

HEINONLINE

Citation: 72 St. John's L. Rev. 1053 1998

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Jul 30 09:32:01 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0036-2905](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0036-2905)



Retrieved from DiscoverArchive,
Vanderbilt University's Institutional Repository

This work was originally published in
72 St. John's L. Rev. 1053 1998

LET'S NOT BURY *TERRY*: A CALL FOR REJUVENATION OF THE PROPORTIONALITY PRINCIPLE

CHRISTOPHER SLOBOGIN*

Introduction	1053
I. Why <i>Terry</i> Was Right: The Case for Proportionality	1056
A. The Security Model v. The Trust and Coercion Models	1057
B. The Danger Exception.....	1062
C. A Sliding Scale v. Probable Cause Forever	1066
II. Revamping the Proportionality Principle	1070
A. Operationalizing Invasiveness.....	1070
1. The Fourth Amendment Threshold	1071
2. Establishing a Hierarchy of Invasiveness.....	1073
3. Incorporating Other Interests Into Invasiveness Analysis.....	1077
B. Justification Schemes	1081
1. The Four (?) Tiers	1082
2. The Myth of Individualized Suspicion and the Importance of Rationality Review.....	1085
3. The Warrant Clause and the Proportionality Principle.....	1091
III. Is the Proportionality Principle an Unworkable Rorschach Blot?	1093
Conclusion.....	1095

INTRODUCTION

I come not to bury *Terry*, but to praise it. Thirty years ago *Terry v. Ohio*¹ established a conceptual framework for the Fourth Amendment that makes more sense than any alternative the courts or commentators have come up with since. That frame-

* Professor of Law, Alumni Research Scholar and Associate Dean for Faculty Development, University of Florida College of Law.

¹ 392 U.S. 1 (1968).

work, which I call the proportionality principle, is very simple: A search or seizure is reasonable if the strength of its justification is roughly proportionate to the level of intrusion associated with the police action. As the Court put it, "there is 'no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails.'"² In *Terry* itself, this principle led to the "holding"³ that a stop and a frisk need be justified only on reasonable suspicion, rather than the higher probable cause standard required for more invasive arrests and full searches.

If only the Court had applied *Terry's* proportionality framework in a consistent fashion and extended it to the entire Fourth Amendment universe, we'd be in much better shape than we are today. Contrary to the suggestions of many commentators,⁴ I think that if the promise of *Terry* had been realized by the Court, our law regulating search and seizure would be more, not less, coherent. We would have more protection of individual privacy, not less. And race would be less of an issue in the law enforcement context, not the all-pervasive problem it is now.

Unfortunately, instead of treating *Terry's* balancing formula as a serious principle that requires some hard thinking, the Court has used it as a smoke screen for an ad hoc agenda. Instead of applying the proportionality principle to all Fourth Amendment analysis, it has used it only in connection with seizures and a few

² *Id.* at 21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967) (alterations omitted)).

³ As discussed *infra* text accompanying notes 41-44, the Court's language about stops is dictum. Further, the phrase "reasonable suspicion" was never actually used in the opinion. As Professor Saltzburg points out, "notwithstanding the fact that *Terry* is widely known today as a reasonable suspicion case and as establishing a reasonable suspicion standard, one can find nothing in the opinion of Chief Justice Warren to support the claim that he thought that was the standard the Court was adopting." Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911 (1998). But for all practical purposes the sentence in the text encapsulates the standard wisdom regarding *Terry*. See CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: CASES AND CONCEPTS* ch. 11 (3d ed. 1993).

⁴ See William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REFORM 551, 614-25 (1984) (criticizing *Terry* for severing the probable cause requirement from the reasonableness inquiry); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855 (1994) (stating that "the dangers that [the balancing/reasonableness] approach poses to the security that the Fourth Amendment is meant to ensure cannot be overstated and should not be overlooked"); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 401-04, 418-20 (1988) (criticizing the "balancing" approach and arguing for an "exceptions" approach).

other isolated scenarios. Accordingly, Fourth Amendment law is a mess, to use the elegant phrasing of Professor Amar.⁵ It's a mess not just descriptively, in the sense that police (and law students) have a hard time mastering it,⁶ but normatively, in the sense that it doesn't capture our core values.

In this paper I try to make the case for rejuvenating and restructuring *Terry's* proportionality principle. The principle needs rejuvenation because its rationale—that the level of intrusiveness should drive the level of justification—seems to have been ignored even in cases purportedly applying *Terry*. It needs to be restructured because subsequent cases have been frustratingly vague about the government and individual interests involved. In the spirit of rejuvenation, Part I lays out the positive case for the proportionality principle, in more detail than *Terry* and its progeny have done. As a beginning to the restructuring process, Part II looks more closely at the two sides of the *Terry* balancing formula—invasiveness and justification—and fleshes out what assessment of them should entail.

In the course of doing so, Part II defends this restructured proportionality principle against various attacks that have been leveled at *Terry*. From the left, these attacks include the argument that *Terry's* balancing formula is an insidious assault on individual freedoms because it undermines the probable cause standard and allows an amorphous pragmatic assessment of interests that inevitably favors the government. From the right they include the contentions that the proportionality idea places restrictions on types of police actions that should not be subject to *any* constitutional regulation and that it mandates judicial activism in the Lochnerian mold. Any principle that can inspire such an outcry from both sides must have something going for it.

But there is one criticism of the proportionality principle that has considerable punch. That criticism is that any effort to take

⁵ See Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994).

⁶ But see Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998) (arguing that Fourth Amendment law is relatively clear and that theory cannot make it any clearer because search and seizure law, and the common law system generally, is a "grown" system, like a jungle, not a "made" system). Despite the limits of theory, I have persevered in my attempt to come up with a unitary theory of the Fourth Amendment because, even if the Fourth Amendment is a jungle, I would at least like to be responsible for one of its nicest trees.

Terry's balancing formula seriously, which is what this paper purports to do, is ultimately unworkable. Part III briefly acknowledges this problem and suggests ways of handling it.

In making these various points, I will refer fairly frequently to an article I wrote several years ago.⁷ Although the structure of this paper is suggested by that earlier article, most of the ideas advanced here are either new or elaborations of the previous piece. I want to thank the organizers of this conference⁸ for giving me an opportunity to flesh out these ideas, and the participants of the conference for helping me develop them.

I. WHY *TERRY* WAS RIGHT: THE CASE FOR PROPORTIONALITY

Terry was right, not only in its specific holding, but with respect to its general approach to the Fourth Amendment. *Terry* only purported to deal directly with the constitutionality of a frisk.⁹ Basing its decision on the Reasonableness Clause of the Fourth Amendment,¹⁰ *Terry* held that police may conduct a pat down of the outer clothing if they have a reasonable suspicion that doing so will prevent harm to themselves or others.¹¹ This relaxation of the probable cause standard can be, and in large part was,¹²

⁷ See Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991).

⁸ Especially John Barrett, Charles Bobis, and Kathleen Hippolite.

⁹ See *infra* text accompanying notes 41-46.

¹⁰ See *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (asserting that "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security").

¹¹ See *id.* at 27.

¹² In rejecting the argument that a frisk should only take place on probable cause to arrest, the Court distinguished frisks primarily on invasiveness grounds. At one point it stated: "[A frisk] must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion . . ." *Id.* at 26. It also stated:

It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest.

Id.

Degree of invasiveness was not, however, the only reason for permitting frisks on grounds short of that required for an arrest. The Court also emphasized that "a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody." *Id.* For further discussion of a danger rationale for *Terry*, see *infra* text accompanying notes 40-61.

justified on proportionality grounds because a pat down is less invasive than a full search, it does not require probable cause.

This rationale makes perfect sense, if one accepts two propositions: (1) the principal interest the Fourth Amendment protects is individual security from government infringement on privacy, property and autonomy (the latter in the sense of ability to control one's movements and maintain dignity), and (2) the greater the threat to that security, the greater justification the government should have to show. I think both propositions are correct.

A. *The Security Model v. The Trust and Coercion Models*

The first proposition—what I will call the “security model” of the Fourth Amendment because of the Amendment’s use of the word “secure”—has been widely accepted by the courts and academics since *Katz v. United States*,¹³ the case which first used the reasonable expectation of privacy language to define the scope of the Fourth Amendment.¹⁴ Property and autonomy were already clearly protected by the Fourth Amendment at the time *Katz* was decided;¹⁵ that case added the privacy rubric to the protected categories. Recently, however, some commentators have attacked this security model of the Fourth Amendment. Thus, it is worth emphasizing its bona fides.

To me, the proposition that the Fourth Amendment protects privacy, property and autonomy is clear from its plain meaning. The amendment states that the people have a “right . . . to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.”¹⁶ To search means “to look into or over carefully or thoroughly in an effort to find or discover something”¹⁷ and to seize means “to take possession of” or to “lay hold [of] suddenly or forcibly.”¹⁸ When the government looks into one’s

¹³ 389 U.S. 347 (1967).

¹⁴ The expectation of privacy language actually came from Justice Harlan’s concurring opinion in *Katz*, 389 U.S. at 360 (Harlan, J., concurring), but has since been adopted by a majority of the Court. *See, e.g., California v. Greenwood*, 486 U.S. 35, 40-41 (1988).

¹⁵ *See, e.g., Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (asserting that the Fourth Amendment is meant “to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property”); *Henry v. United States*, 361 U.S. 98, 103 (1959) (stating that the Fourth Amendment is implicated when officers “restrict[] liberty of movement”).

¹⁶ U.S. CONST. amend. IV.

¹⁷ WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1059 (1983).

¹⁸ *Id.* at 1064.

house or effects, or looks over persons or their papers, the interest most obviously implicated is privacy. When the government takes possession of a house, paper or effect, it is interfering with property rights. And when it lays hold of a person it is most clearly affecting one's autonomous control over movements, conduct and dignity. I don't think it's too audacious to assert that the drafters of the Fourth Amendment, who were particularly bothered by indiscriminate intrusions into their possessions by British soldiers in search of uncustomed goods,¹⁹ were trying to protect property and autonomy and the closely associated notion of privacy with their language.

Back in 1991, I argued that even if we were starting from scratch, without a Fourth Amendment or its history, the security model—which at the time I defined as an interest in regulating government “intrusions” into privacy and autonomy—should be the cornerstone of search and seizure regulation.²⁰ I will not recite that part of the article here. But since that effort, two important arguments about the core of the Fourth Amendment have been made, one by Professor Sundby²¹ and one by Professor Stuntz.²²

Professor Sundby contends that privacy is a problematic basis for regulating searches and seizures for at least three reasons. First, the ease with which it can be manipulated in this technological age makes it an unsteady, constantly diminishing basis for Fourth Amendment protection.²³ Second, the “right to privacy” rubric no longer convincingly justifies restriction of the government's crime prevention efforts;²⁴ as Sundby puts it, in these days of anti-crime hysteria those who advocate for a criminal “right”

¹⁹ See TELFORD TAYLOR, TWO STUDIES OF CONSTITUTIONAL INTERPRETATION 24-41 (1969).

²⁰ See Slobogin, *supra* note 7, at 6-7, 47-68.

²¹ See Scott E. Sundby, “Everyman”'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751 (1994).

²² See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

²³ See Sundby, *supra* note 21, at 1758-63. He concludes that:

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

Id. at 1763.

²⁴ See *id.* at 1763-65.

will not get very far unless they are "prepared to explain how the protection benefits not only the individual claimant but all of society."²⁵ Finally, because privacy interests vary depending upon the situation, reliance on the privacy notion as the basis for Fourth Amendment protection has facilitated the demise of the unitary probable cause standard, which Sundby clearly prefers, in favor of a rudderless "reasonableness" analysis.²⁶ For these reasons, Sundby argues that privacy is no longer the best lens through which to view the interests implicated by searches and seizures. In its stead, he proposes that the Fourth Amendment be reconstrued as a means of maintaining mutual government-citizen trust²⁷ (an approach I will call the "trust model").

