

The Liberal Assault on the Fourth Amendment  
Christopher Slobogin

*As construed by the Supreme Court, the Fourth Amendment's reasonableness requirement regulates overt, non-regulatory government searches of homes, cars, and personal effects—and virtually nothing else. This essay is primarily about how we got to this point. It is fashionable to place much of the blame for today's law on the Warren Court's adoption of the malleable expectation of privacy concept as the core value protected by the Fourth Amendment. But this diagnosis fails to explain why even the more liberal justices have often gone along with many of the privacy-diminishing holdings of the Court. This essay argues that three other liberal dogmas—the probable cause-forever position, the individualized suspicion mantra, and the obsession with exclusion as a remedy—are the primary reasons we have a Fourth Amendment Lite. When a search requires probable cause to be constitutional, courts are naturally more reluctant to denominate every police attempt to find evidence a search. When suspicion must be individualized, they are more likely to gloss over the harms caused by investigations of groups. And when the sole serious sanction for an illegal search or seizure is suppression at trial, many judges have less sympathy for viable claims, because they cannot stomach dismissal of criminal charges against guilty people. Of course, another explanation for the less-than-robust state of Fourth Amendment jurisprudence is that the Supreme Court is concerned about shackling government law enforcement efforts. But this essay also demonstrates that a more moderate approach than the liberal canon can provide greater Fourth Amendment protection than the current regime without further diminishing law enforcement effectiveness.*

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As construed by the Supreme Court, the Fourth Amendment's reasonableness requirement regulates overt, non-regulatory government searches of homes, cars, and personal effects—and virtually nothing else. According to the Court, the Fourth Amendment is mute about undercover searches (inside the home or out), inspections of welfare mothers' and probationers' homes, flyovers of curtilage and trespasses on property beyond it, surveillance of public movements, most compelled testing for drugs and alcohol, dog sniffs of cars and luggage, and rummaging through garbage.<sup>1</sup> And the Amendment is close to irrelevant in a host of other situations, including subpoenas for documents, checkpoints for drunk driving and illegal immigration, residential and business health and safety inspections, and searches of junkyards for stolen parts.<sup>2</sup> Under current constitutional doctrine, the government needs no justification to engage in the first set of actions, and so little to carry out the second that it is virtually unregulated.

This essay is not about whether this state of affairs is good or bad. Rather, it is about how we got to this point. In the following pages, I try to lay out the etiology of Fourth Amendment jurisprudence.

A crucial initial assumption in this essay is that, at bottom, neither the language or the legislative history of the Fourth Amendment drives the analysis on this issue. For instance, contrary to current doctrine, the Court could have decided that all suspicionless efforts at gathering evidence of crime are unreasonable,<sup>3</sup> just as it could have held that home arrests do not require a warrant and that searches of cars do not require probable cause,<sup>4</sup> without offending

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<sup>1</sup>See *Lewis v. United States*, 385 U.S. 206 (1966)(informant in the home); *On Lee v. United States*, 343 U.S. 747 (1952)(informant in a business); *Wyman v. James*, 400 U.S. 309 (1971) (welfare inspections); *Samson v. California*, 126 S.Ct. 2193 (probationers); *California v. Ciraolo*, 476 U.S. 27 (1986) (flyovers); *Oliver v. United States*, 466 U.S. 170 (1984) (open field); *United States v. Knotts*, 460 U.S. 276 (1983) (public surveillance); *Bd. Educ. Pottawatomie Cty. v. Earls*, 546 U.S. 822 (2002) (drug testing of students); *United States v. Place*, 462 U.S. 696 (1983); *Illinois v. Caballes*, 543 U.S. 405 (2005)(dog sniff of car); *California v. Greenwood*, 486 U.S. 35 (1988).

<sup>2</sup>*United States v. Miller*, 425 U.S. 435 (1976), but see *United States v. Hubbell*, 530 U.S. 27 (2000); *Michigan v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (illegal immigrant checkpoints); *Camara v. Munc. Ct.*, 387 U.S. 523 (1967) (health and safety inspections); *New York v. Burger*, 482 U.S. 691 (1987) (junkyards).

<sup>3</sup>See *Kyllo v. United States*, 53 U.S. 27, 33 n.1 (2001) (“When the Fourth Amendment was adopted, as now, to ‘search’ meant ‘[t]o look over or through for the purpose of finding something; to explore to examine by inspection . . .’”).

<sup>4</sup>See *Payton v. New York*, 445 U.S. 573, 603-04 (1980) (White, J., dissenting) (arguing that the Court's rule requiring warrants for non-exigent arrests “finds little or not support in the common law or in the text and history of the Fourth Amendment”); *South Dakota v. Opperman*, 428 U.S. 364, 367-69 (1976) (detailing reasons cars are associated with a lesser expectation of privacy than homes).

either the text of the Amendment or the values of the Framers. I am looking for socio-political explanations for our current Fourth Amendment doctrine, not formalistic ones.

