³ Some of those who were stopped sued, alleging violations of both the Fourth Amendment and Equal Protection Clause.²⁶⁴

What the *Oneonta* court got right was its understanding that even if the Fourth Amendment was not implicated, the Equal Protection Clause was. According to the court, most of the blacks stopped were not "seized" within the meaning of the Fourth Amendment.²⁶⁵ None-

²⁵⁶ *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000).

²⁵⁷ *Id.* at 334.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ In the reported decision, the suspect is described as having a cut hand. *Id.* But the victim did not say this, and in fact she decried the dragnet sweep that subsequently occurred. See John Caher, *After Decades, Film Recalls Humiliation of Oneonta Blacks in Search for Woman's Attacker*, 251 N.Y.L.J., Apr. 10, 2014, <http://www.woh.com/wp-content/uploads/NYLJ-SNF-04-10-14.pdf> (quoting the victim as describing the police conduct as "a blatant violation of human dignity and human rights"); Chisun Lee, *In Search of a Right*, VILLAGE VOICE (July 26, 2005), <http://www.villagevoice.com/news/in-search-of-a-right-6399394> (reporting that "[t]he victim herself said, 'I didn't know where he had cut himself'" and that the investigators concluded that the attacker had cut himself because blood was found on the doorknobs).

²⁶¹ *Oneonta*, 221 F.3d at 334.

²⁶² Bob Herbert, *In America; Breathing While Black*, N.Y. TIMES (Nov. 4, 1999), <http://www.nytimes.com/1999/11/04/opinion/in-america-breathing-while-black.html>. The reported decision says Oneonta had 10,000 residents and 300 blacks, *Oneonta*, 221 F.3d at 334, but census figures from the time put the population at around 14,000.

²⁶³ *Oneonta*, 221 F.3d at 334.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 340. One may doubt this—the court acknowledged that the police shining a spot-

theless, the court understood that even if the Fourth Amendment was not triggered, the police conduct was subject to Equal Protection scrutiny.²⁶⁶

What the *Oneonta* court got wrong, however, was its analysis of how Equal Protection law should work when policing is the subject. Even though strict scrutiny is the rule where racial classifications are concerned, the *Oneonta* court held that strict scrutiny did not apply to the use of race to hunt for a suspect based on a victim description.²⁶⁷ The *Oneonta* court was afraid to apply strict scrutiny—the usual standard when government acts on the basis of race—to the use of race in a victim descriptor, believing that “[p]olice work . . . would be impaired and the safety of all citizens compromised.”²⁶⁸ Indeed, it said that, were police work “hobbled by special racial rules,” most at risk would be those in crime-ridden inner-cities.²⁶⁹ But there is nothing “special” about applying strict scrutiny to racial classifications by the government; to the contrary, it was the *Oneonta* court itself that created “special racial rules” for policing.²⁷⁰

light and saying “What, are you stupid? Come here. I want to talk with you,” was a close call. *Id.*

²⁶⁶ *Id.* at 337–39. Compare *United States v. Avery*, 137 F.3d 343, 354 (6th Cir. 1997) (holding that the Equal Protection Clause prohibits “investigative surveillance” based solely on race), with *United States v. Travis*, 62 F.3d 170, 176 (6th Cir. 1995) (Batchelder, J., concurring in the result) (deeming the equal protection analysis “simply not germane” to consensual encounters).

²⁶⁷ *Oneonta*, 221 F.3d at 337–38.

²⁶⁸ *Brown v. City of Oneonta (Oneonta II)*, 235 F.3d 769, 771 (2d Cir. 2000) (en banc) (Walker, J., concurring in the denial of rehearing in banc).

²⁶⁹ *Id.*

²⁷⁰ The applicability of equal protection doctrine was the hotly debated subject of five separate opinions written in response to the Second Circuit’s denial of a petition for rehearing en banc in *Oneonta*. Judge Straub and Judge Calabresi both argued the proper standard was strict scrutiny—Judge Straub, whenever the police use a racial descriptor, *id.* at 790 (Straub, J., dissenting), and Judge Calabresi, whenever the police effectively search only on the basis of race by ignoring other descriptors, as he contended was the case in *Oneonta*, *id.* at 781 (Calabresi, J., dissenting). Judge Walker, who wrote the panel opinion in *Oneonta I*, here accused Judge Calabresi’s proposal of creating new rules for policing and warned that “injecting equal protection analysis into police investigations that rely on racial descriptors[] would upset th[e] carefully crafted balance” between liberty and effective law enforcement set by the Fourth Amendment. *Id.* at 775 (Walker, J., concurring).

In their petition for writ of certiorari to the Supreme Court, the plaintiffs in *Oneonta* explained how baffling this all was given the Court’s treatment of race in every other context. “Given the Court’s long-standing and unequivocal treatment of race-based government discrimination,” they reasoned,

[T]he conclusion that the Equal Protection Clause is not even implicated by a law-enforcement practice of stopping and questioning large numbers of persons solely and expressly on the basis of their race and in disregard of the nonracial information provided to the police can stand only if one contends that this specific form of

The use of race in policing should *never* get a free pass from classic Equal Protection scrutiny. Under established doctrine, if race is a factor in government decisionmaking, strict scrutiny applies.²⁷¹ That is what the Supreme Court has said time and again, including in affirmative action cases, where there is an argument for lowering the level of scrutiny.²⁷² As the Ninth Circuit pointed out in a criminal case *United States v. Montero-Camargo*, gesturing to those affirmative action cases, “[i]t would be an anomalous result to hold that race may be considered when it harms people, but not when it helps them.”²⁷³

To be clear, in the vast majority of cases, relying on race as part of a victim description to justify a police search would pass muster under strict scrutiny. The Supreme Court has said that scrutiny, while strict, need not be “fatal in fact.”²⁷⁴ If a victim reports that a man of a particular race in a green coat committed a murder, that is who the police should look for, and it is hard to argue otherwise.

What made *Oneonta* an unusual case was the sheer number of people the police questioned—and if the court had focused on the

race-based action is of a type that somehow is exempted from the otherwise well-established protections of the Fourteenth Amendment.

Petition for Writ of Certiorari at 22, *Brown v. City of Oneonta (Oneonta III)*, 534 U.S. 816 (2001) (No. 00-1728).

²⁷¹ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (holding that the Equal Protection Clause “does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes”); see also Karlan, *supra* note 249, at 2007. The Court’s redistricting cases, however, have recognized the legislature’s authority to consider race as one criterion in drawing election districts. Alschuler, *supra* note 249, at 179 n.62. But legislative redistricting is presumed to

differ[] from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

Shaw v. Reno, 509 U.S. 630, 646 (1993); see also *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (explaining that race-consciousness in redistricting does not trigger strict scrutiny unless it subverts “traditional race-neutral districting principles”).

²⁷² See, e.g., *Johnson v. California*, 543 U.S. 499, 507–09 (2005) (holding that strict scrutiny applied to an unwritten policy of segregating prisons by race); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 234 (1995) (“[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect . . .” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980))); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) (concurring in the Court’s decision that a statute requiring racial segregation of prisons and jails was unconstitutional and noting that the need to maintain security and order in prisons did not justify “any dilution of this Court’s firm commitment to the Fourteenth Amendment’s prohibition of racial discrimination”).

²⁷³ *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000).