Professor Stuntz disfavors privacy as the animating feature of Fourth Amendment jurisprudence for somewhat different reasons. He notes that the modern regulatory state, ranging from tax laws to health and safety inspections, involves significant intrusions into privacy, some much more significant than those associated with criminal law enforcement searches that require probable cause.²⁸ Yet, he argues, these regulatory searches could not exist if we were to apply the normal Fourth Amendment warrant and probable cause requirements,²⁹ and thus, privacy interests cannot explain this area of the law. At the same time, he contends, the Court's obsession with privacy has led it to neglect regulation of the force often associated with street searches and seizures.³⁰ Bringing these two themes together, Professor Stuntz suggests that, rather than privacy, coercion (i.e., the extent to which a search or seizure involves a police-citizen encounter) should be the primary focus of the Fourth Amendment³¹ (an approach I will call

²⁵ *Id.* at 1765.

²⁶ *See id.* at 1765-71.

²⁷ *See id.* at 1777 ("I would characterize the jeopardized constitutional value underlying the Fourth Amendment as that of 'trust' between the government and the citizenry.").

²⁸ *See, e.g.,* Stuntz, *supra* note 22, at 1033 (declaring that "information [obtained through tax returns] is undoubtedly private in any ordinary sense of the word . . . [and is] much more sensitive than the usual contents of my glove compartment").

²⁹ *See id.* at 1032 ("In all these [regulatory] areas, the type of regulation that the government seeks to perform is impossible without compelled 'suspicionless' disclosure—disclosure that precedes any showing that the government has a strong interest in obtaining the information *in this case.*").

³⁰ *See id.* at 1068 ("A focus on privacy has led to a great deal of law—sometimes fairly protective, sometimes not—about what police officers can *see*. The doctrine pays a good deal less attention to what police officers can *do.*").

³¹ *See id.* at 1068, 1077 (calling signs that "police coercion is displacing privacy as a

the "coercion model").

Despite these two excellent articles, I continue to believe that securing our privacy, property and autonomy from invasion is the fundamental focus of the Fourth Amendment. Professor Sundby's trust metaphor is a useful heuristic in a number of ways.³² And Professor Stuntz is certainly correct that the courts have neglected regulation of police coercion in the search and seizure context. But privacy should remain at the core of Fourth Amendment protection.

Professor Sundby's trust metaphor is an elucidating way of explaining why, even in an age when subjective expectations of privacy have been diminished substantially, the government must make some showing before it can act.³³ The state should trust its citizens until it can prove they don't deserve to be trusted. But the trust model doesn't help us figure out what that proof should be. For instance, both government intrusions into our houses and government spying on our public movements evidence a lack of trust and presumably should be regulated. But should both require probable cause? Under the trust model one would presumably have to answer yes; otherwise one citizen is being trusted more than another.³⁴ I think that some other referent for measuring the government's showing is needed in these very different types of cases.

focus of attention in the law of criminal investigation . . . a good thing[,]" while branding as "backward" the fact that "we have a large and detailed body of law to tell police when they may open paper bags or the trunks of cars" and very little law on "the level of force that may be used in making an arrest or conducting a search").

³² In addition to the points made below, see *infra* note 186.

³³ For instance, covert government surveillance of the public streets does not infringe subjective privacy expectations, yet it clearly suggests a lack of trust. Of course, it could also be said that, regardless of one's subjective privacy expectations, one should be able to expect privacy from random covert surveillance of public movements, but the trust metaphor provides a more satisfying explanation.

³⁴ In an earlier article, Professor Sundby makes a distinction between "responsive searches" (which involve searches that target individuals) and "initiatory searches" (which, like residential safety inspections, are not aimed at any particular person). See Sundby, *supra* note 4, at 418-20. Generally, he would only allow relaxation of the probable cause standard in the latter situation, and then only when the government can show that there is a compelling government interest in proceeding without probable cause. See *id.* at 419, 430-42. The hypotheticals in the text are responsive searches and therefore would presumably require probable cause. But even under the compelling interest standard, unless the inconvenience of developing probable cause for public surveillance is seen as "compelling" (in which case probable cause would virtually *never* be required for a search), there would be no justification for proceeding on less than probable cause in such a situation.

The coercion model might provide that referent; a house search could be seen as more coercive than covert tracking,³⁵ just as a street search is typically more coercive than a regulatory inspection (the paradigmatic comparison that Stuntz makes). However, I think these differences can be explained just as well by pointing to the lesser degree of intrusion associated with public surveillance and business inspections on the one hand,³⁶ compared to houses and an individual's person on the other. Furthermore, the coercion model does not explain nearly as well as the security model why we regulate completely uncoercive searches such as electronic surveillance³⁷ but do not regulate in any meaningful way very coercive searches such as subpoenas for documents or testimony.³⁸

³⁵ As Stuntz says, "When the police gather information in ways that involve neither a confrontation nor a trespass, they usually are exempt from Fourth Amendment regulation, no matter how private the information they seek." Stuntz, *supra* note 22, at 1056.

³⁶ Professor Stuntz makes much of the fact that business and other types of records are fairly private, yet can be obtained through a subpoena issued on a mere showing of relevance. But most business records do not contain private information, only corporate data. When records *do* contain private information, a different result might be appropriate. Cf. *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1050-51 (D. Haw. 1979) (holding that where the "regulatory search," here a search for Medicaid fraud, is of patient records, the Fourth Amendment's warrant and probable cause requirements apply with full force, because the privacy associated with such records is significant).

Stuntz's most potent and frequent example of the small degree to which the Fourth Amendment protects privacy is that the government can demand private information from us every April 15. See Stuntz, *supra* note 22, at 1019, 1035, 1037, 1039, 1042, 1046. It is true that tax information is relatively private. The reason this illustration still doesn't make Stuntz's point is his assumption that the government's search for tax information is "suspicionless." *Id.* at 1032. Consider what would happen if people were trusted to send in the right amount of tax each year without providing supporting (private) information. My guess is there would be plenty of cause to believe that many, and perhaps most, taxpayers would get the amount wrong (intentionally or inadvertently). That cause would create sufficient generalized suspicion, see *infra* Part III(B)(2), to justify the present system under a proportionality approach.

³⁷ See *Berger v. New York*, 388 U.S. 41 (1967) (requiring a warrant and other protections prior to electronic surveillance).

³⁸ Although Stuntz concentrates on violent (street) coercion in his article, the coercion associated with a subpoena can be significant. This is so not only because a subpoena forcibly seizes property or demands physical presence, but because of the sanction for noncompliance. This sanction is demonstrated by the fate of Susan McDougal, who recently finished serving over 18 months in jail for failing to comply with a subpoena in connection with Special Prosecutor Kenneth Starr's Whitewater investigation. See Allen R. Myerson, *Whitewater Figure Again Defies Starr Inquiry*, N.Y. TIMES, Apr. 24, 1998, at A22.

Or use *Terry* itself as an example, assuming the correctness of its holding that frisks may be based on reasonable suspicion of danger. Which approach—the coercion model, the trust model, or the security model—best explains that holding? Put another way, which model best explains why a frisk requires only reasonable suspicion while a full search requires probable cause?

Under the coercion model, one would presumably argue that a search is more coercive than a frisk. But the sense in which a search is more coercive than a frisk is virtually identical to the sense in which it is more invasive; the coercion comes from the search's greater intrusion into privacy, its interference with more types of property, and its more prolonged insult to autonomy and dignity. In other words, the coercion model adds very little to the security model and, as a semantic matter, may not capture the interests involved as accurately.

Under the trust model, as I suggested above, there may be no way to justify the different treatment of searches and frisks. Both actions imply a lack of trust, yet the trust metaphor does not immediately suggest why the government needs only a suspicion that the frisked person is not to be trusted while it requires probable cause before a search can take place. I think Professor Sundby might argue that *Terry's* relaxation of the probable cause standard in the frisk context is based on the exigencies of the situation—that is, the danger posed to the officer and others by an unfrisked person—which the citizenry will understand and even condone.³⁹ But a frisk on less than probable cause is unlikely to make people accustomed to a probable cause standard feel they are sufficiently trusted unless the government can *also* point to the fact that the invasion visited on them is minor relative to a full search.

B. The Danger Exception

Whether or not it flows from the trust model, the interpretation of *Terry* just mentioned—that it is police safety, not relative unintrusiveness, that authorizes a frisk on less than probable cause—is worth looking at in more detail, if only because most commentators seem to endorse it.⁴⁰ Prevention of imminent harm

³⁹ In an earlier piece, Professor Sundby defends *Terry* as an "emergency" exception to the probable cause requirement. Sundby, *supra* note 4, at 420-25. He does not directly analyze *Terry* in his trust article.

⁴⁰ In addition to Sundby, *supra* note 4, both those who like *Terry*, see Saltzburg,

is clearly a legitimate government objective. What is not clear is why concern about danger should lead to an automatic relaxation of the government's justification, without reference to the degree of invasion associated with the government action. There are three reasons to conclude that such a rule is a bad idea.

First, it doesn't explain the other "holding" in *Terry*. While the Court explicitly purported to be avoiding a decision about the "propriety of an investigative 'seizure' upon less than probable cause,"⁴¹ it followed this disavowal with the declaration that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."⁴² The Court went on to suggest that such a stop may take place based merely on reasonable suspicion that "criminal activity may be afoot,"⁴³ protection of the officer or others need not be an objective of this initial encounter, or otherwise a frisk would be authorized as soon as the officer approached the individual, without the inquiries and further development of suspicion of danger mandated by *Terry*.⁴⁴ As the Court stated in moving from its analysis of stops to its treatment of frisks:

We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.⁴⁵

Those commentators who like *Terry's* indication that stops may take place on reasonable suspicion (which presumably includes every commentator who supports *Terry's* holding about frisks⁴⁶)

supra note 3 (noting that "the Court saw a veteran police officer who made a quick decision to protect himself and others from danger") and those who do not, see Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998) (speaking of "police safety" as the motivating force behind *Terry*) perceive officer safety as the primary justification for *Terry*.

⁴¹ *Terry*, 392 U.S. at 19 n.16.

⁴² *Id.* at 22.

⁴³ *Id.* at 30. See *supra* note 3 for a caveat to this description of *Terry*.

⁴⁴ See *Terry*, 392 U.S. at 29-30.

⁴⁵ *Id.* at 23.

⁴⁶ Requiring probable cause for a stop would make a stop no different than an arrest for Fourth Amendment purposes, and thus render *Terry's* holding concerning frisks irrelevant, since an arrest authorizes a *full* search. See *United States v. Rob-*

need to explain that preference on grounds other than officer safety.

The second reason a danger exception to probable cause is problematic is that prevention of future harm is not intrinsically any more legitimate a goal than investigation of past crime. In related contexts, concern over future harm doesn't justify reducing the showing the government must make before it can act. For instance, short-term pretrial detention on the basis of public safety often requires proof of danger by clear and convincing evidence,⁴⁷ which is *more* than the probable cause required for pretrial detention for past crime (i.e., an arrest).⁴⁸ Most long-term criminal preventive detention statutes (such as those dealing with sexual predators) require proof beyond a reasonable doubt,⁴⁹ the same standard of proof required at a criminal trial before long-term punishment is imposed.⁵⁰ While the Supreme Court has held that the standard of proof for preventive civil commitment may be lower than the standard of proof for criminal punishment,⁵¹ that holding is based primarily on the assumption that commitment for psychiatric treatment does not involve as significant a deprivation of liberty as punishment (i.e., a proportionality rationale), not on the idea that the government's burden should be less when it wants to prevent harm.⁵²

inson, 414 U.S. 218, 227-28 (1973) (discussing *Terry's* recognized distinction between a limited search for weapons and a search incident to arrest).

⁴⁷ See, e.g., Bail Reform Act of 1984, 18 U.S.C. § 3142(f) (1985) (requiring proof by clear and convincing evidence that "no condition or combination of conditions will reasonably assure the safety of any other person and the community"). Other jurisdictions require something closer to probable cause. See, e.g., FLA. STAT. ANN. § 907.041(b)(4) (West Supp. 1998) (requiring a "substantial probability . . . that . . . the defendant poses the threat of harm to the community").

⁴⁸ See *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (defining probable cause for an arrest).

⁴⁹ See, for example, the first sexual predator statute, WASH. REV. CODE ANN. § 71.09.020(1) (West Supp. 1998) (requiring proof beyond a reasonable doubt that the person to be committed "suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence").