The most obvious such explanation for the decisions referenced above is that the Supreme Court is concerned about shackling government law enforcement efforts. Undoubtedly, that is a large part of the answer. But it is not the entire story. As I have suggested elsewhere<sup>5</sup> (and briefly explain again here), effective crime control and a more activist interpretation of the Fourth Amendment are not necessarily mutually exclusive.

Other explanations for the Court's less-than-robust reading of the Fourth Amendment focus on the ironic consequences of decisions, mostly generated by the relatively "liberal" Warren Court, that was meant to *expand* its scope. For instance, it is fashionable to place much of the blame for today's law on the Warren Court's adoption of privacy as the core value protected by the Fourth Amendment. This move, in *Katz v. United States*,<sup>6</sup> was hailed at the time as a major enhancement of constitutional protection against government intrusion. As many have pointed out, however, because privacy is a manipulable concept, the Court has since found it easy to declare that a large array of police actions—ranging from use of informants to public surveillance and workplace drug testing—either do not implicate or are only limply protected by the Fourth Amendment.<sup>7</sup> This diagnosis has some attraction as well, but fails to explain why even the more liberal justices have often gone along with many of the privacy-diminishing holdings of the Court.

In this essay, I too suggest that the modern Court's early expansive stances on the Fourth Amendment have ultimately led to a diminished Fourth Amendment. But *Katz*' expectation-of-privacy formulation is not the culprit. Rather, three other liberal dogmas—what I call the probable cause-forever position, the individualized suspicion mantra, and the obsession with exclusion as a remedy—are the primary reasons we have a Fourth Amendment Lite. The end-logic of these three dogmas produce such unappealing results that even moderate and liberal justices have balked at them, leaving us with a search and seizure jurisprudence that is much less than it could be. When a search requires probable cause to be constitutional, courts are naturally more reluctant to denominate every police attempt to find evidence a search. When suspicion must be individualized, they are more likely to gloss over the harms caused by investigations of groups. And when the sole serious sanction for an illegal search or seizure is suppression at trial, many judges have less sympathy for viable claims, because they cannot stomach dismissal of criminal charges against guilty people.

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<sup>5</sup>Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991) (hereafter Fourth Amendment); Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053 (1998) (hereafter Rejuvenation of the Proportionality Principle).

<sup>6</sup>389 U.S. 847 (1967).

<sup>7</sup>See *infra* note 25 for a listing.

## I. Probable Cause Forever

Of course, probable cause is not required for every police action that is called a search or seizure. *Terry v. Ohio*,<sup>8</sup> a Warren Court decision, stands for the proposition that both detentions short of arrest and patdowns of outer clothing are permissible on reasonable suspicion, which represents a certainty level somewhere below the even-chance threshold often associated with probable cause. The *Terry* Court was willing to relax Fourth Amendment strictures with respect to stops and frisks because the government's interest in "effective crime prevention and detection" on the streets justified the "brief, though far from inconsiderable, intrusion upon the sanctity of the person" that these actions occasion.<sup>9</sup>

In the seizure context, the post-Warren Court has routinely relied on this balancing approach—or what I have called the "proportionality principle"—in holding that several different types of detentions short of an arrest may take place on less than probable cause.<sup>10</sup> In the search context, however, it has been much less willing to follow this route. Instead, the Court has insisted, in the words of Justice Stewart in *Katz*, that "searches conducted . . . without prior approval by judge of magistrate [and therefore without probable cause], are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions."<sup>11</sup> Almost twenty years later, in *New Jersey v. T.L.O.*,<sup>12</sup> a much more conservative Court similarly stated, "[o]rdinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon 'probable cause' to believe that a violation has occurred."<sup>13</sup>

*T.L.O.* then went on to hold that probable cause was *not* required to search a school child's purse for evidence of disciplinary infractions, thereby creating the one major exception (other than *Terry*'s frisk rule) to the probable cause-forever dogma. Labeled the "special needs" doctrine, a phrase taken from Justice Blackmun's concurrence in *T.L.O.*, the exception requires only that government action be "reasonable,"<sup>14</sup> which in practice has meant that neither a warrant or probable cause is required. But the special needs exception is usually only applicable when, as in *T.L.O.*, those conducting the government action are not police and are pursuing some end other than ordinary criminal law enforcement (e.g., school disciplinary searches, drug testing for administrative purposes, checkpoints for immigrants, or inspections of businesses for regulatory, health and safety violations).<sup>15</sup> Indeed, the classic statement of the special needs paradigm is that it kicks in only when "special needs, beyond the normal need for law enforcement, make the

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<sup>8</sup>392 U.S. 1 (1968).

<sup>9</sup>392 U.S. at 26.

<sup>10</sup>See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)(checkpoints); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(seizure of car occupants); *Ohio v. Robinette*, 519 U.S. 33 (1996)(detention after issuance of citation); *Michigan v. Summers*, 452 U.S. 692 (1981)(detention of occupant during search of house).

<sup>11</sup>389 U.S. at 357.

<sup>12</sup>469 U.S. 325 (1985).

<sup>13</sup>*Id.* at 340.

<sup>14</sup>See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS*, ch. 13 (4<sup>th</sup> ed. 2000).

