ARTICLES

THE WORLD WITHOUT A FOURTH AMENDMENT

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INTRODUCTION

In the United States, searches for and seizures of evidence and suspects are governed by the Fourth Amendment to the U.S. Constitution. That provision requires that all searches and seizures be "reasonable," and that warrants be based on "probable cause" and state "with particularity" what is to be seized.[1] American courts have derived several general rules from this language. The most fundamental guideline is that, in determining whether a search or seizure is "reasonable," competing state and individual interests must be balanced.[2] A second rule is that, given the specific reference to warrants in the Fourth Amendment, some preference should be given in this balancing process to judicial authorization of

1. U.S. CONST. amend. IV.

2. One of the earliest explicit statements of this idea by the U.S. Supreme Court came in Brinegar v. United States, 338 U.S. 160 (1949):

> These long-prevailing standards [*i.e.*, probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. . . . The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests.

searches and seizures.[3] Third, the courts have consistently, if somewhat amorphously, defined the "probable cause" required to support a warrant as a level of certainty somewhat closer to a more-likely-than-not standard than a hunch or suspicion.[4] Finally, the courts have identified a number of search or seizure situations in which a warrant is not required; for most of these situations, the police must still have "probable cause," but in many others they may operate on a lower level of suspicion.[5]

The subject of this Article is suggested by a single question: How would we regulate searches and seizures if the Fourth Amendment did not exist? This question is a useful one to ask even leaving aside the possibility of amending the amendment. Starting on a blank slate, as it were, should free us from current preconceptions about the law of search and seizure, ingrained after years of analyzing current dogma. Viewed from this fresh perspective, we might gain a better understanding of the values at stake when the state seeks to obtain evidence or detain suspects. This new understanding in turn should invigorate criticism of current law, and might

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Id. at 176.

In more modern days, the Court has affirmed the notion that search and seizure law depends upon balancing state and individual interests. *See* Maryland v. Buie, 110 S. Ct. 1093, 1096 (1990) ("Our cases show that in determining reasonableness, we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (constitutionality of a particular search depends on "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers"); Camara v. Municipal Court, 387 U.S. 523, 539 (1967) (justifying the Court's holding by asserting that it gave "full recognition to the competing public and private interests here at stake and, in so doing, best fulfill[ed] the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy").

3. Katz v. United States, 389 U.S. 347, 357 (1967) (searches or seizures must be justified by a warrant "subject only to a few specifically established and well-delineated exceptions"); *see also* Carroll v. United States, 267 U.S. 132, 156 (1925) ("In cases where the securing of a warrant is reasonably practicable, it must be used . . . ."). Historians question, however, whether the Framers intended such a preference. *See infra* note 243.

4. In Brinegar v. United States, 338 U.S. 160 (1949), the Court made clear that probable cause does not require proof beyond a reasonable doubt, *id.* at 174, but also that it "has come to mean more than bare suspicion," *id.* at 175; *see also infra* text accompanying notes 128–130.

5. *See generally* C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 140 (2d ed. 1986) (listing the main exceptions).

even lead to fundamental reinterpretations of the Fourth Amendment's language.[6]

Starting from scratch, this Article develops an approach to search and seizure regulation that is very different from current law promulgated by the United States Supreme Court, yet at the same time is reconcilable with the amendment's wording. Part I begins the analysis by briefly cataloging the various state and individual interests that must be considered in deciding how to regulate government attempts to garner evidence through searches and seizures. Based on these factors, Parts II and III develop a regulatory scheme, which has both "procedural" and "substantive" aspects. Part II first makes the case for some sort of *ex ante* review of searches and seizures. It then attempts to define what this procedure should look like. Following a brief look at the United States Supreme Court's exceptions to the "warrant requirement," it develops the following procedural rule: the government should have to obtain third party authorization prior to any nonemergency search or seizure (the "exigency principle"). Part III tries to develop the substantive standards that should guide the *ex ante* decisionmaker, whether it be the investigating agent or a third party. After analyzing the Supreme Court's cases concerning the "probable cause" requirement, it puts forward the following rule: the level of certainty required to authorize a particular search or seizure should be roughly proportional to the level of its intrusiveness (the "proportionality principle"). Part III also defends this principle against claims that it is too elastic to provide adequate guidelines for the police.

The overarching thesis of these two Parts of the Article is that, except in rare instances, only the exigency principle and the proportionality principle should govern regulation of searches and seizures. In one form or another, both of these principles have previously been proposed.[7] But they have not been linked together, nor made the *sine qua non* of search and seizure law; the assertion

6. Another reason to think about search and seizure from scratch is that the outcome of such analysis may be useful in other countries, where the 200-year-old language of the Fourth Amendment is only of passing interest.

7. For instance, the exigency principle replicates one of two "models" of the Fourth Amendment proposed by Professor Bradley. *See* Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1491–98 (1985). The proportionality principle is similar to an idea first proposed (and rejected) by Professor Amsterdam. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 390–91 (1974).

that these rules are both necessary and sufficient in virtually all cases is the key assertion of this Article.

Part IV argues that these two rules are not inconsistent with the language of the Fourth Amendment, despite hundreds of judicial decisions to the contrary. As is true with virtually all the provisions in the United States Constitution, the Fourth Amendment is subject to many interpretations; the version promoted by the courts is just one of many possible versions. In particular, this Article contends that the Supreme Court's definition of probable cause is flawed and has prevented it from developing more sensible, coherent approaches to regulation of searches and seizures.

Finally, in Part V, the ideas described above are applied to a number of different types of investigative actions taken by the government: street stops, roadblocks, regulatory inspections, drug and alcohol testing, and undercover police work. In the course of discussing these various methods of investigation, the Article develops the concept of "generalized" (as opposed to "individualized") suspicion and attempts to flesh out some of the subtleties associated with the intrusiveness notion.

I. STATE AND INDIVIDUAL INTERESTS

As American courts have recognized, the regulation of search and seizure involves balancing the conflicting state and individual interests implicated by the investigative process. Thus, any attempt to produce a regulatory scheme must start by briefly sketching out these various concerns. Obviously, the primary state objective implicated by searches and seizures is effective law enforcement. Because of the significant harm that crime causes to the state's citizens and to the state's social, economic, and cultural fabric, the government's interest in apprehending offenders and securing evidence for their conviction is extremely weighty. A second, somewhat countervailing government interest that must be considered is the state's desire to maintain the allegiance of its citizenry. One way to ensure this allegiance is to minimize the impact of crime through strong-arm police tactics. At the same time, however, if the state's agents are seen by the populace as arbitrary, uncontrolled actors, the legitimacy of the government, at least to the extent it pretends to be democratic, may be undermined.[8]

8. A good recent example of this phenomenon comes from the Soviet Union, where citizens who had become used to a modicum of freedom as a result of President Mikhail Gorbachev's reforms began castigating him and his government for use of the military to suppress democratic movements. *Gorbachev Urges Curb on Press Freedom*,

This second goal of the state thus dovetails to some extent with the key interest of its citizens in this context: avoiding unnecessary searches and seizures.[9] This interest encompasses at least three different aspects, two of which are clearly shared even by citizens who are "guilty."[10] First, the individual citizen, whether or not guilty of crime, is entitled to protection against unjustified government infringement of "privacy" and "autonomy."[11] Even a criminal should be protected from unnecessary intrusions into intimate areas and from unnecessary restraints on liberty.[12] Second, the individ-

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N.Y. Times, Jan. 17, 1991, at A8, col. 4. Even more recently, the Communist Party lost control of the country as a direct result of a failed coup initiated by "hardliners." *Gorbachev Pleads, but Break Away Areas Defy Him, Putting Fate of Union in Doubt*, N.Y. Times, Aug. 27, 1991, at A1, col. 4.

Note that within a democratic state, some organizations (*e.g.*, the military and prisons) may have no pretensions at being democratic; in these legitimate "subcommunities," this state interest, as well as the corresponding individual interests, would be appreciably diminished.

9. One might be tempted to add as a second individual interest the desire to be free from harm produced by crime. But this interest is identical to the first state interest described above; in either case, the aim is to prevent harm to the citizenry and should only be "counted" once. On the other hand, the second state interest deseribed should be considered separately from the individual interest in reducing arbitrary government actions, despite the similarity between the two, because it involves avoiding harm to the *state*, not its citizens.

Note that mistaken searches and seizures not only infringe individuals' interest in avoiding arbitrariness, and negatively affeet the state's interest in maintaining legitimacy, but also may hurt the state's first objeetive of effective law enforcement. Even upstanding citizens are less willing to assist the police when they feel the police cavalierly violate their rights. *See* Maclin, *Seeing the Constitution from the Backseat of a Police Squad Car* (Book Review), 70 B.U.L. REV. 543, 574 n.114 (1990) (citing evidence that people are more reluctant to help police when they think police are abusing their discretion).

10. Whether those citizens who have committed a crime should be protected from arbitrary government action has been a matter of some debate. *See, e.g.*, Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983) (arguing that the purpose of the Fourth Amendment is to protect the innocent, and that the guilty are merely necessary incidental beneficiaries of the innocent person's right not to be searched). The "individual interests" proposed in this Article sidestep this debate.

11. Explicating the diverse meanings of the "privacy" and "autonomy" concepts is beyond the scope of this Article, although some attempts at defining aspects of it are made. *See infra* note 215. For some starting points on this difficult issue, see H. LATIN, PRIVACY: A SELECTED BIBLIOGRAPHY AND TOPICAL INDEX OF SOCIAL SCIENCE MATERIALS (1976); PRIVACY, A VANISHING VALUE? (W. Bier ed. 1980); Klopfer & Rubenstein, *The Concept* Privacy *and Its Biological Basis*, 33 J. SOC. ISSUES no. 3, at 52 (1977). Clearly, property rights are relevant here.

12. This point is accepted in principle by most countries. *See, e.g*, UNITED NATIONS CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS (1988) ("In the performance of their duty, law enforcement officials should respect and protect human dignity and maintain and uphold the rights of all persons."). German courts have held that, at least when a minor crime is involved, nonconsensual government intrusion into

ual, again whether guilty or innocent, has an interest in avoiding government action designed to harass, rather than to solve a particular crime.[13] If the objective of the police is not to garner evidence but to hound the individual, then even the criminal is entitled to protection from them.[14] Third, the innocent individual can legitimately claim an interest in avoiding the stigma, embarrassment, and inconvenience of a mistaken investigation.[15] In contrast to the first two, this third interest obviously cannot be asserted by the guilty individual. This Article will use the terms "invasiveness" or "intrusiveness" to encapsulate the potential for stigmatization, harassment, and violation of privacy and autonomy associated with government investigative techniques, except where differentiation becomes necessary.

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certain particularly private areas may *never* be permissible. *See, e.g.*, The *Diary Case*, *described in* Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1043–44 (1983). For reasons discussed later in this Article, *infra* note 109 and text accompanying notes 171–177, basing the legitimacy of a search on the nature of the crime is not a good idea. The importance of the German approach for present purposes is its illustration that some cultures are willing to countenance complete prohibition of government intrusions into privacy even when they may be necessary to obtain evidence and can be conducted without physically harming anyone.

13. This interest in avoiding harassment is probably most often implicated by "seizures." The police frequently approach citizens for no reason other than to see "what they are up to"; many people view this type of confrontation, however brief, to be offensive. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 14 n.11 (1968) ("[i]n many communities, field interrogations are a major source of friction between the police and minority groups. . . . [The friction caused by m]isuse of field interrogations [increases] as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.") (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183–84 (1967)). Another type of harassment might be constant, conspicuous surveillance of a person carried out by the police merely to let their presence be known rather than to procure evidence. *See generally* Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1330 (1990) (distinguishing between a person's right of personal security or privacy and the "right of locomotion").

14. This principle has been recognized even when the grand jury, which is controlled by the court and much less likely than the police to engage in abuse, is the investigating body. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 707–08 (1972) (official harassment of press using grand jury has no justification).

15. For an example of the public embarrassment caused by an overreaching seizure, see *Drug Profile Hit*, 77 A.B.A.J., Feb. 1991, at 29 (describing mistaken police arrest of Joe Morgan, former Cincinnati Reds player, as a "drug courier"). *See generally* Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982) (study of 117 suits against the police, of which 29 apparently involved allegations of an illegal search, 21% of which resulted in verdicts for the plaintiff).

Most would probably agree, at least in a general way, with this description of the various state and individual interests implicated by the state's efforts to control crime. The difficult part is determining how they interact with one another. To use language often employed by the United States Supreme Court,[16] analysis of any proposed rule involves balancing the "costs" and "benefits" of a given approach to the identified state and individual interests. Unfortunately, an approach which favors the former will often be costly to the latter, and one which benefits the latter will usually undermine the former.

Inevitably, the extent to which one is oriented toward "crime control" or toward "due process" will play a large role in how one measures and balances the costs and benefits of a particular search and seizure rule.[17] Nonetheless, a starting point can be suggested that is probably neutral enough to avoid antagonizing either end of the ideological spectrum. At the least, the interest in avoiding arbitrary government action, shared by both the state and the individual, should lead to two basic requirements: (1) some *procedure* for assessing the propriety of the police action; and (2) some substantive *criteria* for assessing its propriety.

II. PROCEDURE: THE NECESSITY FOR AND SCOPE OF INDEPENDENT AUTHORIZATION

A. *The Need for* Ex Ante *Review in Addition to* Ex Post *Review*

At least two procedures for monitoring police actions can be envisioned. The first involves some sort of third party authorization of the proposed action (*ex ante* review). The second would provide punishment for proven infractions of the rules (*ex post* review). To regulate searches and seizures effectively, both are necessary.[18]

The need for *ex post* review should be self-evident: without a procedure for sanctioning unnecessary privacy and autonomy inva-

16. Cost-benefit analysis has been most prevalent in the Court's decisions concerning the scope of the rule excluding illegally seized evidence. *See, e.g.*, United States v. Leon, 468 U.S. 897, 906–07 (1984); United States v. Calandra, 414 U.S. 338, 348 (1974). It also appears to underlie the Court's analysis in other areas. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 238–39 (1983) (defining "probable cause"); Rakas v. Illinois, 439 U.S. 128, 137–38 (1978) (standing).

17. The "crime control" and "due process" heuristics were first proposed by Professor Packer, who used them to illustrate contrasting perspectives on the extent to which police should be controlled by the law. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149, 153 (1968).

18. But not necessarily sufficient. *See* Amsterdam, *supra* note 7, at 428–29 (advocating "on-the-spot direction and control" by police supervisors).

sions, harassment, and grossly mistaken investigations, police have no incentive to avoid them. A number of *ex post* mechanisms exist or can be imagined, discussion of which is beyond the scope of this Article. To a large extent, the type of sanction or sanctions chosen will depend upon the nature of the police force, the extent of judicial power, and other aspects of the system. For instance, in many European countries the police themselves are the principal enforcers of the rules; infractions are punished through reprimands, demotions, discharges, or even criminal prosecutions brought by the police and the prosecutor.[19] In the United States, because of differences in police training and organization, such an approach is, by itself, unlikely to work;[20] American courts have relied instead on the so-called exclusionary rule, which prohibits use in evidence of illegally seized items.[21] A third option, endorsed by a number of commentators, is a system of civil liability.[22] Other approaches have also been suggested.[23]

For deterrent, retributive, and compensatory reasons, some sort of remedial procedure is essential. But the important point for present purposes is that this *ex post* review, whatever its nature, is not enough. From the individual's perspective, unnecessary government interventions should be avoided altogether. Only a system of *ex ante* review is likely to achieve this objective effectively, for two reasons.

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19. In Germany, for example, "meritocratic promotion policies, for whose good order the parliamentary minister of the interior for that state is responsible . . . give[] the policeman a direct incentive to avoid generating citizen complaints that will remain in his personnel file throughout his career." Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1560–61 (1978). Moreover, Germany has established several stages of reviewers, each of whom must justify their conclusions in writing, and a system of penalties "ranging from rebuke to dismissal with loss of pension rights." *Id.*; *see also id.* at 1555–56 (describing French *procureur's* "regular evaluations of the police officers subject to his supervision, which become part of the officers' official record"). *But see infra* note 27.

20. *See, e.g.*, C. WHITEBREAD & C. SLOBOGIN, *supra* note 5, at 63–64 (citing research suggesting that citizen complaints are discouraged by the police and by complex procedures and do not result in meaningful discipline); *see also* Mapp v. Ohio, 367 U.S. 643, 652–53 (1961) (describing "futility" of such methods); Wolf v. Colorado, 338 U.S. 25, 41–46 (1949) (Murphy, J., dissenting) (comparing police behavior in jurisdictions with and without the exclusionary rule).

21. Mapp v. Ohio, 367 U.S. 643 (1961).

22. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 422–23 (1970) (Burger, C.J., dissenting); Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49.

23. Other suggestions for policing the police include ombudspersons, civilian review boards, contempt citations, and a quasi-administrative procedure enforced by the courts. For a discussion comparing these and other remedial devices to the exclusionary rule, see C. WHITEBREAD & C. SLOBOGIN, *supra* note 5, § 2.05.

First, sanctions cannot, by definition, deter good faith infractions. When the police think they are doing the right thing, a post-injury penalty does not create a disincentive to act.[24] Of course, *ex ante* reviewers may be as prone to making mistakes as investigators, thus providing little additional protection. But research evaluating the impact of the warrant requirement in this country suggests otherwise. Data from the National Center for State Courts indicate that even "perfunctory" review by a magistrate is more likely to assure the legitimacy of a search or seizure than is a system which leaves the decision up to the police (if only because they must justify their decision to a third party).[25] To the extent good faith viola-

24. This fact has been recognized by the Supreme Court in a number of cases. *See, e.g.*, Massachusetts v. Sheppard, 468 U.S. 981 (1984); United States v. Leon, 468 U.S. 897 (1984). Whether it should lead to the adoption of a good faith exception to the exclusionary rule, *cf. Leon*, is not as clear. *See generally* Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith"*, 36 VAND. L. REV. 1511 (1983). The point in the text is not that good faith actions that are illegal should remain unsanctioned, but that, given their existence, some *prevention* mechanism is necessary.

25. A study of several jurisdictions conducted by the National Center for State Courts found that, while often "perfunctory," the warrant process seldom authorized a search later found invalid. Van Duizend, Sutton & Cater, The Search Warrant Process: Preconceptions, Perceptions, and Practices 31, 56 (National Center for State Courts, undated) (reported in MILLER, DAWSON, DIX AND PARNAS, THE POLICE FUNCTION 121–23 (4th ed. 1986) [hereinafter referred to as NCSC STUDY]). The authors found that only 17 out of 347 (or roughly 5%) of all warrant-based searches were invalidated, and that "many of the police officers who were most involved in the warrant process . . . could not remember the last time they or a close associate were involved in a case in which a motion to suppress was granted or a prosecution dismissed because of a faulty warrant." *Id.* at 8–11. The implication is that most suppression motions that are granted involve warrantless searches.

Of course, even if true, such a conclusion does not prove that elimination of the warrant requirement would produce more improper searches. The NCSC study did not provide any information on the suppression *rate* for warrantless searches (which are far more numerous than warrant-based searches, *id.* at 21). If that rate too is low, eliminating the warrant requirement might not change the percentage of searches and seizures subsequently found invalid. Moreover, even a higher rate for warrantless searches must be discounted to some extent, since a warrantless search could be deemed "illegal" solely because no warrant was obtained, a finding which would not occur if the warrant requirement were eliminated.

At the least, however, the data make clear that the basis for a search is more carefully scrutinized when the review process, as slight as it may be, occurs. Other conclusions from the NCSC study confirm this view. Warrant applications were usually screened by prosecutors or a superior police official, a screening which occasionally resulted in further information being added to the application. *Id.* at 24–25. Additionally, the magistrate frequently asked for such information. *Id.* at 31. In its concluding section, the study found that the warrant requirement made the police "at least contemplate" the probable cause requirement before a search, and thus induced a higher standard of care than would otherwise be used. *Id.* at 148–49. The authors also concluded that the warrant requirement served to reduce the possibility that a search would occur

tions are possible,[26] *ex ante* review provides protection *ex post* sanctions do not.

Perhaps more importantly, *ex post* review, whatever its guise, is likely to deter only a modest amount of *deliberate* police abuse. A significant body of work, both empirical[27] and theoretical,[28] indi-

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in the absence of probable cause, and provided a clear and tangible record that permitted more objective later evaluation. *Id.* at 148.

26. Of course, if the substantive system of rules is easily understood and applied, good faith infractions may be a rare event, thus undermining this reason for *ex ante* review. Unfortunately, rules which try, even approximately, to do justice to the competing state and individual interests are unlikely to be simple. *See infra* notes 226–232 and accompanying text.

27. In the United States, at least, police administration of sanctions is unlikely to deter illegalities. *See supra* note 20. Even in countries with supposedly better supervisory structures, *see supra* note 19, internal review appears to be inefficacious. A study of German practice, Bradley, *supra* note 12, quotes a number of authors to this effect and concludes:

> The impression gained by the author in interviews with prosecutors, defense attorueys, and judges is that police discipline [in Germany] is effective in punishing police who are corrupt or who beat up suspects . . . but that it has no effect on conduct such as failing to warn suspects of their constitutional rights or conducting overly broad searches. Indeed, such police conduct is apparently rather widespread in Germany and seems to be encouraged by the police hierarchy.

Id. at 1053 n.111.

With respect to the efficacy of the exclusionary rule, the research at best is ambivalent. According to one author whose research in the area has been exhaustive, "[w]hichever side is required to prove the effect of the rule loses." Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740, 764 (1974) (authored by Davies). In another work, the same author concluded that the "cost" of the exclusionary rule, in terms of lost convictions, is minimal. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 688 [hereinafter Davies, *A Hard Look*]. From this conclusion, he drew a second one: whereas the "systematic" effect of the rule may be significant (in terms of encouraging police to learn the substantive rules), its "specific deterrent" effect on the police is negligible. *Id.* at 689 ("The data on the effects of the rule suggest that the average police officer is seldom involved in an illegal search that leads to the loss of an arrest.").

Civil remedies fare little better. *See, e.g.*, Casper, Benedict & Perry, *The Tort Remedy in Search and Seizure Cases: A Case Study in Juror Decision Making*, 13 LAW & SOC. INQUIRY 279, 281–84 (1988) (from a review of cases and research involving suits against police, the authors conclude that, because the defendant officers often prevail and the awards that are made are not large, the tort remedy is unlikely to produce the deterrent effect often claimed by its proponents). *See generally* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621, 690–95.

28. A recent article by Professor Stuntz suggests some reasons why the warrant requirement probably provides additional protection over either the damages or exclusionary rule sanctions. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991). According to Stuntz, "[t]he harms that flow from illegal searches and seizures are mostly intangible and diffuse." *Id.* at 883. Thus, when damages are the

cates that administrative, civil, and exclusionary remedies are not particularly successful at creating disincentives for the individual police officer. Further, this work suggests that a warrant procedure helps pick up the slack by forcing investigatory officials to justify their actions before the fact.

In short, some sort of *ex ante* review of proposed investigative actions would appreciably curtail police illegality (of both the good and bad faith variety). Of course, any requirement that the police justify their proposed actions to a third party has a cost (probably proportional to the accuracy of the procedure); at the least, it will divert resources that could otherwise have been expended solving crime. But, if information about practice in the United States is accurate, this cost can be minimized,[29] and should not, by itself,[30] override the clear benefits associated with *ex ante* review.

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sanction, it is "very hard for the system to avoid seriously over- or underdeterring police misconduct." *Id.* Although Stuntz is not clear as to which of these two results the "valuation" problem is likely to produce, *id.* at 910 n.62, I think, along with others, that underdeterrence is the probable consequence. *See* Amsterdam, *supra* note 7, at 430 (giving reasons why damages actions are likely to be ineffective); Casper, Benedict & Perry, *supra* note 27.

When the exclusionary rule is the sanction, Stuntz notes, the "valuation" problem is avoided because application of the rule does not require a "judgment about how much harm the defendant has suffered." *Id.* at 883. But the rule is rendered at least partially ineffective for two other reasons: judges' probable cause determinations are likely to be biased after incriminating evidence is found, and police can perjure themselves to cover up any illegalities. *Id.* at 884. Because the police know these two things (my assumption, not Stuntz's), the deterrent effect of the exclusionary rule is dampened. *See* J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 215, 223–24 (2d ed. 1975) (exclusionary rule's impact diminished because police know they can "fabricate probable cause" after a "snitch" and that a successful snitch biases the system in their favor).

Warrants avoid the valuation problem because they protect against subsequent suit. *Id.* at 883; *see also* Carroll v. United States, 267 U.S. 132, 156 (1925) (the warrant, "when properly supported by affidavit and issued after judicial approval[,] protects the seizing officer against a suit for damages"). And warrants at least partially avoid the two problems associated with the exclusionary rule "by forcing the necessary decision to be made, and the police officer's account of the facts to be given, before the evidence is found." Stuntz, *supra* at 884.

Also relevant here is Chief Justice Burger's point that the deterrent effect of the exclusionary remedy is visited most directly on the prosecutor, whose case it either weakens or destroys, rather than on the police, who may never know the evidence has been excluded. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1970) (Burger, C.J., dissenting).

29. The NCSC study found that American police perceive the warrant requirement to be "burdensome, time-consuming, intimidating, frustrating, and confusing." NCSC STUDY, *supra* note 25, at 149. But the study also concluded that magistrates rarely reject warrant applications outright, and that their review of warrant applications usually lasts less than five minutes. NCSC STUDY, *supra* note 25, at 31. Even a less than "perfunctory" review should not last much longer in the typical case. *See infra* note 50.

B. *Attributes of the* Ex Ante *Decisionmaker*

Assuming one accepts the notion that *ex ante* review of the government's investigative decisions is important, the next task is to decide who should carry out this review. Several candidates for this position can be imagined, ranging along a continuum of accessibility to the police. At one end of this spectrum are fellow police. Analogous to practice in medical hospitals,[31] the investigating officer might have to obtain a "second opinion" from another officer who is not involved in the investigation. A more onerous check, occasionally followed in several countries, is a requirement that police seek approval from a prosecutor.[32] Further along the spectrum is a mandate, followed by the United States Supreme Court,[33] that the police obtain authorization from some sort of judicial officer. Somewhere toward the middle of the continuum one could place "lay" decisionmakers; these people may not be as readily accessible as other police officers, but could easily be more available than a judge or prosecutor.[34]

In order to have any effect on police behavior, the decisionmaker should possess at least two attributes: some understanding of the substantive standards governing search and seizure, and

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Document preparation (of affidavits and so on) and *waiting* for judicial approval can take much longer (up to a day in some jurisdictions, NCSC STUDY, *supra* note 25, at 19–26). But an *efficient* process should typically take, overall, no more than an hour, and can be further accelerated if provision for taping of the warrant proceeding is made. *Cf. infra* text accompanying note 112 (describing use of telephonic warrants).