²⁷⁴ See *Adarand Constructors*, 515 U.S. at 237.

record it would have understood how this very fact betrayed the invalidity of the racial classification in that case.²⁷⁵ If there were but three blacks in Oneonta, searching all of them might be “narrowly tailored.” If there were three thousand, it seems plainly not. Had the *Oneonta* court focused on the question of narrow tailoring, it would have had to acknowledge that the searching that actually occurred was a chaotic race-based dragnet in which women and older men were stopped as well as younger men, and in which some men were stopped over and over again. The record makes clear it was hardly a tailored investigation.²⁷⁶ What the police did in *Oneonta* should never have survived strict scrutiny.

In fact, *Oneonta* should help to recall an essential aspect of strict scrutiny under the Equal Protection Clause that will prove critical when we turn to analyzing suspicionless searches: the requirement that state action not be overinclusive.²⁷⁷ If the victim says the suspect is Asian, it would be wildly overinclusive to search blacks and whites as well. But, by the same token, if the victim can provide no further description beyond that the perpetrator was Asian, and if there are many Asians in the locale, then searching all Asians also will be overinclusive—because the government’s actions are not narrowly tailored, but go well beyond the individual or group that the government rightly seeks.

b. Race as Part of a Profile

Before moving on to plainly suspicionless searches, this Section briefly addresses one more familiar example of searching where race sometimes is used as a factor: not a victim or witness’s suspect description, but a general profile developed by law enforcement. Here, the level of “suspicion” is probabilistic, not individualized. But as has consistently been the case, our focus should rest on the protections necessary to avoid arbitrary or discriminatory searching.

²⁷⁵ See Lee, *supra* note 260 (describing the manhunt). Cases like this are mercifully few in the law, particularly in recent years.

²⁷⁶ *The Black List: Is Racial Profiling Legal?*, CBS NEWS (Feb. 13, 2002), <http://www.cbsnews.com/news/the-black-list/>; see *Brown v. City of Oneonta*, 235 F.3d 769, 783 (2d Cir. 2000) (Calabresi, J., dissenting from denial of rehearing en banc) (pointing out facts alleged by plaintiffs but omitted by the panel opinion and concluding that “it is anything but fanciful or bald to suggest . . . that the police questioned virtually all blacks they could find . . .”).

²⁷⁷ See *Craig v. Boren*, 429 U.S. 190, 201–02 (1976) (explaining that using “maleness . . . as a proxy for drinking and driving” by eighteen- to twenty-year-olds was an “unduly tenuous fit,” where just 2% of males in that age group were arrested for that offense).

As with suspect and witness descriptions, courts sometimes move away from the usual Equal Protection analysis when it comes to profiling. They say that race may be used as one factor in a profile, so long as it is not the “sole” factor.²⁷⁸ The standard rule under the Equal Protection Clause, however, is that if race is “a motivating” factor, then strict scrutiny applies.²⁷⁹

As a matter of probabilities, race (or any other suspect classification), is almost never going to be a valid factor in a profile—whether “a” factor or the “sole” factor. For example, if—as seems to be the case in many airport drug interdiction cases—the police are looking for black men, dressed a certain way, walking quickly off a plane from a source city (say, Los Angeles), then in practice the profile means that black men will be treated differently than similarly situated white men.²⁸⁰ Yet, the profile likely is both overinclusive—what percentage of black men coming off planes are carrying drugs?—and underinclusive—in that some percentage of whites likely will be carrying drugs as well. If anything, the wealth of statistical evidence about profiling suggests that minorities are searched disproportionately often, yet the hit rates are lower than for whites, demonstrating the precise problem here.²⁸¹ In theory, it is only in the very rarest of cases that a profile-utilizing race could conceivably pass strict scrutiny.²⁸² In reality,

²⁷⁸ See *United States v. Swindle*, 407 F.3d 562, 569–70 (2d Cir. 2005); *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) (holding that, while apparent Mexican ancestry alone could not justify stopping and questioning a car’s occupants, “Mexican appearance [is] a relevant factor” among others); *United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997).

²⁷⁹ *Johnson v. California*, 543 U.S. 499, 506–07 (2005); *Adarand Constructors*, 515 U.S. at 227; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

²⁸⁰ That is why the Sixth and Eighth Circuit’s decisions in *Avery* and *Weaver* are deeply troubling. See *Avery*, 137 F.3d at 346–47; *United States v. Weaver*, 966 F.2d 391, 396–97 (8th Cir. 1992) (Arnold, J., dissenting); see also Harris, *supra* note 91.

²⁸¹ See Harcourt & Meares, *supra* note 133, at 854–59 (offering studies from New York City, Los Angeles, Arizona, Illinois, and several other locations).

²⁸² It could be that in immigration cases racial identity is probative enough to meet strict scrutiny in some circumstances. See U.S. DEP’T OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY 4 (2014) (reflecting the Obama Administration’s decision to continue to use race in profiling in immigration cases). In *Martinez-Fuerte*, the Court approved a two-stage immigration roadblock. *United States v. Martinez-Fuerte*, 428 U.S. 543, 566–67 (1976). At the first stage, all cars were stopped for brief inspection. But then officers plainly chose those to divert to the secondary inspection on the basis of Hispanic appearance, which the Court was almost cavalier in brushing off. *Id.* at 563–64. On the data, that procedure may have been valid. A miniscule number of cars were sent to secondary, while most—including, almost certainly, most of those with “apparent Mexican ancestry”—traveled on unimpeded. The hit rates for those sent to secondary were high. See *id.* at 554 (“820 vehicles were referred to the secondary inspection area, where Border Patrol agents found 725 deportable aliens in 171 vehicles.”).

the Supreme Court has almost never allowed the use of race in this way.²⁸³

In short, when the government chooses a subgroup for searching based even in part on a suspect classification, strict scrutiny applies. That holds whether race is used as part of a witness description, or as a factor in a profile. Race will generally pass strict scrutiny in a suspect description, but the instances in which race will be a valid factor in a profile are going to be exceedingly rare.²⁸⁴

c. *Suspicionless Racial Searches*

Which returns us to where we began, with singling out those of Arab or Muslim appearance in the case of an unquestionably suspicionless, programmatic airport search. In these cases, unlike a racial profile based on claim of criminality, the government has absolutely no evidence of any particular crime or suspect. The government is simply responding to atmospheric facts: that there is some terrorism, and some terrorists are of a particular racial, religious, or ethnic group. Is such discriminatory conduct by the government permissible? By now the answer should be both clear and easy. Because this is a classification based on a suspect classification, strict scrutiny applies. For such a search to be permissible, it must be narrowly tailored to the government's end.

Focusing on narrow tailoring explains why those who argued after September 11th that the government should focus on Muslims or

Even in immigration cases, of course, whether using race meets strict scrutiny will turn on the size of that group in the population, and what that says about the probability that race is relevant. Thus, in *Montero-Camargo*, the Ninth Circuit ruled out relying on Hispanic appearance for possible immigration violations in cause-based immigration stops, given the huge percentage of Hispanics lawfully in the population. *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000).

²⁸³ One exception, the Japanese Internment Cases, is now almost universally criticized. See Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 310 (2004). The other, *Martinez-Fuerte*, we discuss in note 282, *supra*.