<sup>15</sup>See *id.*

warrant and probable-cause requirement impracticable.”<sup>16</sup> The Court has on several occasions called these special needs situations “exceptional” and “limited.”<sup>17</sup> In other words, outside of frisks, the usual law enforcement search for evidence of criminal activity requires probable cause.<sup>18</sup>

While that outcome may please many who favor strong Fourth Amendment protection, its ultimate effect has been just the reverse. For the consequence of the Court’s rigid adherence to the probable cause standard for searches has been judicial reluctance to apply the latter term even to government actions that clearly involve looking for evidence of crime. Instead, a wide array of intrusive police actions—flyovers of backyards, open field trespasses, undercover activity—have been immunized from Fourth Amendment strictures. Like the stop and frisk at issue in *Terry*, these types of investigative techniques are usually exploratory, and thus usually based on only a smidgeon of suspicion, rather than probable cause. And without these techniques, probable cause might never be developed. When forced to choose between ending such actions or permitting them whenever police want to use them, even many aggressive civil libertarians might choose the latter route. It is no surprise that the Supreme Court, which has to worry about both sides of the balance, has done so. Thus, in holding that the Fourth Amendment does not govern use of undercover agents to gain entry to the home, Chief Justice Warren himself stated “[w]ere we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional per se.”<sup>19</sup>

Consider three other examples reflective of this dilemma. In *United States v. Knotts*<sup>20</sup> the Court declared that using a beeper to track public movements does not implicate the Fourth Amendment. In *United States v. Miller*<sup>21</sup> and *Smith v. Maryland*<sup>22</sup> it held, respectively, that government subpoenas for bank records and government requests for phone records do not trigger Fourth Amendment protection. Much can be said against the Court’s rationale in these cases which, put simply, is that anything we expose to others is no longer private vis-a-vis the government; the Court’s stance that we assume the risk of police discovery in such situations has been roundly criticized by scores of commentators.<sup>23</sup> Yet had the Court decided to the contrary in these three cases, its probable cause-forever dogma would have been triggered, thereby banning public electronic tracking of any individual whom the police couldn’t already arrest, and

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<sup>16</sup>*New Jersey v. T.L. O.*, 469 U.S. 325, 351 (1985)(Blackmun, J., concurring).

<sup>17</sup>*Ibid.* (“exceptional”); *Ferguson v. City of Charleston*, 532 U.S. 67, 74-75 (2001) (same); *Skinner v. Railway Labor Executives’ Ass.*, 489 U.S. 602, 624 (1989)(“limited”).

<sup>18</sup>It is possible to come up with other exceptions, e.g., inventory searches, *Illinois v. LaFayette*, 462 U.S. 640 (1983) and border searches, but even in these situations one could say the special needs moniker fits, either because the search is for purposes other than finding evidence of crime, or is conducted by non-police, or both.

<sup>19</sup>*Lewis v. United States*, 255 U.S. 206, 210 (1966).

<sup>20</sup>460 U.S. 276 (1983).

<sup>21</sup>425 U.S. 435 (1976).

<sup>22</sup>442 U.S. 735 (1979).

<sup>23</sup>*United States v. Miller*, 425 U.S. 435, 451 (1976) (Brennan, J., dissenting) (stating that “the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account”); WAYNE LAFAVE ET AL., *CRIMINAL PROCEDURE*, 3.2(j).

invalidating most subpoenas, even those aimed at businesses and other organizations, despite the fact that both practices are crucial first-stage law enforcement techniques. That prospect must have been daunting. Indeed, even the “liberal” justices signed on to the unanimous *Knotts* opinion, only Justices Brennan and Marshall wrote dissenting opinions in *Miller*, and only they plus Stewart dissented in *Smith*; moreover, only Marshall was adamant about requiring a warrant in the latter two cases.<sup>24</sup>

Given these developments, some have argued, as I noted above, that the real problem in these cases is not the probable cause requirement but *Katz*’ adoption of privacy as the linchpin of Fourth Amendment analysis. Various other concepts—among them, government-citizen trust, coercion and property—have been proposed as substitutes.<sup>25</sup> I have argued elsewhere that none of these concepts satisfactorily capture the gravamen of the Fourth Amendment.<sup>26</sup> But even assuming one or more of these alternatives is conceptually viable, there is no reason to believe that any of them would have fared better in dealing with the probable cause conundrum.