⁵⁰ See *In re Winship*, 397 U.S. 358, 361-64 (1970) (discussing the "virtually unanimous adherence in common-law jurisdictions" to the beyond a reasonable doubt standard).

⁵¹ See *Addington v. Texas*, 441 U.S. 418, 431-33 (1979) (applying the clear and convincing standard of proof in civil commitment proceedings).

⁵² See *id.* at 428-29 (justifying the clear and convincing standard on three grounds: (1) "[i]n a civil commitment state power is not exercised in a punitive sense"; (2) given the fact that the effect of an erroneous commitment is not as great as an erroneous conviction, "[i]t cannot be said . . . that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed," and (3) the difficulty of

The final and most important reason for distrusting a prevention-of-harm exception to probable cause is its potential for swallowing up the probable cause requirement entirely, given the unknowable dangers that pervade police work. As Professor Harris has demonstrated,⁵³ the lower courts are very willing to allow what amounts to suspicionless frisks and searches in street encounter situations on the theory that danger lurks everywhere. The Supreme Court has been more cautious, but it too has contemplated the prevention-of-harm rationale in authorizing subprobable cause searches of houses⁵⁴ and cars⁵⁵ when their occupants have been arrested, as well as no-knock entries of homes when there is reasonable suspicion of danger.⁵⁶ The Court has also relied on that rationale to permit, in the absence of *any* suspicion, inspections of the area of the home immediately surrounding an arrestee⁵⁷ and forced disembarkment of car occupants.⁵⁸ Not all of these Court-sanctioned police actions would be impermissible under a proportionality analysis; for instance, a cursory sweep of a house solely for the purpose of finding confederates of an arrestee (whose home has already been invaded) is not particularly intrusive and might be justifiable on reasonable suspicion.⁵⁹ But a fuller search of the home or of personal possessions on less than probable cause would be disproportionate because these actions are more invasive than a frisk (which only allows police to feel objects, not look at their contents⁶⁰); similarly, suspicionless intrusions will usually be disproportionate precisely because some in-

proving dangerousness).

⁵³ 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 (1998).

⁵⁴ See *Maryland v. Buie*, 494 U.S. 325, 335-36 (1990) (permitting "cursory" search of arrestee's house if there was reasonable suspicion that confederates were there).

⁵⁵ See *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (permitting search of the area of the car accessible to its occupant if there is reasonable suspicion of danger).

⁵⁶ See *Richards v. Wisconsin*, 117 S. Ct. 1416, 1421 (1997) (allowing police to forego the knock and announce requirement if there is a reasonable suspicion that announcing their presence will lead to evidence destruction or harm to officers).

⁵⁷ See *Buie*, 494 U.S. at 334.

⁵⁸ See *Maryland v. Wilson*, 117 S. Ct. 882, 884 (1997).

⁵⁹ Indeed, the Court justified its decision in *Maryland v. Buie* in large part on the ground that a cursory sweep is less intrusive than a full search incident to an arrest of the type involved and prohibited in *Chimel v. California*, 395 U.S. 752 (1969).

⁶⁰ Cf. *United States v. Place*, 462 U.S. 696, 707 (1983) (stating, in dictum, that a dog sniff is not a search because it detects only the presence of contraband).

trusion is involved. In contrast, under a danger rationale which pays no attention to degrees of intrusiveness, all of these searches and seizures are perfectly justifiable: there is always the *potential* for danger in any of these situations. What is ignored is that there is also a great potential for using "danger" as an excuse to conduct searches and seizures that would usually require probable cause.

Use of the danger rationale to justify *Terry* and the other cases noted above is alluring because the harm seems preventable and is very hard to discern; why not let police take the necessary preventive steps? Carried to its logical conclusion, however, this line of reasoning would do away with suspicion requirements altogether. If we really want to prevent harm, we would permit frisks of everyone the police encounter and sweeps of all houses in which they find themselves. There must be some limiting principle here, and that principle is the proportionality idea.⁶¹

C. *A Sliding Scale v. Probable Cause Forever*

One response to all of this might be that, contrary to the assumption made above, *Terry's* endorsement of a reasonable suspicion standard is *wrong*. This suggestion leads to an examination of the second proposition stated above—that the greater the threat to security posed by the government action, the greater justification the government must show. Justice Douglas, for one, believed this proposition to be specious. In his dissent in *Terry*, he argued that if the government action threatens privacy, property, or autonomy interests to an extent sufficient to call it a "search" or "seizure," then it should always require probable cause.⁶² This

⁶¹ An unlikely but not unrealistic case that might test this approach is Justice Jackson's famous example involving search of every outgoing car from a neighborhood in which a child has been kidnapped. See *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting). Justice Jackson said he would "candidly strive hard to sustain such an action . . . because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime." *Id.* at 182. Consider how one might analyze this scenario under the proportionality approach. A brief stop at a roadblock to see the interior of a car would require virtually no suspicion, cf. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), but if the officers want to look in the trunk, they would need probable cause or consent. Refusal to give consent might lead the police to follow the car. But forcibly searching a car from top to bottom simply because it happens to be near an area where a kidnapping took place is not justifiable under proportionality reasoning. Under Justice Jackson's approach, which Professor Amar has endorsed, see Amar, *supra* note 5, at 802, the Fourth Amendment would tend to disappear any time police want to solve a serious crime. See Slobogin, *supra* note 7, at 31 n.109.

⁶² See *Terry*, 392 U.S. at 38 (Douglas, J., dissenting) ("The infringement on per-

probable-cause-forever position has been endorsed by others as well.⁶³

There are two problems with this position, one pragmatic, the other normative. First, it exerts incredible pressure on the courts to reduce the scope of the Fourth Amendment by narrowly defining “search” and “seizure.” For the probable-cause-forever position does not dictate that stops take place only on probable cause; a second option, apparently endorsed by the lower courts in *Terry* itself,⁶⁴ is to hold that stops do not implicate the Fourth Amendment at all. The latter holding would have been much more likely had the *Terry* Court felt compelled to require probable cause for all seizures. Calling a brief stop a seizure and requiring probable cause to justify it would either have made crime prevention virtually impossible or have led to a vast expansion of “preventive crime” statutes such as loitering and traffic laws,⁶⁵ designed to give police probable cause for arresting those suspected of being

sonal liberty of any ‘seizure’ of a person can only be ‘reasonable’ under the Fourth Amendment if we require the police to possess ‘probable cause’ before they seize him.”).

⁶³ See Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 623-24 (1996) (concluding that “[t]he core rule requires a warrant for every search or seizure” except in circumstances in which “law enforcers cannot obtain warrants before they must act”); Gerald S. Reamey, *When “Special Needs” Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295, 340 (1992) (“If the constitutional scheme requires probable cause and a warrant for searches designed to produce criminal evidence, it is hard to imagine what further societal need would be so significant that its presence should reduce the standard of suspicion and judicial review.”); cf. Maclin, *supra* note 40 (“A police safety exception that merely requires police suspicion—as opposed to probable cause—assured, as the nation’s recent history has documented, that the Fourth Amendment rights of blacks and other disfavored individuals would inevitably diminish.”).

⁶⁴ The majority opinion in *Terry* stated that “[t]here is some suggestion in the use of such terms as ‘stop’ and ‘frisk’ that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a ‘search’ or ‘seizure’ within the meaning of the Constitution.” See *Terry*, 392 U.S. at 16. In support, the Court cited, among other material, the Ohio Court of Appeals decision in *Terry*, which the Ohio Supreme Court affirmed on the ground that no substantial constitutional question was involved. See *State v. Terry*, 214 N.E.2d 114, 120 (Ohio Ct. App. 1966), *aff’d*, *Terry v. Ohio*, 392 U.S. 1 (1968).

⁶⁵ Indeed, at the St. John’s conference Professor Meares conjectured that, without *Terry*, the decisions in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) and its progeny striking down vagrancy statutes on void-for-vagueness grounds would have been much more difficult for the Court. See Tracey L. Meares, *Terry and the Relevance of Politics*, 72 ST. JOHN’S L. REV. 1343 (1998); see also, Stuntz, *supra* note 22, at 1076 n. 216 (“It is no accident that the ‘stop-and-frisk’ cases arose at the same time vagrancy and loitering laws were being struck down.”).

up to no good. Combine the unattractiveness of these options with the fact, of which the *Terry* Court was painfully aware,⁶⁶ that the exclusionary rule does little to deter low-level preventive actions even when they are called "seizures," and a holding declaring stops to be nonseizures might well have seemed the best among bad choices.

Admittedly, a holding that a stop is not a "seizure" clearly does violence to the normal meaning of that word, which might have given the Court pause. However, the Court's cases defining "search" for Fourth Amendment purposes have shown no compunction about mutilating that term beyond recognition.⁶⁷ Because, as discussed in more detail below, the latter development is directly related to the Court's adherence to the probable cause standard in the search context, my best guess is that, had *Terry* not adopted a sliding scale approach in the seizure context, that threshold would bear even less semblance to common English usage than it does today.

Even if the Court had resisted this pressure—instead boldly calling the stop in *Terry* a seizure and insisting on probable cause for all seizures—it would have been wrong-headed in doing so. This is not just because, as Professor Amar has so persuasively argued, the text and history of the Fourth Amendment indicates that reasonableness, not probable cause, is the touchstone of substantive Fourth Amendment regulation.⁶⁸ The normative argument against the probable-cause-forever position relies on the intuition, reflected throughout our jurisprudence, that the government's burden should vary depending upon the effect of its actions on the individual. As already noted,⁶⁹ we vary the standard of proof between criminal trials and civil commitment proceedings because of the perceived differences in the deprivation of

⁶⁶ See *Terry*, 392 U.S. at 15 ("[A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.").

⁶⁷ See *infra* text accompanying notes 75-83.

⁶⁸ See Amar, *supra* note 5, at 782-85. Although much of what is said in this article and in my 1991 piece, see Slobogin, *supra* note 7, parallels Professor Amar's work, I don't agree with his remedy package, his diminishment of the Warrant Clause or his willingness to include the seriousness of the offense as a factor in reasonableness analysis. See *infra* text accompanying notes 141-42, 195-207, and *supra* note 61. I also doubt he would agree with my generalized suspicion concept. See *infra* text accompanying notes 162-86.

⁶⁹ See *supra* text accompanying notes 49-52.

liberty that each brings. We adopt different levels of scrutiny in constitutional litigation depending upon whether the individual right infringed by the government is "fundamental" or less so.⁷⁰ In the entitlements context, the degree of process due before benefits can be terminated depends upon the effect of the termination.⁷¹ Outside the constitutional setting, we do the same sort of thing. In the tort context, for instance, many courts require greater proof for punitive damages than for compensatory damages.⁷²

A unitary probable-cause-forever standard thus cuts against a pervasive normative-legal intuition. If taken seriously, it also means that, just as we can't relax the required government justification, we also can't ratchet it *upward*. Thus, requiring something more than probable cause for serious bodily intrusions and electronic surveillance, as the Supreme Court has done,⁷³ and for pri-

⁷⁰ See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 601 (5th ed. 1995).

[I]n the post 1937 period we have had a dichotomy between the judicial review of classifications employed in economic and general social welfare regulation and review of classifications that either touch upon fundamental constitutional values or use a criterion for classification which itself violates a fundamental constitutional value. Classifications of the first type will be upheld so long as they arguably relate to a legitimate function of government. Classifications of the second type, however, will be subjected to independent judicial review, which means that the Court will not give great deference to the legislature in those cases.

Id.

⁷¹ See *Mathews v. Eldridge*, 424 U.S. 319, 340-41 (1976) (finding there is no need for the evidentiary hearing required by *Goldberg v. Kelly*, 397 U.S. 254 (1970), when the state terminates disability benefits rather than welfare benefits, since the former are not need-based and an erroneous determination will not work as much hardship).