30. As shown in a later part of this Article, *infra* text accompanying notes 104–113, when other costs (such as loss of evidence or a suspect) are added to the equation, the analysis changes.

31. A regulatory context which provides an interesting comparison to searches and seizures involves the administration of psychotropic medication (which can cause many harmful side effects). In Washington v. Harper, 110 S. Ct. 1028 (1990), the Supreme Court upheld a prison policy which required, before nonemergency administration of such medication, a review by a panel composed of three persons connected with the prison. Other courts have mandated review by professionals not associated with the treating facility, *see, e.g.*, Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981), or by a court, *see* Rogers v. Commissioner, 390 Mass. 489, 458 N.E.2d 308 (1983), while others have not required any review at all, *see* Dautremont v. Broadlawns Hosp., 827 F.2d 291 (8th Cir. 1987).

32. In Italy, for instance, search warrants and wiretapping orders are usually obtained from the prosecutor. Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 258 n.45 (1977).

33. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 449–53 (1971) (explaining importance of requiring magistrates to issue warrants). *But see* Shadwick v. Tampa, 407 U.S. 345 (1972) (allowing court clerks to issue warrants under some circumstances).

34. This idea is explicated later in this Article, *see infra* text accompanying notes 121–123.

an institutional position which permits application of those standards with relative objectivity. While any of the decisionmakers identified above may possess the necessary competence, probably only the latter two are sufficiently neutral to fulfill the role of *ex ante* reviewer.

1. Competence

Any given individual's "competence" to make decisions about substantive search and seizure law will vary depending upon the complexity of that law. Before 1961,[35] for instance, issuing valid warrants in the United States was an easy matter; the same cannot be said now, especially for heavily regulated investigative techniques such as electronic surveillance.[36] On the other hand, much of current Fourth Amendment jurisprudence can be reduced to more simply framed rules or standards.[37] Similarly, the substantive standard proposed in Part III should be readily comprehended by lay as well as legally educated individuals.[38] Nonetheless, it is worth emphasizing at this point the fact that unless search and seizure law can be put in a form that police (and other people with no legal education) can grasp, we would have to require that *ex ante* review be undertaken by a legally trained decisionmaker in every case, a requirement which, for reasons developed below,[39] is probably impracticable.

2. Objectivity

The central issue in choosing the decisionmaker is not competence but objectivity. As Justice Jackson pointed out, the major drawback to *ex ante* review by the police is not their inability to understand legal rules but rather their tendency to interpret those

35. This was the year the Supreme Court decided Mapp v. Ohio, 367 U.S. 643 (1961), which applied the exclusionary rule to the states. After *Mapp*, there was a dramatic increase in the use of search warrants where nearly none were used before. Milner, *Supreme Court Effectiveness and the Police Organization*, 37 LAW & CONTEMP. PROBS. 467, 475 (1971).

36. *See generally* C. WHITEBREAD & C. SLOBOGIN, *supra* note 5, § 14.04 (describing requirements of the federal Electronic Communications Privacy Act).

37. For instance, every year the Bureau of National Affairs puts out "The Law Officer's Pocket Manual," a small booklet which summarizes the law of search and seizure, interrogation, and entrapment in roughly one hundred pages. Simply stated rules are highlighted in red, with explanations following in black.

38. *See infra* text accompanying notes 233–242. The point is not that police or other laypeople should *always* be able to "get it right," but that the standard should be simple enough to give them a chance.

39. *See infra* text accompanying notes 121–123.

rules in a distorted manner, given the exigencies of their job.[40] Jerome Skolnick has shown that because the police deal with danger, they are "generally . . . 'suspicious' [people]."[41] Further, the dangerous nature of police work—together with its association with authority—leads to social isolation.[42] These inevitable attributes of front-line law enforcement personnel make the police likely to act more precipitously than judiciously,[43] and less likely to understand or endorse conventional norms concerning privacy and autonomy, the use of harassment, and the effects of stigmatization.[44] Whenever possible, someone who is not so close to the investigative process should be entrusted with making decisions about whether and to what extent a proposed action will implicate these concerns.

Although prosecutors obviously are deeply involved in law enforcement efforts, they are removed from the day-to-day dangers of the street, and thus they are more likely than the police to be objective and attuned to public attitudes. Moreover, one cannot discount the effects of education and training—more prevalent in civil law countries than here—emphasizing the prosecutor's role as a quasi-judicial officer of the court;[45] the attitudes inculcated by such train-

40. In Johnson v. United States, 333 U.S. 10 (1948), Justice Jackson stated:

> The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13–14.

41. J. SKOLNICK, *supra* note 28, at 44; *see also* J. WILSON, VARIETIES OF POLICE BEHAVIOR 20 (1968) ("[T]he risk of danger . . . has a disproportionate effect on the officer partly because its unexpected nature makes him more apprehensive and partly because he tends to communicate his apprehension to the citizen.").

42. J. SKOLNICK, *supra* note 28, at 50 ("Policemen whom one knows well often express their sense of isolation from the public."); *see also id.* at 54 ("The element of danger in the policeman's role alienates him not only from populations with a potential for crime but also from the conventionally respectable (white) citizenry, in short, from that segment of the population from which friends would ordinarily be drawn.").

43. *Id.* at 67 ("Danger typically yields self-defensive conduct, conduct that must strain to be impulsive because danger arouses fear and anxiety so easily. Authority under such conditions becomes a resource to reduce perceived threats rather than a series of reflective judgments arrived at calmly.").

44. *Id.* at 52 ("Set apart from the conventional world, the policeman experiences an exceptionally strong tendency to find his social identity within his occupational milieu."). Given this social identity, even a police officer who is not involved in the investigation will find it hard to be "objective."

45. *See generally* Langbein & Weinreb, *supra* note 19, at 1558–59 (differentiating French *procureurs* from American prosecutors by noting the former's professional training as members of the magistracy). European prosecutors generally are not elected, which also might increase objectivity.

ing might help counteract institutional pressures. Objectivity is even more likely if the reviewing prosecutor is not involved in the case being investigated. Finally, adoption of an American-style exclusionary rule, which would significantly undermine any prosecution founded on illegal investigative techniques, should provide additional incentive to consider the interests of suspects.[46] In a world without the Fourth Amendment, reliance on prosecutors as the *ex ante* decisionmakers cannot be ruled out, especially given their relative accessibility.

Nonetheless, given their essentially adversarial position, prosecutors should probably, at most, be considered first alternates for this job. When faced with a choice between securing a conviction and protecting the rights of a suspect, prosecutors will be tempted to favor the former option, and thus are less likely than other potential decisionmakers to apply the substantive standards neutrally.[47] Ideally, the decisionmaker should be someone who has no vested interest in the outcome of criminal cases.

Because of their relatively greater distance from law enforcement pressures, judges or quasi-judges are better equipped to evaluate the legitimacy of a search or seizure. Admittedly, research from the United States, probably the country most dependent on a judicial-type system, indicates that some magistrates merely rubber-

46. If prosecutors were to take on the role of authorizing searches and seizures, a good faith exception of the type adopted by the U.S. Supreme Court in United States v. Leon, 468 U.S. 897 (1984), would be unjustifiable. In *Leon*, the Court held that good faith searches based on a warrant issued by a magistrate are valid, even if in violation of the Fourth Amendment. This conclusion was based largely on the assumption that judges "have no stake in the outcome of particular criminal prosecutions"; thus the threat of exclusion "cannot be expected significantly to deter them." *Id.* at 917. This latter assumption cannot be made with respect to prosecutors, even those not directly involved in the case in question; the temptation to assist a fellow prosecutor (and earn a favor) through the simple expedient of issuing a warrant would be too great.

47. The President's Commission on Law Enforcement and Administration of Justice, in its Task Force Report, provides one significant reason for this conclusion, at least in the United States. The Report states: "Local election [which is the way most state prosecutors are selected] increases the likelihood that the prosecutor will be responsive to the dominant law enforcement views and demands of the community." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT 73 (1967). The Report also contains a statement which is probably relevant even where prosecutors are not elected: "Political considerations make some prosecutors overly sensitive to what is safe, expedient, and in conformity with law enforcement views that are popular rather than enlightened." *Id.* Relatedly, prosecutors work much more closely with the police than with any other segment of the community, and are likely to be more influenced by them. *See also* J. SKOLNICK, *supra* note 28, at 202 ("although the prosecutor plays a magisterial role in the sense of assessing with a critical eye the validity of complaints and the strength of a case, he ultimately represents law enforcement").

stamp police and prosecutor decisions.[48] Yet, as noted earlier, the same research suggests that, at its worst, the judicial warrant requirement in this country forces prosecutors and police to consider the validity of a contemplated search or seizure and to document their requests for authorization, thus raising their "standard of care."[49] With adequate preparation and resolve, a magistrate can be an effective check on overzealous law enforcement personnel.[50] Furthermore, the extra cost to the state of making the decisionmaker a magistrate, rather than a prosecutor, is unlikely to be significant (at least where the police are involved).[51] The Supreme Court's preference for decisionmakers who are divorced from the police and prosecutors is good policy, although it is perhaps poorly implemented in many jurisdictions.

At the same time, the Court is too closely wedded to independent *judicial* authorization of searches and seizures. Although the Court has sanctioned *ex ante* review by nonmagistrates when violations of city ordinances are involved,[52] it has ignored the possibility of expanding this idea to other contexts where the costs of judicial

48. NCSC STUDY, *supra* note 25, at 32 (judges rarely reject applications for warrants).

49. *See* NCSC STUDY, *supra* note 25, at 148–49; *see also supra* note 25.

50. Although the warrant process practice in the United States clearly reduces police misbehavior, its efficacy on that score could be improved with minimal costs to the state. Two possible problems with the American process, and suggestions on how to handle them, are made here.

First, as already noted, magistrates typically review warrant applications in a cursory fashion. *See* NCSC STUDY, *supra* note 25, at 31 (in only 11% of the cases did the review process take longer than five minutes, and 65% lasted 2.5 minutes or less). Of course, in routine cases a cursory review might be all that is needed. To the extent brevity connotes lack of attention, however, one simple solution presents itself: if the magistrate were required to state for the record why he or she is granting (or denying) the application, the process could be made less perfunctory without significant extra expenditure of time or money.

A second problem is police perjury. Although much more likely to affect the accuracy of *ex post* review, *supra* note 28, it can also afflict the *ex ante* process. In particular, the police have been known to "make up" anonymous informants, or use informants whose identity they know, but cannot divulge. *Cf.* H. UVILLER, TEMPERED ZEAL 116 ("most police officers regard such alterations of events as the natural and inevitable outgrowth of artificial and unrealistic *post facto* judgments that release criminals"). Probably perjury can never be eliminated. But certain steps, beyond criminal prosecution, can inhibit it at the warrant application stage. By merely requiring police to provide the identity of their informants to the magistrate (off the record), such perjury can be deterred while still maintaining confidentiality.

51. Most police departments are located near magistrates. Moreover, several jurisdictions now permit applications for warrants by phone. *See infra* text accompanying notes 112–113. And once an application is completed by the officer and submitted to a magistrate, review can be completed relatively quickly. *See supra* note 29.

52. Shadwick v. Tampa, 407 U.S. 345 (1972).

review might be substantial. As developed below,[53] in some situations "laypersons" might be the most effective decisionmakers, if they receive rudimentary training in the substantive standards and are kept separate from law enforcement efforts.

C. *Exceptions to the Independent Authorization Requirement: The Supreme Court's Approach*

Once the *ex ante* reviewer is chosen, the crucial question becomes when he or she should be allowed to monitor ongoing investigations. Ideally, the imposition of a third party decisionmaker would provide a realistic check on police excesses, while not needlessly stalling their legitimate endeavors. This section describes the Supreme Court's approach to this issue. The next section analyzes that approach and suggests an alternative.

To implement the Fourth Amendment's guarantee, the Supreme Court has held that a warrant is required before every search or seizure, "subject only," in Justice Stewart's oft-quoted line, "to a few specifically established and well-delineated exceptions."[54] Lip service to the idea that warrants are preferred continues to this day.[55] But, of late, this preference has seldom been implemented. No longer can one seriously contend that the exceptions to the warrant requirement recognized by the Court are either few in number or "well-delineated." As Professor Bradley has noted, in at least twenty discrete situations the Court has permitted the police to proceed without a warrant.[56] And, as he further notes, every exception typically becomes murkier, not more clear, with each new case construing it.[57]

Although the warrant exceptions recognized by the Supreme Court are legion, they can be categorized into four types: (1) exceptions based on a perception that exigent circumstances make obtaining a warrant impossible or impractical; (2) exceptions resting on a finding that the police action does not impinge upon a substantial privacy interest; (3) "special needs" situations where warrants might frustrate legitimate purposes of the government other than

53. *See infra* text accompanying notes 121–123.

54. Katz v. United States, 389 U.S. 347, 357 (1967).

55. *See, e.g.*, Illinois v. Rodriguez, 110 S. Ct. 2793, 2799 (1990) (speaking of "[t]he ordinary requirement of a warrant"); United States v. Ross, 456 U.S. 798, 825 (1982) (quoting *Katz*).

56. Bradley, *supra* note 7, at 1473.

57. *Id.* at 1479 ("Each 'clear rule' has left unanswered questions which have turned it into an unclear rule.").

crime control; and (4) situations where magistrates are considered unnecessary because other devices already curb police discretion.

1. Exigency Exceptions

By far the largest category of exceptions are those based on exigency. Typically, the Court's exigency exceptions stem from a concern about one or more of the following: imminent harm to officers or others, imminent disappearance of evidence, and imminent escape of a suspect.[58] For instance, the Court's decisions allowing warrantless public arrests and short-term stops are best explained as a recognition that requiring judicial authorization in these situations would likely lead to escape of suspects or harm to others.[59]

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58. The Court has yet to summarize explicitly its holdings in this way, although it has come close. In Minnesota v. Olson, 110 S. Ct. 1684, 1690 (1990), the Minnesota Supreme Court's opinion in the case stated that "a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, . . . or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling." 436 N.W.2d 92, 97 (Minn. 1989) (citation omitted). In upholding the Minnesota court's finding that no exigency existed on the facts of *Olson*, the Supreme Court referred to this language as "the proper legal standard." 110 S. Ct. at 1690.

A fourth factor often listed by the lower courts in defining exigency is the seriousness of the offense. *See* Dorman v. United States, 435 F.2d 385, 392 (D.C. Cir. 1970) (listing gravity of the crime as well as the dangerousness of the suspect and the likelihood of escape as factors to be considered in deciding whether warrantless entry is permitted). However, in Mincey v. Arizona, 437 U.S. 385 (1978), the Supreme Court squarely rejected crime severity as a separate basis for an exception. In *Mincey*, the prosecution argued for a "homicide exception" to the warrant requirement. The Court acknowledged that homicide investigations often involved emergencies justifying a warrantless search (such as the presence of other victims or the killer). *Id.* at 392. But it stated: "We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Id.* at 394.

Several years later, in Welsh v. Wisconsin, 466 U.S. 740 (1984), the Court held that the fact that the crime being investigated is *not* serious will sometimes *prohibit* warrantless entries, citing *Dorman*, among other cases. *Id.* at 751–52. However, the Court was careful to note that it did not necessarily approve of the particular holdings in *Dorman* and its progeny. *Id.* at 752–53. Moreover, its description of their holdings made clear that it still adhered to *Mincey*: "[C]ourts have permitted warrantless home arrest for major felonies if identifiable exigencies, *independent of the gravity of the offense*, existed at the time of the arrest." *Id.* at 752 (emphasis added). *Mincey* and *Welsh* taken together indicate that, as far as the Court is concerned, by itself the nature of the offense may prohibit a warrantless search, but cannot justify it. For further discussion of this issue, see *infra* note 109.

59. In Carroll v. United States, 267 U.S. 132 (1925), the Supreme Court stated:

> The reason for arrest for misdemeanors without warrant at common law was to promptly suppress breaches of the peace . . . while the reason for arrest without a warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous

Also based on exigency concerns are many of the Court's decisions permitting warrantless searches. Thus, for example, the oldest exception to the search warrant requirement—search incident to arrest—is justified as a means of preventing evidence destruction and harm to officers by persons who have just been arrested.[60] The "automobile" exception permits warrantless searches of vehicles that might leave the jurisdiction if police took the time to obtain a warrant.[61] The hot pursuit exception authorizes warrantless entries into homes to make an arrest (as well as warrantless searches up to the time of arrest) whenever the police are hot on the trail of a suspect; requiring a warrant under such circumstances might allow the suspect to escape, destroy evidence, or harm someone.[62] The police are even allowed to undertake certain bodily intrusions in the absence of a warrant if they have probable cause to believe the evidence will dissipate in the meantime.[63]

> offense required that such arrests should be made at once without warrant.

Id. at 157 (citation omitted). The Court has been similarly explicit with respect to stops. *See, e.g.*, Brown v. Texas, 443 U.S. 47, 51 (1979) (to justifiably stop a person, officers must have "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity"); *cf.* Terry v. Ohio, 392 U.S. 1, 30 (1968) (frisk after stop allowed if officer has reasonable suspicion that "criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous").

60. Chimel v. California, 395 U.S. 752, 763 (1969) (search incident to arrest allowed "in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction").

61. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 153 (1925) (where the Court distinguished between searches of houses, which generally require a warrant, "and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought").

62. In Warden v. Hayden, 387 U.S. 294 (1967), the Court upheld the warrantless entry and search of a house by police who were pursuing a suspect, stating:

> The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

Id. at 298–99.

63. Schmerber v. California, 384 U.S. 757, 770 (1966) (warrantless seizure of blood permitted to detect blood alcohol level if "the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence' ") (citing Preston v. United States, 376 U.S. 364, 367 (1964)).

Other exceptions which can be explained through exigency analysis include the plain view seizure exception, *see* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (items that police see in plain view from a place they validly occupy may be seized

In all of these situations save the last the police could, given enough personnel, almost always obtain a warrant without suffering the consequences of the exigency. In the automobile exception context, for instance, one officer could stand guard over the car while another takes any arrested individuals to the station house and obtains a warrant for search of the vehicle. But the Court has adhered to this exception even in the face of such observations.[64] In other words, the Court has frequently been willing to define exigency broadly, in light of the realities of law enforcement.

2. Lesser Expectation of Privacy Exceptions

A second type of exception to the warrant requirement entirely separate from the exigency category is based on expectation of pri-

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without a warrant), and some versions of regulatory inspections, *see, e.g.*, Michigan v. Tyler, 436 U.S. 499 (1978) (permitting warrantless search of burned premises the night of the fire and the morning thereafter to determine its cause, but finding unconstitutional a warrantless search weeks later).

64. In Chambers v. Maroney, 399 U.S. 42 (1970), for instance, the Court stated that "there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." *Id.* at 52. *Chambers* went on to stretch the exigency notion even further by allowing warrantless searches at the station house, so long as a warrantless search would have been permissible on the street. *Id.* at 52 n.10. The purported reason for both findings was that a prolonged seizure of a car pending a warrant (either on the street or in the stationhouse) is just as intrusive, if not more so, than an immediate search, and thus is not necessarily better. *Id.* at 51–52. This rationale is specious, for reasons made clear by Justice Harlan in his opinion in *Chambers*. *Id.* at 61–64 (Harlan, J., concurring in part and dissenting in part). A better reason for the second holding in *Chambers* might go like this: the police should not be forced to get a warrant for a search they *could* have conducted in the absence of one, had they felt it practical at the time. *See id.* at 52 n.10 (where majority noted that the arrest in *Chambers* was made in the middle of the night and "[a] careful search . . . was impractical and perhaps not safe for the officers . . . ."); *cf.* Illinois v. Andreas, 463 U.S. 765, 773 (1983) (where police have authority to conduct warrantless search of package at an international airport, they also have authority to conduct warrantless search of same item the next day after it has been delivered to addressee, so long as there is "a substantial likelihood" that the contents have not changed). *See infra* note 10.

In direct opposition to the Court's rationale for *Chambers* are the Court's "container" decisions, which suggest that if the movable object sought to be searched can easily be placed in a police car (*e.g.*, a trunk or suitcase), a warrant is required in most circumstances. United States v. Chadwick, 433 U.S. 1 (1977). As the Court stated in *Chadwick* (in language that contradicts the *purported* rationale of *Chambers*), "[t]he initial seizure and detention of the footlocker . . . were sufficient to guard against any risk that evidence might be lost. With the footlocker safely immobilized, it was unreasonable to undertake the additional and *greater* intrusion of a search without a warrant." 433 U.S. at 13 (emphasis added). These decisions take the exigency rationale more seriously, although the Court has begun reneging here as well. *See* California v. Acevedo, 111 S. Ct. 1982 (1991) (overturning Arkansas v. Sanders, 442 U.S. 753 (1979), which held that search of a container placed in a car requires a warrant).

vacy analysis. The Court has permitted several types of warrantless searches and seizures, despite the clear absence of exigency, where it determined that the privacy interest infringed by the police action was insignificant. Because this finding usually has meant that the Fourth Amendment is not implicated at all (on the ground that no "search or seizure" occurs when no individual interest is threatened), it also generally leads to a holding that "probable cause" is not required either. This latter aspect of these cases is addressed in Part III. Here the focus will be on the effect of expectation of privacy analysis on the warrant requirement.

This analysis is employed most often in assessing the legality of "searches" (as opposed to "seizures").[65] The Court has gauged the privacy expectations associated with a particular area by examining its exposure to public view,[66] the types of activities that take place there,[67] the steps taken to protect it from public view,[68] and a host of other variables.[69] Relying on one or more of these factors, the Court has upheld warrantless, nonexigent searches of "open fields,"[70] residential[71] and business[72] yards (at least when viewed

65. As just explained, in those cases where the Court holds that no expectation of privacy was violated, it declares that no "search" occurs for Fourth Amendment purposes. Nonetheless, in all of these cases the police were obviously looking for evidence. To most lay people, looking for evidence of crime is a "search," regardless of what that term may mean under the Fourth Amendment. This Article, operating in a "world without the Fourth Amendment," uses the word "search" as a layperson would.

66. *See, e.g.*, Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

67. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 178 (1984) ("In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to . . . the uses to which the individual has put a location . . . .").

68. *See, e.g.*, United States v. Dunn, 480 U.S. 294, 301 (1987) (whether an area is within a home's curtilage, and thus afforded Fourth Amendment protection, depends, *inter alia*, on "the steps taken by the resident to protect the area from observation by people passing by").

69. In *Oliver*, the Court named two other such factors: "the intention of the Framers of the Fourth Amendment," and "our societal understanding that certain areas deserve the most scrupulous protection from government invasion." 466 U.S. at 178. Other cases have looked at whether the police physically intruded upon the searched area. *See, e.g.*, Dow Chemical Co. v. United States, 476 U.S. 227, 237 (1986); California v. Ciraolo, 476 U.S. 207, 213 (1986) (both emphasizing that aerial flights over property do not involve physical intrusion).

70. *Oliver*, 466 U.S. at 170.

71. Florida v. Riley, 488 U.S. 445 (1989); California v. Ciraolo, 476 U.S. 207 (1986).

72. Dow Chemical Co. v. United States, 476 U.S. 227 (1986).

from a plane), jail cells,[73] persons at the international border,[74] and garbage cans at curbside,[75] to name a few cases.[76]

The Court has also permitted warrantless nonemergency police actions on a related assumption-of-risk/implied consent rationale. For instance, it has sanctioned warrantless searches of "heavily regulated" industries on the ground that the owners of such industries surrender much or all of their privacy when they undertake a business known to be strictly monitored by the government.[77] In a sim-

73. Hudson v. Palmer, 468 U.S. 517, 527–28 (1984) (warrantless searches of prison cells permitted because a prison "shares none of the attributes of privacy of a home, an automobile, an office or a hotel room," and the need for "institutional security" is great).

74. Carroll v. United States, 267 U.S. 132, 154 (1925). In United States v. Montoya de Hernandez, 473 U.S. 531 (1985), the Court noted that, in addition to the lesser expectation of privacy accorded individuals crossing the border, "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border." *Id.* at 539–40.

75. California v. Greenwood, 486 U.S. 35 (1988).

76. According to the Court, another exception which is partially based on a lessened expectation of privacy rationale is the automobile exception. As discussed earlier, *see supra* notes 61–64, the primary basis for the so-called *Carroll* doctrine is exigency. But in a number of cases the Court has explained that this exception is also based on reduced expectations of privacy associated with a car. *See, e.g.*, California v. Carney, 471 U.S. 386, 392 (1985) ("In short, [in the car search context] the pervasive schemes of regulation, *which necessarily lead to reduced expectations of privacy*, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met." (emphasis added)). Why the Court feels the need to justify the exception on privacy as well as on exigency grounds is a long story; briefly, it has more to do with the Court's desire to distinguish its automobile cases from its "container cases," *see supra* note 64, than with anything else. *See generally* C. WHITEBREAD & C. SLOBOGIN, *supra* note 5, §§ 7.03, 7.04.

77. United States v. Biswell, 406 U.S. 311, 316 (1972) ("When a [gun] dealer chooses to engage in this pervasively regulated business 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."). The *Biswell* Court also stated that "unannounced, even frequent, inspections are essential," *id.* at 316, thus suggesting that the decision was based in part on an exigency rationale (or perhaps a special needs rationale, *see infra* text accompanying notes 83–97). But because warrants are obtained *ex parte*, requiring them would not prevent the police from engaging in "unannouneed" searches. Nor would a warrant scheme prevent frequent searches. What the Court really seems to be saying in *Biswell* is that a *probable cause* requirement would frustrate the regulatory scheme. *See infra* text accompanying notes 158–161.