Consider property, probably the most commonly touted substitute for privacy as the core Fourth Amendment value. Of course, privacy analysis takes property interests into account; one has more of a privacy interest in a house one owns or rents than in a house that one temporarily occupies as a guest. Commentators such as Morgan Cloud, however, seem to want a Fourth Amendment “rooted in property theories.”<sup>27</sup> Cloud prefers this approach in large part because, he says, property concepts are less “malleable” than privacy concepts and thus less likely to permit significant encroachments on the Fourth Amendment’s scope.<sup>28</sup> But property doctrine is eminently manipulable as well: back in the heyday of the property-oriented approach to the Fourth Amendment the Court had no problem permitting suspicionless searches of privately-owned open fields.<sup>29</sup> The definition of criminal “instrumentalities” was also stretched beyond recognition so that government could assert a superior possessory interest over personal property,<sup>30</sup> a ploy that would be vastly facilitated today by the advent of forfeiture statutes giving government an interest in any item with a “nexus” to criminal activity.<sup>31</sup> Worse yet, surveillance

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<sup>24</sup>Brennan and Marshall clearly called for a probable cause requirement in *Smith*. 442 U.S., 751. However, Stewart’s opinion in that case merely stated that phone numbers fall “within the constitutional protection recognized in *Katz*,” without indicating whether a warrant was required to obtain them. *Id.* at 747. In *Miller*, Brennan simply spoke of requiring “appropriate legal process,” without specifying what that might mean. 425 U.S., 450. Only Marshall explicitly stated he would require a warrant based on probable cause on *Miller*’s facts. *Id.* at 456.

<sup>25</sup>Scott E. Sundby, “Everyman’s” Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 Colum. L. Rev. 1751 (1994)(trust); William J. Stuntz, Privacy’s Problem and the Law of Criminal Procedure, 93 Mich. L. Rev. 1016 (1995); Morgan Cloud, A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment, 3 *Ohio State Journal of Criminal Law* 33 (2005)(property)

<sup>26</sup>Christopher Slobogin, *Rejuvenation*, *supra* note 5, at 1057-62.

<sup>27</sup>Cloud, *supra* note 25, at 72.

<sup>28</sup>*Id.* Cloud also argues that this approach, taking its cue from *Boyd*, would provide almost absolute protection for particularly private papers, communications and the like, but of course a privacy-based Fourth Amendment can accomplish the same goal.

<sup>29</sup>*Hester v. United States*, 265 U.S. 57 (1924).

<sup>30</sup>See *Warden v. Hayden*, 387 U.S. 294, 302 (1967)(“depending on the circumstances, the same ‘papers and effects’ may be ‘mere evidence’ in one case and ‘instrumentality’ in another.”).

<sup>31</sup>See Eric Blumenson & Eva Nilsen, Policing for Profit: The Drug War’s Hidden Economic Agenda, 65 *University of Chicago Law Review* 35, 42-56 (1998) (detailing the breadth of today’s forfeiture statutes).

of any kind could easily be said to be ungoverned by the Fourth Amendment in a property-oriented regime, since it does not involve physical trespass.<sup>32</sup> In other words, even had the Court adhered to a property-based Fourth Amendment, it could have (and undoubtedly would have) succumbed to the anti-regulatory pressure created by the probable cause-forever position.

The allegiance to a unitary probable cause standard has still one other downside: the minimization of *ex ante* review as a regulatory option for searches that don't require probable cause. As Justice Scalia stated in *Griffin v. Wisconsin*, “[t]he Constitution prescribes . . . that where the matter is of such a nature as to require a judicial warrant, it is also of such a nature as to require probable cause.”<sup>33</sup> The converse of this statement, at least as far as the Court is concerned, is that if probable cause is *not* required, neither is a warrant. Thus, the suggestion by Justice Blackmun, in his dissent in *Griffin* that the search of a probationer's home should be considered reasonable only if authorized by a judge was brusquely dismissed by the majority once it found that such searches present a special needs situation outside normal law enforcement.<sup>34</sup> According to the majority, a court order based on less than probable cause is “a combination that neither the text of the Constitution nor any of our prior decisions permits.”<sup>35</sup> The idea that a court could issue an order on mere reasonable suspicion or something less in connection with *normal* law enforcement would likely be even more oxymoronic to the justices who joined this language.

In a variety of ways, then, the probable cause-forever dogma forces courts grappling with the realities of law enforcement to exempt many varieties of surveillance from the Fourth Amendment's restrictions. That dogma is not required by the Fourth Amendment, however. The Fourth Amendment only requires that searches and seizures be reasonable.

That declaration, of course, conjures up the specter of a Fourth Amendment swallowed up entirely by the special needs exception. But there are other ways of conceptualizing reasonableness. I have argued that the Fourth Amendment would be much better served through the adoption of two principles—the aforementioned proportionality principle, and the exigency principle.<sup>36</sup> The *proportionality principle* allows courts to modulate the cause needed to carry out a search depending upon its intrusiveness. Under the proportionality approach, searches of houses would require more cause than searches of open fields, but both would require justification, just as arrests require more cause than stops, but both are governed by the Fourth Amendment. The *exigency principle* requires *ex ante* review of any non-exigent search—even one that does not require probable cause under proportionality analysis. Yet that principle does not have to be inconsistent with the Fourth Amendment's Warrant Clause if, as some Court decisions seem to contemplate, one is willing to adopt a sliding scale definition of probable cause

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<sup>32</sup>This was the gist of Justice Black's dissent in *Katz*, where he argued the words search and seizure “connote the ideal of tangible things with size, form and weight, things capable of being searched, seized, or both.” 389 U.S. at 365 (Black, J., dissenting).

<sup>33</sup>483 U.S. 868, 877 (1987).