²⁸⁴ In a truly baffling decision, the Sixth Circuit in *United States v. Travis* held that if airport drug enforcement officers "decide to interview a suspect for many reasons, some of which are legitimate and some of which may be based on race . . . the use of race in [the] pre-contact stage does not give rise to any constitutional protections." *United States v. Travis*, 62 F.3d 170, 174 (6th Cir. 1995). Yet even that test would seem not to have been met, because officers initiated their investigation of the Hispanic and African-American defendant on nothing more than the fact that her name, "Angel Chavez," seemed "a little bit unusual." *Id.* at 172. The court concluded that the search in question could not possibly have been motivated by race, however, because the officers in question had historically searched *some* white people in the past, and because they did not search *all* Hispanic people. *Id.* at 175.

those of Arab-American descent in airport security (or otherwise) were wrong as a constitutional matter.²⁸⁵ First, doing so is underinclusive. High profile arrestees for terror in the United States have hardly all been Arab-Americans (not to speak of the fact that it may be impossible to discern who is a Muslim from one's appearance).²⁸⁶ But far more important, any such generalization is unacceptably overinclusive. There are some 1.5 million Muslims in this country²⁸⁷ and at least 1.8 million Arab-Americans.²⁸⁸ It is wildly implausible that anything but a minute fraction of this number has any involvement at all with terrorism, let alone unlawful activity. Under the Equal Protection Clause, we do not visit the sins of a very few on those of the same race, religion, or ethnicity. That is one of the important purposes of strict scrutiny.

2. *Non-Suspect Classifications*²⁸⁹

What about subpopulation searches that do not involve a suspect classification, as is frequently the case? In *Maryland v. King*, for example, the Supreme Court upheld Maryland's collection of DNA from those arrested for a variety of crimes without individualized suspi-

²⁸⁵ See, e.g., Browne, *supra* note 254; Kinsley, *supra* note 254, at B07 (“[T]oday we’re at war with a terror network that just killed 6,000 innocents . . . Are we really supposed to ignore the one identifiable fact we know about them?”).

²⁸⁶ Here are some people who qualify and were not of Arabic descent: Timothy McVeigh, Richard Reid, Jose Padilla, and John Walker Lindh.

²⁸⁷ PEW RESEARCH CTR, MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 3 (2007), <http://pewresearch.org/files/old-assets/pdf/muslim-americans.pdf>.

²⁸⁸ MARYAM ASI & DANIEL BEAULIEU, U.S. CENSUS BUREAU, ARAB HOUSEHOLDS IN THE UNITED STATES: 2006–2010 (2013), <http://www.census.gov/prod/2013pubs/acsbr10-20.pdf>. This number is subject to debate. The Arab American Institute Foundation estimates 3.7 million Arab-Americans in the United States. See Jens Manuel Krogstad, *Census Bureau Explores New Middle East/North Africa Ethnic Category*, PEW RESEARCH CTR. (Mar. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/03/24/census-bureau-explores-new-middle-eastnorth-africa-ethnic-category/>.

²⁸⁹ It is not always possible to know whether race motivated the government, of course. Is it intentional when data reveals huge racial disparities in stop-and-frisk, or when a roadblock is positioned in a particular neighborhood? The challenge is that the Supreme Court has said one must prove intentional use of race to trigger strict scrutiny. Rehearsing the impact versus intent dialogue is outside the scope of this project, so here we simply add to the conversation a couple critical things about the policing context.

First, in certain instances, evidence of disparate impact truly ought to be enough to shift the burden to the government to explain. In state highway patrol enforcement, it is very difficult to explain why racial disparity should exist, so the government should bear the burden of proving significant racial difference in adherence to traffic norms. (Studies largely show such significant disparities do not exist.) Second, no matter the crime, the use of offender data as a baseline for justifying disparate treatment is something that itself needs careful scrutiny. See Harris, *supra* note 91, at 294–95 (discussing the problem of racing crime).

cion.²⁹⁰ In insisting that a warrant and cause were not necessary to seize and search King's saliva for his DNA, the *King* Court made much of the fact that Maryland's statute eliminated concerns about arbitrariness on the part of police officers.²⁹¹ But what the *King* Court missed is that in dividing people into groups, legislatures can be just as arbitrary as officers.²⁹² In *King*, the legislature decided to DNA-test not all people, but arrestees; and not all arrestees, but only those that fell within a category of what were deemed "serious" crimes.²⁹³ Other jurisdictions have drawn their own lines.²⁹⁴ The question is whether these lines are sustainable under the Constitution as non-arbitrary ways to distinguish who is searched and who is not.

Rather than the Court's mushy Fourth Amendment balancing test (discussed in Part I), the Equal Protection Clause again provides the right analytic framework.²⁹⁵ At best, Fourth Amendment balancing is aimed at figuring out whether the costs of a policy exceed the benefits. It is not designed to figure out whether there is sufficient justification for treating one group differently than another. The Equal Protection Clause's means-ends tests, on the other hand, are designed to ask the relevant questions with some degree of rigor: What is it the government wishes to achieve, and does it achieve that goal by searching *X* group as opposed to group *Y*?²⁹⁶

a. Stricter Scrutiny

Even if a suspect classification is not involved, the fact that government is discriminating among groups to search and seize—the very interests protected by the Fourth Amendment—justifies heightened scrutiny. A number of doctrinal lines lead to this conclusion. First, heightened scrutiny regularly is applied when enumerated rights are at stake. As the Supreme Court said in *District of Columbia v. Heller*, a

²⁹⁰ *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013).

²⁹¹ *Id.* at 1969–70 (explaining that because the arrestee is "already in valid police custody" and the Maryland statute defines who is subject to DNA testing, officer discretion was cabined.)

²⁹² See *INS v. Chadha*, 462 U.S. 919, 963 n.4 (1983) (Powell, J., concurring in the judgment) (invalidating Congress's legislative veto and explaining that it was "precisely to prevent such arbitrary action that the Framers adopted the doctrine of separation of powers").

²⁹³ *King*, 133 S. Ct. at 1967.

²⁹⁴ *Id.*

²⁹⁵ See Aleinikoff, *supra* note 70, at 987 ("Balancing is undermining our usual understanding of constitutional law as an interpretive enterprise.").

²⁹⁶ As it happens, when the Supreme Court "balances," it often is asking means-ends type questions: what is the government interest; is the search effective in achieving its goal? But it does so badly, without the proper rigor of means-ends analysis, and so reaches wrong conclusions.

Second Amendment case, “[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”²⁹⁷

Similarly, heightened scrutiny is the norm when the government discriminates on the basis of important interests. Discrimination as to a “fundamental” (but not necessarily enumerated) right certainly is treated to strict scrutiny.²⁹⁸ But the list does not end there. In *Plyler v. Doe*, the Supreme Court applied heightened scrutiny to strike down Texas’s denial of funds to educate the children of undocumented aliens, even though “[u]ndocumented aliens cannot be treated as a suspect class” and “education [is not] a fundamental right.”²⁹⁹ Under its heightened scrutiny, the *Plyler* Court required a “significant” or “substantial” government interest and close tailoring.³⁰⁰ Similarly, in *Griffin v. Illinois*, a majority of Justices (the plurality, plus Justice Frankfurter concurring) recognized that, although there is no constitutional right to appellate review, a state could not discriminate against indigents by requiring criminal defendants to pay for a certified record on appeal.³⁰¹ *Griffin* has been extended to justify heightened scrutiny in a number of circumstances involving discrimination against non-suspect classes as to “undeniably important” rights.³⁰²

The Fourth Amendment interest in avoiding arbitrary searches and seizures is as significant as the interests at stake in *Heller* or *Ply-*

²⁹⁷ *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

²⁹⁸ See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 84–86 (1992) (applying strict scrutiny under the Equal Protection Clause to a law providing for infinite detention of insanity acquittees, noting that “[f]reedom from physical restraint [is] a fundamental right”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–17 (1973) (explaining that where a law “impinges upon a fundamental right explicitly or implicitly protected by the Constitution, [it] require[s] strict judicial scrutiny”); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (requiring a compelling interest “[s]ince the classification here touches on the fundamental right of interstate movement”); *Skiner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (applying strict scrutiny in overturning a compulsory sterilization statute on the ground that it interfered with a fundamental right of procreation).