⁷² See DOBBS, LAW OF REMEDIES §3.11(4) (2d ed. 1993) (describing case law rejecting a preponderance standard and substituting a clear and convincing standard for punitive damages given their punitive intent). I suppose the best counter-example is that we apply the same reasonable doubt standard of proof at any criminal trial, whether it's adjudicating capital murder charges or a misdemeanor. See *In re Winship*, 397 U.S. 358 (1970) (applying the reasonable doubt standard to a juvenile delinquency proceeding). In practice, however, the procedures in the former instance (ranging from jury and counsel rights to the nature of the sentencing proceeding) are much more protective. See *Bullington v. Missouri*, 451 U.S. 430 (1981) (stating double jeopardy applies to capital sentencing because of its increased formality); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that there is no right to counsel if defendant does not face jail term); *Baldwin v. New York*, 399 U.S. 66 (1970) (declaring there is no right to jury trial for petty crimes).

⁷³ See *Winston v. Lee*, 470 U.S. 753, 766 (1985) (requiring that before conducting surgery on a defendant for the purpose of obtaining evidence, the state must show that the procedure does not unduly threaten the defendant's health or safety, or his or her dignitary interest, and that it is *necessary* to effect the government's inter-

vate papers, as the courts should do,⁷⁴ would be inconsistent with a unitary approach. Under the proportionality principle, on the other hand, such superprotection makes perfect sense, given the serious privacy invasions associated with such actions.

II. REVAMPING THE PROPORTIONALITY PRINCIPLE

To say that *Terry's* proportionality principle is the appropriate framework for Fourth Amendment analysis is not to say that the Court's version of that principle is acceptable. In fact, the way the Court has manipulated *Terry's* insight is reprehensible. Even in those cases where it has adhered to the spirit of *Terry*, the Court has failed to develop any good framework for applying the balancing formula.

Refinement of that framework, or at least a start at doing so, is the goal of this part of the article. Both the assessment of invasiveness that the proportionality principle demands and the manner in which the government can justify its invasions require analytical schemes that have yet to find their way into the case law. In developing these schemes, I borrow liberally from the insights of several people here at this conference, as well as my own previous work.

A. Operationalizing Invasiveness

To implement *Terry's* proportionality principle, some assessment of the invasiveness of the police action in question must be made. The Supreme Court's efforts in this regard have been abysmal. The Court has been remiss in three areas: defining the threshold of the Fourth Amendment; differentiating the various degrees of invasiveness; and incorporating into invasiveness analysis other constitutional considerations.

est); *Berger v. New York*, 388 U.S. 41, 59-60 (1967) (requiring for electronic surveillance a warrant plus a showing of "exigent circumstances," by which the Court appeared to mean a particular need for the surveillance).

⁷⁴ The Court has indicated that private papers are entitled to no more protection than other items. See, e.g., *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986); *United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring). But good arguments exist that they are entitled to special protection under the First, Fourth and Fifth Amendments. See Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 987-88 (1977).

1. The Fourth Amendment Threshold

As many commentators have pointed out,⁷⁵ the most obviously flawed Fourth Amendment decisions from the Court are those telling us what is not governed by that Amendment: prosecutorial requests for bank records⁷⁶ and phone number logs;⁷⁷ use of undercover agents;⁷⁸ trespassing on cornfields;⁷⁹ flyovers of backyards;⁸⁰ rifling through curbside garbage bags;⁸¹ using enhancement devices to conduct surveillance of public movements⁸² and business property,⁸³ and so on. Although my students often disagree over the relative invasiveness of these practices, no area of criminal procedure is more likely to make them lose respect for the Supreme Court than the Court's blithe pronouncements that a person who expects privacy in these situations is being unreasonable. It just doesn't jibe with the type of society in which they thought they lived.

The Supreme Court is almost as unimpressive when it comes to telling us what is not a seizure: interrogations on busses,⁸⁴ chases of fleeing youths;⁸⁵ pointed questioning about alienage at one's place of work;⁸⁶ asking for ticket and identification at airports.⁸⁷ Perhaps if people were told they had the right to terminate such encounters (which the Court insists they have)⁸⁸ and the police honored that right, then continued cooperation with the police could sensibly be said not to implicate the Fourth Amendment.

⁷⁵ See Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 549, 563-75 (1990) (concluding that "the Court has permitted police surveillance powers to grow almost unchecked to their present epic proportions"); see also Amar, *supra* note 5, at 783 (calling the Court's refusal to label naked-eye searches "unconvincing and unworthy").

⁷⁶ See *United States v. Miller*, 425 U.S. 435, 446 (1976).

⁷⁷ See *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979).

⁷⁸ See *United States v. White*, 401 U.S. 745, 753 (1971) (plurality opinion); *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

⁷⁹ See *Oliver v. United States*, 466 U.S. 170, 177 (1984).

⁸⁰ See *Florida v. Riley*, 488 U.S. 445, 451-52 (1989); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986).

⁸¹ See *California v. Greenwood*, 486 U.S. 35, 37 (1988).

⁸² See *United States v. Knotts*, 460 U.S. 276, 282 (1983).

⁸³ See *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986).

⁸⁴ See *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (remanding to Florida Supreme Court for ultimate disposition on seizure issue).

⁸⁵ See *California v. Hodari D.*, 499 U.S. 621, 629 (1991).

⁸⁶ See *Immigration Serv. v. Delgado*, 466 U.S. 210, 218 (1984).

⁸⁷ See *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (plurality opinion).

⁸⁸ See *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (stating that a person subject to a *Terry* stop "is not obliged to respond" to questions).

But the Court does not require such a warning⁸⁹ nor, if one were given, would it likely alleviate the inherent coercion of such confrontations.⁹⁰

This truly depressing line of decisions is the direct result of a twofold abuse of *Terry*. The first abuse is the implicit use of *Terry's* proportionality principle to determine the threshold of the Fourth Amendment. Although the Court has never acknowledged as much, the only good explanation for the Court's unwillingness to regulate so many actions that are clearly searches and seizures is that it has decided that the cost to law enforcement of doing so outweighs the "minimal" intrusions involved.⁹¹ Such an application of the balancing formula is barred by the language of the Fourth Amendment itself. That provision's prohibition on "unreasonable searches and seizures" applies the reasonableness test only *after* something has been labeled a search or seizure.⁹²

The second abuse of *Terry* in this context (which inevitably follows from the first) is the *failure* to apply its proportionality principle to actions which should have been designated searches and seizures. If the Court had been willing to recognize that some relatively less invasive "searches" and "seizures" can take place on less than probable cause, it would have felt much more comfortable broadening the definition of those two terms.⁹³ Indeed, in many of the decisions in which the Court rejected application of the Fourth Amendment, the police had developed a degree of suspicion that might have justified the action under proportionality

⁸⁹ See *Bostick*, 501 U.S. at 437.

⁹⁰ See Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1306 (1990) (stating that, "[v]ery few persons will have the moxie to assert their fourth amendment rights in the face of police authority . . .").

⁹¹ The Court came closest to saying as much in *United States v. Dionisio*, 410 U.S. 1, 9-13 (1973), in which it held that grand jury subpoenas are not seizures because the "minimal intrusion" associated with such a subpoena is justified by the investigative tradition of the grand jury.

⁹² *Terry* itself made this point clear. After concluding that the stop and frisk is a "serious intrusion upon the sanctity of the person," 392 U.S. at 17, the Court stated that "there can be no question . . . that Officer McFadden 'seized' petitioner and subjected him to a 'search.'" *Id.* at 19. The court then stated that it next had to decide whether "at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did." *Id.* (emphasis added to show the Court's apparent belief that reasonableness analysis kicks in only once the police action has been denominated a seizure or search).

⁹³ I elaborate on this point in Slobogin, *supra* note 7, at 77-78.

reasoning. For instance, in *Oliver v. United States*,⁹⁴ which permitted trespass on private property outside the curtilage, the police were acting on "reports" that the defendant was raising marijuana on his farm.⁹⁵ In *California v. Ciraolo*⁹⁶ and *California v. Greenwood*,⁹⁷ respectively permitting suspicionless flyovers and rifling through garbage, the police were acting on tips about drug possession.⁹⁸ In *California v. Hodari D.*,⁹⁹ holding that chases are not seizures, the police had seen the defendant flee before them.¹⁰⁰

Although the police in these cases did not have probable cause, they may have had enough suspicion to justify, under a proportionality scheme, their relatively uninvasive actions. If so, the Court could have had its cake and eaten it too. It could have brought these actions within the compass of the Fourth Amendment and still approved them. Instead it has read vast domains of intrusive police action out of the Fourth Amendment.

2. *Establishing a Hierarchy of Invasiveness*

These examples lead to the next question about invasiveness that the Court has failed to answer satisfactorily: How are we to gauge the relative intrusiveness of a police action that is considered a search or seizure? The Court has given us *some* guidelines in this regard. With respect to seizures, for example, the Court has told us that a *Terry* stop is less invasive than an arrest,¹⁰¹ and that a brief stop at a sobriety roadblock is less invasive than either a stop or an arrest.¹⁰² The factors it has relied on in making these types of assessments include the extent to which police rely on a show of force, the length and cause of the detention, the extent to which the detention is routinely applicable to everyone (as with roadblocks), and where the detention takes place.¹⁰³

With respect to searches, the Court has indicated that

⁹⁴ 466 U.S. 170 (1984).

⁹⁵ *See id.* at 173.

⁹⁶ 476 U.S. 207 (1986).

⁹⁷ 486 U.S. 35 (1988).

⁹⁸ *See Ciraolo*, 476 U.S. at 209 (stating that police had an anonymous tip); *see also Greenwood*, 486 U.S. at 37 (noting that police "received information").

⁹⁹ 499 U.S. 621 (1991).

¹⁰⁰ *See id.* at 629.

¹⁰¹ *See Terry*, 392 U.S. at 16-19.

¹⁰² *See Michigan State Police v. Sitz*, 496 U.S. 444, 451 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-60 (1976).

¹⁰³ *See generally* WHITEBREAD & SLOBOGIN, *supra* note 3, at §3.02 (discussing Supreme Court case law distinguishing arrests from other types of detentions).

searches of houses and luggage are more invasive than searches of cars,¹⁰⁴ which in turn are more invasive than frisks,¹⁰⁵ drug testing in the school or workplace,¹⁰⁶ and most other searches in the latter two arenas.¹⁰⁷ It has also indicated that regulatory inspections of gun and liquor stores and the like are even less invasive.¹⁰⁸ In arriving at these conclusions, it has looked at the extent to which privacy has traditionally been associated with the area searched, whether privacy is diminished because of a connection with the public sphere (as with public roads and workplaces), and whether there was foreknowledge that privacy is minimal in some contexts (e.g., workplaces, schools, pervasively regulated industries).¹⁰⁹

Neither these conclusions about autonomy and privacy interests or the factors used in reaching them are clearly out of whack. But the Court has also told us that the fundamental inquiry about our security vis-à-vis the government depends upon "expectations society is prepared to recognize as 'reasonable.'"¹¹⁰ If that is the

¹⁰⁴ See *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977) (listing reasons why cars have a "diminished expectation of privacy" vis-à-vis houses and luggage).

¹⁰⁵ See *Terry*, 392 U.S. at 27.

¹⁰⁶ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (concluding that collecting urine samples from fully clothed students while they are monitored from behind involves "negligible" privacy intrusion); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671 (1989) (asserting that "the 'operational realities of the workplace' may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts").

¹⁰⁷ See *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."). Although *New Jersey v. T.L.O.*, 469 U.S. 325, 337-38 (1985), insisted that a search of a child's purse, "no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy," it noted that privacy expectations might change if the search focused on a locker, desk or other school property. *Id.* at 337 n.5. Further, its subsequent decision in *Vernonia*, 515 U.S. at 658, suggests that even its stance with respect to purses might have shifted somewhat.

¹⁰⁸ See *United States v. Biswell*, 406 U.S. 311, 316 (1972) (declaring that, "[w]hen a dealer chooses to engage in this pervasively regulated business [sale of guns] and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection"); *Colonade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (holding suspicionless, warrantless searches of liquor stores permissible).

¹⁰⁹ See *Slobogin*, *supra* note 7, at 43-46.