<sup>34</sup>Id. at 877-78.

<sup>35</sup>Id. at 877.

<sup>36</sup>Slobogin, *Fourth Amendment*, *supra* note 5; Slobogin, *Rejuvenation*, *supra* note 5.

so that warrants can issue on varying degrees of cause,<sup>37</sup> or if the *ex ante* review is conducted by someone other than a judge or is called something besides a warrant, moves which even Scalia has conceded are possible in special needs situations.<sup>38</sup>

The proportionality and exigency principles ameliorate the pressure created by the probable cause-forever stance without sacrificing the core protection of the Fourth Amendment. Under this regime, courts would be more willing to say that police attempts to find evidence are “searches” because the consequence of such a holding would not be as dramatic. For instance, undercover work, even if called a search, might only require probable cause when it involves long-term infiltration.<sup>39</sup> Observation of public activities like the tracking that occurred in *Knotts* could more easily be denominated a Fourth Amendment event because they could be justified on a lesser showing, given their lesser intrusiveness.<sup>40</sup> And all subpoenas for records could more comfortably be called searches because only subpoenas for personal records like those sought in *Miller* or *Smith* would require heightened cause; subpoenas for impersonal, organizational records could be obtained on the traditional relevance grounds.<sup>41</sup>

Under the proposed regime, then, courts could more easily avoid the temptation to define the Fourth Amendment threshold in terms of assumptions of risk, and might be more willing to speak of that threshold in the terms *Katz* originally stood for: expectations of privacy *society* recognizes as reasonable.<sup>42</sup> I do not pretend that their usefulness in resolving Fourth Amendment conundrums alone is sufficient reason to adopt the proportionality and exigency principles.<sup>43</sup> But particularly in this day of heightened concern over security, a Fourth

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<sup>37</sup>This is the precise approach the Court adopted in *Camara v. Municipal Ct.*, 387 U.S. 523 (1967), where the Court required “probable cause” for residential inspections, defined in terms of whether there was cause to believe a particular area of houses, because of their age, number of previous inspections, etc., required checking. In that case, Justice White stated for the majority that “[t]he test of ‘probable cause’ required by the Fourth Amendment can take into account the nature of the search that is being sought” and that “[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.” *Id.* at 539-40.

<sup>38</sup>In *Griffin*, for instance, Scalia admitted that the Court had “arguably come to permit an exception to the [no warrants but on probable cause] prescription for administrative search warrants, which may but do not necessarily have to be issued by courts.” Other decisions have contemplated judicial authorization on less than probable cause even in non-administrative settings. See, e.g., *Hayes v. Florida*, 470 U.S. 811, 817 (1985) (“We . . . do not abandon the suggestion . . . that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting.”); *United States v. Karo*, 468 U.S. 705 n.5 (1984) (suggesting that a warrant authorizing use of a beeper might permissibly be based on reasonable suspicion).

<sup>39</sup>For further discussion of this approach, see Christopher Slobogin, *Deceit, Pretext and Trickery: Investigative Lies by the Police*, 76 OREGON L. REV. 775, 805-08 (1997).

<sup>40</sup>For explication of this point, see Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L. J. 213 (2002).

<sup>41</sup>For explication of this point, see Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 841-45 (2005).

<sup>42</sup>This has been the official formulation of the Fourth Amendment’s threshold ever since Justice Harlan used the language in his concurring opinion in *Katz*. 389 U.S. at 360. See, e.g., *California v. Greenwood*, 486 U.S. 35, 40-41 (1988).

<sup>43</sup>For more normative arguments in their favor, see Slobogin, *Fourth Amendment*, *supra* note 5, at 29-37; 68-75; Slobogin, *Rejuvenation*, *supra* note 5, at 1070-92.

Amendment theory's pragmatic impact on judicial decision-making is far from an irrelevant consideration.

## II. The Fixation on Individualized Suspicion

Hand in glove with the Court's probable cause doctrine is the individualized suspicion requirement. As the Court has stated, "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."<sup>44</sup> That precept is normally a wise one. But it cannot be honored when large groups of people are subjected to searches or seizures, like those that occur in connection with roadblocks, drug testing, public camera surveillance and data mining. In these latter situations, an individualized suspicion requirement would stop the government's investigation dead in its tracks.

One response to this situation is to adhere to the individualized suspicion requirement and simply prohibit group searches. But that solution is as "unreasonable" as the eradication of first-stage investigative techniques that occurs under a probable cause-forever stance. Group searches are an important means of keeping us safe, a fact even liberal justices recognize.

The Court's approach, in contrast, has been to determine whether the group intrusion is a special needs situation. If "ordinary law enforcement" is involved, the Court continues to require individualized suspicion.<sup>45</sup> In special needs situations, however, the Court has been satisfied with a bland assertion by the government that the group search or seizure is meant to deal with an unquantified "problem," such as illegal immigration, drunk driving, business safety violations, or substance abuse among customs agents and school children.<sup>46</sup> In other words, just as the probable cause dogma has encouraged a narrow definition of search, the individualized suspicion dogma has left the Court with no tools for dealing with group searches, with the result that it has essentially adopted a hands-off attitude toward them.