The conclusion that the heavily regulated industry exception is based primarily on a lesser expectation of privacy rationale is supported by the Court's most recent business inspection case, in which it stated that "[b]ecause the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, have lessened application in this context." New York v. Burger, 482 U.S. 691, 702 (1987) (citation omitted).

ilar vein, a series of Court decisions has sanctioned various types of undercover activity in the absence of a warrant, on the ground that people assume the risk that their friends or acquaintances are government agents or may eventually become such agents.[78] The Court has extended this analysis to "institutional" agents as well, holding that the government need not obtain warrants to search bank records "voluntarily" surrendered to banks[79] or phone numbers in the possession of telephone companies.[80]

Although usually not using expectation of privacy language, the Court has also upheld warrantless nonexigent *detentions* by emphasizing the low level of infringement on personal autonomy occasioned by the police action. For instance, the Court's decisions permitting warrantless roadblocks to detect illegal immigration[81] and drunk driving[82] are based primarily on the perceived triviality of the intrusion involved.

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78. Using an assumption of risk/public exposure rationale, the Court has found that no warrant is required to authorize: (1) a search by an undercover agent who is invited into the defendant's home by the defendant, Lewis v. United States, 385 U.S. 206 (1966); (2) an undercover search of defendant's store during store hours, Maryland v. Macon, 472 U.S. 463 (1985); (3) police efforts to obtain reports about the defendant's conversations from an acquaintance of the defendant, Hoffa v. United States, 385 U.S. 293 (1966); and (4) use of a concealed listening device on an undercover agent, On Lee v. United States, 343 U.S. 747 (1952); *accord* United States v. White, 401 U.S. 745 (1971).

79. United States v. Miller, 425 U.S. 435 (1976).

80. Smith v. Maryland, 442 U.S. 735 (1979).

81. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court gave several reasons for not requiring a warrant prior to immigration roadblocks. Most relevant here is its first reason: "The degree of intrusion upon privacy that may be occasioned by a search of a house hardly can be compared with the minor interference with privacy resulting from the mere stop for questioning as to residence." *Id.* at 565. The Court also minimized the intrusion involved in such a roadblock by pointing to the "visible manifestations" of the field officers' authority at a checkpoint. *Id.* Other reasons given by the Court for not requiring a judicial warrant, not involving privacy concerns, were the ease with which the validity of the checkpoint could be reviewed after a challenged stop, and the fact that the location of the roadblock was not established by officers in the field. *Id.* at 565–66.

82. The Court's opinion in Michigan Department of State Police v. Sitz, 110 S. Ct. 2481 (1990), upholding warrantless, suspicionless sobriety cheekpoints, relied heavily on *Martinez-Fuerte*. While it never directly addressed the warrant issue, the Court emphasized the minimal intrusiveness of such checkpoints, stating that "[t]he intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*." *Id.* at 2487.

3. "Special Needs" Exceptions

A third category of exceptions is what has come to be called "special needs" situations. This language first appeared in Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.*,[83] where he stated: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."[84] Despite the restrictive tone of this passage, in *T.L.O.* Blackmun was willing to label searches of school children's personal effects a "special needs" situation, and thus joined the majority in eliminating both the warrant and probable cause requirements in that context.[85] The special needs jargon has surfaced in several opinions since *T.L.O.*, including cases permitting warrantless searches of employees' offices[86] and probationer's homes,[87] and warrantless substance abuse testing of customs agents[88] and railway workers.[89]

Although the precise contours of the special needs exceptions to the warrant requirement are unclear, they do not appear to be based either on an exigency rationale (as defined here) or on a finding of reduced expectations of privacy; nor do they rest on a combination of the two. Some of the special needs cases involved exigent circumstances, but others did not; in any event, the Court's broad holdings clearly do not require a finding of exigency in order to

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

84. *Id.* at 351 (Blackmun, J., concurring).

85. *Id.* at 353.

86. O'Connor v. Ortega, 480 U.S. 709, 724 (1987) ("when employers conduct an investigation, they have an interest substantially different from 'the normal need for law enforcement' " (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)); *see also* 480 U.S. at 732 (Scalia, J., concurring in the judgment) (" 'special needs' are present in the context of government employment").

87. Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) ("[Probation s]upervision . . . is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large.").

88. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989) ("It is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement.").

89. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989) ("The Government's interest in regulating the conduct 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*, 483 U.S. at 873–74)). The special needs language seems to be the Court's favorite rubric of late, appearing in cases that are probably best analyzed under other rationales. *See, e.g.*, New York v. Burger, 482 U.S. 691, 702 (1987) (where the Court, in addressing whether junkyards are a " 'closely regulated' industry," also refers to "special need" analysis).

sustain a warrantless search under this rubric.[90] And while the Court did find lessened privacy expectations in some of the special needs situations,[91] it relied on this finding only in justifying abandonment of the probable cause standard, not as support for eliminating the warrant requirement.[92]

The predominant focus of these decisions appears to be the "administrative" nature of the searches or seizures in question. The fact that the government investigators in these special needs situations typically are looking for proof of something other than crime, or at least evidence of something other than serious crime, is used by the Court to minimize the individual interests involved and, at the same time, bolster the government interest in dispensing with a warrant. With respect to individual interests, the Court implies that because the purpose of the search is not directly prosecutorial, less protection is needed.[93] On the government side, the Court ex-

90. Although some of the cases mentioned above involved arguably exigent circumstances, *see, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985), the opinions justifying the results all use broad language permitting warrantless searches with or without exigency, so long as the Court's other requirements are met. For instance, in *T.L.O.*, the Court flatly stated that "we hold today that school officials need not obtain a warrant before searching a student who is under their authority." 469 U.S. at 340. *See also Von Raab*, 489 U.S. at 667 ("The Customs Service has been entrusted with pressing responsibilities, and its mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions."); *Griffin*, 483 U.S. at 877 (in the probation setting, "we think it reasonable to dispense with the warrant requirement."); *Ortega*, 480 U.S. at 722 ("Imposing unwieldy warrant procedures in [cases where the employer wishes to enter an employee's office, desk or file cabinets for a work-related purpose] . . . would conflict with the 'common sense realization that government offices could not function if every employment decision became a constitutional matter.' " (quoting Connick v. Myers, 461 U.S. 138, 143 (1983)).

91. *Von Raab*, 489 U.S. at 672 ("Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity."); *Skinner*, 489 U.S. at 627 ("[T]he expectations of privacy of [railway employees involved in accidents or safety violations] are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."); *Ortega*, 480 U.S. at 725 ("[T]he employer intrusions at issue here 'involve a relatively limited invasion' of employee privacy." (quoting Camara v. Municipal Court, 387 U.S. 523, 537 (1967)). *But see Griffin*, 483 U.S. at 873 ("A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.' "); *T.L.O.*, 469 U.S. at 337–38 ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." (footnote omitted)).

92. *See infra* notes 151–156 and accompanying text.

93. Intimations of this kind of reasoning run throughout the Court's special needs cases. In *T.L.O.*, the Court notes that its holding does not necessarily apply to searches by the police or by school officials acting at the behest of the police. 469 U.S. at 341 n.7.

presses its concern about the impact a warrant requirement will have on the efficiency of government officials whose primary job is something other than law enforcement. Whereas the Court is willing to tolerate the inconvenience caused by judicial authorization when it distracts the police in their single-minded effort to "ferret out crime," it has resisted imposing the requirement when it compromises these other, "administrative" interests of the government. Thus, for instance, in justifying elimination of *ex ante* review for investigations of work-related infractions, the Court stated that imposing "unwieldy" warrant procedures on work supervisors "would seriously disrupt the routine conduct of business and would be unduly burdensome."[94] Similar language is found in the other special needs cases.[95]

In short, the special needs exceptions suspend the warrant requirement when, because ordinary police investigation is not in-

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In *Ortega*, the Court stated, "we do not address the appropriate standard when an employee is being investigated for criminal misconduct or breaches of other non-work-related statutory or regulatory standards." O'Connor v. Ortega, 480 U.S. 709, 729 n.* (1987). In *Von Raab*, the Court was most explicit: "Because the testing program adopted by the Customs Service is not designed to serve the ordinary needs of law enforcement, we have balaneed the public interest in the Service's testing program against the privacy concerns implicated by the tests, without reference to our usual presumption in favor of the procedures specified in the Warrant Clause, to assess whether the tests are required by Customs are reasonable." National Treasury Employees Union v. Von Raab, 498 U.S. 656, 679 (1989). *See also Skinner*, 489 U.S. at 620–21 ("The FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.' " (quotmg 49 C.F.A. § 219.1(a) (1987)).

94. *Ortega*, 480 U.S. at 722.

95. In New Jersey v. T.L.O., 469 U.S. 325 (1985), the Court stated that requiring a warrant "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 340. In Griffin v. Wisconsin, 483 U.S. 868 (1987), it concluded that in apprehending those who have violated probation conditions, "[a] warrant requirement would interfere to an appreeiable degree . . . , setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires." *Id.* at 876. Finally, with drug and alcohol testing, the Court declined to require a warrant in part because it would "divert valuable agency resourees," *Von Raab*, 489 U.S. at 666, and require employers to grapple with the unfamiliar "intricacies of this Court's Fourth Amendment jurisprudence," Skinner v. Railway Labor Executives' Ass'n, 489 U.S 602, 623 (1989). In these last two cases, the Court also gave two other reasons for eliminating the warrant requirement: (1) the fact that the regulations at issue narrowly and clearly defined who was subject to testing and thus obviated the need for judicial overview, *Von Raab*, 489 U.S. at 667; *Skinner*, 489 U.S. at 622; and (2) the possibility that delay occasioned by the warrant requirement "may result in the destruction of valuable evidence," *Skinner*, 489 U.S. at 623. The first reason is discussed further *infra* in the text accompanying notes 98–103. The second is clearly an exigency rationale.

volved,[96] "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[97]

4. Absence of Discretion Exceptions

In its drug and alcohol testing cases, the Court has given another reason for dispensing with a warrant requirement. There, it noted that, given the existence of regulations clearly setting out who could be tested (*e.g.*, customs employees seeking promotion or railway workers involved in accidents), "there are virtually no facts for a neutral magistrate to evaluate."[98] Thus, according to the Court, monitoring by a third party was unnecessary regardless of whether employee testing is a "special needs" situation. While not yet clearly identified as such, this absence of discretion idea qualifies as a separate exception to the warrant requirement.

This basis for an exception first made its appearance in the Court's decisions allowing warrantless searches of lawfully impounded cars[99] and personal effects taken from persons placed in custody.[100] Although these decisions include hints of both the diminished privacy and special needs rationales,[101] the principal justi-

96. One other case in which the special needs language surfaced is Michigan Department of State Police v. Sitz, 110 S. Ct. 2481 (1990), which upheld warrantless sobriety checkpoints conducted by the police. However, in *Sitz* the Court made clear that the special needs rubric was not applicable in this context, *id.* at 2485, reinforcing the idea that this language is reserved for law enforcement divorced from ordinary police work.

97. This language comes from Camara v. Municipal Court, 387 U.S. 523, 532–33 (1967), but is quoted by the Court in *T.L.O.*, 469 U.S. at 340; *Ortega*, 480 U.S. at 720; and *Skinner*, 489 U.S. at 623. Other pre-*T.L.O.* cases might also be explicable using this rationale. *See, e.g.*, United States v. Villamonte-Marquez, 462 U.S. 579, 589 (1983) (permitting warrantless boarding of a boat on intercoastal waterways to inspect documents because "[c]ustoms officials do not have as a practical alternative the option of spotting all vessels which might have come from the open sea and herding them into one or more canals or straits in order to make fixed checkpoint stops").

98. *Skinner*, 489 U.S. at 622 ("[I]n light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate.").

99. *See* South Dakota v. Opperman, 428 U.S. 364 (1976); *see also* Florida v. Wells, 110 S. Ct. 1632 (1990); Colorado v. Bertine, 479 U.S. 367 (1987); Florida v. Meyers, 466 U.S. 380 (1984); Michigan v. Thomas, 458 U.S. 259 (1982).

100. Illinois v. Lafayette, 462 U.S. 640 (1983).

101. In the leading case permitting warrantless car inventories, South Dakota v. Opperman, 428 U.S. 364 (1976), the majority spoke of the diminished expectation of privacy associated with automobiles, *id.* at 367–68, and the government's interest in avoiding harm to the police, false claims of theft, and vandalism through the inventory mechanism, *id.* at 369. Neither point justifies warrantless searches. Cars (searches of which usually require probable cause, Carroll v. United States, 267 U.S. 132, 155–56 (1925)), do not somehow lose whatever privacy protection they have because they have

fication for warrantless inventories has been their standardized nature. As Justice Powell explained in the leading case on the subject, when making an inventory search of cars

> [t]he officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate.[102]

Although the inventory and drug testing cases are the only Court decisions to have explicitly adopted the absence of discretion rationale, a few other decisions seem to rely on it as well.[103]

D. *Analysis and a Proposal: The Exigency Principle*

Maximum protection of individual interests would be afforded by requiring *ex ante* protection for every search and seizure. In light of the police's tendency to be overly suspicious and to undervalue individual prerogatives, we might want to force them to seek authorization in every case. But this approach would unnecessarily frustrate the state's interest in combatting crime. In particular, when exigent circumstances are present, the police should be able to act on their own. On the other hand, the other categories of warrant exceptions recognized by the Supreme Court are not justifiable.

1. Justifying and Refining the Exigency Exception

The "exigency principle" can be more elaborately stated as follows: the police should be able to proceed without obtaining independent authorization when they believe, with the requisite

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been impounded; indeed, the *Opperman* Court nowhere suggested as much. And while the government interests described are the type of "administrative" (as opposed to "crime investigation") objectives usually advanced in special needs cases, the fact that the police (who are familiar with warrant procedures) are the government agents performing the search makes this situation unlike those cases. *Cf. supra* text accompanying notes 83–97.

102. *Opperman*, 428 U.S. at 383 (Powell, J., concurring). The majority made the same point less explicitly. *Id.* at 376 ("[W]e conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not 'unreasonable' under the Fourth Amendment.").

103. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 604 (1981) (approving warrantless searches under the Federal Mine Safety and Health Act in large part because the Act's explicit standards prevent mine owners from being subject to the "unchecked discretion of Government officers"); United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) ("[S]ince field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops.").

degree of certainty,[104] that violence to others, disappearance of evidence, or escape of a suspect is imminent.[105] The rationale behind this principle is obvious. Frequently, the police have no time to seek even a second opinion from a fellow officer, much less approach a prosecutor or judge, if they are to have any chance at preventing harm, procuring evidence, or apprehending a suspect. While the possibility of police miscalculation in such "fluid" situations (with the consequent damage to individual interests) is fairly high, the cost to the state of prohibiting action would be even greater.[106]

This calculus is most apparent when the first exigency category—preventable harm to others—is involved; the law recognizes many instances where the interests of a potentially dangerous individual are sacrificed to protect other people.[107] To some extent, the

104. The requisite level of certainty as to the existence of exigent circumstances should be determined by the proportionality principle, addressed *infra* in the text accompanying notes 214–242.

105. Police should not be allowed to "create" the exigency; thus, for instance, if they believe they have sufficient reason to suspect evidence is in a particular house well *before* they go to arrest its occupant, they should attempt to get a search warrant, rather than timing an arrest to create an emergency. *Cf.* Vale v. Louisiana, 399 U.S. 30 (1970) (where the Court invalidated a search pursuant to a drug arrest made by officers who, instead of immediately executing two arrest warrants on the defendant for bond violations, waited until he came out of his house and began the drug transaction).

106. According to Goldstein & Marcus, *supra* note 32, European countries that recognize a need for judicial authorization usually have an exigency exception. In France, for instance, the police do not need to obtain judicial authorization prior to any search for evidence of "flagrant" offenses; an offense is flagrant if it is " 'in the process of being committed or . . . has just been committed,' or if, 'in the period immediately following the act, the suspected person is pursued by clamor, or is found in possession of objects, or presents traces or indications, leading to the belief that he has participated in the felony or misdemeanor.' " *Id.* at 252 n.32 (quoting FRENCH CODE OF CRIMINAL PROCEDURE art. 53 (G. Kock trans. 1964)). In Italy, the police may act on their own "in cases of necessity and urgency," including measures necessary for reasons of "public safety and security." *Id.* at 257 n.43. In Germany, warrantless actions are permitted "where there is 'danger in delay' or where a person is caught in the act of committing an offense." *Id.* at 260.

107. The most obvious examples of this phenomenon are those state statutes which permit summary short-term detention of the dangerous mentally ill based solely on the application of a mental health professional or a "responsible" citizen. *See, e.g.*, CAL. WELF. & INST. CODE § 5150 (West 1984) (permitting either a police officer or a clinician to authorize emergency, 72-hour admission); N.Y. MENTAL HYG. LAW § 9.39 (McKinney 1988) (permitting a mental health professional to authorize emergency admission for up to 48 hours). A finding of dangerousness may also permit abrogation of the confidentiality usually associated with the attorney-client relationship, *see, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1984) (permitting lawyer to reveal confidential information to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm), and the therapist-client relationship, *see, e.g.*, Tarasoff v. Regents of Univ. of Calif., 17 Cal. 3d 425, 551 P.2d 334,

second and third exigency categories are justified on the same ground: destruction of evidence or escape of a suspect may endanger the public by preventing conviction of a violent individual. More straightforwardly, failing to extend the exigency principle to these latter categories would mean that evidence or suspects within the state's grasp will often be lost irretrievably, a significant cost the state should not have to bear merely to ensure that the police's decision is subjected to independent review.[108] Because the police cannot be expected, in truly exigent situations, to evaluate whether the loss of evidence or a suspect will in fact be permanent, they should be able to act on their own when either of these two categories apply.

Other types of "exigencies" are sometimes found in court opinions; none of these, however, should qualify the police to act on their own unless they are based on emergency considerations.[109]

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131 Cal. Rptr. 14 (1976) (clinician who believes patient will harm another has a duty to protect against that harm, including, if necessary, warning the potential victim).

108. Note too that, as between a truly exigent situation and one which is not, the police officers' certainty assessments are likely to be more accurate in the former situation, since the danger, evidence, or suspect is more likely to be "right in front of them."

109. As noted earlier, *see supra* note 58, the most frequently proposed "exigency," aside from those discussed in the text, is offense gravity. Professor Bradley, for instance, has suggested that warrantless entries might be considered more reasonable in serious felony cases than in misdemeanor cases. Bradley, *supra* note 7, at 1487 n.96. And Professor Schroeder would *prohibit* warrantless searches in investigations of *non*-serious crimes. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations—Warrantless Entries into Premises: The Legacy of* Welsh v. Wisconsin, 38 U. KAN. L. REV. 439 (1990). If current precedent is any guide, the Supreme Court would probably disagree with Bradley and, at least in some cases, agree with Schroeder. *See supra* note 58. I believe both Bradley and Schroeder are wrong.

The possibility that harm to others, evidence destruction, or escape will occur probably increases with crime severity. But the fact that an offense is grave does not by itself create an emergency. When true exigency is not present, the state will not be damaged by a warrant requirement for serious crimes, except to the extent that such a requirement inconveniences investigation of a crime the state is particularly eager to solve. For reasons developed later in this article, *see infra* text accompanying notes 171–177, this latter interest is insufficient to justify relaxed protection. If anything, we should be more concerned about controlling the police in serious cases where intense public pressure may encourage abuse.

On the other hand, the Court's and Schroeder's contention—that exigency of the type defined here is an insufficient justification for warrantless entries when minor crimes are involved—gives too much weight to individual interests. In practice, truly "minor" crimes usually do not involve imminently violent individuals, crucial evidence that can be destroyed, or suspects who are likely to leave the jurisdiction to escape apprehension. *See* Schroeder, *supra*, at 536–38. But in those cases where any of these factors *are* present, the state should not be barred from acting by a warrant requirement. Apparently, the fear underlying the contrary position is that police are more likely to abuse their discretion when investigating minor crimes, or that such abuse is less easily condoned in this situation, or a combination thereof. *See* Welsh v. Wiscon-

Relatedly, because police discretion should be kept to a minimum, the "imminence" component of the exigency principle must be narrowly defined; otherwise, the exception could easily swallow the rule, as experience in the United States has borne out.[110] At least in urban areas, where magistrates are plentiful, any search or seizure which takes place more than an hour or so after police develop the relevant level of suspicion can usually be preceded by independent authorization.[111] Indeed, in many American jurisdictions, judicial warrants can be obtained in much shorter periods of time. Some states have begun experimenting with "telephonic warrants," which enable the police to call a magistrate and, based on their recitation of the facts known to them, receive a judicial rnling over the phone,

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sin, 466 U.S. 740, 751 (1984) ("It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it" (quoting McDonald v. United States, 335 U.S. 451, 459–60 (1948) (Jackson, J., concurring)). But a narrowly defined exigency exception, on those rare occasions when it would apply in investigations of minor crimes, does not give the police much discretion.

A final problem with basing any search and seizure rule on a severity of crime factor is the difficulty of discerning which crimes are "minor" and which are "serious" for this purpose, a difficulty suggested by Professor Schroeder's truly heroic effort to accomplish the task. *See* Schroeder, *supra*, at 498–534, 549–52; *cf. Welsh*, 466 U.S. at 753 (where the crime labelled "minor" by the Court was driving-while-intoxicated, which is considered very serious in many states). Moreover, even if a useable definition of crime magnitude is devised, its application may be impossible, given the realities of law enforcement; activity which appears to be a "minor" crime at one point may well be, or become, "serious" and vice versa. *Cf.* Berkemer v. McCarty, 468 U.S. 420, 430 (1984) (rejecting a minor crime exception to *Miranda v. Arizona*, in part because "[t]he police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony").

110. See, *e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970), in which the Court permitted warrantless stationhouse searches of cars that could have been searched in the field pursuant to the automobile exception. Clearly, once the car is at the stationhouse, no exigency exists. Moreover, even if one accepts the "continuing exigency" rationale for *Chambers*, *see supra note* 64, all it should authorize is a quick search for items that might harm or be destroyed (akin to what happens in the "field"), not the type of leisurely, top-to-bottom search that often takes place at the stationhouse.

111. *See supra* note 29.

Occasionally the statement in the text will not be true. If police are in "hot pursuit," for instance, considerable time might elapse between the point at which the requisite certainty is established and the search or seizure. Nonetheless, given the exigency of pursuit, no warrant should be required. *See, e.g.*, United States v. Scott, 520 F.2d 697 (9th Cir. 1975), *cert. denied*, 423 U.S. 1056 (1976) (warrantless entry held valid even though it took place 105 minutes after commission of crime, since police were in pursuit during entire period).

all of which is recorded and later transcribed.[112] Such procedures should be mandated wherever feasible.[113]

2. The Invalidity of Other Types of Exceptions

While a narrowly defined exigency exception to the warrant requirement properly balances state and individual interests, the other types of exceptions recognized by the United States Supreme Court cannot be justified. Expectation of privacy analysis is irrelevant to determining when a warrant is required. Special needs analysis, at least as described by the Court, is contradictory and gives far too much weight to the state's interest in combatting crime. The absence of discretion rationale is usually plausible only in the abstract, and in any event does not justify eliminating *ex ante* review entirely.

Without agreeing with the Court's particular findings on the matter, we can assume that some invasions by the police are less violative of privacy than others and that many are "minimal." Moreover, as developed in Part III, expectation of privacy analysis is useful in determining the level of certainty necessary to pursue a particular investigation. But so long as some insult to individual interests occurs, the invasiveness of a police action should have no bearing on whether *ex ante* review is required to authorize it.

The benefit of this position is apparent: even "minimal" intrusions such as searches of open fields, jail cells, garbage cans, and heavily regulated businesses should be prevented if they are unnecessary. At the same time, the cost of requiring *ex ante* review for minimal invasions is no greater than the cost of requiring it for those which are significant. So long as the exigency exception is available, in neither case will the state lose evidence or a suspect due to the need to obtain prior authorization. The only cost is that occasioned by forcing such authorization in a larger number of cases (and this cost need not be significant[114]).

112. *See* FED. R. CRIM. P. 41(c)(2); W. LAFAVE, 2 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.3(c) (2d ed. 1987).

113. Ideally, prompt procedures for evaluating the allegedly exigent search or seizure should be available. In the United States, the individual arrested without a warrant is entitled to a judicial review of the arrest within two days, Riverside County v. McLaughlin, 111 S. Ct. 1661 (1991), but often must wait several weeks or months before the legitimacy of a search is adjudicated and illegally seized property returned. The different treatment of searches is due, at least in part, to the prevalent method of redressing them—the exclusionary rule—which is triggered by pretrial motion that is normally not made until well after arrest.

114. *See supra* note 29.

To the extent the special needs exceptions to the warrant requirement are based on a finding of a reduced expectation of privacy,[115] the same criticism is applicable. It will be remembered, however, that in this category of cases the Court has sought to minimize the individual interests involved in a different way, by focusing on the "administrative" rather than "criminal" focus of the investigation. This attempt at trivializing the victim's interests also falls short. There is no doubt that in most, if not all, of the special needs situations the primary motivation behind a search and seizure is something other than gathering evidence for criminal prosecution. For instance, "evidence" discovered during a school search is usually used for disciplinary purposes[116] and the results of drug testing normally form the basis for employment and treatment decisions.[117] Although somewhat stretched, analogous observations can be made about investigations by probation officers.[118] But to rely on these realities to justify dispensing with judicial authorization is ironic at best. In effect, such a conclusion means that the state must provide more protection against police abuse for those suspected of crime than for those who are not. More importantly, while the motivation of government agents may be relevant to the level of intrusion their actions occasion,[119] the fact that the reason for an investigation is "administrative" rather than "criminal" does not, by itself, lessen the insult to individual interests: a search of a school child's purse to obtain evidence of wrongdoing is very invasive, whether the "wrongdoing" being investigated is defined criminally or by school regulation.

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115. *See supra* note 91.

116. *But see* New Jersey v. T.L.O., 469 U.S. 325, 385 n.30 (1985) (Stevens, J., concurring in part and dissenting in part) (citing a number of cases in which evidence discovered by school officials was used in a criminal prosecution against the student).

117. In the two cases in front of the Court, the test results were to be used primarily, if not solely, in employee disciplinary proceedings. National Treasury Employees Union v. Van Raab, 489 U.S. 656, 663 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 682, 620–21 (1989). Most testing programs incorporate a treatment feature, often making it a prerequisite to retaining one's job after a positive test. *See infra* note 345.