¹¹⁰ This language first appeared in Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967), but has since appeared in majority opinions in a number of cases. See, e.g., *California v. Greenwood*, 486 U.S. 35, 39-40 (1988) (stating that an expectation of privacy will only give rise to Fourth Amendment protection if society is prepared to accept that expectation as objectively rea-

proper test—and the subjective, personal nature of privacy and autonomy suggests it is—then why not determine what society thinks is reasonable? Because the Court has made no attempt to do so, its invasiveness hierarchy is ultimately suspect.¹¹¹

Society's views can be gleaned in at least two ways. The first is to look at the positive law on trespass, contract and so on for clues as to what areas and items we think are private.¹¹² When, as is often the case, that source does not help, research of the type that I have done with Joe Schumacher, sampling how citizens rate the intrusiveness of various types of police actions, may be useful.¹¹³ Although the use of empiricism to settle normative questions can raise troublesome issues,¹¹⁴ these quandaries largely disappear where the content of the law *explicitly depends* upon the answer to an empirical question.

Many of the Court's intuitions about invasiveness—e.g., that bedrooms are more private than cars, which are more private than junkyards—are borne out by our research.¹¹⁵ But many are not. Not surprisingly, the gap between the Court's views and the views of the "society" we sampled is greatest in those cases in which the Court has held that police action does not implicate the Fourth Amendment. For example, our sample viewed undercover activity of intimates and government perusal of bank records, both of which the Court has left unregulated, as much more invasive than

sonable); *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (stating that "[t]he touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy'"); *United States v. Jacobsen*, 466 U.S. 109, 122 (1984) (noting that in order to be considered a search covered by the Fourth Amendment, it is necessary to determine whether it infringes on "an expectation of privacy that society is prepared to consider reasonable"); *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978) (stating that legitimation of expectations of privacy must be based on references to concepts of real or personal property law or to understandings recognized by society).

¹¹¹ At the St. John's conference, Professor Stuntz suggested that we cannot measure constructs like privacy, stigma, and the effects of racial discrimination. William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213 (1998). Perhaps we can't in any scientific way, but the suggestions made below should get us pretty close.

¹¹² See Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249 (1993).

¹¹³ 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 (1993).

¹¹⁴ See Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315 (1996).

¹¹⁵ See Slobogin & Schumacher, *supra* note 113, at 739-40.

a *Terry* patdown.¹¹⁶ A proportionality approach based on the research would not only denominate the former investigative activities to be "searches" but might well require more than reasonable suspicion to justify them. Similarly, while flyovers of backyards and looking through garbage bags were not considered as intrusive as a pat down,¹¹⁷ they were seen as much more intrusive than looking at the exterior of a car or going through a magnetometer at an airport.¹¹⁸ These findings suggest that, under a proportionality rule, some credible reason for the former types of action is necessary.

Our research also calls into question some Court decisions about investigative techniques that it *is* willing to call a search or seizure. Take, for instance, the Court's assumptions that we expect appreciably less privacy at work and at school.¹¹⁹ A theoretical rationale for recognizing diminished privacy protection in these locales, obliquely suggested by the Court's cases,¹²⁰ is that many of the searches conducted there are relatively benign, particularly when they can be characterized as administrative rather than criminal in objective. Indeed, our research suggested that when the motivation of a search or seizure is seen as protective or facilitative rather than adversarial, the perceived intrusiveness of the action diminishes significantly. Illustrative is the finding that subjects viewed rummaging through luggage at an airport as no more intrusive than a dog sniff or searching a sixth grader's

¹¹⁶ Out of 50 scenarios assessed by our sample on a scale of 0 (for not intrusive) to 100 (for very intrusive), a pat down was ranked (hereafter designated by R) 19th, and had a mean score (hereafter designated as M) of 54.76, while using a chauffeur as an undercover agent (R=31; M=67.56) and a secretary (R=34; M=69.98) were viewed as more intrusive. *See id.* at 738-39 (Table 1).

¹¹⁷ Flying 400 yards above the backyard in a helicopter was ranked 10th (M=40.32) and going through garbage was ranked 13th (M=44.95), compared to a patdown (R=19; M=54.76). *See id.*

¹¹⁸ Going through a magnetometer at an airport was ranked 2nd (M=13.47) and inspecting the exterior of a car was ranked 4th (M=19.46). *See id.*

¹¹⁹ *See supra* notes 106-07.

¹²⁰ For instance, in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995), the Court justified random drug testing of student athletes in part because the testing "was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." In *New Jersey v. T.L.O.*, 469 U.S. 325, 337 n.5 (1995), the Court deferred deciding whether the reduced protection it endorsed for schoolchildren would apply if the search had been carried out by police looking for evidence of crime rather than school teachers investigating disciplinary infractions. *Cf. Camara v. Municipal Court*, 387 U.S. 523, 537 (1967) (discussing "public acceptance" of residential health and safety inspections).

locker;¹²¹ apparently, this result stemmed from the perception that the airport search was designed to prevent a serious danger that could not effectively be averted in other ways.¹²² Residential and business inspections for the purpose of ensuring safe living and working conditions were viewed the same way.¹²³

However, our research also suggests that when searches in these settings are not imbued with facilitative aims, people's privacy expectations, contrary to the Court's assumption, are heightened.¹²⁴ Apparently searches in the school and workplace for drug usage, contraband and disciplinary infractions are not as easily encompassed by the Family Model of criminal procedure;¹²⁵ they seem to be perceived as adversarial invasions rather than paternalistic. If so, the proportionality principle would demand greater justification than mere assertions that schools and workplaces have drug or disciplinary problems, which is in effect the Court's current stance.¹²⁶

3. Incorporating Other Interests Into Invasiveness Analysis

A third deficiency of the Court's case law is closely related to the second. As Professor Amar has pointed out,¹²⁷ the Court has utterly failed to take into account those interests aside from privacy, property and autonomy that are protected by other provisions of the Constitution. The First Amendment (in connection, for example, with searches of newspaper offices or diaries), the Sixth Amendment (in connection with subpoenas of attorney files), the Equal Protection Clause (where race is involved) and the Due

¹²¹ See Slobogin & Schumacher, *supra* note 113, at 768-69 (discussing empirical support for an "implied consent" theory when the government's object is to prevent imminent harm (as in airport frisks) or to facilitate and aid (as in fire, safety, and health inspections)).

¹²² See *id.*

¹²³ See *id.* at 769.

¹²⁴ Compare the following findings to a patdown (R=19; M=54.76); using a secretary as an undercover agent (R=34; M=68.98); accompanying subject of drug test to a urinal at work and listening for sounds of urination (R=39; M=72.49); searching a high school student's purse (R=41; M=75.14). See *id.* at 738-39 (Table 1).

¹²⁵ Cf. John Griffiths, *Ideology in Criminal Procedure, or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 380-83 (1970) (discussing a "family model" of the criminal process which would, inter alia, assume good faith on the part of government officials).

¹²⁶ See *infra* notes 175-77 and accompanying text.

¹²⁷ See Amar, *supra* note 5, at 804-11 (describing how the Court's focus on warrants and probable cause has made difficult the integration of values from the First, Sixth and Fourteenth Amendments into search and seizure analysis).

Process Clause (where police conduct shocks the conscience) all may independently add weight to the individual's side of the balance, thus requiring more by way of government justification.

Because Professor Amar has already made the basic argument,¹²⁸ I want to focus on just one aspect of it—the equal protection aspect, or to be more blunt, race. Professor Maclin has argued in *Black and Blue Encounters*¹²⁹ that, in evaluating individual interests under *Terry*, the Court should take race into account; the added coercion and anxiety blacks feel when confronted by the police should be considered in determining invasiveness. He bases this position on convincing proof that the police target minorities for stops and other confrontations,¹³⁰ and that the latter group has grown to expect and resent that fact.¹³¹ However, he also bases it on the conclusion that “[t]he ruling in *Terry* was a significant setback in the fight against discriminatory police tactics,”¹³² a setback which can be redressed only by abandoning race-neutral analysis.¹³³

If Professor Maclin is saying that discriminatory tactics make an otherwise reasonable search or seizure unreasonable, perhaps on a Fourth-Amendment-plus-equal-protection theory, I have no quarrel with him.¹³⁴ For instance, I think *Whren v. United*

¹²⁸ See *id.*

¹²⁹ Tracey Maclin, “*Black and Blue Encounters*”—*Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991).

¹³⁰ See *id.* at 250-55.

¹³¹ See *id.* at 255-62.

¹³² *Id.* at 267-68.

¹³³ See *id.* at 268-78.

¹³⁴ However, if he really means that cops should have to have more suspicion to stop a black person than a white person (it is ultimately hard to tell from his article), I think he is off base. Giving blacks more leeway to commit crime is not going to solve the race problem.

That does not mean we should not try to lessen the subjective sense of invasion blacks feel. Two suggestions made at the conference might go far toward accomplishing this goal. First, Professor Fyfe recounts that, when he was a police officer, he would explain to people he had stopped why he had done so, and even occasionally had the stopped individuals listen to the radio dispatch that occasioned the stop. See James J. Fyfe, *Terry: A[n Ex-] Cop's View*, 72 ST. JOHN'S L. REV. 1231 (1998). Our research confirms that knowledge of the objective of a search lessens the sense of intrusion. See Slobogin & Schumacher, *supra* note 113, at 759-60 (“[T]his study provides clear support for the proposition that searches and seizures tend to be viewed as more intrusive when . . . their objective is not clear rather than specified.”). Of course, to the extent police cannot come up with a credible race-neutral reason for the stop, they should be embarrassed out of stopping the individual in the first place.

States,¹³⁵ which has almost done away with the pretext doctrine, is wrongly decided, in part because it allows and even encourages discriminatory tactics.¹³⁶ To the extent abandoning race-neutral analysis means resurrecting pretext arguments, I agree with Professor Maclin wholeheartedly. Where I disagree with him is in his assertion that *Terry* does the same thing as *Whren*. There are three reasons for that disagreement.

First, reasonable suspicion is not a hunch; it requires an articulable belief that criminal activity is afoot. Some of the examples Professor Maclin gives in his article, such as the round-ups of black youth by the Boston police in the wake of the Stuart shooting,¹³⁷ are clearly not authorized by *Terry*. Unfortunately, they probably would have happened regardless of how the Supreme Court decided that case. Professor Maclin may be right that an officer who confronts a black man "knows that he has unchecked discretion to make the stop."¹³⁸ But that is not *Terry's* fault; it is the fault of a society that does not make the officer obey *Terry*.

That gets to the second point. Professor Maclin's target should not be *Terry*, but the lack of remedies for discriminatory police action. As the *Terry* Court itself pointed out,¹³⁹ the exclusionary remedy is virtually useless in this situation because most

The second means of diminishing the sense of invasion felt by blacks is to make clear they are not being targeted to the exclusion of whites. At the conference, Professor Amar noted that in some situations stopping everyone is less invasive than stopping only a certain subgroup. See Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998) ("Attention to issues of race and sex and possible discrimination yields a surprising thought: sometimes equality values may counsel a broader search or seizure, and perhaps this broader search—though more threatening to privacy values—may be more constitutionally reasonable because less susceptible to discrimination and discretion.").

¹³⁵ 116 S. Ct. 1769 (1996).

¹³⁶ The *Whren* Court did indicate that if a police action was the product of intentional racial discrimination, relief must be sought under the Equal Protection Clause, see *id.* at 1774, but the Court's case law in this area makes proof of such discrimination virtually impossible. See David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 551-53 (1997).

¹³⁷ See Maclin, *supra* note 129, at 257; see also *id.* at 251-52 (describing six cases, none of which involved reasonable suspicion).

¹³⁸ *Id.* at 259.

¹³⁹ See *Terry v. Ohio*, 392 U.S. 1, 14-15 (1968) ("The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.").

stops never lead to a prosecution in which to invoke it.¹⁴⁰ I do not agree with Professor Amar,¹⁴¹ however, that his package of jury damage awards, injunctions and class actions will take care of the problem.¹⁴² Nor, contrary to Professor Fyfe's suggestion,¹⁴³ do I think the police can be counted on to take care of this situation themselves.¹⁴⁴ As I have argued elsewhere,¹⁴⁵ an "ombudsman" independent of the police—who can discern patterns of misbehavior better than attorneys with individual or even class clients, who can make officers pay out of their own pocket for bad faith and discriminatory actions, and who has the power to obtain dismissal of the worse miscreants—is a much more powerful remedial device than these traditional ones.