²⁹⁹ *Plyler v. Doe*, 457 U.S. 202, 217–18, 223–24 (1982). But see Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92 (2013) (arguing that education is a fundamental right and effectively has been recognized as such).

³⁰⁰ *Plyler*, 457 U.S. at 217–18.

³⁰¹ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); *id.* at 21–22 (Frankfurter, J., concurring in the judgment). Although both opinions couch their rationale in terms of rational basis review, they clearly apply a form of heightened scrutiny. See David M. Treiman, *Equal Protection and Fundamental Rights—A Judicial Shell Game*, 15 TULSA L.J. 183, 197 (1979).

³⁰² See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (applying heightened scrutiny to a law that discriminated as to parent-child relational rights by conditioning appeal of a parental rights adjudication on payment of fees).

ler. In *Wolf v. Colorado*, the Court incorporated the Fourth Amendment through the Due Process Clause, applying it to the states.³⁰³ In doing so, Justice Frankfurter invoked the classic language of fundamental Due Process rights: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty.'"³⁰⁴

One might argue that the analysis here is circular: the very question is whether Fourth Amendment rights are being violated, so one can't rely on the fact of violation to set the level of scrutiny. The Fourth Amendment only prohibits "unreasonable" searches and seizures; until scrutiny is applied, there is no conclusion as to what is unreasonable.³⁰⁵

But that objection proves too much, for, under the Equal Protection Clause—which is driving the analysis here—the level of scrutiny typically is set as a function of the underlying interests or rights that *potentially* are infringed, before there is a conclusion as to whether those rights have in fact been violated. When the government chooses among people on the basis of race, it has not necessarily violated the Equal Protection Clause. Rather, that is the question close scrutiny helps us answer—just as in the Fourth Amendment context. The level of scrutiny defines the right.³⁰⁶

When enumerated rights are at stake, the level of scrutiny is not always strict—but it is always heightened.³⁰⁷ Where arbitrary or un-

³⁰³ *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).

³⁰⁴ *Id.* at 27.

³⁰⁵ The same might be said of any other area where heightened scrutiny is applied. The First Amendment doesn't prohibit all laws that infringe speech, just ones that fail to meet the various doctrinal tests. Compare *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 804 (2000) (holding that a content-based restriction on speech may be upheld only if it satisfies strict scrutiny), with *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (reaffirming that "a regulation of the time, place, or manner of protected speech" must be narrowly tailored to meet a "legitimate" government interest, but need not be the least restrictive means), and *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (applying intermediate scrutiny to a statute criminalizing the destruction of Selective Service registration certificates).

³⁰⁶ See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

³⁰⁷ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (requiring heightened scrutiny for the Second Amendment's "core" right to bear arms for self-defense); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (applying heightened, but not strict scrutiny to a Second Amendment claim "not within the core right identified in *Heller*"); *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010) (applying intermediate scrutiny to uphold a ban on handguns without serial numbers, explaining that "it is not the case that [strict scrutiny] must be applied to all Second Amendment challenges. . . . We do not treat First Amendment challenges that way."); *Peruta v. Cty. of San Diego*, 758 F. Supp. 2d 1106, 1115 (S.D. Cal. 2010) (applying

justified policing is a demonstrable concern, constitutional analysis requires something more than simply deferring to what the government says, which is what courts typically do in special needs cases.³⁰⁸ That is simply at odds with how we treat the rest of the Constitution.

b. What Stricter Scrutiny Should Look Like

The difference between lackluster and sufficient scrutiny is seen in two of the Supreme Court's first cases involving suspicionless searches—one that gets it quite right and one that goes seriously awry. Both involve drug testing, both were written by Justice Kennedy, and both were decided the same day. Justice Scalia flipped his vote between the two cases, and his explanation for why he did so is illustrative of the point here—the need for a level of scrutiny that does not allow the government to single out subpopulations for insufficient reason. In particular, what is needed is a level of scrutiny that prevents arbitrary and discriminatory searching.

Skinner v. Railway Labor Executives' Ass'n involved a program subjecting railway laborers to drug and alcohol testing under a variety of circumstances.³⁰⁹ Most of the testing allowed by the regulations was suspicion-based.³¹⁰ But one critical provision of the regulations mandated drug and alcohol testing of all relevant employees, without any showing of individual suspicion, when a “major train accident” occurred.³¹¹

Although the *Skinner* Court talked in the language of balancing, read carefully much of the decision was standard means-ends analy-

intermediate scrutiny to a restriction on concealed weapons permits, noting, “fundamental constitutional rights are not invariably subject to strict scrutiny.”).

Moreover, there may be some basis for concluding that the level of invasiveness—as the Court suggests in its special needs jurisprudence—ought to have an impact on the level of scrutiny. For example, the Court required something more than probable cause when it banned the use of deadly force to stop a fleeing felon except in limited circumstances, and when it prohibited surgery under anesthesia to recover a bullet from a suspect. *Tennessee v. Garner*, 471 U.S. 1 (1985); *Winston v. Lee*, 470 U.S. 753 (1985). Similarly, under the Due Process Clause, the Court in *Rochin v. California* condemned the pumping of a suspect's stomach to obtain evidence, stating that due process is not “heedless of the means by which otherwise relevant and credible evidence is obtained.” *Rochin v. California*, 342 U.S. 165, 172 (1952). While DNA buccal swabs and urine drug tests are not as invasive as any of these intrusions, they are still violations of bodily integrity that may reveal deeply personal information. Scrutiny, if not strict, should be enough to make sure the government is not arbitrarily singling people out for these invasions.

³⁰⁸ See *supra* notes 73–77 and accompanying text.

³⁰⁹ *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 606 (1989).

³¹⁰ Employees could be tested, for example, when an accident occurred and a supervisor could articulate “reasonable suspicion” that a particular employee was involved. *Id.* at 611.

³¹¹ *Id.* at 609.

sis—just what would be required under the Equal Protection Clause.³¹² First, the Court thoughtfully assessed the nature of the privacy intrusion, both the sensitive nature of monitoring urine collection and the information testing it could reveal.³¹³ This established that the government conduct was a “search” that implicated Fourth Amendment concerns and thus justified heightened scrutiny. Then, the Court set out both the importance of the government’s demonstrated interest and the close relationship between that interest and not only the testing program in general, but the way it was applied in particular instances.³¹⁴ There had been numerous documented accidents involving fatalities, injuries, and substantial property damage, which were attributable to the use of drug and alcohol by employees.³¹⁵ Only employees on a train that had been in a major accident were tested, and all were tested precisely because it was often impossible to determine who was responsible before drugs and alcohol dissipated from the system.³¹⁶ Employees could be excused from testing if it was immediately apparent they could not have been responsible.³¹⁷ Finally, as the Court noted, the group testing was at least in part a deterrent from coming to work under the influence of drugs or alcohol.³¹⁸ Explaining that warrants and cause are usually necessary to prevent arbitrariness, the Court determined that the searches here were reasonable because “[b]oth the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them.”³¹⁹

Skinner stands in sharp contrast to the decision in *National Treasury Employees Union v. Von Raab*.³²⁰ *Von Raab* involved a drug-testing program for certain employees of the Customs Service, including those transferring into jobs involving drug interdiction or the use of firearms.³²¹ The ostensible reason for this testing was the danger of narcotics in corrupting those who came in contact with traffickers, and

³¹² *Id.* at 624.