118. In Griffin v. Wisconsin, 483 U.S. 868 (1987), the Court made much of the fact that a probation officer's duty is not merely to discover probation violations (which themselves are often not separate criminal violations) but also to help the probationer, through monitoring the client's progress and seeking rehabilitative and other services for the client. *Id.* "In such a setting," it concluded, "we think it reasonable to dispense with the warrant requirement." *Id.* at 877.

119. *See, e.g.*, Small, Privacy as a Psycholegal Construct 64 (on file with the author) ("ratings of the offensiveness of intrusive activities are significantly shaped by the stated motive of the intruder"); *see also infra* text accompanying notes 318–322.

Before writing off the special needs exceptions, however, one must also consider the state's interests. In contrast to the Court's treatment of the lesser privacy exceptions—where no effort is made to point to any cost a warrant requirement might impose on the state—the Court's analysis of special needs situations emphasizes the extra burden such a requirement imposes on government when its agents are not professional police but "lay" investigators (*e.g.*, teachers, employers, or probation officers). In particular, the Court appears to believe the warrant requirement will: (1) divert lay investigators from their everyday, primary chores, and (2) enmesh them in a procedure that is foreign to them.[120]

These assumptions can be challenged, especially in the probation context.[121] But even granting their validity (at least in the school and employment settings), *elimination* of *ex ante* review is not justified; at most some adjustment of the review process is called for. Rather than require a court officer to assess the propriety of the

120. *See supra* notes 93–97 and accompanying text.

121. Although the Court emphasizes the rehabilitative role played by the probation officer, *see supra* note 118, in reality the principal job of the probation officer is to "control the probationer—to make him conform his behavior to the requirements of the law and the probation conditions during the time he is under supervision." R. DAWSON, SENTENCING 122–23 (1969). As Professor Dawson notes, "[i]n official documents, the treatment or rehabilitation objective of probation supervision receives primary attention. In practice, however, the control objective receives the major expenditure of manpower." *Id.* at 123; *see also id.* at 125 ("In both Detroit and Milwaukee [two jurisdictions studied by Dawson], the control objective dominates the supervision process."). Dawson continues:

> Some probation officers feel very strongly that control is best accomplished through active surveillance of probationers. These officers emphasize the necessity of going into the field to find out 'what actually is going on.' *Like the police*, they seek to enhance their control function by making their 'presence' felt, by making their clients feel that they are being watched carefully.

Id. at 125–26 (emphasis added).

As this brief description of their job shows, probation officers are much more like police, in terms of job description and attitude, than the other "lay" investigators involved in the Court's special needs cases. Their job involves both danger and social isolation, the two factors that make police bad candidates for performing an *ex ante* review function. *See supra* notes 40–44 and accompanying text. At the same time, because their job is so closely tied to investigation, they are unlikely to be distracted from their principal duties by a warrant requirement. Nor is that requirement likely to confront them with alien concepts, since they are very familiar with courts and the criminal process, if only because of their preparation of presentence reports and involvement in probation revocation proceedings. *See generally* 3 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 25.1(a) (1984) (probation officer's role in preparation of presentence report); *id.* § 25.4(b) (probation officer's role in initiating revocation proceeding). In short, the Court's attempt to lump probation officers together with teachers and employers, rather than the police, is based on faulty perceptions about their function.

action, an adequately trained lay decisionmaker, located on or near the school or workplace, could perform the role.[122] The proximity of this person would lessen whatever time burden is associated with seeking authorization from a court officer. And the procedural burden could be lightened by eliminating some of the more formal accoutrements of the usual warrant application process: written applications, affidavits, and the like. Because lay investigators such as teachers and employers are less likely to fall prey to the hypersuspiciousness and tunnel vision that police exhibit,[123] the counterweight provided by independent review of their proposed actions need not be as structured as the review the police must face. The important objective is to provide *ex ante* protection by an independent third party; the police/magistrate model need not be imposed in every context.

The final justification for eliminating the warrant requirement—the absence of discretion rationale—is suspect for two reasons. First, in most of the cases in which the Court has relied on it, police discretion is not in fact significantly minimized by administrative or legislative standardization of procedures. For instance, the usual inventory policy does not, contrary to Justice Powell's assumption, require an inventory of every car that is impounded.[124] Even if it did, the scope of such a search can vary tremendously, depending upon the police officer's predilections.[125] Second, assuming administrative or legislative provisions do manage to eliminate

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122. The model for such a decisionmaker could come from a number of different arenas. *See, e.g.*, the description of different systems for monitoring nonemergency administration of medication, *supra* note 31.

123. *See supra* text accompanying notes 40–44.

124. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367, 379–80 (1987) (Marshall, J., dissenting), where the inventory policy at issue provided the officer who has arrested the driver of a car three options for disposing of the vehicle: (1) allow a third party to take custody; (2) take the car to the nearest public parking facility, lock it, and take the keys; or (3) impound the car and search it.

125. This fact is illustrated by the Court's cases. In Michigan v. Thomas, 458 U.S. 259 (1982), the police found a bag of marijuana in an unlocked glove compartment during their "inventory" search. They then conducted an extremely thorough examination under the front seat, inside the locked trunk, and under the dashboard. In Florida v. Meyers, 466 U.S. 380 (1984), the police conducted a thorough "inventory" search eight hours after the impoundment, a lapse of time suggesting their objective was more than protecting themselves or the owner's valuables.

Although the Court's decision in *Opperman* warned against inventory searches that are merely "a pretext concealing an investigatory police motive," South Dakota v. Opperman, 428 U.S. 364, 376 (1976), such pretextual searches are exceedingly hard to prevent unless the police are forced to justify their actions to a third party. *See generally* Bursoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. L. REV. 363 (1989).

all discretion, they must still be subject to some type of review. Again using inventory searches as an example, the mere fact that a police department adopts a detailed inventory policy does not mean that policy is reasonable; indeed, unless monitored by the judiciary, the removal of all discretion may well result in serious insult to individual interests on a routine basis.[126] In short, the absence of discretion rationale, while theoretically plausible, should not permit the state to avoid an *ex ante* determination.

E. *Summary*

In a world without the Fourth Amendment, *ex post* sanctions for police misconduct would be supplemented with a requirement of *ex ante* review before all nonexigent searches and seizures. Exigent circumstances would exist only when government investigators are confronted with imminent violence to others, disappearance of evidence, or escape of a suspect. Otherwise, the search and seizure should be approved beforehand.

The *ex ante* reviewer must be able to apply the substantive standards competently and objectively. The former requirement is controlled by and places limits on the complexity of the substantive standards and the latter requirement eliminates anyone directly involved in law enforcement. Otherwise, the identity of the decisionmaker and the nature of the review process would vary, depending upon the extent to which abuse is likely to occur. Police actions would generally be preceded by judicial review. Searches and seizures sought to be conducted by lay investigators, on the other hand, could be reviewed relatively informally by other laypersons.

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126. Consider in this regard Florida v. Wells, 110 S. Ct. 1632 (1990), where the Court stated in dictum that police regulations permitting inventory searches would be adequate if they mandated either: (1) that all containers found in an impounded car be opened; (2) that no containers be opened; or (3) that the decision whether to open a container be left up to the police officer based on "the nature of the search and characteristics of the container itself." *Id.* at 1635. Obviously, variant (3) does *not* remove discretion from the police and thus would not pass muster under the absence of discretion rationale. While (1) and (2) apparently do remove discretion, they would also permit suspicionless searches, which would be unreasonable under the proportionality principle advanced in this Article, *see infra* text accompanying notes 214–242. Under that approach, routine inventory searches of cars would not be permitted. Justification for such searches would not exist unless the police could show, with the level of certainty necessary to intrude into a car, that there exists one of the supposed dangers of not conducting an inventory search (*i.e.*, vandalism, false claims of theft, or harm to the police; *see supra* note 101).

In any event, regardless of the substantive standard in effect, a court would have to analyze the reasonableness of any particular policy before it went into effect.

The positions taken here would significantly change practice in the United States. But the only "real" cost of a warrant requirement as defined above is the expense of maintaining a system of neutral decisionmakers and making the police use it.[127] In most contexts, this system of decisionmakers already exists. The burden of training these people, and then training the police and other government investigative officials to rely on them, is significantly outweighed by the increased protection of individual security that would result.

III. SUBSTANCE: THE NECESSITY OF CERTAINTY THRESHOLDS AND HOW TO ESTABLISH THEM

A. *The Centrality of the Certainty Inquiry*

The procedures just discussed cannot be fully evaluated without knowing the criteria that must be considered—by government agents in emergency situations and by the neutral decisionmaker in all others—in assessing the propriety of a given search and seizure. The primary assumption in this Part of the Article is that the single most important factor in this assessment is what could be called the "certainty requirement." This criterion refers to the level of confidence we must have that a search or seizure will be successful before we allow it to occur (the Fourth Amendment, for example, speaks of probable cause). Almost by definition, an investigative action can never be based on complete certainty. At the same time, routinely allowing police to act on little or no suspicion would lead to an unacceptable number of unnecessarily invasive, harassing, and stigmatizing searches and seizures. Thus the central substantive question in regulating these investigative techniques is how much certainty the police must have before they act. As with the previous discussion on the scope of *ex ante* review, the Supreme Court's approach to this issue will be examined first, followed by a proposal.

127. One likely cost of adopting the exigency principle will be police disgruntlement at what they perceive to be another bone-headed bureaucratic obstacle. American police complain that even the relatively loose warrant requirement currently imposed in the United States causes the loss of "good cases." NCSC STUDY, *supra* note 25, at 96. But, in fact, this complaint appears to be unfounded. *Id.* Once the police understand that a warrant need only be sought when there is no significant danger of losing a "good case," their morale should not be significantly damaged by an *ex ante* authorization requirement.

B. *The Supreme Court's Approach to Determining the Certainty Threshold*

Although claiming that probable cause is the norm, the Supreme Court has explicitly sanctioned one other, lower level of certainty—reasonable suspicion—and has implicitly recognized still another, even lower certainty threshold, which could be called the relevance standard. It has also permitted government investigations in the absence of any suspicion. This section first describes these various certainty levels and the situations in which they are applicable, and then summarizes how the Court justifies its decisions in this area.

1. Levels of Certainty

The only substantive certainty standard provided by the language of the Fourth Amendment is "probable cause." The definition given this phrase by the Supreme Court is amorphous, probably necessarily so. In the arrest context, it exists when the facts and circumstances in a given situation are sufficient to warrant a prudent person in believing that the person to be seized has committed or is committing a crime.[128] In the search context, probable cause refers to a belief by the same prudent person that the evidence or persons to be seized are located at the place to be searched.[129] Despite use of the word "probable," the case law suggests that if the concept were quantified it would not require a fifty-one percent or more-likely-than-not level of certainty but rather something somewhat lower.[130]

Probable cause was the sole standard recognized by the United States Supreme Court for justifying police investigative efforts until 1968. In that year, the Court decided *Terry v. Ohio*,[131] in which it indicated that some types of police action short of arrest or the most intrusive searches may be authorized by what it called "reasonable suspicion." This level of certainty it defined as suspicion of criminal

128. Beck v. Ohio, 379 U.S. 89, 91 (1964).

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

130. For instance, the American Law Institute's formulation uses the phrase "reasonable cause" to avoid the implication that a standard of "more probable than not" is required. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 220.1(5) (1975); *see also* W. LAFAVE & J. ISRAEL, *supra* note 121, § 3.3(b). Also noteworthy in this regard is that, when asked to quantify the degree of certainty represented by the phrase "probable cause," 166 federal judges gave, as an average response, 45.78%. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1325 (1982).

131. Terry v. Ohio, 392 U.S. 1 (1968).

activity based on specific and articulable facts, rather than on a hunch.[132] Although the phrase sounds similar to "probable cause," it is meant to connote a lower certainty threshold; if quantified, it might require only a twenty to thirty percent level of certainty.[133]

The Court has also allowed some types of police action on less than reasonable suspicion. The clearest examples of this phenomenon are the cases, already alluded to,[134] in which the Court has found that *no* suspicion is required because the police action is neither a "search" or "seizure" as those words are used in the Fourth Amendment, and thus does not implicate the Constitution. The decisions regarding undercover activity[135] and searches of "open fields"[136] fall into this category, as do a number of decisions finding that various types of brief encounters with the police are not "seizures."[137]

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132. *Id.* at 27 ("[I]n determining whether the officer acted reasonably in such circumstances, 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."). Although the *Terry* holding focused on the validity of a "frisk" short of a full search, *id.* at 19 n.16 ("we . . . decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause"), the tone of the opinion strongly intimated that the predicate "stop" could also be based on a level of suspicion lower than probable cause, *see, e.g.*, *id.* at 22 ("[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."). Later cases confirmed this view. *See, e.g.*, Adams v. Williams, 407 U.S. 143, 145–46 (1972).

133. A survey asking 164 federal judges to assign a percentage to "reasonable suspicion" found that, on average, they equated that phrase with a 31.34% level of certainty. McCauliff, *supra* note 130, at 1327–28.

The percentages associated with probable cause and reasonable suspicion in this article are admittedly somewhat arbitrary. They are chosen primarily to contrast reasonable suspicion with probable cause. The reason for doing so should become apparent in later discussion. *See, e.g.*, *infra* text accompanying notes 292–306.

134. *See supra* notes 65–80 and accompanying text.

135. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 745 (1979) ("[P]etitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and . . . even if he did, his expectation was not 'legitimate.' "); Hoffa v. United States, 385 U.S. 293, 302 (1966) ("Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."). See *supra* notes 78–79 for other cases sanctioning suspicionless undercover activity.

136. Oliver v. United States, 466 U.S. 170, 183 (1984) ("[W]e find no basis for concluding that a police inspection of open fields accomplishes . . . an infringement [of the personal and societal values protected by the Fourth Amendment]."). Analogously, the Court has found that flyovers of private "curtilage" do not implicate the Fourth Amendment. *See* cases cited *supra* notes 71–72.

137. *See, e.g.*, California v. Hodari D., 111 S. Ct. 1547 (1991) (chasing a person not a seizure); Michigan v. Chesternut, 486 U.S. 567 (1988) (accelerating and following a person who began running upon seeing police car not a seizure); INS v. Delgado, 466

In a second group of cases, the Court has permitted suspicionless investigations *despite* a finding that the Fourth Amendment applies. For instance, the Court has permitted the police to stop, without showing any justification, all drivers passing through roadblocks that are set up to detect illegal immigration or drunken drivers, despite holding that such stops are "seizures" and therefore governed by the Fourth Amendment.[138] Similarly, although finding that drug and alcohol tests are "searches" for purposes of the Fourth Amendment, the Court has sanctioned programs permitting administration of such tests to *all* persons who apply for or are promoted into certain types of jobs at the United States Customs Service, and to *all* railway personnel involved in accidents or safety violations.[139] Inventories, although searches under the Fourth Amendment, may also be carried out in the absence of any suspicion that evidence of illegality or other damage to state interests will be discovered.[140]

U.S. 210 (1984) (brief questioning at workplace in the absence of obvious physical restraint not a seizure); Florida v. Rodriguez, 469 U.S. 1 (1984) (showing of badge in a public airport and request to move 15 feet to where companions were standing with other officers not a seizure).

138. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court stated at the outset that "[i]t is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment," *id.* at 556, and concluded by stating, "we hold that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment," *id.* at 566. In Michigan Department of State Police v. Sitz, 110 S. Ct. 2481 (1990), it cited *Martinez-Fuerte* in holding that "a Fourth Amendment seizure occurs when a vehicle is stopped at a checkpoint," *id.* at 2485, and concluded that stopping everyone passing through such a checkpoint to detect drunk driving "is consistent with the Fourth Amendment," *id.* at 2488.

139. In Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 616–17 (1989), the Court held that requiring government employees to produce blood, urine, or breath samples for chemical testing was a search, and in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989), it reiterated that view with respect to urine testing. Nonetheless, both decisions permitted suspicionless testing. In *Skinner*, the Court concluded "that the compelling Government interests served by the FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee." *Skinner*, 489 U.S. at 633. In *Von Raab*, it stated: "We hold that the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable." *Von Raab*, 489 U.S. at 679.

140. Inventory searches of cars are constitutional so long as they are conducted pursuant to a lawful impoundment, and are of a routine nature "essentially like that followed throughout the country," and not a mere "pretext concealing an investigatory police motive." South Dakota v. Opperman, 428 U.S. 364, 376 (1976); *see also* Illinois v. Lafayette, 462 U.S. 640, 646 (1983) ("At the station house, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed."); United States v. Villamonte-Marquez, 462

The next group of cases are those that appear to require some degree of suspicion, but at a level well below the reasonable suspicion standard. For instance, although many of the Court's decisions concerning "heavily regulated" industries do not require any suspicion,[141] some seem to mandate that the government obtain a subpoena before a nonconsensual inspection.[142] Similarly, the Court's holding allowing governmental access to bank records may be limited to cases where a subpoena is obtained.[143] Although issuance of a subpoena must be based on some showing of a connection between the sought after evidence and state interests, at most it requires proof that the evidence sought is relevant to an ongoing investigation.[144] Whatever reasonable suspicion may be, it contemplates more than a showing of relevance, a standard which merely requires that the evidence have "*any* tendency to make the existence of any fact that is of consequence to the determination of

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U.S. 579 (1983) (authorizing random, suspicionless boarding of boats on waterways with access to the sea).

141. In United States v. Biswell, 406 U.S. 311, 311 (1972), the Court upheld 18 U.S.C. § 923(g) (1968), which "authorizes official entry during business hours into 'the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining . . . records . . . and . . . firearms or ammunition." No subpoena was required. *See also* New York v. Burger, 482 U.S. 691 (1987) (upholding New York statute which permits inspections of junkyard records and inventories during business hours); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (dicta approving a federal statute providing criminal sanctions for liquor dealers who refuse warrantless entry to government inspectors).

142. Donovan v. Dewey, 452 U.S. 594, 604–05 (1981) (upholding the Federal Mine Safety and Health Act of 1977 in part because forcible entry was not permitted unless government seeks a court injunction); *cf.* Donovan v. Lone Steer, Inc., 464 U.S. 408, 414 (1984) (upholding use of a subpoena because a subpoena does not contemplate nonconsensual entry and can be tested in court).

143. United States v. Miller, 425 U.S. 435, 446 (1976) ("[W]e hold that respondent lacks the requisite Fourth Amendment interest to challenge the validity of the subpoenas [seeking respondent's bank records].").

144. Rule 17(c) of the Federal Rules of Criminal Procedure permits issuance of a subpoena at the request of a party, subject to quashing or modification "if compliance would be unreasonable or oppressive." One interpretation of this language is that "(1) the subpoena may command only the production of things relevant to the investigation being pursued; (2) specification of things to be produced must be made with reasonable particularity; and (3) production of records covering only a reasonable period of time may be required." United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971). *See generally* 8 J. MOORE & R. CIPES, MOORE'S FEDERAL PRACTICE ¶ 17.07 (2d ed. 1991).

In United States v. R. Enterprises, Inc., 111 S. Ct. 722 (1991), the Supreme Court held that, at least when issued by a grand jury, a Rule 17(c) subpoena need not meet even the requirements of relevancy, as that term is defined for trial purposes.

the action more probable or less probable than it would be without the evidence."[145]

Finally, in many of its "special needs" cases, the Court has been coy about the precise level of suspicion required, but intimated that something below reasonable suspicion might be permissible. In the probation, work, and school contexts, the Court not only eliminated the warrant and probable cause requirements, but also stated that the level of certainty need meet only the "reasonableness" standard.[146] While a citation to *Terry v. Ohio* usually accompanies this statement, the *Terry* language quoted is not that developing the reasonable suspicion standard, but rather the passage defining "reasonableness" as an analysis of "whether the . . . action was justified at its inception" and "was reasonably related in scope to the circumstances which justified the interference in the first place."[147] In its application of this language, the Court appears to be willing to authorize investigative action on less than reasonable suspicion, at least in some cases.[148]

2. Rationales for Exceptions to the Probable Cause Standard

In its decisions justifying searches and seizures based on less than probable cause, the Court has relied on one or more of the

145. FED. R. EVID. 401 (emphasis added). The commentary to the rule makes clear that this standard merely requires some logical relationship between the evidence and any issue in the case.

146. Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (search of probationer's residence "reasonable" because conducted pursuant to a valid regulation which permitted searches based on "reasonable grounds"); O'Connor v. Ortega, 480 U.S. 709, 725–26 (1987) ("We hold . . . that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."); New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) ("[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.").

147. 392 U.S. at 20, *cited in T.L.O.*, 469 U.S. at 341, and in *Ortega*, 480 U.S. at 726.

148. For instance, in justifying the search of a student's purse in *T.L.O.* the Court seemed to approve of a mere relevance standard. After quoting the federal evidence rule defining relevance, the Court stated: "The relevance of T.L.O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary 'nexus' between the item searched for and the infraction under investigation." 469 U.S. at 345. In *Griffin*, the Court upheld a search by a probation officer who thought the probationer "may have had" contraband in his possession. 483 U.S. at 875. In dissent, Justice Blackmun argued that this level of certainty did not amount to reasonable suspicion. *Id.* at 890 (Blackmun, J., dissenting) (information available to probation officer "did not supply support for any suspicion, reasonable or otherwise, that would justify a search of petitioner's home"). The majority's analysis on this point was almost nonexistent. *Id.* at 879–80 n.7 (discussing the identity of the informant).

following factors: (1) the minimal degree of infringement on privacy or autonomy occasioned by the police action;[149] (2) the magnitude of the harm the state seeks to address through the search or seizure; (3) the difficulty of dealing with the problem if probable cause is required; and (4) the adverse effect of a probable cause standard on officials who are not police, given that standard's complexity and the difficulty of meeting it.[150] The Court's use of these factors is haphazard, in the sense that there is no apparent relationship between a particular combination of rationales and a given level of suspicion.

Consider, for example, the cases endorsing the "reasonableness" rule, the last level of certainty described above (which may equate with a relevance test). In adopting this standard in *T.L.O.*, the Court relied entirely on the second and fourth factors: while finding school children's privacy interest in their personal effects undiminished,[151] the Court permitted searches of those effects on less than probable cause in recognition of both "the substantial need of teachers and administrators for freedom to maintain order in the schools"[152] and the goal of sparing them "the necessity of schooling themselves in the niceties of probable cause."[153] In contrast, in es-

149. In evaluating this factor, the Court rarely looks at the potential for harassment or stigmatization arising from a search or seizure, despite their importance in individual terms. *See supra* notes 13–15 and accompanying text. Instead it usually looks solely at privacy and autonomy interests. This narrow focus is presumably due, at least in part, to the Court's insistence on defining Fourth Amendment protection in terms of preventing unreasonable incursions into "reasonable expectations of privacy" (for searches) and "restraints on liberty" (for seizures). *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (Fourth Amendment protects "reasonable expectations of privacy"); Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."). Intrusiveness should be more broadly defined.

150. This last factor is obviously analogous to the justification for dispensing with a warrant in special needs cases. See *supra* text accompanying notes 83–97.

151. 469 U.S. at 337–40. While apparently equating a child's purse with an adult's for Fourth Amendment purposes, the Court avoided addressing whether a schoolchild "has a legitimate expectation of privacy in lockers, desks or other school property provided for the storage of school supplies." *Id.* at 337–38, 337 n.5.

152. *Id.* at 341.

153. *Id.* at 343. Justice Blackmun's concurring opinion in *T.L.O.* (in which the special needs rubric first saw the light of day) also stressed these two factors. He spoke both of the government's "heightened obligation to safeguard students whom it compels to attend school," and the inefficiency of doing so if probable cause is required: "The time required for a teacher to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education." *Id.* at 353 (Blackmun, J., concurring in the judgment).

tablishing reasonableness as the standard for probation violation investigations, the Court seemed to place weight primarily on the third and fourth factors (with perhaps a bow to the second factor): it found that a probable cause requirement would reduce the "deterrent effect" of probation and unduly complicate the probation officer's job.[154] Finally, the basis for the Court's decision establishing reasonableness as the governing norm for investigation of workplace infractions was somewhat different than either of the previous two cases. While focusing on the same variables as *T.L.O.* in evaluating the state side of the balance (often using similar language),[155] it also noted, in contrast to that case, the diminished expectations of privacy in the work environment.[156]

The factors relied upon in cases which allow the police to act in the absence of suspicion also vary somewhat. As pointed out in Part II,[157] the decisions that simply find the Fourth Amendment not implicated by the police action normally rely purely on the first factor (the lack of privacy or autonomy expectations). Those cases permitting suspicionless government actions that *are* considered "searches" look at other factors as well. One of the first of these latter cases was *United States v. Biswell*,[158] where the Court upheld an inspection of a pawn shop under the Gun Control Act. The Court first noted that close scrutiny of interstate traffic in firearms "is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traf-

154. Griffin v. Wisconsin, 483 U.S. 868, 878–79 ("[T]he probation regime would . . . be unduly disrupted by a requirement of probable cause" because it (1) "would reduce the deterrent effect of the supervisory arrangement" by assuring the probationer "that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected"; and (2) would prevent the probation agency from "proceed[ing] on the basis of its entire experience with the probationer, and . . . assess[ing] probabilities in the light of its knowledge of his life, character, and circumstances.").

155. O'Connor v. Ortega, 480 U.S. 709, 724–25 (1987) ("The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest [citing the language from Blackmun's opinion in *T.L.O.* that is quoted *supra* note 153]. Additionally, . . . [i]t is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard.").

156. 480 U.S. at 725 ("[T]he privacy interests of government employees in their place of work . . ., while not insubstantial, are far less than those found at home or in some other contexts. . . . Government offices are provided to employees for the sole purpose of facilitating the work of an agency. The employee may avoid exposing personal belongings at work by simply leaving them at home.").

157. *See supra* text before note 65.