Third, once such an effective remedy is in place, the version of *Terry's* proportionality doctrine advanced here is ultimately more likely than a probable cause standard to deter bad faith police action against African Americans and other people of color. That is because, again, it avoids the pressure that a probable-cause-forever standard creates to enact low-level crime prevention stat-

¹⁴⁰ At the St. John's conference, Professor Fyfe recounted data from New Orleans indicating that only 1 out of every 100 people stopped by police were prosecuted for crime. Even if more prosecutions were to occur, the exclusionary rule would likely have little effect on police under great pressure from their bosses and the public to inhibit crime and criminals. See Albert T. Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 AM. J. CRIM. L. 25, 26-33 (1978) (describing the multiple incentives for officers to exhibit a crime control bias regardless of legal constraints imposed by judiciary).

¹⁴¹ See Amar, *supra* note 5, at 811-20.

¹⁴² As Professor Steiker points out, "widespread public support for unrestrained police power . . . suggests that . . . popular juries would be unwilling to find much police conduct 'unreasonable' . . . Juries will often fear the robbers more than the cops because the robbers tend to be mostly poor and/or members of minority groups and because the cops tend to focus their attentions on just such disfavored groups." Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 850 (1994).

¹⁴³ See Fyfe, *supra* note 134.

¹⁴⁴ See CHRISTOPHER SLOBOGIN, *REGULATION OF POLICE INVESTIGATION* 563-65 (2d ed. 1998) (detailing historical and conceptual problems with police-initiated sanctions). Fyfe himself tells the story of one officer who "tossed *creeps* every night until he found one who was dirty" and yet was regarded as an "asset" by his supervisor and commander. See Fyfe, *supra* note 134. Fyfe also notes that many police officers "hold the view that unfruitful frisks are a positive public relations device because they demonstrate to the innocent citizens stopped that police are vigorously doing their jobs." *Id.*

¹⁴⁵ See Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1058 (1996). For further treatment of this point, see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, U. ILL. L. REV. (publication forthcoming).

utes, and leaves investigative stops (as well as casual police-citizen encounters) entirely unregulated. At the same time, it does not, like a probable cause standard would, abandon preventive law enforcement. As Randall Kennedy has suggested, the latter outcome might well visit real discrimination on communities of color, given the fact that they tend to be victimized by crime much more often than other communities.¹⁴⁶

B. Justification Schemes

Terry recognized that one justification standard was not enough, and it created reasonable suspicion to help fill the void. But the Supreme Court has never seriously followed up on *Terry's* insight that government justifications can and should come in all shapes and sizes. Thus, while adhering to a probable cause-reasonable suspicion matrix in connection with seizures, it has only applied that dyad in search contexts involving "special needs."¹⁴⁷ In other settings in which neither standard is easily met, the Court has usually resorted to undifferentiated assertions about "strong" government interests and the like.¹⁴⁸ The result is a mess, both practically and normatively.

The Court should develop a justification hierarchy that consists of at least four tiers, and that applies across the board to all searches and seizures. To probable cause and reasonable suspicion should be added a higher clear and convincing standard and a lower relevance standard. There follows a description of the four standards, an examination of when they would apply, and a brief

¹⁴⁶ See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1259 (1994) ("Although the administration of criminal justice has, at times, been used as an instrument of racial oppression, the principal problem facing African-Americans in the context of criminal justice today is not over-enforcement but *under-enforcement* of the laws.")

¹⁴⁷ The special needs rubric first surfaced in Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (involving searches in public schools for disciplinary infractions), but has since become the label applied to a host of situations in which "ordinary law enforcement" is not involved. See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989) (stating that regulation of railroad employees to ensure safety "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements' ") (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)); *O'Connor v. Ortega*, 480 U.S. 709, 724 (1987) (asserting that investigation of workplace infractions involves "an interest substantially different from 'the normal need for law enforcement' ") (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J. concurring)).

¹⁴⁸ See *infra* notes 175-77.

exploration of how all this fits in with the Warrant Clause.

1. The Four (?) Tiers

The best place to start is probable cause, because it is the standard with which we are most familiar—except that we don't really know what it means. It is often defined as a more-likely-than-not finding, or perhaps a level of certainty just a little below that.¹⁴⁹ But can we be serious about that definition? Are we really willing to allow police to arrest someone when there is a 50% chance they have the wrong person? Are we willing to let the police ransack a house when there is a one-in-two chance they've got the wrong place?

Then there's reasonable suspicion, defined by a group of federal judges as approximately a 30% level of certainty.¹⁵⁰ Apparently a stop may constitutionally consist of a fifteen to twenty minute detention.¹⁵¹ Are we really willing to subject two innocent people to such inconvenience, embarrassment and discomfort in order to nab one bad actor?

These questions may strike some as meaningless at best and disingenuous at worst, given the difficulty of translating percentages into anything police and magistrates can use on the street.¹⁵² But they're similar in tone to how we talk about standards of proof. For instance, the reasonable doubt standard is often discussed in terms of our willingness to let nine guilty people go free to ensure that one innocent person is not convicted.¹⁵³ To get some idea of the type of justification we want to require for invasive police actions, we need to think about analogous normative queries.

If it were left up to me, I'd require arrests and searches of houses, car interiors and luggage to be based on clear and convincing justification (usually quantitatively defined at about a 75% level of certainty), a stance which might not be that far from the

¹⁴⁹ See generally WAYNE LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.3(b) (1985); C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1325 (1982) (summarizing a survey of federal judges).

¹⁵⁰ See *id.* at 1327-28 (summarizing a survey of federal judges).

¹⁵¹ See *United States v. Sharpe*, 470 U.S. 675 (1985). Although the Court in *Sharpe* noted that part of the 20-minute detention in that case was the defendant's fault, see *id.* at 687-88, its main emphasis was on the "diligence" of the police in carrying out their investigation. See *id.* at 694 (Marshall, J., concurring).

¹⁵² Note, however, that statistical information relevant to whether the government is justified can often be generated. See *infra* text accompanying notes 177-80.

¹⁵³ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 367 n.158 (1972).

position of some courts and even some police officers on the matter.¹⁵⁴ For more invasive actions (e.g., a body cavity search; electronic surveillance; perusal of private diaries; particularly prolonged, invasive undercover operations), I would additionally require clear and convincing proof that the evidence thereby sought is crucial to the state's case and that the search will be conducted in the least intrusive manner possible.¹⁵⁵ For prolonged stops and similarly invasive seizures, I would require what we presently call probable cause (i.e., a 50% likelihood); the same standard should apply to undercover intrusions of the same approximate length.¹⁵⁶ For short stops, pat downs,¹⁵⁷ and many of the actions that the Court excludes from Fourth Amendment oversight—e.g., flyovers, searches of open fields and garbage, and more than casual encounters at roadblocks and on the street—I would require reasonable suspicion, which I would define to be something like a 20% to 30% chance of success.¹⁵⁸

¹⁵⁴ One study of seven jurisdictions found that, depending on the jurisdiction, between 75% and 100% of all warrant-based searches of homes and similar locations discovered evidence of crime. See RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS AND PRACTICES* 23-24 (1985); see also H. RICHARD UVILLER, *TEMPERED ZEAL* 77 (1988) (quoting officer who said: "I wouldn't lock anybody up on less than 90 percent sure").

¹⁵⁵ The suggested standard is probably not that different from what the Court already requires with respect to serious bodily intrusions and electronic surveillance. See *supra* note 73 and accompanying text.

¹⁵⁶ As I have argued elsewhere, the intrusion associated with many types of undercover activity is no different from that associated with overt police conduct; if anything, the covert nature of undercover activity exacerbates the intrusion. See Slobogin, *supra* note 7, at 103-06; see also, Christopher Slobogin, *Deception, Pretext and Trickery: Investigative Lying by the Police*, 76 OR. L. REV. 755, 805-08 (1997) (distinguishing between "passive" and "active" undercover activity, with the latter requiring *ex ante* review and a cause determination).

¹⁵⁷ The subjects in our research seemed to think that the intrusion associated with a pat down is not as great as the intrusion associated with the initial stop. See Slobogin & Schumacher, *supra* note 113, at 738 (questioning on public sidewalk for 10 minutes, R=36, M=69.45, compared to a pat down, R=19, M=54.76). This assessment might be based on the perception that a pat down discloses to police only the shape and feel of an object, not its contents or appearance. See *supra* note 60 and accompanying text.

¹⁵⁸ This standard would not handcuff or overly endanger the police, contrary to Professor Saltzburg's suggestion in his article for this conference. See Saltzburg *supra* note 3. Professor Saltzburg states that:

[T]he majority in *Ybarra* fails completely to tell the police what they were supposed to do if someone in the bar turned his back on the police, reached into a pocket, began to move around outside the sight of the officers, or did anything else that would fall short of reasonable suspicion but scare any officer who had any sense.

Id.

That leaves the lowest standard—what I'm calling the relevance standard—to be defined. Evidence at trial is relevant if it has any tendency to make a fact in issue more probable than not.¹⁵⁹ The relevance standard would require police to articulate a reason for believing their action has some tendency to lead to information that would help solve a crime or apprehend a suspect. Put statistically and arbitrarily, it might require a 5%-10% success rate. Using legal terminology, the relevance standard could be said to require demonstration of an "objective credible belief" that a "legitimate law enforcement objective" will be achieved through the police action.¹⁶⁰ I would apply this standard to all but the most casual police-citizen questioning¹⁶¹ as well as to regulatory inspections of businesses and homes.

Under a proportionality approach, the animating inquiry in setting these levels of suspicion should be how much explanation for a given intrusion is necessary to convince an innocent person subjected to it that the police acted reasonably. The innocent person who is arrested will expect a "damn good reason" for the inconvenience. The innocent person who is stopped on the street for a brief interrogation is likely to be satisfied with a much less extensive explanation for the interruption. The official excuse for a mistaken action should be adequate, but need be no more than

To me, any of the actions described by Professor Saltzburg would authorize a frisk and the seizure necessary to effect it. The possibility of danger is high—at least at the reasonable suspicion level—when someone who has just been told by the police that the bar is going to be searched for drugs turns his back, reaches into a pocket or hides from the police. On the other hand, the standard would prevent police from frisking everyone in the *Ybarra* bar in the absence of such suspicious behavior.

¹⁵⁹ See FED. R. EVID. 401.

¹⁶⁰ This is a combination of the brief stop standard adopted by the New York courts in cases like *People v. de Bour*, 352 N.E.2d 562, 571-72 (N.Y. 1976) (requiring "some objective credible reason" for the "minimal intrusion of approaching [an individual] to request information"), and the standard adopted by the ABA to govern technologically-assisted physical surveillance of public places. See Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383, 416-18 (1997) (defining the legitimate law enforcement standard).

¹⁶¹ Admittedly, there is difficulty in defining what is "casual." As Fyfe notes: There often is no bright line between merely initiating a conversation with a person who looks vaguely *wrong* and detaining someone against his will. On the street, both interactions usually begin with words like, "Hi. Can I talk to you for a minute?" or "How you doing? I was hoping you'd be able to help me with something here."

Fyfe, *supra* note 134.

adequate, to dissipate the umbrage the action excites. This is the central insight of the proportionality principle: The justification for a search or seizure should nullify its intrusiveness, no more and no less.

2. The Myth of Individualized Suspicion and the Importance of Rationality Review

The next aspect of the justification scheme that needs significant fine-tuning concerns the *type*, rather than the amount, of evidence the government must proffer in order to meet its justificatory burden. The courts often mantra the idea that suspicion must be "individualized."¹⁶² *Terry* itself appeared to endorse this position; at one point, the majority opinion stated that "in determining whether the officer acted reasonably . . . , due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."¹⁶³ One consequence of this preference for particularized suspicion is frequent judicial expression of concern over police use of "investigative profiles" based on statistical information, particularly those relying on correlations between certain types of behavior or features and criminal activity (e.g., drug courier profiles).¹⁶⁴ To distinguish this nomothetic, or group-based, type of evidence from individualized suspicion, I have called it "generalized" suspicion.¹⁶⁵

¹⁶² *Chandler v. Miller*, 117 S. Ct. 1295, 1301 (1997) ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing") (citation omitted); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (opining that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure") (citation omitted); *Wilcher v. City of Wilmington*, 842 F.2d 748, 753 (5th Cir. 1998) (stating that for Fourth Amendment purposes, "'some quantum of individualized suspicion' on the particular individual seized is required").