³¹³ *Id.* at 624–28.

³¹⁴ *Id.* at 628–30.

³¹⁵ *Id.* at 607–08.

³¹⁶ *Id.* at 609.

³¹⁷ *Id.* at 609 n.2.

³¹⁸ “The FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather ‘to prevent accidents and casualties’” *Id.* at 620–21 (quoting 49 C.F.R. § 219.1(a) (1987)).

³¹⁹ *Id.* at 622.

³²⁰ *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

³²¹ *Id.* at 660–61.

the need to ensure the sobriety of those that fire weapons.³²² But entirely absent was any showing that a problem existed in the Customs Service, as was demonstrated regarding railroad employees in *Skinner*. Indeed, the Commissioner of Customs had stated that he “believed that Customs is largely drug-free.”³²³ Nor was there any tight connection between the drug-testing program and any of the evils the Court identified. Those who deal with traffickers can be corrupted even if they are not personally using drugs; those who deal with traffickers of other goods (say diamonds) can also be corrupted; and many, many, government officials who carry and fire weapons were not subjected to drug testing.

Justice Scalia’s justification for joining *Skinner* but dissenting in *Von Raab* goes to the heart of what has gone wrong in “special needs” cases involving suspicionless subpopulation searches. In *Skinner*, he explained, “the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society.”³²⁴ In *Von Raab*, by contrast, “neither frequency of use nor connection to harm is demonstrated or even likely”—the record did not reflect “*even a single instance* in which any of the speculated horrors actually occurred.”³²⁵ In other words, in *Von Raab* the means did not achieve the ends.

Had the Supreme Court applied heightened mean-ends scrutiny in *Maryland v. King*, the DNA testing case, it would have come to a different result. The Court tried to justify testing arrestees (but not the population at large) on the basis of a need to identify the suspect, but that does not wash: fingerprinting already did the trick.³²⁶ The real reason for DNA testing was to solve cold cases.³²⁷ Yet, there was zero empirical evidence in the record to prove that people arrested for particular crimes were more likely the culprit in a cold case than any other person walking around the streets. If society wants to subject everyone to DNA testing, that sort of general search might be fine, as Part II makes clear. But what lawmakers cannot do is take the politically easy approach of subjecting arrestees to such searches, in order to signal that they are tough on crime (or to gradually try to build a

³²² *Id.* at 660.

³²³ *Id.* at 683–84 (Scalia, J., dissenting).

³²⁴ *Id.* at 680.

³²⁵ *Id.* at 681, 683.

³²⁶ *Maryland v. King*, 133 S. Ct. 1958, 1987–88 (2013) (Scalia, J., dissenting).

³²⁷ *Id.*

universal database without confronting the broader political question). The *Maryland v. King* Court simply got it wrong in allowing this kind of invasion of privacy and bodily integrity of one group but not another without requiring a sufficient—or, in this case, really, any—connection between that group and the goal.

B. *Searching on Less than Probable Cause*

The next tough question returns us to the Fourth Amendment: Is it ever justifiable to conduct a suspicion-based search on less than probable cause? Suspicion-based searches always involve singling out.³²⁸ Although warrants may not always be required, the framers of the Fourth Amendment plainly saw “probable cause” as the appropriate threshold for distinguishing who might be singled out for government searching from who could not.³²⁹ But, consistent with “reasonableness” analysis, it may be appropriate to lower the cause threshold in some instances. This Section explains when, and how.

1. *Terry Unbound*

As Part I.A made clear, following *Terry*, the cause threshold was lowered in many circumstances, at times to the point of extinction. When there is no cause at all, we are in the realm of suspicionless searches. But when there is some cause, as in *Bruce v. Beary*, the question is whether searches are permitted on cause less than probable cause.

The Supreme Court has been quick to justify suspicion-based searches on too little cause, increasing police discretion to the point it could not be cabined. Stop-and-frisk is the banner child for all that has gone wrong. Just to recall: in New York, some four and a half million people were searched between 2004 and 2012.³³⁰ Over 85% were minority males.³³¹ A federal court found that, even when giving every benefit of the doubt to the police, hundreds of thousands of the searches were unconstitutional (which is at least in part because the doctrine provides officers little sense of what is and is not “reasonable suspicion”).³³²

³²⁸ See Colb, *supra* note 250, at 1486–87 (describing the additional “targeting” harm that results from government targeting).

³²⁹ See Amsterdam, *supra* note 123, at 411 (explaining that the Warrant Clause defines “reasonable”); *supra* Part II.D.1. If any amount of cause would suffice for investigative searches, it is hard to see what protection the Fourth Amendment provides.

³³⁰ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 575 (S.D.N.Y. 2013).

³³¹ *Id.*

³³² *Id.* at 559.

This is not investigative policing based on some identifiable quantum of suspicion; in truth, it is *in terrorem* deterrence. In defending stop-and-frisk in New York, both the Mayor and the Police Commissioner made statements indicating that the program was meant to get guns off the streets by making clear that anyone could be searched at any time.³³³ Exceptionally low “hit rates” in the context of stop-and-frisk confirm this was suspicionless, deterrent policing and not suspicion-based investigative policing: Philadelphia police stopped over 215,000 pedestrians in one six month period in 2012 and found three guns.³³⁴ The same year, Boston police stopped 123,000 people and found nine guns and one knife.³³⁵ The NYPD found guns in less than 1% of stops.³³⁶

The problem is that suspicionless deterrent measures, when administered like this, are simply unconstitutional. There was neither of the appropriate protections for suspicionless searches, generality or randomness. Rather, there was singling out of some individuals over others with insufficient (or no) basis. This is precisely the sort of arbitrary policing the Constitution condemns.

Some argue *Terry* should be overruled, but it is dubious whether eliminating stop-and-frisk entirely is the right answer—or even feasible.³³⁷ Police have long relied on their authority to question people based on an intuition or some evidence that something was amiss.³³⁸ For years, police relied upon vagrancy and loitering laws to remove people who seemed problematic or out of place. When constitutional law properly clamped down on this practice, finding such laws unconstitutionally vague or otherwise in violation of First Amendment

³³³ See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 606 (S.D.N.Y. 2013).

³³⁴ Wigglesworth, *supra* note 106.

³³⁵ NAACP, *supra* note 86, at 24.

³³⁶ *Floyd*, 959 F. Supp. 2d at 559. In 98.5% of frisks (and over 99% of stops), no weapon was found. *Id.*

³³⁷ See David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 683 (1994) (suggesting that of the justices then on the Court, only Justice Scalia would be amenable to a return to pre-*Terry* law); David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 39–40 (1994) [hereinafter Harris, *Frisking Every Suspect*] (explaining that the doctrine is more likely to go the other direction, i.e., that the *limits Terry* placed on automatic frisking will likely soon be dispensed with).

³³⁸ See Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51 (2015) (surveying studies of police officer behavior in the 1960s and 1970s); Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 427–28 (2006) (describing the leeway given to government officials in American history).

rights,³³⁹ police forces turned to stop-and-frisk.³⁴⁰ Even before the Supreme Court authorized the practice in *Terry*, some states had stop-and-frisk statutes on the books.³⁴¹

Perhaps these laws are misguided, but persistent arguments for investigative stops suggest some core utility. They also suggest that under some circumstances police will continue to utilize these practices. As the *Terry* majority seemed to concede, it may be better to accept the inevitability of stop-and-frisk and regulate it, rather than relegating it to the realm of the lawless.³⁴² And, in truth, simply overruling *Terry* would leave a significant investigative gap: what, precisely are police supposed to do if they lack probable cause yet believe, to quote *Terry*, that "crime is afoot?"