158. 406 U.S. 311 (1972).

fic within their borders."[159] Next, it pointed out that "to be effective and serve as a credible deterrent," inspections must be "unannounced" and "frequent"; thus, the "prerequisite of a warrant [based on probable cause] could easily frustrate [such] inspection[s]."[160] Balanced against these government interests, the Court found little on the individual side of the calculus: "[W]hen a dealer chooses to engage in this pervasively regulated business 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."[161]

Like *Biswell*, the Court's decisions allowing suspicionless drug and alcohol testing of railway and customs employees relied on the first three factors. In its decision involving railway employees, for instance, the Court weighed its assumption that such employees should expect measurements of their job fitness[162] against the significant harm to the public that can be caused by their substance abuse which, it asserted, can be adequately detected only through such testing.[163] On the other hand, the Court needed only the first two factors to justify suspicionless sobriety checkpoints. The Court simply contrasted the "slight" intrusion a brief roadblock detention occasions[164] with the "magnitude of the drunken driving problem."[165]

C. *Analysis of the Rationales*

Reframing somewhat more precisely the principal conclusions of the previous section, the United States Supreme Court has looked

159. *Id.* at 315.

160. *Id.* at 316. While the Court refers only to the warrant requirement as a "frustrating factor," it was using this requirement as a proxy for probable cause. *See supra* note 77.

161. *Id.*

162. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 628 (1989) ("[T]he expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.").

163. *Id.* at 628–29 ("[T]he Government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. . . . While no procedure can identify all impaired employees with ease and perfect accuracy, the FRA regulations supply an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place.").

164. Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481, 2486 (1990).

165. *Id.* at 2485–86. The Court also diseussed the "effectiveness" of the sobriety checkpoint as a means of achieving the government's goal, *id.* at 2487–88, but in an offhand way that suggested this issue was not particularly important. *See infra* note 178.

at four factors in justifying searches and seizures on less than probable cause: (1) the intrusiveness of the search or seizure (the "intrusiveness" factor); (2) the magnitude of the harm caused by activity that is being investigated (the "harm severity" factor);[166] (3) the difficulty of detecting, and therefore deterring, the activity in the absence of the investigative method in question (the "difficulty of detection" factor); and (4) the extent to which a probable cause requirement distracts government officials from carrying out their noninvestigative functions (the "official distraction" factor). Although other justifications for reducing the certainty level could be formulated, probably all of them derive from one of these four.[167]

This section demonstrates that, of these four factors, the level of intrusion associated with the police action is the most important gauge of how much certainty the police must have before they conduct a search or seizure. Further, this section argues that the second and third factors, to the extent they should be considered at all, should usually be relevant only to the extent they help analyze the level of intrusiveness associated with a search or seizure, or the level of certainty the police possess. Finally, this section contends that the fourth factor is specious.

1. Intrusiveness: The Core Factor

Let us begin with an observation involving the use of torture—an investigative technique usually identified with interrogation, although it could also be called a "search." In many civilized socie-

166. The seriousness of the crime problem facing the government can be viewed at both a systemic and individual case level. The cases described above usually refer to "generic seriousness"—*e.g.*, the "substance abuse problem" (as in *T.L.O.*, *Von Raab*, or *Sitz*) or the "illegal immigration problem" (as in *Martinez-Fuerte*). Several commentators have also been willing to consider the severity of a particular criminal act as a factor in determining the level of certainty necessary. See *infra* note 172. For purposes of Part III, these two senses of crime seriousness are collapsed.

167. For example, Professor Bradley proposes a number of variables which might be considered in gauging the reasonableness of a search or seizure. *See* Bradley, *supra* note 7. In addition to those listed in the text, he mentions the "dangerousness of the defendant," *id.* at 1481, "the nature of the property to be seized (*e.g.*, a diary versus the contents of a garbage can), the nature of the entry (day or night; forcible or peaceful), [and] the scope of the search," *id.* at 1491. Although, at first glance, all of these factors may seem different from those in the text, they are not. As discussed below, *see infra* text accompanying notes 171–178, dangerousness is subsumed by the harm severity rubric. The other factors listed by Bradley are all related to the intrusiveness question. Clearly, the nature of the property searched and the scope of the search are prime determinants in the degree of privacy invasion occasioned by a police action. The nature of entry is also relevant to intrusiveness. Nighttime entries are more invasive and more stigmatizing than those that take place in the day, and forcible entries are clearly more intrusive than consensual ones (which, if truly consensual, are not intrusive at all).

ties, police use of torture is banned, regardless of the crime being investigated or the difficulty of it otherwise being detected.[168] In other words, no state interest can trump the individual interest in avoiding the extremely invasive procedures associated with this investigative technique. From this fact, one might conclude that intrusiveness is the key variable in regulating the police.

Such a conclusion is warranted, but should not be so easily reached. Despite the aversion to torture, situations can be imagined in which its use might be contemplated in civilized countries. For instance, suppose government agents believe that terrorists have planted a nuclear bomb in New York City, and that it will go off in twenty-four hours if it is not located and defused. One of the suspected terrorists is captured and admits to planting the bomb, but he refuses to reveal its location. Given the magnitude of the harm that would otherwise occur, and the impossibility of finding out where the bomb is in any other way, we might be sorely tempted to authorize torture in this situation, despite its barbaric nature.

Even here, however, the severity of harm and difficulty of detection rationales do not outweigh the intrusiveness factor. For even on these facts, we would not permit the torture unless the state can show some degree of certainty that the person tortured possesses the desired information. For instance, if instead of being a

168. According to Amnesty International, as of mid-1983, 34 countries had unilaterally adopted a United Nations declaration outlawing torture. AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES 262 (1984). *The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452, U.N. GAOR Supp. (No. 34) at 91, U.N. DOC. A/10034 (1975) defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons." Pain and suffering "arising only from, inherent in or incidental to, lawful sanctions, to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners" are not considered torture. *Id.* The declaration bans torture, so defined, under all circumstances, including "state of war or a threat of war, internal political stability, or any other public emergency." *Id.*

The United States has not signed the declaration, for reasons having mostly to do with an aversion to ratifying international treaties proposed by international groups. *See generally* Nagan, *The Politics of Ratification: The Potential for United States Adoption and Enforcement of the Convention Against Torture, the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights*, 20 GA. J. INT'L & COMP. L. 311 (1990). Nonetheless, the President (with the advice and consent of the Senate) is expected to sign both the "Torture Convention" (a modification of the above declaration) and congressionally passed statutes implementing the Convention by 1992. Conversation with Winston Nagan, Chair of Amnesty International, United States chapter, Jan. 28, 1991.

terrorist who admits to knowing the location of the bomb, the person the police propose to inquisition is someone they randomly picked up off the street, we presumably would not allow the investigation to proceed. People might differ on the level of suspicion required before the torture could take place. But I would guess that virtually everyone would require the government to demonstrate *some* level of suspicion (perhaps akin to what the Court calls "probable cause"). This requirement would exist because the technique is so intrusive.

Now let's look at a scenario that is closer to a traditional "search." Assume scientists develop a device that can "look" and "hear" through walls, as well as read people's minds. As with the use of torture, the intrusion occasioned by this investigative tool is so significant that, in civilized societies, it might be banned outright. But if we did decide to allow its use because, for instance, there is no other way of detecting a very serious crime, we would do so, I submit, only if the police possessed a high level of suspicion that it would produce results.[169] Again, the intrusiveness of the search would dictate that some level of suspicion be shown, regardless of the countervailing state interests.

As these thought experiments suggest, the primary substantive variable in determining the certainty threshold for searches and seizures should be their level of intrusiveness. The more intrusive an investigative technique is, the more assured we want to be that it will result in the discovery of probative evidence before we allow the

169. An investigative technique that may be almost as intrusive as the hypothesized mind-reading device is video surveillance. In United States v. Torres, 751 F.2d 875 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985), the Seventh Circuit permitted the FBI to use this technique in investigating alleged terrorists who were thought to be manufacturing bombs in designated "safe houses." However, in doing so, the court was extremely cautious. First, it emphasized that the safe houses were "dedicated exclusively to illicit business" and thus were associated with a lessened privacy expectation. *Id.* at 883. Secondly, in addition to requiring the government to show probable cause that a crime was being committed in the safe houses, *id.* at 884, it required proof that no other, less intrusive means of pursuing the investigation was available, *id.* at 883; *see also id.* at 877 (noting that even electronic surveillance would be unsuccessful, since, according to the FBI, the terrorists would play the radio loudly and speak in code). The court also stated that "in declining to hold television surveillance unconstitutional per se we do not suggest that the Constitution must be interpreted to allow it to be used as generally as less intrusive techniques can be used." *Id.* at 882–83.

Unfortunately, the court, taking its lead from Title III's regulation of electronic surveillance, *see* 18 U.S.C.A. §§ 2510 (West 1970 & Supp. 1991), did not require the government to show *more* than "probable cause" (although, on the facts of the case, a very high level of suspicion seems to have existed, *Torres*, 751 F.2d at 877). *See also* United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987); United States v. Biasucci, 786 F.2d 504 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986).

police to undertake it. On the other hand, as the level of intrusion decreases—as we become less concerned about the device's potential for infringement of privacy and autonomy, harassment, or false stigmatization—we may not require as high a level of certainty. Put another way, because the cost to individual interests of a mistake by the police is greatest when the intrusion is greatest, and diminishes as the intrusion lessens, the tolerance for such mistakes should vary inversely with the level of intrusion. Note further that the cost to the *state* of a police mistake is also greatest when the intrusion is greatest, because the public is more likely to perceive unnecessary police intrusions as illegitimate when they are significant.

While the thought experiments may show that the level of intrusion is the single most important factor in determining the level of certainty, they do not show that factors such as harm severity, difficulty of detection, or official distraction are irrelevant. In considering the justifiability of an investigative technique we may be more willing to lower the certainty threshold as the severity of the harm, or the difficulty or inefficiency associated with detecting it, increase. The damage to the state of losing evidence or a suspect, always significant, is magnified when the crime or the "crime problem" is a serious one. Similarly, limiting use of a given investigative technique is most costly when detecting and deterring an illegal activity is otherwise difficult. Finally, as the Court points out, where lay investigators are involved, the harm to government interests other than crime solving increases with the level of certainty that must be demonstrated before a search or seizure may occur. Thus, one might conclude that, although the harm severity, difficulty of detection, and official distraction factors are secondary considerations, the certainty threshold should be relatively lower when they are present than when they are not. This is probably the Supreme Court's position, to the extent any consistent stance can be discerned.[170]

While plausible, this reasoning suffers from several flaws; at the same time, it fails to recognize that some of the concerns that underlie what the Court has labeled as "state" interests can be relevant

170. Occasionally, however, one gets the impression that the Court believes the harm severity and difficulty of detection factors should be the *primary* considerations. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674–75 (1989) ("Where, as here, the possible harm against which the Government secks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.").

in other ways. These conclusions are fleshed out below with respect to each of the three state interests identified by the Court.

2. The Harm Severity Factor

The harm severity concept is usefully divided into two types. The first looks at the harm already caused by the offense which is the subject of the investigation ("past harm"). The second concerns the harm that will or might occur if investigation of the offense is not successful ("future harm"). Past harm, no matter how severe, should never provide the basis for reducing the certainty threshold. Future harm, if it can be identified in concrete terms, might permit a reduction in the certainty level, but only in rare instances when additional considerations are present as well.

In its decisions which rely on the harm severity rationale as a justification for permitting searches and seizures on less than probable cause, the Supreme Court seems to focus on future harm.[171] Thus, analysis of its decisions is deferred for the moment. Others, however, have forthrightly proposed that the certainty threshold vary according to the gravity of the crime already committed.[172] They would, for example, permit police more leeway in murder investigations than in misdemeanor cases; the level of certainty necessary to carry out a search of a house or a frisk of a person would be lower in the first instance than in the second.

Even assuming that the severity of past harm can be measured in a meaningful way,[173] the seriousness of the crime to be solved, by

171. For instance, in *Martinez-Fuerte*, the Court focused on the effects of illegal immigration. 428 U.S. at 551 ("Many more aliens than can be accommodated under the quota want to live and work in the United States."). In *Sitz* the Court emphasized the deaths caused by drunk driving. 110 S. Ct. at 2487–88 ("Media reports of alcohol-related death and mutilation on the Nation's roads are legion."). In *Skinner* and *Von Raab*, it stressed the harm caused by railway employees and customs agents who abuse substances. *See, e.g.*, *Skinner*, 489 U.S. at 628 ("Employees subject to the [drug and alcohol] tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."). In each case, the harm most relevant to the Court was not the offense in question, but the consequences to society if the offense was not detected or deterred.

172. United States v. Soyka, 394 F.2d 443, 452 (2d Cir. 1968) (Friendly, J., dissenting), *cert. denied*, 393 U.S. 1095 (1969); *Bradley, supra* note 7, at 1486–87; *cf.* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974) (proposing limiting the exclusionary rule to nonserious cases).

173. This assumption is easily challenged. At what point does an offense become so serious that police no longer need probable cause to search a house? Should the dividing line be between felonies and misdemeanors, between offenses that are considered "harmful" and those that are not, or should it vary from case to case, depending more on the nature of the crimmal act rather than the technical offense committed? And how

itself, should be irrelevant to the degree of certainty police must have before they act. To see why this is so, compare the severity of harm factor to the other reasons the state might advance for reducing investigative restrictions. The difficulty of detection and official distraction rationales, although deficient for reasons to be developed below, at least provide a logical explanation for lowering the level of certainty: when the state can show the presence of these factors, it has demonstrated that the usual certainty requirement, derived from the intrusiveness associated with the proposed police action, will compromise its investigation (by making it very difficult or inefficient). The same cannot be said about the harm severity rationale. Indeed, investigations of more serious crimes, such as murder, are often less difficult than investigations of lesser crimes, such as burglary or drug offenses. In effect, easing the state's investigative burden in cases of serious crime would not be the result of a "balancing" process between state and individual interests, but rather would represent a unilateral surrender of privacy and autonomy protection merely because the state is particularly eager to garner evidence in these cases.

In analogous contexts, the nature of the crime committed does not lessen the state's obligations to its citizens. For example, the state's admittedly great interest in solving a murder does not permit a relaxation of the right to remain silent, the right to jury trial, the right to counsel, or—most analogous to the subject of the present discussion—the burden of proof; if anything, given the greater consequences that flow from a murder conviction, we are more protective of these rights in homicide cases.[174] This reality supports a common-sense intuition: that differences in individual protections against government intervention should usually flow from differences in the consequences of the intervention, not from the nature of the crime.

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does one apply whatever standard is appropriate in cases where it is not known what crime has been committed?

174. The rights to remain silent and force the state to prove its case beyond a reasonable doubt do not vary with the crime, and even apply in the "quasi-criminal" juvenile delinquency context. *In re* Winship, 397 U.S. 358 (1970) (reasonable doubt standard); *In re* Gault, 387 U.S. 1, 55 (1967) (right to remain silent). The rights to jury trial and counsel do vary with the crime, but *inversely*. Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel applies to all crimes, including misdemeanors, except where no jail term is actually imposed); Baldwin v. New York, 399 U.S. 66 (1970) (right to jury trial attaches for all crimes except those for which no more than six months imprisonment is authorized).

In the search and seizure context, the consequence of a government action is almost always independent of the illegality involved. The intrusion associated with a search of one's house is usually the same whether police are looking for a murder weapon or evidence of forgery, just as the intrusion associated with a frisk is normally identical whether the police are looking for a gun used during a robbery or for a marijuana cigarette.[175] Thus, the certainty level necessary to authorize a search or seizure should not vary with past harm when all else is equal.[176]

A more sensible variation of the harm severity rationale would focus on future "danger" to the public (whether posed by a murderer or a misdemeanant) rather than on the harm already caused. If the danger is significant, then the government's interests expand to include protection of the community as well as solving the crime. But this version of the harm severity factor should rarely be applicable, for at least two reasons.

First, it must be narrowly defined to encompass only those situations where the danger is palpable. Given the ease with which threats to society can be imagined, the future-danger version of the harm severity rationale would emasculate the certainty requirement if the government were not required to articulate reasons for believing a specific menace exists. The fact that a person who has committed a murder is on the loose does not meet this test; the danger, if it exists at all, is too amorphous and thus does not justify relaxing investigative strictures.[177] Similarly, in its cases invoking the harm

175. *But see infra* text accompanying notes 198–204.

176. In the only case in which it *squarely* confronted the issue, the Supreme Court appeared to agree that the crime magnitude factor, by itself, is not a convincing reason for allowing the police more discretion. In Mincey v. Arizona, 437 U.S. 385, 394 (1978), the Court overturned a decision of the Arizona Supreme Court adopting a "murder scene exception" to the warrant requirement, in part because it allowed searches of homes whenever the police thought their search was a "reasonable . . . search." *Id.* at 395. The court seemed intent upon preserving not only the warrant requirement but also the attendant probable cause rule in this context.

177. In contrast, if a serial killer is at large, there may be a real possibility of harm both in terms of further deaths and in terms of the debilitating effect this possibility can have on normal community relations. An example of such a scenario occurred in Gainesville, Florida: during one week of August, 1990, four young women and one young man were brutally murdered, apparently by the same person. For several weeks after these murders, the people of Gainesville, especially the women, were extremely anxious and curtailed many of their usual activities. *'Life As Usual' Makes Slow Return*, Gainesville Sun, Sept. 2, 1990, at 1A; *Killings Numb City's Sense of Well-Being*, Gainesville Sun, Aug. 29, 1990, at 8A. Sales of guns skyrocketed, while the business of many other concerns dwindled. *Businesses Affected by Scare*, Gainesville Sun, Aug. 30, 1990, at 1A; *Slayings Convince Many to Buy Guns*, Gainesville Sun, Aug. 29, 1990, at 1A.

severity rationale, the Supreme Court's typically vague descriptions of the future harms to be averted—whether it be from drunk driving, an inability to maintain school discipline, or substance abuse by employees in sensitive situations—provide inadequate support for its holdings. While these "categories" of harms may be more real than the harm threatened by a single murderer, their impact varies from place to place and time to time. Thus, to benefit from a reduced certainty threshold, the government should have to show that its proposed action is responsive to a specified danger at a particular time and place. But the Court has been content with a showing that the proposed action is rationally calculated to avert an abstract harm; no proof of harm in the case in question is required.[178] The result has been broad rules that permit reduction of the certainty threshold any time the government can say it has a "problem" of the type noted by the Court, however ambiguously defined that problem may be, and even if the problem is nonexistent among the specific population, or in the specific area, to be investigated. *T.L.O.*, for instance, applies the reasonableness/relevance standard to all public primary and secondary schools, even those which do *not* have discipline problems.

The second reason the future-harm version of the harm severity rationale should be of limited applicability is that, even if a specific, significant danger can be identified, it should lead to relaxation of the substantive standard only if the government can show that development of the usual, intrusion-based confidence level would compromise its efforts to prevent the perceived danger. Consider again the nuclear bomb hypothetical: the excuse for permitting torture in that scenario is only in part the threat posed; at least as important is the fact that no alternative exists for discovering the

178. *See* descriptions of various Court decisions, *supra* note 171 and *infra* note 330. In some cases, the Court has referred to statistical information which helps specify the problem the government wished to tackle. For instance, in both *Martinez-Fuerte*, 428 U.S. at 554, and *Sitz*, 110 S. Ct. at 2488, the Court referred to data demonstrating that the roadblocks found reasonable in those eases actually detected the dangerous activity the government asserted existed (illegal immigration and drunk driving, respectively). But even in these cases, the tone of the Court's opinion suggested that, in future cases, the government's burden in terms of proving how its actions will avert a given danger will be minimal. In *Martinez-Fuerte*, the Court only required a showing of effectiveness with respect to one of the two roadblocks considered, and relegated its discussion of that roadblock's effectiveness to a footnote. 428 U.S. at 562 n.15. In *Sitz*, the Court was apparently satisfied so long as there was not "a complete absence of empirical data" suggesting that the sobriety checkpoint in that case was effective at detecting drunk drivers. 110 S. Ct. at 2487. *See infra* text accompanying notes 281–306 for further discussion of these cases.

whereabouts of the bomb. If a less severe alternative were available, and it could be effectively implemented in time, we would not permit torture regardless of the magnitude of the threat to society. In short, harm severity, to the extent it is a relevant state interest at all, is intimately linked to the difficulty of detection factor.

3. The Difficulty of Detection Factor

What the Court is usually referring to when it talks about "serious" law enforcement problems is just such a combination of the harm severity factor and the difficulty of detection/deterrence factor.[179] The latter factor adds greater weight to the state side of the balance because, as explained above, it provides a relevant reason for differing certainty thresholds even for intrusions which have the same impact on the individual. Thus, for example, while the level of certainty necessary for search of a house should not vary according to the nature of the crime, it might be lowered if there were no other way to meet the government's legitimate objectives.

Unless reliance on the difficulty of detection rationale is strictly limited, however, it too, like the harm severity factor, would soon render meaningless any attempt at establishing certainty thresholds. In effect, this rationale permits the government to evade any certainty requirement which it cannot meet. As a practical matter, it thus would place very few restrictions on law enforcement officials who, aided by their control over the relevant information, can be expected routinely to produce ingenious explanations as to why a particular degree of justification is impossible to achieve.[180] For this reason, operation of the difficulty of detection rationale should be permitted only when strong justification exists for reducing the certainty threshold below its typical intrusion-based level.

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179. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 552, 557 (1976) ("Interdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems. . . . [An individualized suspicion requirement at roadblocks] would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly."); *see also supra* note 163 (quoting *Skinner*). For brief descriptions of the Court's other cases, see *supra* text accompanying notes 158–165.

180. In this regard, it is interesting to consider how the difficulty of detection rationale would interact with the Supreme Court's decision in Nix v. Williams, 467 U.S. 431 (1984), which held that the exclusion of illegally obtained evidence is not required when the police can show they would have discovered the evidence through lawful means. In any case where the police do not have the requisite certainty and act anyway, they could choose to argue either that they could not develop that certainty level (thus triggering difficulty of detection analysis) or that they would have eventually (thus admitting to an illegality but triggering the *Williams* rule).

Here again, the distinction between past and future events is important: such justification will never exist when the harm being investigated has already occurred. In such cases, regardless of how serious the harm was or how difficult the case is to "crack," the government has the luxury of time. With enough effort, a crime can eventually be solved, if it is solvable at all, without resort to reducing certainty levels. Thus, the typical search and seizure, aimed at procuring evidence with respect to a past act, should not trigger difficulty of detection analysis.

Conversely, when the search and seizure is aimed at obtaining proof of future harm, time may not be on the government's side, as the nuclear bomb scenario illustrates. When imminent damage to society is anticipated, the state may legitimately point to a need for loosening investigative restrictions. Again, however, the justification for such a step should not be speculative. In addition to showing that a specific, significant danger exists, the state should have to demonstrate that the danger cannot be averted unless the usual level of certainty is dispensed with.

While, as noted earlier, the Supreme Court's cases seldom require precise proof of future harm, they could be said to involve situations which meet the second part of this test. At least, a plausible argument can be made that the types of offenses at issue in these cases—illegal immigration, drunk driving, use of drugs and alcohol, illegal firearms trafficking—are *intrinsically* difficult to detect (and the associated danger thus characteristically difficult to avert) if probable cause (or even reasonable suspicion) were required. These offenses are not likely to leave evidence of their commission—such as a victim, or missing goods—that is easily accessible to investigating officers. Thus, the argument might go, they are different from other offenses, such as homicide or burglary, which by nature can be solved despite a probable cause requirement (and, consequently, deterred).

Yet, even accepting this distinction, the Court's analysis in these cases is ultimately flawed, in two ways. Most significantly, it fails to recognize a central paradox that arises when the difficulty of detection factor is applied to "categories" of harms as the Court has done: to the extent the government provides the proof that a specific, significant societal danger exists (which, as argued above, it must do if it wants to rely on the difficulty of detection rationale), it weakens its claim that the danger is difficult to detect.

Consider in more detail the Court's opinion in *Skinner v. Railway Labor Executives' Association*.[181] There the Court relied on the harm severity/difficulty of detection tandem in authorizing suspicionless drug and alcohol testing of railway employees involved in accidents or safety violations. The Court first noted the significant public interest in ensuring that railway workers are not impaired by psychoactive substances, in view of the harm such employees can cause.[182] It then concluded that, given the difficulty of detecting such impairment from outward appearance,[183] requiring "individualized suspicion" before testing would prevent significant deterrence of drug and alcohol use[184] and would "seriously impede" attempts to obtain information about the cause of railway accidents,[185] thus frustrating the government's efforts to prevent this harm.

The fault in the Court's reasoning is its insistence that suspicion must be "individualized." It may be that discerning impairment from an individual's outward appearance alone is very difficult. But, as developed further in Part V,[186] levels of certainty can be actuarially based as well as founded on observations specific to a particular individual. Once this concept of "generalized" suspicion is recognized, the complaint that a certainty requirement will prevent detection becomes much less plausible in the types of cases in which the Court gives it credence. In *Skinner*, for instance, the government's efforts to prove statistically that substance abuse is a significant cause of railway accidents suggested (however unwittingly) that there might easily be justification for initiating some

181. 489 U.S. 602 (1989).

182. *Id.* at 628 ("[E]mployees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others.").

183. The Court made this finding both generally, *id.* at 628 ("An impaired employee . . . will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.' " (quoting 50 Fed. Reg. 31,526 (1985)), and after a railroad accident, *id.* at 631 ("Obtaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident.").

184. *Id.* at 630 ("By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty." (citation omitted)).

185. *Id.* at 631 ("A requirement of particularized suspicion of drug or alcohol use would seriously impede an employer's ability to obtain . . . information [about the cause of accidents], despite its obvious importance.").

186. *See infra* text accompanying notes 263–274.

sort of test program in postaccident situations.[187] On the other hand, if a significant level of harm cannot be demonstrated, the chances are good that the government has no business trying to detect the harm in the first place.[188] Given this direct relationship between the magnitude of harm sought to be investigated and the suspicion requirement (and the inverse relationship between these two factors and difficulty of detection), reliance on the harm severity/difficulty of detection tandem will often prove logically untenable.