The proportionality principle counsels an intermediate approach, requiring what I call "generalized suspicion." It would permit group searches, but only if there is reason to believe that the proportion of criminals likely to be so discovered roughly equals the hit rate associated with the intrusion involved. For instance, if the government wants to conduct full searches of everyone in a group, it should generally have to show why there is reason to believe that approximately one out of two of those searches will produce evidence of crime (the statistical equivalent of probable cause). Similarly, data mining using personal records of identifiable individuals ought to be able to finger viable suspects approximately half the time, given the intrusion involved.

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<sup>44</sup>City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

<sup>45</sup>Id.

<sup>46</sup>See e.g., Michigan v. Sitz, 496 U.S. 444, 453-54 (1990) (noting the magnitude of the drunk driving problem nationwide); Martinez Fuerte, 428 U.S. 543, 557-58 (1976) (noting that the illegal immigration problem is "substantial"); Vernonia School Dist. 47J, 515 U.S. 661 (1995) (noting that drug infractions at the school in question had increased in recent years).

At least one caveat to this approach should be recognized, however. When the government can show the intrusion is aimed at *preventing* harm from a person or persons in the group that is *significant* and *imminent* the cause requirement should probably be relaxed. This exception recognizes a principle that has long been established in criminal law; for crimes like drunk driving, for instance, we allow conviction of those who create a significant and imminent harm even when the actual probability of harm posed by the defendant was low. We should be able to conduct searches under like circumstances.<sup>47</sup> Thus, for instance, the carnage that would follow from a terrorist act on a plane justifies suspicionless searches of groups at airports despite the extremely low likelihood that any one person boarding the plane is a hijacker. Similarly, as the Court stated in dictum in *City of Indianapolis v. Edmond*, “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.”<sup>48</sup>

The “generalized suspicion” concept, combined with a strict dangerousness exception, pours content into the reasonableness inquiry, which otherwise permits government to justify actions affecting thousands of people based on vague assertions of need. If the concept nonetheless strikes the reader as too technocratic or activist, consider the comments of Justice Scalia in his dissent in *National Treasury Employee’s Union v. Von Raab*,<sup>49</sup> where the majority upheld drug testing of customs agents. Scalia was livid about the holding, calling it “a kind of immolation of privacy and human dignity in symbolic opposition to drug use.”<sup>50</sup> Not normally associated with a fondness for detailed judicial oversight, Scalia nonetheless argued that the Court should have to find some “social necessity” before approving a drug testing program, and asserted that the majority provided no “real evidence of a real problem that will be solved by urine testing of Customs Service employees;” rather the majority’s holding was based on “nothing but speculation, and not very plausible speculation at that.”<sup>51</sup> In support of this point, he noted that only 5 agents out of 3,600 Customs employees had tested positive for drugs.<sup>52</sup> In other words, even Scalia recognizes that some type of concrete justification is needed before courts affirm government intrusions.

The difficulty, of course, is determining what sort of justification is necessary. Let us assume that drug testing deters and detects dangerous drug use. On that (big) assumption, would 100 positive tests have been enough to justify the drug testing program in *Von Raab*? Or would 30 have been sufficient? When is there “real evidence of a real problem”? The proportionality principle, working in tandem with the generalized suspicion concept, provides a way to answer these questions. Assuming that the invasion associated with drug testing using a blood test should generally require probable cause (and that there is no airport-like significant and imminent danger presented by drug-using customs agents), the Court in *Von Raab* should have demanded that roughly *half* of the employees test positive in order to justify mass testing on a

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<sup>47</sup>Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 53-58 (2003).

<sup>48</sup>531 U.S. 32, 44 (2000).

<sup>49</sup>489 U.S. 656 (1989).

<sup>50</sup>Id. at 681 (Scalia, J., dissenting).

<sup>51</sup>Id. at 681-82.

<sup>52</sup>Id. at 683-84.

sustained basis. That number may seem high, but then so is the intrusiveness of a blood-drug test.<sup>53</sup>

If one's intuition is still that a mass drug testing program should not be so easily frustrated, consider the scenario from another perspective. Over 7% of the American population as a whole, and 19% of those between 18 and 25, have used illegal drugs in the past 30 days.<sup>54</sup> If one believes, say, that 100 positive tests in the *Von Raab* sample (3% of the total) represents a "real problem," then the Fourth Amendment would present no obstacle to nationwide drug testing (at least if one assumes that use of drugs by young adults can be just as dangerous as use of drugs by customs agents). That result would be offensive to most, including, I would guess, the majority in *Von Raab*. In short, Fourth Amendment analysis should mimic equal protection rationality review "with bite," if not strict scrutiny.<sup>55</sup>

The exigency principle also places limitations on group searches. As Scalia's comments in *Griffin*, noted in the previous section, indicate, the Court's special needs jurisprudence not only jettisons a warrant requirement, but appears to abandon all pretense of *ex ante* review. The exigency principle, in contrast, would require such review before *all* non-exigent group searches, special or not, just as is required when a single house, person, paper or effect is searched. The rationale for this *ex ante* review requirement is the same as it is when individual search and seizures are involved. Justice Jackson famously defended warrants as a means of forcing "inferences [to] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."<sup>56</sup> That rationale doesn't change simply because the government is no longer engaged in "ordinary" law enforcement.