¹⁶³ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

¹⁶⁴ The U.S. Supreme Court has avoided deciding whether use of profiles is permissible. *See, e.g.*, *United States v. Sokolow*, 490 U.S. 1 (1989); *Florida v. Rodriguez*, 469 U.S. 1 (1984). Most lower courts hold either that profiles cannot establish reasonable suspicion or can do so only when supplemented with other facts. *See Morgan Cloud, Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 851 nn.37, 38 and accompanying text (1985). As one commentator has stated, "profile factors that do not relate specifically to the 'particular conduct' of the suspect will be discounted." Charles L. Becton, *The Drug Courier Profile: "All Seems Infected that th' Infected Spy, as All Looks Yellow to the Jaundic'd Eye"*, 65 N.C. L. REV. 417, 458 (1987) (citation omitted).

¹⁶⁵ *See Slobogin, supra* note 7, at 57, 81-86.

The conceptual case against reliance on generalized suspicion appears to be premised on the idea that use of profiles and the like undermine human autonomy and the notion of individualized justice.¹⁶⁶ But the distinction between individualized and generalized suspicion is, in all relevant respects, meaningless. To justify the stop he made in *Terry*, Officer McFadden needed the general knowledge about behavior of criminals that he had learned from his 39 years on the force as much as his specific observations of Terry, Chilton and Katz. Indeed, if one looks closely at the last half of the sentence quoted from *Terry* in the previous paragraph, the Court recognized precisely that fact. Put another way, had Officer McFadden taught a class of rookies how to identify potential burglars, those officers who later relied on his stereotypes and behavioral tips in nabbing their first Terry or Chilton would not somehow be violating the Fourth Amendment.¹⁶⁷ If a profile can produce the success rate required by the proportionality principle, then its contents or the fact that it is based on knowledge of past perpetrators is not all that important. We might not permit race

¹⁶⁶ See Cloud, *supra* note 164, at 853; see also *United States v. Berry*, 670 F.2d 583, 600 (5th Cir. 1982) ("A profile does not focus on the particular circumstances at issue."). I criticize these arguments in Slobogin, *supra* 7, at 82-85. Here I only summarize one of the points I made in the earlier piece.

Critics of profiles have also pointed out that many profiles appear to be ad hoc in nature, and not really worthy of the name. See *United States v. Sokolow*, 490 U.S. 1, 13-14 (1989) (Marshall, J., dissenting) (pointing out how elements of drug courier profiles have been manipulated from case to case, apparently to justify seizures after the fact); Becton, *supra* note 164, at 470 ("[T]he profile simply is too susceptible to selective enforcement and retrospective application to support a retreat from *Terry's* requirement of objective factfinding.") (citation omitted). This criticism of profiles is well-taken, but is aimed at the implementation of profiles, rather than their underlying premise.

¹⁶⁷ I take this example from JOHN MONAHAN & LARRY WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 226-27 (1985). After writing this sentence, I learned from the transcript of the suppression hearing in *Terry*, provided by the organizers of this conference, that Officer McFadden had not once in his 39 years observed a stick-up. See Defendants' Bill of Exceptions, *State v. Terry* and *State v. Chilton* (Nos. 79,491 & 79,432), reprinted in Appendix, *State of Ohio v. Richard D. Chilton* and *State of Ohio v. John W. Terry: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387, 1477 (1998) [hereinafter *Terry* transcript]. Never one to let a fact get in the way of a good theory, I still think the example makes the point. I am bolstered in this assertion by the observation of Mr. Payne, the state's attorney in *Terry*, that Officer McFadden had plenty of experience with criminals in his 39 years that stood him in good stead on the day he made his famous stop. See Reuben M. Payne, *The Prosecutor's Perspective on Terry: Detective McFadden Had a Right to Protect Himself*, 72 ST. JOHN'S L. REV. 733 (1998).

and like variables to be included in such a profile,¹⁶⁸ but we should otherwise consider it to fall within the Fourth Amendment's dictates.

The hostility toward generalized suspicion is not only conceptually misguided; it is also pragmatically insidious. That is because without such a notion there can be no meaningful justification requirement in a vast number of search and seizure scenarios where separating the innocent from the guilty on an "individualized" basis is virtually impossible. Consider that, as construed by the Supreme Court, the Fourth Amendment imposes virtually no limitations on roadblocks for the purpose of detecting illegal immigrants¹⁶⁹ and drunk drivers,¹⁷⁰ or drug testing of customs workers¹⁷¹ and student athletes,¹⁷² or regulatory inspections of residences¹⁷³ and businesses,¹⁷⁴ even though the Court concedes that all of these situations involve searches or seizures. Leery of imposing difficult-to-meet individualized suspicion requirements in these situations, the Court has been satisfied with claims by the government that its action will address a "significant" criminal or regulatory problem;¹⁷⁵ once this allegation is made, the Court leaves virtually everything else up to the state. In traditional constitutional jurisprudence terminology, the Court is engaging in what is, at most, rationality review.¹⁷⁶

¹⁶⁸ But sometimes we might. For instance, if the perpetrator of a crime is known to be black, that fact obviously should be included in any profile. Cf. Slobogin, *supra* note 7, at 89 (arguing that the use of race as a criterion for determining who should be referred to the secondary checkpoint at an immigrant roadblock, at issue in *Martinez-Fuerte*, might be justifiable on the ground that illegal immigrants are likely to be Hispanic).

¹⁶⁹ See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

¹⁷⁰ See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

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

¹⁷² See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

¹⁷³ See *Camara v. Municipal Court*, 387 U.S. 523 (1967).

¹⁷⁴ See *New York v. Burger*, 482 U.S. 691 (1987); *United States v. Biswell*, 406 U.S. 311 (1972).

¹⁷⁵ See, e.g., *Sitz*, 496 U.S. at 453-54 (noting the magnitude of the drunk driving problem and thus that "the choice among . . . reasonable alternatives remains with . . . governmental officials . . ."); *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (stating that the pervasively regulated business exception to the warrant requirement is met if the government has a "substantial" interest in the business activity being regulated); *Martinez-Fuerte*, 428 U.S. at 557-58 (asserting that the illegal immigration problem is "substantial" and that roadblocks will apprehend many such immigrants); see also *infra* note 177.

¹⁷⁶ Stuntz may have been the first to recognize this point clearly. See Stuntz, *supra* note 22, at 1033 (describing the Court's special needs and regulatory cases as

That result would not be possible under a proportionality regime which recognizes the generalized suspicion concept. Let's assume that the government wants to initiate drug and alcohol testing using urinalysis in a particular workplace. Let's also assume that the government cannot demonstrate individualized cause, i.e., cause based purely on observation of individuals' behavior at work, either because drugged behavior is not easily observable or because it is too difficult to post observers over everyone. While the Court would usually permit the drug testing anyway, at least so long as the government produced any credible evidence that the testing is necessary to prevent a threat to health and safety,¹⁷⁷ a proportionality analysis would require more. Assuming that urinalysis testing is sufficiently invasive so that under the proportionality principle, it requires probable cause (defined above as about a 50% level of certainty),¹⁷⁸ the government would need to show that roughly 50% of the relevant employees are at risk for drug use. Only if it can demonstrate a generalized suspicion at the requisite level should it be able to conduct the test.

Requiring this type of proof may seem like a classic Catch-22 situation, given the inability to conduct the drug test. However a resourceful government can often develop cause in multiple ways. In *Skinner v. Railway Labor Executives Association*,¹⁷⁹ for example, the government was able to show, based on data obtained prior to any suspicionless testing programs, that at least 45 of the train accidents and incidents that occurred between 1975 and

"reasonableness review of ordinary regulatory legislation").

¹⁷⁷ See *Vernonia Sch. Dist. 47J*, 515 U.S. at 661 (concluding that the governmental interest in deterring drug use among physiologically vulnerable children is "compelling," and that drug infractions at the school in question had increased in recent years); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 629-30 (1989) (citing the possibility that without drug testing, psychoactive substance use among employees might go undetected, with the consequence that lives might be lost and railways would be unable to obtain information about the causes of major accidents); *Von Raab*, 489 U.S. at 670 (noting that the "national interest in self protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics" or impaired while using their weapons). *But see Chandler v. Miller*, 117 S. Ct. 1295, 1305 (1997) (holding that the state interest of ensuring that illegal drug use does not impair the ability of elected officials to carry out public functions, or undermine public confidence and trust in elected officials, is insufficient to justify suspicionless testing).

¹⁷⁸ See *supra* text accompanying note 156.

¹⁷⁹ 489 U.S. 602 (1989).

1983 were caused by drug or alcohol-impaired employees.¹⁸⁰ If that number amounts to somewhere near half the train incidents during that period, the requisite generalized suspicion would exist for anyone who causes or is involved in a train accident or safety violation. If it doesn't, individualized suspicion would typically need to be shown before a particular individual could be tested.

Generalized suspicion would play a similar role in other scenarios the Court has confronted. If, as I would argue, factory safety inspections¹⁸¹ should at least have to abide by the relevance standard,¹⁸² the government would have to demonstrate that such inspections (in whatever geographic area and industry the government chooses) have a one-in-twenty chance at success. If police wish to search private junkyards for stolen parts,¹⁸³ which our subjects thought involved an invasion analogous to a pat down,¹⁸⁴ they would have to show a one-in-three probability that evidence of fencing will be discovered.

In short, Fourth Amendment analysis should mimic equal protection rationality review "with bite," if not strict scrutiny.¹⁸⁵ Courts evaluating the reasonableness of a search or seizure, whether it is in the street or regulatory in nature, or whether it is of an individual or a group, should demand from the government a specific showing of need that is proportionate to the invasion.¹⁸⁶

¹⁸⁰ See *id.* at 607.

¹⁸¹ Cf. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (holding that obtaining a warrant for such inspections does not depend on a demonstration of probable cause, but on satisfying reasonable legislative or administrative standards for conducting it).

¹⁸² In our study, the scenario which came closest to a factory inspection, searching a coal mine (R=16; M=52.17), fell just below a pat down (R=19; M= 54.76). See Slobogin & Schumacher, *supra* note 113, at 738 (Table 1). However, when our subjects were told that the goal of the coal mine search was to discover safety violations (rather than left uninformed of its purpose), its rank dropped to 8 out of 50, which puts it closer to the relevance level. See *id.* at 763 (Table 3).

¹⁸³ Cf. *New York v. Burger*, 482 U.S. 691 (1987).

¹⁸⁴ See Slobogin & Schumacher, *supra* note 113, at 738 (Table 1) (searching a private junkyard (R=17, M=54.15); a pat down (R=19, M=54.76)).

¹⁸⁵ See *supra* note 70.

¹⁸⁶ Or, if that showing is not forthcoming, an explanation why it is not possible to make should be presented. If the government, despite diligent efforts, cannot generate the necessary data to permit informed speculation about the problem, it might be entitled to conduct the proposed search in an effort to get the relevant justifying information. Professor Sundby's trust metaphor is useful in explaining why. For Sundby, searches in the absence of suspicion are nonetheless permissible if the government can show that "trusting the citizenry is simply too costly given the immediacy and importance of the government interest." Sundby, *supra* note 21, at 1802. If the government can convince the citizenry that there is a compelling state interest that can only be met

Courts should not acquiesce to what the Supreme Court has permitted: searches and seizures justified solely by vague assertions about the magnitude of whatever problem the government has targeted.

Although this type of review is a throwback to *Lochnerism*,¹⁸⁷ it is defensible *Lochnerism*. It is defensible not just because of footnote 4's exemption of government actions affecting fundamental rights,¹⁸⁸ and not just because the Fourth Amendment's Reasonableness Clause appears to call explicitly for substantive due process analysis,¹⁸⁹ but because the proportionality principle is the right normative approach for all Fourth Amendment situations. In an article bemoaning the difficulty of applying the Fourth Amendment in the modern context,¹⁹⁰ Professor Seidman illus-

through suspicionless searches, then the citizenry may be willing to put up with such investigative techniques, and indeed may even be grateful for them. Without such a showing, on the other hand, the damage to government-citizen trust would be significant. *See id.* at 1800-01. In a sense, Sundby is saying that a strong showing of need alleviates the perceived intrusiveness of the action. *See supra* text accompanying notes 119-23.