Even if the government can prove the (often contradictory) claims that harm severity and difficulty of detection coexist and thus that the certainty threshold should be reduced or eliminated, its authority should be further limited by a requirement that its investigation proceed in the least intrusive manner feasible. The respondent in *Skinner* made such an argument, asserting that other, less invasive methods of detecting drug and alcohol use are available.[189] But the Court, demonstrating the second flaw in its difficulty of detection analysis, rejected the need to consider these options, even assuming that they existed. Citing previous opinions

187. For instance, a government study showed that from 1972 to 1983 " 'the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor.' " 489 U.S. at 607 (quoting 48 Fed. Reg. 30,726 (1983)). *See infra* note 342 for further data, and text accompanying notes 341–346 for the impact of these data on the analysis of whether the test program in *Skinner* was permissible. For other examples of how the concept of generalized suspicion plays out in practice, see the discussion in Part V analyzing the propriety of roadblocks to detect illegal immigrants and drunken drivers, *infra* text accompanying notes 281–306.

188. *See* discussion of *Von Raab*, *infra* text accompanying notes 334–340 (argning that drug testing of customs agents is impermissible because government failed to show any drug use by agents, much less harm deriving from it).

189. In particular, the respondent argued for "reliance on private prescriptions already in force, and training supervisory personnel 'to effectively detect employees who are impaired . . . .' " 489 U.S. at 629 n.9.

An even better alternative might have been a simple functional test, aimed directly at assessing the degree of impairment induced by drugs or alcohol. This type of test can often less intrusively, more accurately, and probably less expensively determine the effect of psychoactive substances (as well as the impact of other factors). For instance, drivers for the Old Town Trolley Company in San Francisco must daily undergo and pass a physical test before they can work. According to the head of the test program, the test is more accurate at gauging impairment than drug and alcohol testing, and is short enough in duration to permit its administration every day. Interview on ABC News, June 5, 1990; *cf.* Comment, *Just Say Maybe: A Review of Drug Testing Methods and Constitutional Challenges to Public Sector Compulsory Urinalysis in the Third Circuit*, 18 SETON HALL L. REV. 679, 710 (1988) ("Some types of [drug] tests can approximate the time of ingestion, but none can supply proof of impairment.").

which questioned the necessity of canvassing all options,[190] it pointed out that one " 'can almost always imagine some alternative means by which the objectives of the [Government] might have been accomplished.' "[191]

The Court's implication that least drastic means analysis is not necessary in search and seizure cases is only half right. When the government has the requisite degree of certainty for a particular search or seizure (based on its level of intrusiveness), it may not need to show that no lesser intrusion will achieve its aims. But when, as in *Skinner*, the government relies on the difficulty of detection rationale, it is in effect arguing that it *cannot* develop the suspicion that would ordinarily be required to justify the proposed action. If accepted, this argument should at most permit the government to act on little or no suspicion, not grant it the power to use any technique, regardless of its nature, to detect or eradicate the harm. Assuming, as argued above, that intrusiveness is the core variable in regulating searches and seizures, choosing the technique that may be used in this situation requires least drastic means analysis. In other words, even if one accepts the Court's conclusion in *Skinner* that the government must be allowed to proceed without any showing of suspicion, generalized or otherwise, one must make an assessment of whether the method it proposes (here, blood tests, urinalysis, or breathalyzer tests) is the least intrusive means of effectively ascertaining impairment due to substance abuse. To suggest, as the Court does, that such an assessment is unnecessary not only cuts against the notion that intrusiveness is the touchstone of search and seizure analysis, but also creates a disincentive to develop and disseminate techniques that are less offensive to privacy and autonomy interests.[192]

One possible way of evading both the harm severity/difficulty of detection paradox and the restrictions posed by least drastic

190. *E.g.*, Illinois v. Lafayette, 462 U.S. 640, 647 (1983) ("The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."); United States v. Martinez-Fuerte, 428 U.S. 543, 556 n.12 (1976) ("The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.").

191. *Skinner*, 489 U.S. at 629 n.9 (quoting United States v. Sharpe, 470 U.S. 675, 686–87 (1985)).

192. For instance, functional testing of employee impairment, *see supra* note 189, is much less widely used than drug and alcohol testing. This is probably due in part to the high profile and stamp of approval given the latter by court decisions. *See generally* Gampel & Zeese, *Are Employers Overdosing on Drug Testing?*, 55 BUS. & SOC'Y REV. 34 (1985).

means analysis might be to vary the argument somewhat (following the suggestion in the Court's cases) by focusing on the difficulty of *deterring* the targeted harmful activity if some showing of suspicion is required. On this account, one might say that, whether or not serious harm is currently observable or predictable, we need to prevent the possibility of its occurrence in the future. And, because we are interested in deterrence, not just apprehension, more intrusive actions may be required even if they are no more effective at detecting the harm. Using sobriety checkpoints, rather than drug testing, as an example, this argument might be applied as follows: even if suspicionless roadblocks are not the best or least intrusive way of detecting drunken driving (given police ability to discern its outward symptoms),[193] they are the best way of inhibiting that activity or making sure it never becomes a problem; the specter of a roadblock is much more likely to deter people from drinking and driving than is the fear of being spotted weaving down the road.

Assuming, against evidence to the contrary,[194] that this assertion is true, the argument suffers from a flaw often found in utilitarian contentions: it offers no principled way of limiting the proposed justification.[195] Surely an even better method of deterring drunken

193. *See, e.g.*, Justice Stevens's dissent in Michigan Department of State Police v. Sitz, 110 S. Ct. 2481, 2491 (1990) (noting that during Maryland's several-year checkpoint program—involving 125 checkpoints—143 arrests were made, while in Michigan, in 1984 alone, police made 71,000 arrests based solely on police observation).

194. In his dissent in *Sitz*, Justice Stevens contended that sobriety checkpoints were unnecessary, in part because the number of fatal crashes involving drunken driving in the United States had decreased significantly between 1982 and 1988. *Id.* at 2491 n.2 (Stevens, J., dissenting). In response, Chief Justice Rehnquist argued for the majority that "[i]t was during this same period that police departments experimented with sobriety checkpoint systems." *Id.* at 2486 n.**. The impossibility of deciding which Justice is right about the deterrent effect of these roadblocks points out still another problem with the difficulty of detection/deterrence rationale.

Although checkpoints undoubtedly inhibit drunk driving to some extent, probably the most important deterrents during the six-year period noted by Justice Stevens were the nationwide media blitz against drunken driving, together with stiffened penalties for violators of driving-while-intoxicated statutes. *See, e.g.*, FLA. STAT. § 316.193(2) (1990) (providing for fines of between $250 and $500 and imprisonment of up to 6 months for first conviction of driving under the influence, a $500 to $1000 fine and up to 9 months for a second conviction, and up to 5 years for a fourth conviction); *id.* § 316.193(5) (providing for mandatory probationary periods in addition to other penalties, including public service requirements).

195. *Cf.* F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 86 (1964) ("[D]eterrent theory offers no clear standards by which either the kind or amount of punishment can be determined. . . . In times of stress and insecurity the effort to deter may result in draconian measures with consequent injury to individual and social interests.") (summarizing the view of Raffaele Garofalo, a criminologist). *See generally* Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime*

driving is to announce that anyone found to be intoxicated at a checkpoint will be beaten. Such a proposal would not fly because it is disproportionately offensive to individual interests. Just as retributive notions prevent the government from punishing all crimes with the death penalty, despite its supposed deterrent effect, the deterrence rationale in the search and seizure context must be subject to a limiting principle, which can only be the level of intrusiveness associated with the proposed deterrent measure.

Unless the limitations associated with the difficulty of detection/deterrence rationale are recognized, significant damage could result to individual interests, and possibly to state interests as well.[196] In the Court's hands, this rationale has provided an insidious way of disguising what at bottom is merely a claim that restrictions on investigation (to wit, suspicion and least drastic means requirements) are burdensome. Instead of requiring the government to prove that it has a serious, precisely defined problem on its hands, and that the proposed solution is the least intrusive way of attacking it, the Court has been satisfied with vague assertions that the proposed method can "effectively" deal with or deter a "significant" problem and has ignored the possibility of alternative investigative methods.[197] The danger inherent in the Court's approach

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Control, 94 YALE L.J. 315 (1984). Even proponents of deterrent theory admit that it is not self-limiting. *See, e.g.*, Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 957 (1966).

196. The lower the level of certainty required for a search and seizure, the more state resources will be wasted in conducting it, since more mistakes will occur. Presumably, the government in some way or another usually considers this cost of a lower certainty standard and, weighing it against the increased ability to gather evidence and apprehend suspects that such a standard brings, decides to pay the price. If the government is not willing to pay the price, it can always impose a higher level of certainty on itself. Something like this probably explains why many prosecutor offices dismiss cases that they think are winnable but weak. *See* Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 310–13 (1980). However, as is true with sobriety checkpoints after the Court's decision in *Sitz*, when the police may act with little or no suspicion and are not required to seek even minimal *ex ante* review, unthinking waste of resources is more likely; the police may have little incentive to avoid repeated possibly futile efforts, at individual *and* state expense.

197. For other detailed examples of this tendency, see discussion of the Court's misuse of the difficulty of detection factor in *United States v. Martinez-Fuerte, infra* text accompanying notes 285–287, and in *New York v. Burger, infra* note 330. Consider also, in this regard, the Supreme Court's opinion in Michigan Department of State Police v. Sitz, 110 S. Ct. 2481 (1990), the case which upheld suspicionless sobriety checkpoints. There, the Court implicitly acknowledged the lower court's finding that less intrusive alternatives to such checkpoints exist (*e.g.*, watching for weaving vehicles, *see supra* note 193). Nonetheless, it stated that "for purposes of [the] Fourth Amendment . . . , the choice among such reasonable aiternatives remains with the governmental

should be apparent: to paraphrase the Court's dismissal of the less drastic means argument made in *Skinner*, one can almost always imagine an easier way for the government to achieve its objective.

To summarize, the difficulty of detection/deterrence factor should generally not be allowed to lower the certainty threshold for several reasons: alternatives are usually available (both in terms of developing the requisite suspicion and in terms of other, unintrusive options); the deterrence rationale is insufficiently bounded; and the administrative inconvenience arguments which the factor occasions are a slippery slope. When combined with a showing that some specific, significant harm might otherwise result, the difficulty of detection/deterrence factor may be dispositive in rare cases, more readily hypothesized than realized, such as the torture thought experiment. But unless the government's efforts to deal effectively with an anticipated, specified harm would be thwarted, the level of certainty necessary to justify a particular search and seizure should be determined solely with reference to the intrusiveness of the proposed action.

The harm severity/difficulty of detection tandem might still play a significant role in regulating searches and seizures, however, because of its usefulness in gauging *intrusiveness*. Specifically, these two factors may be germane when the people subjected to the search or seizure are aware of the obstacles to detecting the harm and believe it will directly affect them. As pointed out above,[198] the level of intrusion usually does not vary with the level of crime being investigated. Thus, a frisk for a gun is normally equally intrusive whether its purpose is to gather evidence of a felony or a misdemeanor. But suppose that the frisk for the gun is conducted at an airport in an effort to detect and deter hijackings or bombings by terrorists. If the people subject to the frisk are aware that its purpose is to prevent the possibility of harm to their person, and that it is the only feasible way of avoiding that harm, they may feel genuinely grateful for the government intervention. Their sense of intrusion, harassment, or stigmatization might be significantly reduced given their awareness of the danger confronting them and of the few

officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Id.* at 2487. This language is insidious, for it proposes that, once the government makes the vague showing of harm the Court allows, an intrusive technique may be used at random, without demonstrating any degree of certainty that it will be successful and without demonstrating that any less intrusive, equally effective investigative method exists.

198. *See supra* text accompanying notes 172–176.

options available to avert that danger.[199] If this assumption is accurate,[200] the certainty threshold necessary to justify initiation of a blanket frisk operation at the airport could also be significantly reduced. Based on the same assumption, any person who thereafter actually refused the frisk could be considered "suspicious" enough to warrant a nonconsensual frisk.

This conception of consent, based on informed speculation about the genuine desires of those searched, is very different from the Court's version, which assumes that consent given to government agents is voluntary unless there is obvious coercion,[201] and which "implies" consent solely from foreknowledge of the search and seizure.[202] At the same time, this conception of consent allows

199. On the other hand, if the possibility of harm to those frisked is infinitesimal or nonexistent (*e.g.*, because airplane terrorism has been unheard of for years), or if there are other, less intrusive ways of detecting the weapon (such as a magnetometer), then the same sense of gratitude is unlikely and the usual certainty threshold for frisks would be required.

200. The intuition described in the text is borne out by prelimmary research conducted by the author and Joseph Schumacher, Ph.D. [research which is hereinafter referred to as the Intrusiveness Rating Study]. Over 300 students were given fifty search or seizure scenarios and asked to rate their "intrusiveness" on a scale of 0 to 100. While frisks and other searches of the person were rated, on average, as fairly intrusive, airport searches designed to detect terrorist acts were not. Research results on file with author, pending publication.

201. In United States v. Mendenhall, 446 U.S. 544 (1980), for instance, the Court found "voluntary" the following actions by the defendant: (1) accompanying two identified Drug Enforcement Administration agents from a public airport terminal to a DEA office; (2) surrendering her purse to be searched; and (3) disrobing for further search. The Court stressed that "[t]here were neither threats nor any show of force," *id.* at 558, and that the defendant had been told twice that she could refuse consent, *id.* at 559. The Court discounted the facts that the defendant was a 22 year-old black female with an 11th grade education, *id.* at 558, and had indicated prior to the disrobing that she had a plane to catch, *id.* at 559. It ignored the officers' testimony that they had taken Mendenhall's ticket and driver's license for a time before returning it, *id.* at 548, that they noticed she "became quite shaken, extremely nervous" and "had a hard time speaking" during this initial encounter, *id.*, and that they would have restrained her had she not accompanied them to the DEA office or had she tried to leave it, *id.* at 575 nn.12–13 (White, J., dissenting). As the four-member dissent pointed out: "On the record before us, the Court's conclusion can only be based on the notion that consent can be assumed from the absence of proof that a suspect resisted police authority." *Id.* at 577 (White, J., dissenting).

In Florida v. Rodriguez, 469 U.S. 1 (1984), another airport case, the Court found that the defendant's agreement to talk to an identified plain-clothes officer and walk 15 feet to where his companions were standing with another officer was "clearly the sort of consensual encounter that implicates no Fourth Amendment interest." *Id.* at 5–6.

202. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656, 672 (1989) ("Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity."); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 628 (1989) ("Though some of the privacy interests implicated by the toxicological testing at issue

the police to draw inferences from a refusal to consent, a position which, to date, the Court has been unwilling to endorse fully, for reasons based as much on the Fifth Amendment and the Due Process Clause as the Fourth Amendment.[203] Some of the ramifications of this idea are developed further in Part V.[204] For now, the important point is that, if harm severity and its difficulty of detection are to be considered in determining the validity of a search or seizure, they are usually germane only when measuring the strength of *individual* interests, not the state's.

4. The Official Distraction Factor

The fourth rationale supporting an exception to the probable cause standard—the official distraction factor relied upon by the Court in analyzing school, workplace, and probation investiga-

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reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered [railway] employees and to this reasonable means of procuring such information."); United States v. Biswell, 406 U.S. 311, 316 (1972) ("[Suspicionless inspections] pose only limited threats to the dealer's justifiable expectations of privacy [because w]hen a dealer chooses to engage in this pervasively regulated business . . . he does so with the knowledge [that they will occur]."). Although none of these cases speak in terms of consent, using instead the diminished expectation of privacy idiom, the idea is the same: because the victims of the government search knew it was coming and technically could have avoided it (by getting another job or business), they are afforded less protection than others.

203. The Court has addressed the issue in language that usually resonates with privilege against self-incrimination doctrine, although occasionally it derives from vagueness concerns. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 361 (1983) (finding unconstitutionally vague a "stop and identify" statute "because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute"); Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring) (a person who is briefly stopped "is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation"); Camara v. Municipal Court, 387 U.S. 523, 540 (1967) ("appellant may not constitutionally be convicted for refusing to consent to [a warrantless residential safety] inspection").

204. *See infra* text accompanying notes 319–330. In *Von Raab*, the Court attempted to justify the suspicionless drug testing upheld in that case by analogizing to other situations in which suspicionless government action is accepted, including airport searches similar to the type described in the text, 489 U.S. at 675 n.3, and searches of employees of the United States Mint when they leave the workplace, *id.* at 671. These two situations seem distinguishable from the drug testing program at issue in *Von Raab*, however. In both, those searched would probably "vote" for the searches (although perhaps begrudgingly)—the airport passengers for the reasons given in the text and the Mint employees because they know that without these searches the Mint could not function (meaning they would no longer have a job). In contrast, unless it makes sense to say that the typical customs agent (as distinguished from the government) is likely to believe that drug testing is crucial to maintaining the efficiency of the customs service, this notion of "genuine" implied consent would not aid the state's case in *Von Raab*.

tions—is even less plausible than the harm severity or difficulty of detection rationales. At the outset, note that it applies only to those investigations conducted by government agents whose principal job is something other than investigation; the public is harmed, according to this rationale, to the extent such officials are distracted from routine duties in order to justify (at a heightened level) searches or seizures that they undertake. Thus, even assuming its validity, the official distraction factor is difficult to apply to at least one of the situations addressed by the Court: the probation context. Because the primary job of a probation officer is making sure the probationer does not stray from court-ordered probation conditions,[205] that official should be governed by the rules governing the police.

In the school and workplace, on the other hand, the lay investigator is probably taking time from his or her usual obligations. To some extent this cost is unavoidable if we want school administrators and employers to be able to control their environments. The social harms the Court believes are *unnecessary* in this setting are twofold: the cost associated with forcing these individuals to master the "niceties" of the "probable cause" concept, and the cost associated with requiring them to meet the certainty threshold it implies, as opposed to some lower level of certainty (subsumed under the "reasonableness" rubric). Neither cost seems particularly significant. And, in any event, before we allow the official distraction factor to have any impact on the certainty threshold, we must believe that the public harm caused by imposing a probable cause standard in the lay investigation context is greater than the damage caused by that standard's application to normal police work. Otherwise, the state would be justified in abandoning the probable cause rule in the latter context as well. Since such a showing cannot be made, the official distraction rationale is exposed for what it is: the meaningless assertion that certainty requirements are inconvenient to the government.

The Court's assumption that lay investigators will find the probable cause concept difficult to comprehend is not supportable. Whether the standard is "probable cause," "reasonable suspicion," or simple "relevance," the inquiry boils down to how certain the investigator is that the search or seizure will produce evidence or a suspect. As the Court has pointed out many times,[206] this inquiry is

205. *See supra* note 121.

206. The Court's first detailed statement to this effect is perhaps the most on point. In Brinegar v. United States, 338 U.S. 160 (1949), the Court indicated that the probable cause determination is not to be divorced from "the factual and practical considerations

a common sense one, based on logical inference, which suggests it is not the special preserve of the police or a judicial officer.[207] Certainly, school administrators, teachers, and employers can fathom it as easily as the police.

The Court's concern that the normal work of lay investigators will be unreasonably disrupted if they cannot act on a level of certainty lower than probable cause is also specious. Where police investigation is concerned, developing probable cause (as opposed to some lower level of suspicion) may well require a greater investment of time and resources. In contrast, the damage to public interests caused by requiring a school official or an employer to meet a probable cause standard, rather than, say, a "reasonable suspicion" or "relevance" standard, will typically be minimal. As a matter of course, given the "community" involved, the person investigating an infraction of school or workplace regulations will either have witnessed it or have a report from someone who did, and will easily be able to name or find the perpetrator and collect incriminating information;[208] the same cannot be said of the police officer investigating a robbery, burglary, rape, or homicide. The same aspects of schools and workplaces on which the Court relies in disparaging the

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of everyday life on which reasonable and prudent men, *not legal technicians*, act." *Id.* at 175 (emphasis added). On several occasions, it has warned against interpreting the probable cause standard in a "hypertechnical" fashion and insisted on its commonsense basis. *See, e.g.*, United States v. Ventresca, 380 U.S. 102 (1965) (warrant affidavits should be tested in "a commonsense and realistic fashion," and reviewing courts should "not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner"); *accord* Massachusetts v. Upton, 466 U.S. 727, 732 (1984); Illinois v. Gates, 462 U.S. 213, 236 (1983).

207. Note that in approximately 40 states, at least some of the magistrates (between 13,000 and 14,000 nationally) are not lawyers, suggesting that nonlawyers can adequately address these concepts. Silberman, *Non-Attorney Justice in the United States: An Empirical Study* 24–35 (1979). Moreover, after reviewing the sparse empirical literature available, Davies concluded that "[i]n contrast to the critics' assumption that search law is hypertechnical, the few indications we do have about the nature of illegal searches suggest that legal complexity probably is not the cause of most illegal searches." Davies, *A Hard Look*, *supra* note 27, at 683.

208. As the Supreme Court noted in Ingraham v. Wright, 430 U.S. 651, 670 (1977), the "openness of the public school and its supervision by the community afford significant safeguards" against the violation of constitutional rights. The same "openness" should diminish students' ability to hide their misconduct. Consider, for example, this list from *T.L.O.* of the types of activities typically regulated by school rules: secret societies, students driving to school, use of parking lots, smoking on campus, the direction of traffic in hallways, student presence in the hallways during class hours without a pass, profanity, school attendance, cafeteria use and cleanup, eating lunch off-campus, and unauthorized absences. 469 U.S. at 377 n.16 (Stevens, J., dissenting). To the extent investigation of any of these activities requires a search or seizure (which is unlikely), a reliable eyewitness should be easy to come by. Even the more serious individual inci-

individual interests at stake—their confined, controlled, and quasi-public nature[209]—ensure that investigations in these locations will usually require much less expenditure of effort than does police work. Thus, in the former contexts, the diversion of resources and consequent harm to the public interest imposed by a probable cause standard should be minimal.

In any event, this harm cannot measure up to the damage produced by application of the probable cause standard to police work. Because of the probable cause rule, and the attendant warrant requirement, police are less likely to pursue a potential arrest[210] and, of those arrests they make, a small but noticeable number are likely to end in dismissal.[211] These unsolved or dismissed criminal cases, both in terms of frustrated vengeance and failed incapacitation, cost society much more than any inefficiency created by requiring investigators of administrative violations to meet a probable cause standard. Assuming searches and seizures by these other public officials

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dents likely to occur at school (*e.g.*, possession of drugs or weapons) are unlikely to be detected at all unless a student or faculty member observes them.

Of course, to the extent the purpose of a search or seizure is to deter a general drug or violence problem that exists in the school, developing "individualized suspicion" will be more difficult and dragnet searches will become more tempting. *Cf.* Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980) (use of dog to sniff entire classes of students for drug odor). The Court avoided addressing the propriety of such actions in *T.L.O.*, 469 U.S. at 342 n.8. Under the approach advanced in this article, such searches would not be permitted unless the government developed enough "generalized" suspicion to authorize the intrusion they occasion. *See supra* text accompanying notes 186–188. While this task might involve considerable effort, it is the kind of job that can be handled by one administrator, by collecting information about drug usage and violence in the school; it would not necessitate involvement of individual teachers.

209. Actually, the Court has only explicitly disparaged individual privacy interests in the latter context. *See* language from *Ortega*, *supra* note 156. How the Court might characterize expectations of privacy in the general school setting, outside the context of a search of a school child's purse and other personal effects (the issue in *T.L.O.*), remains to be seen. *See supra* note 151. The Court's most likely approach, given the government-oriented trend of its "special needs" cases, is to follow the *Ortega* line of reasoning.

210. It is interesting to note that as early as 1962—before Fourth Amendment law was well developed, and before the nationwide application of the exclusionary rule in *Mapp* could have had any major impact on the conviction rate—Inbau contended that decisions limiting searches and seizures had "actually facilitat[ed]" the activities of "the criminal element," and had led to some of the increase in crime observed since 1950. Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 85, 86 (1962).

211. Although the percentage of cases dismissed by prosecutors or judges as a result of illegal searches and seizures varies, it usually hovers between 0.5% and 1% of arrests for all crimes. *See* Davies, *A Hard Look*, *supra* note 27, at 667 (summarizing studies). Of course, dismissal of cases results from the exclusionary sanction, not substantive law. If some other sanction were relied upon, dismissal would not be a cost, in either police- or lay-investigated cases.

are of comparable intrusiveness to those conducted by the police, they should be permitted only upon comparable showings of certainty.

At bottom, the Court's reliance on the official distraction rationale seems to be an attempt, where lay investigators are involved, to avoid the inefficiency connected with formalizing the investigative *process*.[212] As an earlier part of this Article indicated,[213] the burden and discomfort associated with requiring employers or school teachers to approach a judicial officer in a courthouse may argue in favor of adjusting the procedures attendant to authorizing a search or seizure. But lowering the *substantive* standard to accommodate a need for "efficiency" comes close to being a non sequitur if we care at all about individual interests.

D. *A Proposal: The Proportionality Principle*

For the reasons given above, in a world without the Fourth Amendment the level of certainty necessary to authorize a police action should, with rare exception,[214] be governed solely by the level of its intrusiveness. Thus, for example, the government would generally have to show a higher degree of confidence that a search will be successful when evidence is thought to be in a private home than when it is believed to be in a warehouse or in the "open fields." An arrest, in contrast to a short detention, would usually require a higher level of certainty that the individual has committed a crime (and, if warrantless, that the relevant exigency exists). This idea can be called the "proportionality principle."

All-important to application of this principle is a coherent definition of the term "intrusiveness." This Article has made a superficial stab at this task by positing three individual interests encompassed by the intrusiveness rubric—privacy and autonomy, freedom from harassment, and avoidance of false stigmatization—and by suggesting some ways that the harm severity and difficulty of

212. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 723–24 (1987) ("To ensure the efficient and proper operation of the agency . . . public employers must be given wide latitude to enter employee offices for work-related, noninvestigatory reasons. . . . [p]ublic employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner.").

213. *See supra* text accompanying notes 121–123.