At the same time, the exigency principle does not pose the obstruction to law enforcement objectives that the probable cause-forever and individualized suspicion requirements do. *Ex ante* review would only be required when there is time to obtain it. Furthermore, when the justification requirement is below probable cause, as is often true with group searches, the second opinion does not have to come from a judge. For instance, school locker searches might be approved by principals, and public camera installation might be authorized by any high level, politically accountable official who is divorced from front-line law enforcement.

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<sup>53</sup>Perhaps, as the Supreme Court has suggested, when *everyone* in a group is subject to the government action (or those searched are selected according to neutral criteria), the perceived intrusiveness that flows from being targeted is lessened. See *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). But this rationale must be applied cautiously; carried to its logical conclusion, government could evade the fourth amendment simply by searching everyone.

<sup>54</sup>Office of National Drug Control Policy, Drug Use Trends, Oct. 2002, available at [www.whitehousedrugpolicy.gov/publications/factsht/druguse/index.html](http://www.whitehousedrugpolicy.gov/publications/factsht/druguse/index.html) (table).

<sup>55</sup>See Slobogin, *Rejuvenation*, *supra* note 5, at 1089-90. Of course, if 50% of the country were using illegal drugs, the logic of the proportionality principle would authorize nationwide testing. Perhaps that outcome suggests limits on the proportionality principle. But it may also suggest something about the sensibleness of the relevant substantive criminal law.

<sup>56</sup>*Johnson v. United States*, 333 U.S. 10,14(1948).

### III. The Obsession with Exclusion

Since 1961, when the Supreme Court decided *Mapp v. Ohio*,<sup>57</sup> exclusion has been the remedy of choice when the Fourth Amendment is violated. The *Mapp* Court was convinced that other remedies were “worthless and futile,” and that, in any event, both the Fourth and Fifth Amendments required suppression of illegally obtained evidence.<sup>58</sup> The post-Warren Court has completely eliminated the Fifth Amendment basis for the rule,<sup>59</sup> and pretty much done away with its Fourth Amendment foundation as well, insisting that it is merely a judicially-created remedy designed to deter police misconduct.<sup>60</sup> Yet suppression of the fruit of the illegality remains the primary sanction for Fourth Amendment violations. In the meantime, administrative and damages remedies have atrophied or been explicitly narrowed by a Supreme Court hostile to lawsuits against law enforcement agents and their employers.<sup>61</sup>

Elsewhere I have discussed at length how the exclusionary rule undermines civil liberties, albeit unintentionally and indirectly (as is true with the probable cause and individualized suspicion dogmas).<sup>62</sup> First, the rule is ineffective as a deterrent, in either the specific or general sense, because it seldom comes into play and is only an indirect punishment when it does so. Police know that most questionable searches and seizures never result in arrest or prosecution, and that many of those that do will not trigger a suppression hearing because of the prevalence of plea bargaining. When a hearing does take place, miscreant officers often prevail because of perjury and the hindsight biasing effect of judicial knowledge that criminal evidence was found. Even when evidence is suppressed, the prosecutor is hurt much more than the officer, whose primary goal is obtaining “collars,” not convictions, and whose superiors are likely to be sympathetic to aggressive policework as long as it does not result in egregious abuse.<sup>63</sup> The latter point also helps explain why the rule does not have much of a “systemic” effect either. Research strongly suggests that training programs (run by these same superiors or supervisors like them) routinely slight constitutional issues and that officers are not well-versed in Fourth Amendment law.<sup>64</sup>

It is the damage to that law that is the exclusionary rule’s most insidious effect, however. The exclusionary remedy ensures that the only Fourth Amendment claims most judges see are

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<sup>57</sup>367 U.S. 643 (1961).

<sup>58</sup>Id. at 652, 648-49..

<sup>59</sup>See *Andresen v. Maryland*, 427 U.S. 463 (1976) (holding that the Fifth Amendment is never violated when police seize voluntarily created papers).

<sup>60</sup>*United States v. Calandra*, 414 U.S. 338, 348 (1973) (“In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”).

<sup>61</sup>See generally Whitebread & Slobogin, *Criminal Procedure*, 48-59 (discussing the good faith, policy, and concrete damages limitations on damages actions under Section 1983).

<sup>62</sup>Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 ILL. L. REV. 363 (1979).

<sup>63</sup>Id. at 374-79.

<sup>64</sup>Id. at 393-94 (describing nonchalance toward constitutional issues in both academy and field training and several studies showing that police perform barely better than chance on questions concerning Fourth Amendment law).

brought by guilty people seeking to elude conviction. Thus, the people responsible for interpreting the Fourth Amendment are virtually never confronted by a breach of privacy claim from an innocent individual. To the contrary, in the typical case they know that vindication of the claim will diminish or end any possibility of punishing an obvious criminal. That is hardly a prescription for a fair, open-minded assessment of Fourth Amendment issues.