2. *Terry Cabined*

But what is to be done? There have been a host of suggestions to place controls on stop-and-frisk. Some would restrict the use of *Terry*-type stops to certain contexts, such as felonies, or to violent crimes.³⁴³ Others focus on recordkeeping, which has been instituted in

³³⁹ See *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring police to advise individuals under custodial interrogation of their rights to remain silent and consult an attorney); *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the exclusionary rule to the states); *Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931) (invalidating a Hawaii law that prohibited loitering in public places); *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965) (finding a Florida anti-loitering ordinance void for vagueness); *Commonwealth v. Carpenter*, 91 N.E.2d 666 (Mass. 1950) (striking down an anti-loitering ordinance as unconstitutionally vague); *Ex parte Mittelstaedt*, 297 S.W.2d 153 (Tex. Crim. App. 1956) (striking down anti-loitering ordinance as an unreasonable restraint on personal liberty). But see RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960s* 186–88 (2016) (arguing that although conventional wisdom says *Terry* was a response to the end of vagrancy laws, vagrancy laws actually continued past the 1960s).

³⁴⁰ See GOLUBOFF, *supra* note 339, at 42–73.

³⁴¹ New York, for example, passed a stop-and-frisk law in 1964. *Id.* at 202–03.

³⁴² *Terry v. Ohio*, 392 U.S. 1, 14 (1968) (acknowledging that the law "is powerless to deter invasions of [other] constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal"); see also Harris, *Frisking Every Suspect*, *supra* note 337, at 13–14 (arguing that *Terry* was a practical concession to give power back to the police as a compromise after *Mapp*).

³⁴³ See Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1691–93 (1998) (contending that fidelity to *Terry* would cabin permissible stops to the originally announced rationale of preventing crime and protecting police in dangerous situations and rejecting expansion to completed felonies or trivial offenses); Harris, *Frisking Every Suspect*, *supra* note 337, at 48–49 (proposing that *Terry* be limited to investigation of suspected crimes involving the use of force, violence, or weapons); David Keenan & Tina M. Thomas, Note, *An Offense-Severity Model for Stop-and-Frisks*, 123 YALE L.J. 1448, 1452–53 (2014) (suggesting that *Terry* stops for petty offenses should be presumptively invalid). In Seattle, following a DOJ investigation, police now cannot stop-and-frisk on reasonable suspicion of a

many jurisdictions as a result of court-ordered settlements or state laws.³⁴⁴ In order to ensure the integrity of that data, some commentators have suggested giving people a “receipt” explaining why they were stopped and the process for issuing a complaint.³⁴⁵ Departments can create early intervention systems and make it easier to sack bad cops.³⁴⁶ There are prominent calls for expanded use of body and patrol cameras.³⁴⁷

As a doctrinal matter, though, the best solution is to return *Terry* to its roots: as an investigative tool to be used when police lack probable cause but can specify *precisely* what they think is occurring—and have the facts to back it up. In *Terry*, the stop was predicated on the perceived imminence of a specific crime. *Terry* detailed at length the movements of Katz, Chilton, and Terry, and explained how those “specific and articulable facts” led to a reasonable inference that a robbery was about to take place. The *Terry* Court noted that it

misdemeanor unless there is reason to believe the suspect poses a public safety risk. Memorandum Submitting Consensus Seattle Police Department Policies and Order Approving Same at 3, *United States v. City of Seattle*, No. C12-1282JLR (W.D. Wash. Jan. 17, 2014), http://www.justice.gov/crt/about/spl/documents/spd_docket118.pdf. The Massachusetts Supreme Court has held that an officer cannot order a person out of a car without suspicion of a criminal, rather than civil offense. *Commonwealth v. Cruz*, 945 N.E.2d 899, 908 (Mass. 2011).

³⁴⁴ As part of a DOJ agreement, Newark police must collect and analyze “the age, race, ethnicity, gender, location, time of day, reason for stop, post-stop activity, duration, and result or outcome of each encounter.” *CITY OF NEWARK AND UNITED STATES OF AMERICA AGREEMENT IN PRINCIPLE 5* (2014), http://www.justice.gov/crt/about/spl/documents/newark_prinagree_7-22-14.pdf. The Seattle consent decree requires officers to report similar information. Memorandum Submitting Consensus Seattle Police Department Policies and Order Approving Same, *supra* note 343, at 4–5.

³⁴⁵ See David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 173–75 (2009) (encouraging a more robust review of citizen complaints); Andrew Guthrie Ferguson, *Policing ‘Stop and Frisk’ with ‘Stop and Track’ Policing*, HUFFINGTON POST (Aug. 17, 2014), http://www.huffingtonpost.com/andrew-guthrie-ferguson/policing-stop-and-frisk-w_b_5686208.html (proposing “random audits of people stopped . . . to compare the reported sentiment to the actual sentiment.”).

³⁴⁶ See Harris, *supra* note 345, at 166–68; see also *America’s Police on Trial*, ECONOMIST (Dec. 13, 2014), <http://www.economist.com/news/leaders/21636033-united-states-needs-overhaul-its-law-enforcement-system-americas-police-trial> (“[I]t must be easier to sack bad cops.”).

³⁴⁷ According to one study, 90% of Americans support it, and Obama recently designated \$74 million to the cause. Justin T. Ready & Jacob T.N. Young, *A Tale of Two Cities*, SLATE (Dec. 10, 2014), http://www.slate.com/articles/technology/future_tense/2014/12/police_body_cams_won_t_help_unless_they_come_with_the_right_policies.html. Cameras are not an antidote to bad police behavior, as countless YouTube videos are testament, but they do facilitate data collection and resolve factual disputes when officer conduct is challenged. See *id.*; David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 369–70 (2010) (discussing how cameras improve officer behavior).

"would have been poor police work indeed for an officer of 30 years' experience" to watch Terry and Katz casing the store as they were without investigating further.³⁴⁸

This critical aspect of *Terry* is precisely what has disappeared. Police no longer even attempt to specify the crime for which they supposedly have suspicion. Between 2004 and 2009, the percentage of stops in which a NYPD officer failed to articulate suspicion of *any* particular crime rose from 1% to 36%.³⁴⁹ In 55% of stops officers identified "high crime area" as a factor, but those stops had little to no correlation to actual crime rates, and in 42% of stops officers indicated as a basis for suspicion that the target had engaged in "furtive movements," encompassing such harmless activities as "walking in a certain way" and "stuttering."³⁵⁰ In Newark, police articulated sufficient justification for their stops just 25% of the time.³⁵¹

If "reasonable suspicion" (rather than probable cause) is to be allowed to justify police searching, it must provide some meaningful protection against arbitrary and capricious police intrusion. In *Terry*, the Court warned that if stops were made to turn on the "inarticulate hunches" of an arresting officer, "the protections of the Fourth Amendment would evaporate."³⁵² Before stopping someone for further investigation, police should be able to articulate a specific, plausible crime that is being committed or is imminent, as well as the specific evidence that supports it.

As for the frisk, it must also rest on articulable facts, as *Terry* made clear. It would have been "clearly unreasonable" to ask McFad-

³⁴⁸ *Terry v. Ohio*, 392 U.S. 1, 23 (1968).

³⁴⁹ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013); Fagan Report, *supra* note 105, at 39.

³⁵⁰ *Floyd*, 959 F. Supp. 2d at 614.