214. The exception arises when the state can show that the certainty threshold ordinarily necessary to justify a particular intrusion must be lowered in order to allow the state a realistic chance to detect clearly harmful future conduct. *See supra* text accompanying notes 179–197.

detection rationales may be relevant to it.[215] But much more must be done, both empirically[216] and theoretically.[217] Ideally, this work would produce a more refined concept of intrusiveness than the Supreme Court's which, as shown in various parts of this Article, is both unrealistic[218] and theoretically inconsistent.[219]

These observations lead to the primary objection to the proportionality principle: it can be easily manipulated and arbitrarily applied. A standard which depends upon determining the relationship between the "intrusiveness" of a search or seizure and its likelihood of "success" is clearly subject to idiosyncratic interpretation. Addressing a proposal similar to the one advanced here, Professor Amsterdam has argued that adopting a "sliding scale" approach to searches and seizures would convert the Fourth Amendment "into one immense Rohrshach blot."[220] Operating under such a standard, he suggested, would mean that the validity of searches and seizures would be decided on a case-by-case basis, thus providing little or no future guidance to the police.[221] Professor Amsterdam

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215. *See supra* text accompanying notes 9–15 & 198–204, as well as notes 149 & 167. Summarizing the notions expressed at these various spots produces a number of overlapping factors that might be relevant to the intrusiveness inquiry. In no particular order, they would include the extent to which a typical person would feel the government action (1) infringes privacy/intimacy interests; (2) infringes autonomy/locomotion interests; (3) is conducted in an offensive, harassing, or embarrassing manner (which would include consideration of whether it is conducted at day or at night, roughly or politely, for an unnecessary period of time, in public or in private); (4) is preceded by genuine consent; and (5) is benevolently motivated, in that it will prevent harm to the person that would otherwise be difficult to detect. Contrary to the Court's approach, the intrusiveness inquiry should not include whether the target of the action was on notice that the intrusion should or might take place, nor should it depend upon whether the target has been similarly intruded upon by private citizens.

216. Some initial attempts have been made. *See, e.g.*, Kagehiro, *Psycholegal Research on the Fourth Amendment*, 1 PSYCHOLOGICAL SCI. 187 (1990); Small, *supra* note 119; Intrusiveness Rating Study, *supra* note 200.

217. *See* materials cited *supra* note 11; *see also* Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541 (1988); Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. CRIM. L. & CRIMINOLOGY 1, 34–68 (1989).

218. Consider its statements that "reasonable" privacy interests are not infringed by intentional police entry onto fenced-in private property marked with no trespassing signs, Oliver v. United States, 466 U.S. 170, 171 (1984); flights over private backyards, Florida v. Riley, 488 U.S. 445, 450–51 (1988); and inspections of businesses, United States v. Biswell, 406 U.S. 311, 316 (1972).

219. *See, e.g.*, discussion of undercover activity, *infra* text accompanying notes 351–352.

220. Amsterdam, *supra* note 7, at 393. Professor Amsterdam continued: "[P]resent law is a positive paragon of simplicity compared to what a graduated fourth amendment would produce."

221. *Id.* at 394.

concluded (quoting from Justice Jackson): "the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police."[222] Although this criticism suggests that adoption of the proportionality principle is most likely to harm individual interests, one might also criticize it from the state's perspective: operation of the principle might cause the police to refrain from acting when they should, or in good faith confusion act wrongly (in the process suffering what they feel is undeserved sanction), thereby increasing the "cost" to the state by undermining effective law enforcement.

Undoubtedly, given the countervailing interests at stake in the regulation of searches and seizures, clarity is an important goal. Further, no claim can be made that the proportionality inquiry will always be easy, or that it will arrive at many "bright-line" rules. Nonetheless, there are at least two responses to Professor Amsterdam, one deontological, the other consequentialist.

First, the alternatives to a sliding scale approach are deeply inimical to both individual and state interests. Consider the alternatives adopted in the United States: either one level of certainty (prior to 1968) or, as was the case until recently, two levels. As the Supreme Court's experience shows, neither is satisfactory from a theoretical point of view. The Court abandoned the single probable cause standard because it was too difficult to meet in situations where the state had a legitimate interest in acting because of the lesser intrusion involved.[223] And now the Court is abandoning the two-tiered approach, because it has been confronted with searches and seizures it views to be even less intrusive, as the drug testing and roadblock cases show.[224] At the same time, because it is still officially wedded to the probable cause and reasonable suspicion standards for most cases, the Court is prevented, at least technically, from requiring *more* certainty than probable cause for particularly intrusive investigative techniques.[225] From a deontological

222. *Id.* (quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)).

223. Terry v. Ohio, 392 U.S. 1, 26–27 (1968) ("[A] perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime.").

224. *See supra* text accompanying notes 163–165.

225. *See, e.g.*, New York v. P.J. Video, Inc. 475 U.S. 868, 874 (1986) (rejecting a " 'higher' standard of probable cause than that used in other areas of Fourth Amendment law" when the search is of material protected by the First Amendment); Tennessee v. Garner, 471 U.S. 1, 11 (1985) ("Where the officer has probable cause to believe

perspective, the proportionality principle is essential to establishing a sound regulatory framework for searches and seizures.

Professor Amsterdam, for one, would readily agree with this conclusion.[226] Nonetheless, he believed (along with many others)[227] that without clear rules to guide them, the police are more likely—in fact if not in theory—to harm individual interests. On the surface, this argument is a plausible attack on the proportionality principle. The argument's flaw is not so much its conclusion as its premise: that clear rules are possible. As has been ably demonstrated by several commentators, with respect both to law generally and regulation of search and seizure specifically, even seemingly "bright-line" rules usually become blurred as the police and the adversarial process test their outer limits.[228] The grail of "rule-oriented" jurisprudence is as mythical as King Arthur's.

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that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

When confronted with particularly intrusive situations, the Court has occasionally avoided the limitations of the probable cause standard while claiming to adhere to it. For instance, in Winston v. Lee, 470 U.S. 753 (1985), it considered the permissibility of state-coerced surgery to obtain a bullet thought to be evidence of a crime. The Court found that, as far as the certainty threshold is concerned, a probable cause finding that the bullet was where the state said it was is sufficient. *Id.* at 760. But the Court also required the reviewing court to find that the procedure does not threaten the safety or health of the individual or unnecessarily impinge on the individual's "dignitary interests" before such surgery could be authorized. *Id.* at 761. It also required the trial court to consider the extent to which prohibiting the intrusion would affect "the community's interest in fairly and accurately determining guilt or innocence." *Id.* at 762. In applying this last factor to the facts of the case, the Court made clear that it would only be satisfied if the state could show a "compelling need" for the evidence. *Id.* at 765.

226. *See, e.g.*, Amsterdam, *supra* note 7, at 393 ("A sliding scale approach would considerably ease the strains that the present monolithic model of the fourth amendment almost everywhere imposes on the process of defining the amendment's outer boundaries.").

227. *See, e.g.*, Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. REV. 518, 532; LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141.

228. Speaking of the Court's experience, Professor Bradley has stated: "In an effort to give 'clear rules' to the police while maintaining a degree of flexibility, the Court has failed on both counts." Bradley, *supra* note 7, at 1479. Even proponents of bright-line rules come close to admitting defeat. *See* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 333 (1982) (after discussing the problems with the "bright-line" rule established in New York v. Belton, 453 U.S. 454 (1981), Professor LaFave states, "the quest for clear rules must proceed with caution if reasonable and predictable results are in fact to be obtained").

More generally, *see* Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661–69 (1958) (arguing that even simple rules are subject

This is particularly so with respect to rules concerning levels of certainty, which comprise the bulk of search and seizure jurisprudence. To say that probable cause, or probable cause and reasonable suspicion, represent the only permissible levels of certainty, as Professor Amsterdam would have it, is not to propose a bright-line rule. As the Supreme Court's experience illustrates, the supposed adherence to a two-tiered approach to certainty has exerted little control over judges.[229] The phrases "probable cause" and "reasonable suspicion" are broadly defined, with the result that their application to particular facts is often difficult to predict.[230] These developments were inevitable: outside of quantifying the standards, as this Article did earlier,[231] meaningfully distinguishing between these or any other levels of certainty (other than at the extremes) is very difficult.[232] Given the absence of concrete guidance provided

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to ambiguity); *see also* Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1 ("[A]ny attempt to achieve certainty regarding any important constitutional issue is unlikely to succeed and—even if it does succeed in the short run—will inevitably create uncertainty as to more issues than it settles. The process of rendering a decision will tend to distort the issue decided as well as the applicable precedents and doctrines.").

229. *See supra* text accompanying notes 134–148 for a description of cases in which the Court veered from both the probable cause and reasonable suspicion standards.

230. This point is difficult to support in a short note. One must read several opinions relating to the same general fact pattern to see how minimally the probable cause and reasonable suspicion concepts constrain the courts and to get an idea of the subtle factors that affect their analysis. *Compare, e.g.*, Justice Powell's concurrence in United States v. Mendenhall, 446 U.S. 544, 560–61 (1980) (reasonable suspicion exists when defendant arrives from a source city, is the last to leave the plane, appears nervous, claims no luggage and goes to the desk of an airline other than one on which she arrived) *with* Reid v. Georgia, 448 U.S. 438, 440–41 (1980) (no reasonable suspicion when defendant arrives from a source city, nervously looks over shoulder, has no luggage other than a shoulder bag, and makes efforts to conceal he is traveling with someone else). *See also* Justice Jackson's dissection of the majority's finding of probable cause in Brinegar v. United States, 338 U.S. 160, 184–88 (1949) (Jackson, J., dissenting). Justice Jackson disparaged the majority's equation of the facts in that case with the facts of Carroll v. United States, 267 U.S. 132 (1925), by noting that "while several facts are common to the two cases, the setting from which those facts take color and meaning differ in essential respects." *Brinegar*, 338 U.S. at 185 (Jackson, J., dissenting).

231. *See supra* notes 130 & 133 and accompanying text.

232. As Professor LaFave notes, "the difference between the two may lie in the degree of probability required. However, comparison on this basis is not without difficulties, for, as explained elsewhere in this Treatise, it is less than clear precisely what quantum of probability is required in order to make a lawful arrest." 3 W. LAFAVE, *supra* note 112, at 431 (footnote omitted). Nonetheless, he suggests that a distinction can be made:

> The point is well illustrated by the case of *Luckett v. State*, where a state patrolman stopped a green car with a license prefix 82J on the basis of a radio broadcast that such a car had been used by those persons fleeing from a recent burglary. The court quite properly concluded that while

by these malleable concepts, a decisionmaker is likely to set the certainty threshold at whatever level seems reasonable, taking into account factors such as level of intrusiveness, severity of the crime, and so on.

Thus, a second, consequentialist argument in favor of adopting the proportionality criterion is that it would allow courts and police to do more openly what they will do in any event, with the advantage that the number of factors they must consider in arriving at their decisions will be significantly reduced. In arriving at the necessary confidence threshold, intrusiveness *alone* will determine the level of certainty. While that concept is by no means self-defining, and incorporates a number of variables,[233] at least courts and government officials will not need to confront the problematic issues connected with ascertaining the seriousness of the harm involved[234] or the difficulty of detecting it[235] (except to the extent these issues are relevant to the intrusiveness inquiry[236]), and will not have to measure the degree to which noninvestigative duties of the investigator will be compromised by a particular certainty threshold.

> the officer "did not have probable cause to stop every green automobile with an 82J license prefix and formally arrest its occupants," there was a basis for a *Terry*-type stop because the officer "had a brief, but sufficient, description of the automobile; the crime had been committed only a short time beforehand, and the car was discovered traveling away from the scene of the crime at a location which was within the range of possible flight."

Id. at 436 (footnote omitted).

If this case is considered a *good* illustration of how probable cause and reasonable suspicion can be distinguished, it makes my point. I would argue that probable cause to arrest existed on these facts (even if, after stopping the car, nothing further alerted the officer's suspicion). The chances are extremely high that the car stopped was the car described by the radio broadcast and fairly high (given the short time between the burglary and the stop) that the people in it were those who fled the burglary. The quantum of probability required in *Luckett* for reasonable suspicion would make the latter certainty threshold difficult to meet in a wide variety of situations in which the Supreme Court and other courts have found it to exist.

The police are no better than the courts (or law professors) at making the distinction between probable cause and reasonable suspicion. *See* J. SKOLNICK, *supra* note 28, at 214 ("It is often difficult for police to draw a line between what, on the one hand, constitutes suspicious behavior, and on the other, provides sufficient evidence to infer 'reasonable or probable cause' for an arrest—even under present standards allowing search only as incident to an arrest. No simple formula can determine reasonable cause, since many factors must be taken into account.").

233. *See supra* note 215.

234. *See, e.g., supra* note 173 and note 109.

235. *See, e.g., supra* text accompanying notes 177–197.

236. *See supra* text accompanying notes 198–204.

These latter factors, which are easily as manipulable as the intrusiveness concept, would play little or no role in the typical case.

None of this should suggest that, with the adoption of the proportionality approach, the search for ways of easing investigative decisionmaking would be abandoned. Police confusion, although perhaps inevitable, can be moderated through several mechanisms. 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," many of them similar to those that exist today in the United States.[237] 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.[238] To help the courts achieve this approximate justice, empirical work can provide information on the public's views concerning the hierarchy of privacy interests,[239] as well as measure levels of certainty in typical investigative situations.[240] Third, where clear rules do not develop (which will often be the case), the police would at least have an easily remembered "standard of thumb" that will help fill in the gaps. Given the ambiguity of the proportionality standard, the crime control bias of the police will probably lead to mistakes in interpretation.[241] But overall, as noted above, its application will result in more "reasonable"

237. For instance, as Part V indicates, *infra* text accompanying notes 253–257, the basic rules concerning the degree of certainty necessary for arrest, as opposed to a stop, seem congruent with the proportionality principle, as do the certainty threshold differentials between a search of a house and a frisk. Search incident to arrest doctrine would also be unlikely to change drastically, since if probable cause to arrest a person exists, enough suspicion usually exists to justify a search for weapons or evidence. However, if the arrest were for a minor misdemeanor, or the police have no reason to suspect harm or evidence destruction, the proportionality rule might arrive at different results than the Court has. *See* New York v. Belton, 453 U.S. 454 (1981) (allowing search of interior of car incident to arrest even if occupants no longer in car); United States v. Robinson, 414 U.S. 218 (1973) (allowing a search incident to an ordinary traffic offense).

238. Professor LaFave has argued that "as between a complicated rule which in a theoretical sense produces the desired result 100% of the time, but which well-intentioned police could be expected to apply correctly in only 75% of the cases, and a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90% of the time, the latter is to be preferred over the former." LaFave, *supra* note 228, at 321. This makes sense, *if* in the 10% of the clear rule cases in which the police are wrong, they are not too wrong.

239. The author is beginning some work in this regard. *See* description of Intrusiveness Rating Survey, *supra* note 200.

240. For examples of such attempts, see Part V, *infra* note 264 and accompanying text, and text accompanying notes 292–295.

241. Thus, Skolnick states that "[w]here the policeman perceives the line between legality and illegality as hazy, he usually handles the situation in the interest of justify-

searches and seizures than occur under rigid, inflexible rules.[242] Finally, and perhaps most importantly, if the first half of the proposal advanced in this Article is also accepted, in all nonexigent situations (*i.e.*, much of the time), an independent party, rather than law enforcement officials, would be applying the proportionality principle.

IV. RECONCILIATION WITH THE FOURTH AMENDMENT

Combining the two proposals advanced above into one, I would propose that, whenever some level of justification is required, authorization by a neutral third party should be obtained in all nonexigent situations (the "exigency" principle). In both exigent and nonexigent circumstances, a search or seizure is usually authorized only if the likelihood of its success is roughly proportional to its intrusiveness (the "proportionality" principle). Part V offers some applications of this two-factor approach. Here its relationship to the language of the Fourth Amendment is examined.

As should be clear from the preceding discussion, the proposal is inconsistent with current Fourth Amendment jurisprudence in several ways. Most obviously, because it requires a warrant prior to all nonexigent police investigations, the proposal would not be consistent with current case law recognizing exceptions in a number of nonemergency situations. Additionally, it would not adhere to the two- (or three-?) tiered approach to certainty officially favored by the Supreme Court, but rather would require a flexible, sliding scale analysis. Finally, as a result of these two differences, the proposal would run afoul of well-accepted Fourth Amendment doctrine in a third way: because it would require warrants prior to all nonexigent intrusions, even minimal ones, and because it permits minimal intrusions on a low level of suspicion, the proposal would allow warrants to issue on less than probable cause, at least as that term is currently defined by the courts.

While the proposal thus conflicts, in three significant areas, with the Fourth Amendment as construed by the Supreme Court, it does not necessarily conflict with the *language* of the Fourth Amendment, nor with the intent of the Framers. The language of the amendment only requires that searches and seizures be "reasonable," and that warrants be based on "probable cause." Neither of these terms are defined in the Fourth Amendment, and there is very

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ing a contention of legality, irrespective of the actual circumstances." J. SKOLNICK, *supra* note 28, at 214.

242. For an example of how rigid rules can result in unreasonable searches, see Professor LaFave's analysis of New York v. Belton, in LaFave, *supra* note 228, at 324–32.

little information as to what the founding fathers had in mind when they used these phrases.

This Article, like the Supreme Court, has taken the position that the "reasonableness" of a search and seizure should be determined through a balancing of state and individual interests. But, unlike the Court, this Article concludes that an appropriate balancing of these interests should lead to the proportionality principle. Nothing in the Fourth Amendment or its "legislative history" prevents such a conclusion about how the reasonableness of a search or seizure should be analyzed, nor dictates the Court's current multifactor approach to this issue.[243]

The Fourth Amendment does require that warrants be based on "probable cause." But the Court's equation of this phrase with a level of certainty akin to a more-likely-than-not standard is not the only possible interpretation of it. Indeed, little in the history and nothing about the language of the Fourth Amendment suggests that this phrase stands for *any* particular level of certainty.[244] I would propose that "probable cause" be defined as that cause which makes probable the reasonableness of the intrusion occasioned by a given search or seizure. Under this definition, if a search or seizure is very intrusive, more "probable cause" would be required than if the search were minimally intrusive. So long as the proportionality cri-

243. Professor Taylor has demonstrated that the exclusive focus of those involved with drafting the Fourth Amendment was on searches under "general" warrants and writs of assistance: in particular the Framers were concerned with the extent to which warrants not based on any showing of suspicion were used to justify searches. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 24–41 (1969). Thus, one can conclude that the Framers were not interested in a warrant *requirement*, but in avoiding abuse of such a requirement. Nothing about the proposal in this Article runs counter to this concern. But the proposal, for reasons articulated earlier, *supra* text accompanying notes 24–30, deals more directly with the abuses associated with warrantless searches and seizures.

244. Clearly, the drafters of the Fourth Amendment wanted warrants to be based on "probable cause" in order to prevent their misuse. *Id.* Thus, probable cause probably meant something more to them than a "bare suspicion." *Cf.* 2 LEGAL PAPERS OF JOHN ADAMS 142 (L. Worth & M. Zobel eds. 1965) (recounting that James Otis argued that general writs "totally annihilate" a person's privilege to be safe in the home because "[c]ustom house officers may enter our houses when they please—. . . bare suspicion without oath is sufficient."). But what else probable cause meant to the Framers is unclear from preconstitutional history. *Cf.* Amsterdam, *supra* note 7, at 395 ("The third and fourth problems in developing a satisfactory general theory of the fourth amendment's scope can be stated in one sentence. Its language is no help and neither is its history."). Thus, the most one can say about the founding fathers' intent on this score is that when a warrant is used to authorize searches and seizures involving "persons, houses, papers, and effects" it must be based on something more than a suspicion that evidence will be discovered there.

terion is met, however, a warrant could issue on "probable cause," regardless of the level of certainty thereby represented, without violating the language of the amendment.

Because the courts have been unwilling to define probable cause in this adaptable way, the warrant requirement is slowly being read out of the amendment and many types of searches and seizures are unregulated. For any type of police action associated with a low probability of individualized suspicion (*e.g.*, searches of heavily regulated industries, drug tests, sobriety checkpoints) the Supreme Court has been unable, even if it had been willing, to impose a warrant requirement; the Court knows that establishing such a requirement would in effect prohibit such actions because the police would so rarely be able to meet the probable cause threshold. And because the Court has adopted only one concrete alternative to probable cause, it has either explicitly (as with "open fields" searches) or implicitly (as with roadblocks) declared a wide array of police actions that any layperson would not hesitate to call a search or a seizure to be outside the ambit of the Fourth Amendment. Arguably, the Court would have felt less pressure to invent the "lesser expectation of privacy" and "special needs" exceptions to the warrant requirement, and felt less compelled to permit the suspicionless and virtually suspicionless searches and detentions that it has, had it opted for the flexible definition of probable cause proposed here.[245]

At one time, almost twenty-five years ago, it appeared the Court might do just that. In *Camara v. Municipal Court*,[246] the Warren Court held that the goverument must obtain warrants to conduct nonconsensual health inspections of residences. But, for a number of reasons,[247] the Court concluded that such warrants did not have to be based on cause to believe the particular house

245. The Court's preference for permitting suspicionless searches and seizures when the intrusion is "minimal" is particularly unfortunate, since in many of the cases where it did so, some degree of suspicion existed, perhaps enough to satisfy the demands of the proportionality principle proposed here. *See, e.g.*, California v. Hodari D., 111 S. Ct. 1547 (1991) (defendant and others ran from police after spotting their car); New Jersey v. T.L.O., 469 U.S. 325, 328 (1985) (vice-principal searched purse after teacher reported T.L.O. was smoking in bathroom and T.L.O. denied it; found cigarettes and saw rolling papers; searched further and found marijuana); Florida v. Rodriguez, 469 U.S. 1, 3–4 (1984) (detectives detained two men after one of the men saw them and said "get out of here" twice, and the other started "running in place"); Oliver v. United States, 466 U.S. 170, 173 (1984) (agents entered defendant's fields "[a]cting on reports that marihuana was being raised on [his] farm"). *See also* undercover agent cases discussed *infra* note 354.

246. 387 U.S. 523 (1967).

247. *See* discussion of *Camara* in Part V, *infra* text accompanying notes 314–317.

searched was in violation of the health code. Rather they could issue whenever the state could show that conditions of the area "as a whole," including passage of time and the nature of the buildings, merited inspection of the houses within the area.[248] In effect, the Court created a new type of "probable cause"; a warrant to inspect a house could be based on a relatively low statistical probability that the house was in violation of a health or safety regulation.

In justifying this holding, the Court stated: "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[249] It also stated: "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."[250] These passages suggest that probable cause is whatever level of certainty seems reasonable under the circumstances. But the *Camara* Court never explicitly said so, and subsequent cases continued to give lip-service to a "single-standard" definition of probable cause.[251] A better approach would have been to redefine openly the term to allow the sliding scale approach suggested in this Article.[252]

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248. 387 U.S. at 536.

249. *Id.* at 536–37.

250. *Id.* at 539.

251. As Justice Scalia stated for the majority in Griffin v. Wisconsin, 483 U.S. 868, 877 n.4 (1986):

> In the administrative search context, we formally required that administrative warrants be supported by "probable cause," because in that context we use that term as referring not to a quantum of evidence, but merely to a requirement of reasonableness. *See, e.g.*, . . . Camara v. Municipal Court. . . . In other contexts, however, we use "probable cause" to refer to a quantum of evidence for the belief justifying the search, to be distinguished from a lesser quantum such as "reasonable suspicion."

Note that, although *Camara* and its progeny remain alone in endorsing this flexible type of probable cause for warrants, other cases indicate that the Court has at least contemplated judicial authorization on less than probable cause. *See, e.g.*, Hayes v. Florida, 470 U.S. 811, 817 (1985) ("We . . . do not abandon the suggestion . . . that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting."); United States v. Karo, 468 U.S. 705, 718 n. 5 (1984) (rejecting the government's contention that reasonable suspicion should be sufficient to issue a warrant authorizing placement of a beeper in a private home by saying: "It will be time enough to resolve the probable cause-reasonable suspicion issue in a case that requires it.").

252. For a different, but in some ways related, slant on how the Fourth Amendment should be interpreted and on *Camara* specifically, *see* Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383 (1988). A second article, published after this Article was accepted for publication, proposes an economic model of the Fourth Amendment that results in an approach akin to,

V. CASE STUDIES

To gain a better idea of how the exigency and proportionality principles proposed in this Article would work, this Part discusses five general types of seizures and searches which raise some of the more interesting issues in this area: street stops, roadblocks, regulatory inspections, drug testing, and undercover agent operations. Also addressed, in greater detail, is the idea of using "generalized" suspicion to satisfy the certainty requirement.

A. *Street Stops*

The classic example of police investigation occurs when a police officer notices suspicious activity while on the beat. Under American case law, if the officer has "probable cause" to believe a crime has been committed, the suspect or suspects may be arrested and a search of their person conducted.[253] If probable cause is lacking, but there is reasonable suspicion that criminal activity is afoot, the officer may still detain the suspect for a short time and conduct inquiries.[254] Furthermore, a limited patdown or frisk (as opposed to a full search) is permissible if the officer has a reasonable suspicion that someone may be endangered by concealed weapons.[255] A warrant is not required in any of these situations. These rules are consistent with the approach advanced in this Article. No warrant is required for the typical street stop because exigency exists: the suspect could escape or people could be hurt if the police tried to obtain judicial authorization before acting.[256] Because arrests and searches are more significant intrusions than stops and frisks, the former actions should require a higher degree of certainty. If a stop becomes prolonged (say, more than ten minutes), it should be treated as an arrest, which requires a higher level of certainty.[257] If such certainty is not present, the person should be released.

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but ultimately different from, the proportionality principle. Fritzler, *Optimality in Fourth Amendment Law*, 27 AM. CRIM. L. REV. 473, 519–21 (1990).

253. Chimel v. California, 395 U.S. 752 (1969).

254. Adams v. Williams, 407 U.S. 143 (1972).

255. Terry v. Ohio, 392 U.S. 1 (1968).

256. However, unlike the Court's rules, the approach proposed in this Article would require a warrant for nonexigent arrests. *See* United States v. Watson, 423 U.S. 411 (1976) (no warrant required for nonexigent public arrest). In practice, most public arrests are exigent.

257. *Cf.* United States v. Sharpe, 470 U.S. 675 (1985) (permitting a stop of 15-minute duration); MODEL CODE OF PRE-ARRAIGNMENT PROC. § 110.2(5)(a)(ii) (1975) (limiting stops to 20 minutes).