The best argument for retaining the rule despite its flaws is that current alternatives to it are worse. Police are not good at policing themselves, criminal prosecution against misbehaving officers will usually be overkill, and damages suits are seldom brought and seldom won because of plaintiffs' ignorance of their rights, the expense of civil litigation, the inchoate nature of the injury (which deters lawyers as well as potential plaintiffs from bringing suit), the biases of juries and, as with the suppression remedy, the efficacy of police perjury. Furthermore, even if the officer loses, he or she is usually indemnified, judgment proof, or both, minimizing the impact of the verdict on the officer.<sup>65</sup>

A damages action need not be so punchless, however. I have proposed a different damages regime, which would consist of several core components: (1) a liquidated damages/penalty for all unconstitutional actions, preferably based on the average officer's salary; (2) non-indemnifiable personal liability, at the liquidated damages sum, of officers who knowingly or recklessly violate the Fourth Amendment; (3) entity liability, at the liquidated damages sum, for all other violations; (4) state-paid legal assistance for those with Fourth Amendment claims; and (5) a judicial decisionmaker.<sup>66</sup> With these components in place, innocent people as well as criminals will have an incentive to bring Fourth Amendment claims, officers who knowingly or recklessly violate the Fourth Amendment will receive direct, unalloyed punishment, and departments will have a financial incentive to ensure that their employees know the law. Just as important, judges will be more likely to acknowledge the true base rate of unconstitutional actions, because they will see before them numerous people who were searched and found to have *no* evidence of crime in their pockets, homes or records. Under these conditions, judges are more likely to evaluate accurately the overall societal impact of progovernment findings (as well as much less likely to condone perjury). In short, in a damages regimes of the type described here judges will be forced to internalize the purpose of the Fourth Amendment—protecting the privacy and autonomy interests of *all* citizens.

Additionally, a damages regime is a much better remedial fit for certain types of Fourth Amendment violations. As the Supreme Court's recent decision in *Hudson v. Michigan* notes, exclusion may meaningfully vindicate Fourth Amendment rules meant to "prevent[] the government from seeing or taking evidence," but it does not as clearly serve interests protected by other rules.<sup>67</sup> Thus in *Hudson* the Court rejected exclusion as a remedy for a violation of the knock-and-announce rule, because that rule is meant to prevent unnecessary destruction of property and minimize violence by or embarrassment of a surprised resident, interests which have little to do with the subsequently seized evidence (for which the police in *Hudson* had

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<sup>65</sup>Id. at 384-86.

<sup>66</sup>Id. at 442.

<sup>67</sup>126 S.Ct., 2159, 2165 (2006).

probable cause and a warrant).<sup>68</sup> A damages action compensating the individual for injury to person or property would make much more sense in this situation. The same analysis suggests that exclusion is not a good remedy for other execution rules, as well as post-search rules such as record-keeping and periodic review requirements.<sup>69</sup> Most important, as has often been pointed out, exclusion provides no remedy for the *innocent* victims of police misconduct.

I am not arguing for replacement of the exclusionary rule with a damages regime, although a persuasive argument to that effect can be made. Rather, I am saying that the dominance of the exclusionary rule has been one of many reasons judicial endorsement of a robust Fourth Amendment has been stymied. And I am saying that without a meaningful damages regime, the Fourth Amendment law that we do have is not likely to make much of a practical difference.

### Conclusion

The Court's adherence to the probable cause standard, the individualized suspicion requirement, and the exclusionary remedy is either short-sighted or disingenuous (depending upon the extent to which the justices understand and care about the effects of these precepts). None of these doctrines is required by the Fourth Amendment. Instead, the proportionality and exigency principles should govern, and a realistic damages regime instituted.

These latter recommendations are not ivory tower prescriptions. Chief Justice Warren Burger proposed replacing the exclusionary rule with an administrative damages scheme similar to the one I have outlined here.<sup>70</sup> Despite its rejection in cases like *Griffin*, the exigency principle embraces a commonsense notion that has been espoused in other Court opinions.<sup>71</sup> And the all-important proportionality principle derives directly from *Terry v Ohio*.

The probable cause, individualized suspicion and exclusionary rule dogmas are all revered by those who want a vigorous Fourth Amendment. Unfortunately, these dogmas have backfired. They have fed, rather than restrained, the temptation to give government leeway in its law enforcement efforts. The good news is that more moderate positions are both consistent with the Fourth Amendment and more likely to lead to its full implementation.

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<sup>68</sup>Id.

<sup>69</sup>See Slobogin, *supra* note 42, at 401-02 (arguing that exclusion is a poor fit when an arrest is unreasonably executed, an inventory is not filed, or an arrest involves excessive force).

<sup>70</sup>*Bivens v. Six Named Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 422-23 (1971) (Burger, C.J., dissenting).

<sup>71</sup>See Whitebread & Slobogin, *supra* note 14, at 139, 141 (summarizing exceptions to warrant requirement).