¹⁸⁷ The *Lochner* era, so-named after *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court struck down a state law regulating work hours on substantive due process grounds, is maligned today as an example of the Court acting as a super legislature in deciding between different regulatory regimes. Professor Stuntz, for one, has argued that courts should continue to shy away from this type of analysis:

Wherever the regulatory state engages in any form of compelled information gathering (and it does so everywhere), there is an enormous cost to taking privacy interests seriously: doing so requires judicial judgments about whether one regulatory path is more reasonable than another. That sounds uncomfortably close to the regime that the Supreme Court sought to bury a half-century ago.

Stuntz, *supra* note 22, at 1034.

¹⁸⁸ In *United States v. Carolene Products*, 304 U.S. 144 (1938), the Supreme Court rejected *Lochnerism*, but in footnote 4 suggested that legislation which undermined fundamental rights or discriminated against "discrete and insular minorities" would still be subject to rationality review. *See id.* at 153 n.4.

¹⁸⁹ *See Amar, supra* note 5, at 811. Professor Amar argues:

Unlike the Due Process Clause, in whose name so much has been done, the Fourth Amendment clearly speaks to substantive as well as procedural unfairness and openly proclaims a need to distinguish between reasonable and unreasonable government policy. For those who believe in a 'substantive due process' approach to the Constitution, the Fourth Amendment thus seems a far more plausible textual base than the Due Process Clause itself. For those who believe in general rationality review, the Fourth, here too, is more explicit than its current doctrinal alternative, the Equal Protection Clause.

Id.

¹⁹⁰ *See generally* Louis Michael Seidman, *The Problems with Privacy's Problem*, 93 MICH. L. REV. 1079 (1995).

trates the consequences of failing to adopt the approach advocated here with an example that directly implicates the *Terry* scenario. As he notes, "there is no constitutional right to sidewalks; in principle, walking on sidewalks could be treated as a highly regulated activity." If so, he points out, the government could interrupt that activity at will, on the theory that people wishing to get from one place to another consent to such intrusions just as junkyard dealers consent to random searches of their yards.¹⁹¹ Noting that the Court has yet to explain how it would distinguish the two situations,¹⁹² Seidman concludes that "the rejection of *Lochner* makes it difficult to evaluate the justice of various background conditions."¹⁹³ He is right, and that is precisely why we should *not* reject *Lochner* in the Fourth Amendment context. Given the government's ability to manipulate our surroundings,¹⁹⁴ we might otherwise ultimately face the elimination of concrete justification requirements for *any* search or seizure.

3. The Warrant Clause and the Proportionality Principle

To this point, I have not touched upon the role of warrants under a proportionality regime. *Terry*, of course, held that a warrant was not necessary to authorize a stop and frisk,¹⁹⁵ a holding that made eminent sense given the exigencies of the situation. But when there is no exigency, *ex ante* review of the search by some independent official might be preferred. Professor Stuntz has noted that such review both eliminates the hindsight bias that can infect *ex post* review and makes perjury by the police difficult, given their ignorance about what they will find.¹⁹⁶ To these rea-

¹⁹¹ See *id.* at 1096.

¹⁹² See *id.*

¹⁹³ *Id.* at 1100.

¹⁹⁴ This is the problem with Professor Stuntz's implicit bargaining model. See William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553 (1992). Professor Stuntz argues, *inter alia*, that owners of entities like junkyards would bargain for less protection from government intrusion than the proportionality rule would dictate, given what the government could do to them (e.g., burdensome licensing or reporting mandates) if it was stymied by suspicion requirements. But this implicit bargaining idea proves too much because, contrary to Professor Stuntz's assertion, *see id.* at 556-67, it applies to ordinary law enforcement as well. The substantive law could be changed to regulate not just junkyards but sidewalks, cars and homes in ways that might make lessened Fourth Amendment protection look comparatively attractive.

¹⁹⁵ See *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁹⁶ See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 912-15 (1991).

sons for ex ante review can be added an obvious third reason: ex ante review, at least meaningful ex ante review, prevents illegal searches and seizures and the breach of privacy and trust that goes with them.

If these reasons convinced one to require before-the-fact authorization in all non-exigent circumstances, a conflict between the text of the Fourth Amendment and the proportionality principle arises. The Fourth Amendment's Warrant Clause states that warrants shall issue only upon probable cause.¹⁹⁷ Thus, if warrants are the vehicle for providing ex ante review, those searches and seizures which the proportionality approach permits on less than probable cause could not be authorized by a warrant.

There are three ways of handling this conflict, all sanctioned by one or more Supreme Court decisions. The first, which I suggested in 1991, is to redefine probable cause to mean "that cause which makes probable the reasonableness of the intrusion occasioned by a given search or seizure."¹⁹⁸ This is essentially how *Camara v. Municipal Court*¹⁹⁹ looked at probable cause in connection with residential safety inspections. The Court there held that warrants for such inspections could issue based solely on a "probable cause" showing that the conditions of the area to be inspected merited the intrusion.²⁰⁰ Under this sliding scale definition, probable cause would subsume the four tiers described above and a warrant could constitutionally authorize searches and seizures in a host of situations which do not require probable cause as it is presently defined.

If that gambit is considered too confusing, or too inconsistent with Fourth Amendment history,²⁰¹ a second alternative would be to develop other methods of ex ante review. The Supreme Court has recognized at least two contexts in which what might simply be called a "court order" could issue on less than probable cause. In *Hayes v. Florida*,²⁰² the Court stated in dictum "that under cir-

¹⁹⁷ See U.S. CONST. amend. IV, (mandating that, ". . . no warrant shall issue except upon probable cause . . .").

¹⁹⁸ Slobogin, *supra* note 7, at 76.

¹⁹⁹ 387 U.S. 523 (1967).

²⁰⁰ See *id.* at 536.

²⁰¹ According to Professor Amar at least, "[t]he watering down of 'probable cause' necessarily authorizes ex parte warrants on loose terms that would have shocked the Founders . . . [In allowing such warrants,] [h]istory has been turned on its head." Amar, *supra* note 5, at 785.

²⁰² 470 U.S. 811 (1985).

cumscripted 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.²⁰³ In *United States v. Karo*,²⁰⁴ the Court indicated that court orders authorizing beeper tracking of items inside a residence might constitutionally be issued based on reasonable suspicion.²⁰⁵

Finally, of course, there is the tack the Court most commonly prefers; that is to retain the unitary probable cause standard and insist that ex ante authorizations meet that standard. For the reasons given above, I prefer the first or second approaches to this one. It must be admitted that, even with the advent of telephonic warrants,²⁰⁶ the costs of requiring ex ante review for all non-exigent searches and seizures would not be negligible in a regime that defines the scope of the Fourth Amendment as broadly as I would. The costs could be mitigated to some extent by permitting ex ante review by administrators rather than judges when the search takes place in an administrative context.²⁰⁷ In any event, the cost, whatever it may be, is worth the extra security.

III. IS THE PROPORTIONALITY PRINCIPLE AN UNWORKABLE RORSCHACH BLOT?

Reacting to the proportionality idea six years after *Terry* was decided, Anthony Amsterdam made two comments. The first is one I have stolen for this article: "A sliding scale approach would considerably ease the strains that the present monolithic model of the [F]ourth [A]mendment almost everywhere imposes on the process of defining the [A]mendment's outer boundaries."²⁰⁸ The second comment was far more critical: "[P]resent law is a positive paragon of simplicity compared to what a graduated [F]ourth [A]mendment would produce."²⁰⁹ He added that the sliding scale approach would convert the Fourth Amendment "into one im-

²⁰³ *Id.* at 817.

²⁰⁴ 468 U.S. 705 (1984).

²⁰⁵ *See id.* at 718 n.5.

²⁰⁶ *See, e.g.*, FED. R. CRIM. P. 41(c)(2).

²⁰⁷ *See Slobogin, supra* note 7, at 35-36.

²⁰⁸ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393 (1974).

²⁰⁹ *Id.*

mense Rorschach blot."²¹⁰

There is no doubt that the assessment of relative invasiveness and the multiple tiers of justification that my version of the proportionality principle demands are complex. But this scheme is not necessarily muddier than the present one. The Court's rulings often require subtle evaluations of intrusiveness.²¹¹ And the justification hierarchy described here (as opposed to the degree of certainty associated with each) is not really that far removed from the Court's own template.²¹²

If there is a significant difference in clarity between current law and the rejuvenated proportionality principle advanced in this paper it may be in the other direction. This proposal makes more explicit how invasiveness is to be assessed and thus should provide a clearer picture of the relative intrusiveness of different types of police actions. It also defines more concisely the types of justifications the government must put forward.

Finally, the discretion granted police by the proportionality approach can be bounded in several ways. As I stated in 1991:

First, as has occurred over time with the equally amorphous language of the Fourth Amendment, application of the proportionality principle to recurring situations would undoubtedly lead to the development of some relatively clear "rules" Second, in developing these rules, only rough proportionality should be the goal: in some cases, individual (or state) interests may be sacrificed, at least marginally, to achieve greater clarity. . . . Third, where clear rules do not develop . . . the police would at least have an easily remembered "standard of thumb" that will help fill in the gaps. . . . Finally, . . . if . . . [ex ante review

²¹⁰ *Id.*

²¹¹ See *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) (holding that "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket" went beyond the scope of a frisk) (quoting *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992)); *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987) (holding that moving a stereo set to see serial numbers is a search requiring probable cause).

²¹² The probable cause and reasonable suspicion standards are obviously firmly ensconced in Supreme Court jurisprudence. Relevance is the standard applied to subpoenas, see *United States v. R. Enter., Inc.*, 498 U.S.292, 301 (1991), and perhaps to some searches. See *Griffin v. Wisconsin*, 483 U.S. 868, 889-90 (1987) (Blackmun, J., dissenting) (arguing that the standard the majority adopted for justifying search of probationer's home does not even amount to reasonable suspicion). As already noted, *supra* text accompanying note 73, a clear and convincing standard may be the practical effect of cases like *Winston v. Lee* and *Berger v. New York*, dealing with bodily surgery and electronic surveillance, respectively.

is required in all non-exigent circumstances then often] an independent party, rather than law enforcement officials, would be applying the proportionality principle.²¹³

CONCLUSION

One of the pamphlets announcing this conference stated that, since *Terry's* recognition of the reasonable suspicion standard and the reasonableness balancing test, "[n]either Fourth Amendment jurisprudence nor policing in this country has ever been the same."²¹⁴ *Terry* and its progeny did change Fourth Amendment jurisprudence. But *Terry* probably didn't change law enforcement practice all that much. Police were conducting preventive stops and frisks long before that decision.²¹⁵ Most of the special needs searches and seizures that have been approved using *Terry's* balancing formula were already routine prior to *Terry*.²¹⁶ *Terry* didn't alter law enforcement practices; it just provided, in the hands of the post-Warren Court, a rationale for the status quo.

On the other hand, if the underlying rationale of *Terry* were dusted off and rejuvenated, law enforcement *would* never be the same. *All* government searches and seizures would be regulated, not just those that rise above some ill-defined level of intrusion. Investigations of groups and institutions, as well as of individuals, would require *concrete* justification proportionate to the invasion they perpetrate. All of this could be instituted without denying law enforcement the ability to be proactive, an ability that would be circumscribed under a more rigid approach. Given these advantages, we should not bury *Terry*, but resurrect it.

²¹³ Slobogin, *supra* note 7, at 74-75 (footnotes omitted).

²¹⁴ Pamphlet announcing St. John's University School of Law, *Terry v. Ohio* 30 Years Later: A Conference on the Fourth Amendment, Law Enforcement and Police-Citizen Encounters (1998) (on file with *St. John's Law Review*).

²¹⁵ See Fyfe, *supra* note 134 (opining that "*Terry* had little or no impact on what police do . . . in New York City. . . . Even the 1964 law [setting out the stop and frisk rules] . . . was viewed by street cops as a clarification of longtime practice rather than as a definition of new authority").

²¹⁶ See *Frank v. Maryland*, 359 U.S. 360, 368-70 (1959) (canvassing a long history of statutes permitting warrantless, routine health and safety inspections of homes).