³⁵¹ Press Release, Dep't of Justice, Justice Department Reaches Agreement with City of Newark, New Jersey, to Address Unconstitutional Policing in Newark Police Department (July 22, 2014), <http://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-newark-new-jersey-address-unconstitutional-policing>. That so many stops violate even the present standards for reasonable suspicion suggests that remedial failures pose an additional problem. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 Nw. U. L. REV. 1609, 1622–36 (2012).

³⁵² *Terry*, 392 U.S. at 22. Applying strict scrutiny to investigations rooted in a suspect description or profile including a suspect classification would address this concern as it would require officers to explain precisely why the classification is relevant. Judge Walker recognized this in *Oneonta*—in advancing a parade of horrors that would result if equal protection doctrine were extended to policing, he noted that "[o]fficers would be forced to justify" their "non-articulable hunches, . . . intuition, and sense impressions." That, he said, was "unworkable." *Brown v. City of Oneonta*, 235 F.3d 769, 777 (2d Cir. 2000) (Walker, J., concurring in the denial of rehearing in banc).

den to approach the men without allowing him to frisk them if he suspected they were armed.³⁵³ But police must, *Terry* makes clear, have additional reason to think the person is armed and dangerous before frisking.³⁵⁴ *Terry* explicitly held that a frisk could *not* be predicated on “unparticularized suspicion.”³⁵⁵ Yet courts now allow officers to frisk any time a drug crime is suspected, on the generalized theory that drugs and weapons go hand in hand. That is by definition unparticularized; it is exactly what *Terry* prohibited.³⁵⁶ The same goes for frisking because the stop occurs in a “high crime area” or because the suspected crime could conceivably involve the use of a tool that might be used as a weapon.³⁵⁷ The incredibly low hit rates from frisks bear testament.³⁵⁸

The same rules should apply to automobile stops. In cases involving stops for something other than a traffic violation, courts have fallen into the habit of stating that the standard for the stop is “reasonable suspicion.”³⁵⁹ But when did probable cause go out the window in the context of automobile stops, and what is the justification? If anything, stopping an automobile is more of an interference than what could be a very quick encounter on the street. There is a good argument that automobile stops should never be allowed on less than probable cause. But at the very least, before stopping an automobile, police must have specific facts pointing to a specific offense that either is being committed or is imminent.

Compare in this regard two automobile cases, *Alabama v. White* and *United States v. Arvizu*. In both cases, an officer stopped the driver, searched the car and found drugs. *Alabama v. White* was suspicion-based policing; police had a definitive tip that a specific person was carrying drugs, and the tipster provided predictive information

³⁵³ *Terry*, 392 U.S. at 24.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ See Harris, *Frisking Every Suspect*, *supra* note 337, at 23–27 (tracing the development of the law authorizing automatic frisks for drug offenses); see also *United States v. Brown*, 913 F.2d 570, 572 (8th Cir. 1990) (“Since weapons and violence are frequently associated with drug transactions, the officers reasonably believed that the individuals with whom they were dealing were armed and dangerous.”); *United States v. Gilliard*, 847 F.2d 21, 25 (1st Cir. 1988) (finding that drug purchasers may also be justifiably frisked because firearms are “tools of the trade”); *United States v. Post*, 607 F.2d 847, 851 (9th Cir. 1979) (finding that “[i]t is not unreasonable to suspect that a dealer in narcotics might be armed”).

³⁵⁷ See Harris, *Frisking Every Suspect*, *supra* note 337, at 27, 31.

³⁵⁸ See *supra* notes 105, 107–11 and accompanying text.

³⁵⁹ See, e.g., *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1206 (10th Cir. 2007); *United States v. Jenkins*, 452 F.3d 207, 212 (2d Cir. 2006); *Weaver v. Shadoan*, 340 F.3d 398, 407 (6th Cir. 2003).

about the suspect's movements, confirmed by the officer.³⁶⁰ Although the police lacked probable cause in *White*—all the observed movements were innocent and the tip was anonymous—at least the stop there was for a defined crime, and quite particular in its specifications.³⁶¹ In *Arvizu*, on the other hand, a border patrol agent used a variety of innocent behaviors to justify the stop: the fact that the children seemed to be waving in an “abnormal” fashion, and the fact that the driver slowed down when he saw the officer.³⁶² The Court held the officer had reasonable suspicion of “illegal activity”—but of what, precisely?³⁶³ If police observe a traffic violation, they have probable cause. If not, they should not be stopping cars, except perhaps in the very rare case—like *Alabama v. White*—where a specific crime has been reported.³⁶⁴

C. Kids, Convicts, and Workers

What has been said thus far covers most of the existing doctrine. But there remains a collection of cases that may require different treatment. All of these cases involve government searching in particular institutional contexts in which the targets bear some special relationship with government: in schools, in workplaces, and surrounding incarceration. Searches of people in these circumstances can be either suspicion-based or suspicionless.

The Supreme Court justifies searches in these cases on a variety of bases, but primarily by arguing that people in schools, prisons, and government workplaces have reduced expectations of privacy.³⁶⁵ Doc-

³⁶⁰ *Alabama v. White*, 496 U.S. 325, 327 (1990).

³⁶¹ *Id.* at 327–30. One would have thought *White* was on the low end of acceptable cause, until the Supreme Court's decision in *Navarette v. California*, 134 S. Ct. 1683 (2014). There, police got an anonymous tip that a particular car had run the caller off the road. Officers located the car, and followed it for five minutes, seeing no evidence of anything erratic. Nonetheless the officers stopped the car, said they smelled marijuana, and searched it, finding drugs. *Id.* at 1686–87; *cf.* *Florida v. J.L.*, 529 U.S. 266, 273–74 (2000) (holding that an anonymous tip that a young Black male wearing a plaid shirt at a particular bus stop would be carrying a gun did not amount to reasonable suspicion).

³⁶² *United States v. Arvizu*, 534 U.S. 266, 270–71 (2001).

³⁶³ *Id.* at 277.

³⁶⁴ Pretextual traffic stops still pose a problem, but as we explain in Part III.A, *supra*, the Equal Protection Clause provides some protection. If the police are habitually pulling over Blacks (or Hispanics, or Asians) at a higher rate than other groups, law enforcement should have to show there is a compelling reason to do so, and that the practice is narrowly tailored—i.e., that Blacks commit so many more traffic offenses that singling them out is justifiable.

³⁶⁵ *E.g.*, *Samson v. California*, 547 U.S. 843, 852 (2006) (“[W]e conclude that petitioner [parolee] did not have an expectation of privacy that society would recognize as legitimate.”); *Bd. of Educ. v. Earls*, 536 U.S. 822, 832 (2002) (“[S]tudents affected by [the school's drug testing]

trinally, this reasoning shares the famous circularity of cases asking whether government conduct is a “search”—the more the government announces people are subject to search, the less one’s reasonable expectations of privacy, with the result that the searches are constitutional.³⁶⁶ It also begs the question of the Court’s competence, discussed above, to assess how violated a person in a particular situation feels by a given government intrusion.³⁶⁷ The reduced expectation of privacy theory, standing alone, is not sufficient.

Still, there are some contexts in which the doctrinal requirements might be altered, based largely on the custodial relationship between the individuals searched and the government.³⁶⁸ Even yet, two (by now familiar) caveats are in order. First, one must distinguish between suspicion-based and suspicionless searches, in order to ensure the correct protections are in place. And second, in assessing those protections, it is essential to recall that the goal is preventing government arbitrariness.

1. Lowering Cause Thresholds; Eliminating Warrants

A lowered or modified cause threshold for suspicion-based searches may be appropriate in these quasi-custodial contexts. In *New Jersey v. T.L.O.*, for example, the Court allowed school officials to search when there was reasonable suspicion of the violation of school rules, which themselves are not a crime.³⁶⁹ Institutions—particularly schools—must have rules, and if they are to be enforced, there must be authority to search. Similarly, *O’Connor v. Ortega* was premised on the notion that one must have the authority to go into a coworkers

Policy have a limited expectation of privacy.”); *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987) (“Public employees’ expectations of privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.”).

³⁶⁶ See Petitioner’s Reply Brief, *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (No. 86-5324), 1987 WL 880233, at *4 (noting the circularity in “telling [a probationer or parolee] at the time of release that he is subject to search at any time and then later conduct searches at will on ground that no intrusion into an expectation of privacy had occurred.” (quoting 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.10, at 137 (1978))); Corey E. Stephenson, *Supreme Court Asked If State Can Require Suspicionless Parolee Searches*, MO. LAW. MEDIA (Mar. 18, 2006), 2006 WLNR 27167652 (reporting that Chief Justice Roberts called privacy expectations argument “circular” during oral argument for *Samson v. California*).

³⁶⁷ See *supra* note 71.

³⁶⁸ See, e.g., *Goss v. Lopez*, 419 U.S. 565, 581–82 (1975) (recognizing a student’s constitutional right to due process when facing suspension from school, but limiting it to notice and a “rudimentary” hearing); Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 872 (2012) (explaining that *T.L.O.* was premised on “the purported educational value of school discipline and consequent alignment of interests between student and school official[s]”).

³⁶⁹ *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

office without a warrant and on something less than probable cause—even if the motivation is that the worker may be guilty of malfeasance.³⁷⁰ In *Bell v. Wolfish*, the Court reasoned that, while there is no “iron curtain drawn between the Constitution and the prisons of this country,” certain restrictions on rights were necessary to protect the safety of inmates and officers and to further institutional goals.³⁷¹

Still, in each case, the concern for arbitrariness must be addressed. Note that in *T.L.O.* and *Ortega*, the Court required “reasonable suspicion” of a specified offense.³⁷² Contrast that with the shameful decision in *Samson v. California*, upholding an entirely baseless search of a parolee.³⁷³ There, the Court upheld a California statute permitting an officer to search a parolee at any time with no cause whatsoever.³⁷⁴ The search in that case appears to have been nothing but the harassing action of a police officer itching to exercise his power that particular day.³⁷⁵ Any lowered cause threshold that fails to confine government discretion of this sort is simply unacceptable. Even in the context of prisons, which prove the exception to many constitutional rules, the Court has acknowledged that “intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society.”³⁷⁶ Yet it has rejected the idea that prisoners can be searched only with particularized suspicion or “pursuant to an established policy.”³⁷⁷ Some protection against harassment is necessary if the Fourth Amendment is to have any role whatsoever behind bars.

In addition, although the “special needs” doctrine fails to coherently distinguish “ordinary” criminal investigation from “special needs,” whatever might be “special” about the government’s relationship with students and employees evaporates when police show up at a workplace or school in their regular law-enforcement capacities. When that happens the usual rules should apply. In Arizona, for example, a team of law enforcement officers, private prison guards, and

³⁷⁰ *Ortega*, 480 U.S. at 720–21.

³⁷¹ *Bell v. Wolfish*, 441 U.S. 520, 545–46 (1979) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974)).

³⁷² *Ortega*, 480 U.S. at 726; *T.L.O.*, 469 U.S. at 342.

³⁷³ *Samson v. California*, 547 U.S. 843 (2006).

³⁷⁴ *Id.* at 854–57.

³⁷⁵ See *id.* at 846–47 (stating that the officer knew the parolee from prior interactions, stopped him, and radioed dispatch to find out if there were outstanding warrants against him; when dispatch responded that there were no warrants and that the parolee “was in good standing with his parole agent,” the officer searched him anyway).

³⁷⁶ *Hudson v. Palmer*, 468 U.S. 517, 528 (1984).

³⁷⁷ *Id.*

20 drug-sniffing dogs stormed into a school, locked the doors and prohibited students from leaving while they conducted a drug sweep.³⁷⁸ The three students caught with small stashes of marijuana—that's all the raid turned up—were criminally charged.³⁷⁹ It is difficult to square this sort of activity with concededly exceptional rules based on the special nature of a governmental intrusion.

2. Programmatic Searches

Finally, there is the question whether suspicionless subpopulation searches should be subjected to lower or different standards in these government custodial situations. In *Vernonia School District 47J v. Acton*, the Supreme Court approved a drug-testing program for student athletes.³⁸⁰ Yet, the evidence was thin at best that a drug problem existed in the athlete population specifically.³⁸¹ Then, in *Board of Education v. Earls*, the Justices approved a drug-testing program for students involved in extracurricular activities, where there was no evidence of a drug problem at all, let alone a greater problem than in the populations excluded.³⁸²

It may make sense in schools, workplaces, and prisons to afford greater deference to the government's stated interest in assuring the safety of those in particularly close relationships with the government. Drug testing took off in private workplaces as well as public, for example, after reports revealed the number of lives lost and profit surrendered due to workplace drug use.³⁸³ Still, there are serious privacy concerns at issue, and scrutiny cannot be toothless. In *Von Raab*, for example, employees were told to bring in and show their medical prescriptions—be it depression medication, incontinency pills, etc.—to explain any unusual results in their urinalysis.³⁸⁴ As in the ordinary circumstance, when searches in these custodial contexts are directed only at a subgroup rather than a generalized population, the government must be in possession of facts that justify doing so.

³⁷⁸ Sathbh Walshe, *For-Profit Prison Guards Are Being Used in Arizona's School-to-Prison Pipeline*, BUS. INSIDER (Dec. 13, 2012), <http://www.businessinsider.com/prison-guards-at-high-school-drug-bust-2012-12>.

³⁷⁹ *Id.*

³⁸⁰ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

³⁸¹ *See de Ganon, supra* note 72, at 596–97.

³⁸² *Bd. of Educ. v. Earls*, 536 U.S. 822, 826 (2002); *see de Ganon, supra* note 72, at 597–98.

³⁸³ Janice Castro et al., *Battling the Enemy Within: Companies Fight to Drive Illegal Drugs Out of the Workplace*, TIME MAG., Mar. 17, 1986, at 52 (reporting the significant cost of drug abuse in the workplace and measures that private businesses were taking to combat it).

³⁸⁴ Brief for the Petitioners, *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (No. 86-1879), 1988 WL 1025626, at *4.

The specialized contexts in this Section present hard questions we do not purport to solve. But what we do suggest is that, if in these special circumstances courts should defer to the government's asserted reasons as to *why* they are searching (because the government claims to know best how to run its institutions), there must still be safeguards in place to ensure there is a good reason as to *who* they are searching. There must still be an answer to the question, "why me?"

CONCLUSION

The Supreme Court's "special needs" doctrine—and its vast expansion of *Terry*—have made a mess of the proper Fourth Amendment question: When is a search or seizure "reasonable"? Though many scholars have tried, so far none have created workable alternatives or solutions to the mushy Fourth Amendment doctrine created by the Court. As such, citizens are being subjected to the kind of arbitrary, discriminatory policing the Fourth Amendment is supposed to protect against. The constitutional analysis can be simplified greatly by distinguishing between the protections attendant suspicion-based and suspicionless searches. In both cases, the primary question should be whether the government can justify intruding on a particular group or individual, in essence, providing an answer to the question, "why me?" That is what the law has lost sight of, and what must be recovered.