Although, to this point, current Fourth Amendment law and the approach advocated in this Article are congruent, they diverge when one analyzes the extreme ends of the "seizure" spectrum. At one end, the Supreme Court has been unwilling to recognize that the Fourth Amendment is implicated by detentions short of an actual restraint by the police. It has declared that no seizure occurs, and thus no suspicion is required, when government agents briefly question people at their place of work,[258] chase a pedestrian down the street in a police car,[259] or approach a person in an airport and request him to walk fifteen feet to where his companions are standing with other officers.[260] At the same time, the Court has required nothing more than "probable cause" to justify long-term pretrial detention.[261] Application of the proportionality principle would probably arrive at different results in all of these cases.[262] Escalat-

258. INS v. Delgado, 466 U.S. 210 (1984).

259. Michigan v. Chesternut, 486 U.S. 567 (1988).

260. Florida v. Rodriguez, 469 U.S. 1 (1984).

261. Such detention is much more intrnsive than most searches and should thus require greater justification. In Gerstein v. Pugh, 420 U.S. 103 (1975), however, the Court held that an arrested person may be kept in jail for an indefinite period—later limited to 48 hours, Riverside County v. McLaughlin, 111 S. Ct. 1661 (1991)—based on a finding of probable cause. Although it also held that this finding must be made by a magistrate, *Gerstein*, 420 U.S. at 114, it permitted the decision to be made *ex parte*, and held that the rights to counsel, confrontation, and cross-examination do not attach. *Id.* at 123.

262. Two Court decisions handed down in the 1991 term illustrate the differences betwecn the Court's approach and the approach advocated in this Article. In the first case, California v. Hodari D., 111 S. Ct. 1547 (1991), police in an unmarked car came across a group of five youths huddled around a red vehicle. When the youths saw the police car, they ran and the red vehicle sped away. One officer gave chase to a youth, who threw away crack cocaine just before being caught. The Court held that the cocaine was admissible because at the time it was discovered the defendant was not seized—that is, there had been no "physical contact" or "submission to authority." *Id.* at 1550-51. The dissent pointed out the disingenuousness of this holding: no reasonable person would feel free to go about his business in such a situation. *Id.* at 1556-57 (Stevens, J., dissenting). At the same time, the *result* in *Hodari* is correct. Although the police did "seize" the defendant when they gave chase, they also had a high degree of suspicion that the youth was up to no good, sufficient to justify at least a temporary detention.

In Florida v. Bostick, 111 S. Ct. 2382 (1991), the Court was wrong in both result and rationale. There two officers, one armed, boarded a bus and surveyed the passengers. Without *any* suspicion, they singled out the defendant and asked to search his luggage. The Court rejected the Florida Supreme Court's holding that a seizure occurred at this point. Although the Court remanded the case for a determination as to whether the defendant had felt frec to go about his business when confronted by the police, it strongly suggested that it would find no seizure. It stressed that a seizure does not occur simply because police question an individual, *id.* at 2386, or beeause the defendant does not fcel free to leave, especially here, where the defendant stated he would not have left anyway beeausc of the imminent departure of the bus. *Id.* at 2387. Agaín,

ing intrusions, from a brief stop for questioning, to more elaborate questioning, to searches, to arrest, and so on through long-term detention, should be predicated on increasing levels of suspicion. Stipulating to one or two "levels" exacerbates the possibility of harassment and arbitrariness.

How is one to determine whether a particular certainty threshold has been reached? As already noted, by nature this inquiry must usually be a common sense, seat-of-the-pants assessment, just as it is under current Fourth Amendment law; in such cases, there are very few concrete guidelines. However, occasionally the degree of certainty possessed by police is roughly quantifiable. For instance, "drug courier profiles" offer the police the potential, at least theoretically, to correlate certain aspects of an individual who is disembarking from an airplane (*e.g.*, departure point, arrival point, place in line, nervous appearance, type of luggage)[263] with a particular likelihood that he or she is a drug courier.[264] To date, the Supreme Court has refused to sanction explicitly the use of these investigative tools[265]—commendably so, given the post hoc nature of the so-called "profiles" at issue in the cases before it.[266] How-

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however, a person in the cramped confines of a bus confronted by two officers is not likely to feel "free to go about his business." *See supra* note 13. And here, unlike in *Hodari*, there was no suspicion, even of the generalized variety. *Cf. United States v. Flowers*, 912 F.2d 707, 710 (4th Cir. 1990) (where a sweep of 100 buses, possibly containing as many as four to five thousand people, resulted in seven arrests).

263. These examples of items found in profiles are gleaned from Supreme Court cases. *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 4–5 & n.6 (1989); Florida v. Royer, 460 U.S. 491, 493 n.2 (1983). The precise contents of the profiles are often kept "classified," for obvious reasons.

264. For instance, according to one study conducted by the Drug Enforcement Administration, between 40 and 50% (depending upon how one interprets the results) of those identified as drug couriers pursuant to a profile turned out to be carrying either illegal drugs or other evidence connecting them with the illegal drug trade. *See* J. MONAHAN & L. WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 226–27 (1985) (describing the study).

265. In the five Court decisions where agents appeared to, or claimed to, rely on a profile, the Court either fails to mention the fact, or discusses it only in passing, making no serious effort to analyze its use. *See* United States v. Sokolow, 490 U.S. at 10 ("A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."); Florida v. Rodriguez, 469 U.S. 1 (1984) (no mention of profile despite discussion in petitioner's brief, *see* Brief for Petitioner, *id.* at 32 (No. 83-1367)); Florida v. Royer, 460 U.S. 491, 502 (1983); United States v. Mendenhall, 446 U.S. 544, 565 n.6 (1980) (Powell, J., concurring) ("I do not believe that these statistics [connected with use of a profile] establish by themselves the reasonableness of this search."); Reid v. Georgia, 448 U.S. 438, 440–41 (1980) (per curiam).

266. In his dissent in *Sokolow*, Justice Marshall noted "the profile's 'chameleon-like way of adapting to any particular set of observations,' " 490 U.S. at 13 (Marshall, J.,

ever, if a profile is proven to show the requisite correlation with crime,[267] and it is clear that the profile was actually used by the police in deciding to act, rather than made up afterward,[268] then its use should not be prohibited.

Two conceptual objections to the use of such profiles have been advanced.[269] The first is that a stop made pursuant to this type of instrument is not based on anything intrinsic to the particular individual stopped, and thus violates the notion of "individualized" justice. Assuming that "individualized" justice is something we should care about at the investigative phase,[270] the argument that

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dissenting) (quoting United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987) (case below)). He then described a series of cases which set forth the types of factors police have claimed were part of a drug courier profile. In one profile, the fact that a person is first to deplane was listed; in another the fact that the person is last to deplane was considered important; and in still another, the focus was on persons who deplaned in the middle. *Id.* Other comparisons in Marshall's list are also interesting. *Id.* at 13–14 (one-way ticket, nonstop flight, changed planes; no luggage, a gym bag, new suitcases; traveling alone, with companion; nervous, too calm).

267. Under current law, for instance, a 30% success rate might be required if the government plans to stop and question the individuals for a brief period of time. *Cf. supra* note 133 (equating reasonable suspicion with a 30% likelihood). However, if the confrontation becomes prolonged, then further suspicion should be demonstrated, *see supra* text accompanying notes 256–257, based either on the profile or other information. Moreover, the government should not be able to escape this further showing by proving that the extended confrontation was the product of "consent," unless the consent is genuine. *Cf. supra* text accompanying notes 201–204.

268. In order to avoid police manipulation of the profile to fit the facts, it should first be filed with the court.

269. *See* Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U.L. REV. 843, 853 (1985).

270. At trial, we would not want conviction to rest on the conclusion that the defendant is one among many, or even one among a few, who could have committed the crime. *Cf.* People v. Collins, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968) (rejecting the use of mathematical probability theory at the trial stage). But during the investigative phase, the focus is on who *may* have committed a crime. Thus, the fact that a "profile's focus is literally not upon an individual's unique conduct, but upon that conduct's alleged similarity to the behaviors of others," Cloud, *supra* note 269, at 853, should not matter. The individual's "uniqueness" is taken into account in assessing the intrusiveness of a search or seizure; it need not be considered in developing the level of certainty necessary to justify the intrusion.

Perhaps the lack of "individualization" concern is that profiles are more likely to lead to "dragnet" searches involving large numbers of innocent people. (The DEA study of profile use cited *supra* note 264, for instance, involved contacting 1.3 persons per thousand in various airports over an eight week period. J. MONAHAN & L. WALKER, *supra* note 264, at 226.) If we bar use of profiles for this reason, however, then a number of other government investigative techniques (*e.g.*, roadblocks, drug testing, residential and business inspection programs) would be called into question. Perhaps they should be. But the basis for prohibition should be a lack of sufficient certainty in light of the intrusion occasioned by such dragnet searches, not the fact that they are not based on "individualized" suspicion.

"generalized" suspicion is an insufficient basis for police action both proves too little and too much. It falls short because a person targeted by a profile *is* being stopped for characteristics or actions specific to that individual, such as nervous appearance, choice of luggage, and choice of flights (factors which, when taken together, happen to correlate at a particular level with being a drug courier). It proves too much because, if carried to its logical conclusion, the argument would circumscribe many accepted types of police action. For instance, the suspicion underlying the detention of a person believed to be a potential criminal is often based on police experience with previous crimes under similar circumstances;[271] thus, in a sense, these stops too are based on "generalized" suspicion.

The second objection aimed at profiles and similar investigative tools is that they often rely on "innocent" facts—that is, facts that are not clearly related to criminal activity. If police are relying in an ad hoc, seat-of-the-pants manner on such facts to justify their actions, there may be cause for concern.[272] But if the state has statistically demonstrated the relevant correlation between a certain cluster of individual traits and criminal activity, then the potential

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271. Consider, for example, the basis for the stop in Terry v. Ohio, 392 U.S. 1 (1968). There Officer McFadden, an officer with 30 years experience in the Cleveland police department, observed two men take turns walking down the street to stare into a window 24 times, conferring with each other after each trip. *Id.* at 5–6. Why is this behavior cause for intervention? According to Professor Cloud, it is suspicious because it is "so unique that it distinguishes [the two men] from innocent shoppers and pedestrians." Cloud, *supra* note 269, at 853. But why is it "unique"? Presumably because all of us, including Officer McFadden, know from past experience how innocent shoppers act, and thus how people who are not shoppers act. As many have noted, the difference between individualized and "actuarial" decisionmaking is not as clear as it seems. *See, e.g.*, Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1427 (1979) ("Although the clinician need not identify in advance the characteristics he will regard as salient, he must nevertheless evaluate the applicant on the basis of a finite number of salient characteristics, and thus, like the statistical decisionmaker, he treats the applicant as a member of a class defined by those characteristics."). Like other decisionmakers, police inevitably act on stereotypes derived from their experience.

The following hypothetical from J. MONAHAN & L. WALKER, *supra* note 264, at 225, might better make the point:

> Assume that the Cleveland Police Chief asked Officer McFadden and other similarly experienced officers to address a class of new recruits at the police academy on the topic, "What to Look for in Preventing Burglaries." Could a recruit take notes at this lecture and then rely on the experience of Officer McFadden and Officer McFadden's colleagues to justify the recruit's own reasonable suspicion in making future stops?

If the answer to the question is yes, then one would be hard pressed to conclude that drug courier profiles cannot be used because they are not "individualized."

272. Especially given the police's crime control bias. *See supra* note 241.

for abuse is not readily apparent, even if the traits are not by themselves usually connected with such activity.

In *Camara v. Municipal Court*,[273] the Supreme Court implicitly recognized both of these points. The types of inspections permitted in *Camara* were, and still are, based on "generalized" rather than "individualized" suspicion, since they are authorized whenever evidence of deteriorating conditions in the neighborhood *as a whole* exists. Moreover, these inspections routinely rely entirely on facts as "innocent" as those found in a drug courier profile. Compare, on the one hand, the relationship between the age of buildings in an area sought to be inspected and the possibility of a safety code violation in a particular building and, on the other, the connection between the departure city of an airplane passenger (say, Bogota, Colombia) and the possibility that he or she is violating the drug laws. In both situations, the facts are at best marginally related "logically" to the illegality in question. But, in each, they may be relied upon because of their statistical relationship to the eventuality sought to be proven by the government. In short, the fact that suspicion is "generalized" or based on "innocent" information usually should not, by itself, bar police action.[274]

Occasionally, however, the basis for the level of suspicion possessed by the police may taint the stop or search. For instance, imagine that police in a particular jurisdiction routinely ask all black persons found in predominantly white neighborhoods for identifying information and an explanation of why they are there.[275] By

273. 387 U.S. 523 (1967).

274. A third reason for not relying on generalized suspicion is more persuasive: that the data, statistics, or inferences upon which it relies are unreliable. Empirical assessments are often suspect; for instance, to date, good work on the drug courier profile has been scanty. *See generally* Cloud, *supra* note 269, at 884–920. *But see* DEA study, described *supra* note 264. If well done, however, statistical analyses are hardly less reliable than the intuitions, unfounded assumptions, and guesswork on which the courts and police now rely. *See generally* Saks & Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 146 (1980–81) ("[T]he decisionmaker whose only tool is intuition will often err. . . . It has been well established for some time now that when the same information is available to intuitive humans or a good mathematical model, the human's decisions are consistently less accurate." (footnote omitted)). The *ex ante* review process should be able to ferret out grossly inaccurate empirical information. And the adversarial *ex post* process is always available to make more subtle challenges to empirical findings. *See generally* Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 498–512 (1986) (recommending methods of evaluating research and discussing the judiciary's ability to do so).

275. *Cf.* Kolender v. Lawson, 461 U.S. 352 (1983), *overruled on other grounds*, United States v. Taylor, 110 S. Ct. 2143 (1990) (finding unconstitutional a loitering statute which permitted the police, on 15 separate occasions, to detain or arrest Mr.

definition, these stops are not based on "individualized" suspicion that criminal activity is afoot. Nonetheless, analogous to a stop based on a drug courier profile, the police might have a "generalized" suspicion that a certain percentage of blacks found in all-white areas are intent on committing or already have committed crime.

These stops should not be permitted, even in the unlikely event the aforementioned percentage rose to the level necessary to authorize a stop (which, in addition to infringing the autonomy interest, involves the stigmatization associated with being singled out on the public street by the police, as well as the possibility of perceived harassment). The rationale for this conclusion is not that the individual interests involved are somehow weightier in this situation than in others; under the proportionality principle, once the requisite certainty (based on the level of intrusion) is established, these interests have been taken into account. Rather it is grounded in the belief that a police action which depends upon factors such as race denigrates the *state's* interest in maintaining a democratic society and the allegiance of the populace. As *Brown v. Board of Education*[276] implicitly recognized, the symbolic and actual effect of this type of government action damages societal institutions regardless of its empirical justification.[277] Some citizens might see the state's behavior as a justification for using race as a surrogate in their own

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Lawson, a black, because he refused to identify himself and account for his presence in white or business neighborhoods); Brown v. Texas, 443 U.S. 47 (1980) (finding unconstitutional a police stop solely because detainee is in a "high drug problem area").

276. 347 U.S. 483 (1954) (holding unconstitutional separate but equal education of blacks).

277. The *Brown* Court quoted the lower court to the following effect:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for *the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.*

347 U.S. at 494 (emphasis added). The rest of the quotation (and the Court's opinion) discusses the negative effects of this sense of inferiority on a black child's ability to learn and psychological well-being. But the Court has consistently upheld *Brown*, despite empirical findings suggesting that segregation may *not* be particularly harmful educationally and psychologically. *See, e.g.*, Stephan, *School Desegregation: An Evaluation of Predictions Made in* Brown v. Board of Education, 85 PSYCHOLOGICAL BULL. 217 (1978). Morcover, there is considerable evidence to suggest that some members of the *Brown* Court preferred focusing on the types of concerns encapsulated in the highlighted language. *See* R. KLUGER, SIMPLE JUSTICE 689, 706 (1976) (noting Justice Jackson's aversion to relying on psychological assessments of the impact of segregation and Chief Justice Warren's minimization of this part of *Brown*).

decisionmaking.[278] Other, more sensitive, citizens who experience or hear about such stops will question the legitimacy not only of the stops themselves, but of the government that would permit them.[279] In either case, the democratic state's interests are severely damaged.

Thus, the proposition advanced here is that those "innocent" facts which are likely to accentuate or create the appearance of invidious discrimination may not be relied upon in determining investigative certainty. Other than race, there may be no other characteristics that fit in this category. For instance, use of factors such as age or gender in making investigative decisions is probably permissible, since such a practice is unlikely to induce the kinds of societal repercussions that use of race would.[280] The full implications of this idea cannot be developed here; a few further comments about how its scope might be limited are made in the next section.

B. *Roadblocks*

Because it is a convenient way of screening for many types of illegal activity, the roadblock is becoming a popular investigative technique. As noted earlier in this Article, the United States Supreme Court has approved the use of roadblocks to detect both illegal immigration and drunken driving. A closer examination of these two situations provides further opportunity for elaborating

278. Probably the best example of this phenomenon comes from South Africa, where private actions are clearly influenced by the government-supported policy of apartheid. When President F.W. DeKlerk called for the end of apartheid in February 1991, the leader of the Conservative Party stated the move "struck at the roots of white community life." *See South Africa Moves to Scrap Apartheid*, N.Y. Times, Feb. 2, 1991, at A1, col. 1.

279. Monroe, *Complaints About a Crackdown*, TIME, July 16, 1990, at 20 (describing hostile community reaction to "dragnet" stops of Hispanics and other minorities by Los Angeles police).

280. For this reason, the position in the text is quite different from traditional equal protection analysis. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW §§ 14.1–14.10 (3d ed. 1986). The latter analysis, at bottom, focuses on whether a particular characteristic is irrelevant to the decision at issue; in most cases in which an equal protection claim is raised, such as decisionmaking about employment and housing, race is not pertinent and discrimination based on it makes out a colorable constitutional claim. *Id.* § 14.5. In the investigative context, on the other hand, race may well be a useful discriminating variable. *See* J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 74–75 (1980). The argument here is that, even if this correlation exists, race may not be relied upon as an investigative factor, given the negative effects on state interests described in the text. *See generally* Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 241–50 (1983). Use of other factors that have a high correlation to crime (*e.g.*, gender and age) is unlikely to create the same negative effects.

the two-factor approach to search and seizure regulation advocated here.

In *United States v. Martinez-Fuerte*,[281] the Court upheld the constitutionality of a checkpoint established in southern California to detect illegal immigration. The Court required neither a warrant nor any level of suspicion as authorization for either the initial "slow-down" stop at this checkpoint, or the referral of selected individuals to a secondary checkpoint where their papers could be checked.[282] This holding is clearly suspect under the exigency principle; whether it conforms with the proportionality principle is more difficult to ascertain.

Unlike the street stops described above, the illegal activity sought to be discovered by the checkpoints did not present the government with an emergency. Thus, the exigency principle would require authorization of the roadblock by someone independent of the law enforcement officers who operated it. On this point, the Court noted that "[t]he location of a . . . checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources."[283] Although the officials "responsible for making overall decisions" probably were not involved in front-line law enforcement, neither were they immune from the crime control biases of the police. Some check on their authority by an independent magistrate would prevent indiscriminate use of the checkpoint mechanism.[284]

The more difficult aspect of *Martinez-Fuerte* is whether the independent authority should permit such a roadblock. In addressing this issue, the Court relied primarily on the harm severity/difficulty of detection rationales. It concluded that the illegal immigration problem was "substantial" and that checkpoints of the type advocated by the government are the only method of detecting significant numbers of illegal aliens.[285] These facts, in addition to the

281. 428 U.S. 543 (1976).

282. *See id.* at 546–47 for a detailed description of the procedures at issue.

283. *Id.* at 559.

284. The Court's only comment in this regard was to "assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class." *Id.* This point is probably true, but does not consider whether the officials will have sufficient justification, as discussed below, for authorizing a particular roadblock.

285. *Id.* at 557–58 ("[I]n their absence [the] highways would offer illegal aliens a quick and safe route into the interior. Routine checkpoint inquiries apprehend many smugglers and illegal aliens who succumb to the lure of such highways.").

relatively unintrusive nature of the roadblocks,[286] lead the Court to hold that no suspicion is required before stopping people at such checkpoints and referring them to a secondary checkpoint.[287]

Martinez-Fuerte is another example of how the harm severity/difficulty of detection concept can be abused. While the Court's findings with respect to the scope of illegal immigration and its elusiveness are readily acceptable, they distract from the central proportionality question that should determine the legitimacy of a search or seizure: is the government action effective enough to justify its impact on autonomy and privacy interests? In *Martinez-Fuerte*, this determination would have required an attempt to gauge the extent to which, without the roadblocks, the harm associated with illegal immigration—whatever its magnitude and however difficult to prevent—would increase. In other words, some effort at generating generalized suspicion should have been made.

As developed below, sufficient information is available from the Court's opinion in *Martinez-Fuerte* to make such an assessment. But before the certainty inquiry required by the proportionality principle can be taken up, an important preliminary issue needs to be addressed. Justice Brennan's dissent in *Martinez-Fuerte* argued that the stops authorized by that case were unconstitutional because, *inter alia*, the immigration officers focused almost exclusively on Hispanics.[288] Note that race was not the sole criterion for the stops in *Martinez-Fuerte*: at the initial stop, *every* car was detained, however briefly,[289] and the secondary referrals, although based "largely" on race, did not rely entirely on that factor, since only a small proportion of Hispanics were referred.[290] But race clearly

286. *Id.* at 565 (degree of intrusion associated with roadblock "hardly can be compared" with that occasioned by search of a house).

287. The Court's conclusion that suspicionless stops were permissible was most explicit with respect to the initial stops; there, requiring "reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens." *Id.* at 557. With respect to the referral stop it stated: "As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved." *Id.* at 563–64.

288. *Id.* at 571–72 (Brennan, J., dissenting).

289. *Id.* at 546 ("The 'point' agent standing between the two lanes of traffic visually screens all northbound vehicles, which the checkpoint brings to a virtual, if not a complete halt." (footnote omitted)).

290. *Id.* at 563 n.16 ("Less than 1% of the motorists passing the checkpoint are stopped for questioning, whereas American citizens of Mexican ancestry and legally resident Mexican citizens constitute a significantly larger proportion of the population of southern California.").

was an important criterion in the decision to refer drivers to the secondary checkpoint. Absent this factor, the government's level of suspicion would have been significantly reduced (and, under proportionality analysis, the level of intrusion permitted correspondingly decreased).

Nonetheless, on the facts of *Martinez-Fuerte*, race may have been a legitimate factor for government officials to consider, despite the position taken above against race-based investigative decisions. In contrast to the hypothetical in the previous section, this trait is directly relevant to the substantive crime which the government was attempting to detect in *Martinez-Fuerte*, at least if one assumes that all or virtually all illegal immigrants in Southern California are of Hispanic ethnic origin. On this assumption, those who enter the country illegally are known to be Hispanic; in the previous hypothetical, those who commit or are about to commit burglary are not known to be black. Put another way, the negative symbolic effect of stopping Hispanics in order to detect illegal immigration by Hispanics in Southern California is negligible compared to that associated with stopping blacks to prevent burglary in white neighborhoods.[291] Citizens are unlikely to view this state activity as a model for engaging in racist behavior or as a sign that the state is corrupt or discriminatory. Although a close question, one could provisionally conclude that, in this context, race was a permissible factor to consider.

Assuming the use of race as one of the bases for developing suspicion is not problematic, the stops in *Martinez-Fuerte* were justified under the proportionality analysis suggested in this Article. According to data from one of the cases consolidated for that decision, during an eight-day period, 0.12 percent of those initially stopped and twenty percent of those referred to the secondary checkpoint were illegal immigrants.[292] Translated into levels of suspicion regarding future stops at this location, these success rates are relatively low. But the initial "slow-down" involved only a visual survey of the car's occupants, thus requiring little or no suspi-

291. In the Court's words, "[d]ifferent considerations would arise if, for example, reliance were put on apparent Mexican ancestry at a checkpoint operated near the Canadian border." *Id.* at 564 n.17.

An analogous situation arises when police know the perpetrator of a particular crime is of a certain race. Certainly they would be allowed to rely on race as one of the factors in deciding who to investigate for that crime.

292. *Id.* at 554 (171 out of the 146,000 vehicles referred contained illegal aliens); *id.* at 564 n.17 (roughly 20% of referred vehicles contained one or more illegal aliens).

cion.[293] The secondary referral was more intrusive, but generally involved only a few questions and a document check, lasting from three to five minutes.[294] To me, the levels of "generalized" belief that illegal immigrants will pass through the checkpoint seem roughly proportional to the levels of intrusion associated with the effort to detect them.[295]

Thus, the result under the proportionality principle could be the same as the Court's result using harm severity/difficulty of detection analysis. But proportionality reasoning is preferable, because it requires the state to make a showing of some suspicion (if only of the "generalized" variety) before it acts[296] and because it focuses solely on the level of intrusion as the gauge of how much certainty should be required. In contrast, the Court's approach implies that the government may set up such roadblocks at will, and reaches this conclusion relying in part on abstract factors such as the "substantiality" of the illegal immigration problem and the "formidable" obstacles to detecting it.

In *Michigan Department of State Police v. Sitz*,[297] the Supreme Court relied on similar factors in holding that warrantless, suspicionless stops may be made at roadblocks set up to detect drunk drivers, so long as every driver is stopped. *Sitz* not only used the inappropriate analysis, but, unlike *Martinez-Fuerte*, is clearly wrong. First, while the roadblock in *Martinez-Fuerte* was at least authorized by a third party, the location of the checkpoint in *Sitz* was chosen by police on the street in obvious violation of the exigency principle.[298] Second, the success rate in *Sitz* was too low to

293. *Id.* at 546 ("Most motorists are allowed to resume their progress without any oral inquiry or close visual examination. In a relatively small number of cases the 'point' agent will conclude that further inquiry is in order.").

294. *Id.* at 546–47.

295. Note that, at least according to one survey, judges, on average, equate reasonable suspicion with a 30% degree of certainty. McCauliff, *supra* note 130, at 1328. The second document-check stop in *Martinez-Fuerte* is probably shorter and, more importantly, less likely to result in harassment or stigmatization, than the typical stop and frisk authorized by *Terry v. Ohio*.

296. How is the government to obtain the types of statistics normally relied upon for an assessment of generalized suspicion without carrying out the proposed action and thus possibly unjustifiably infringing on individual interests? Occasionally, data may be available from another jurisdiction. *Cf.* Michigan Dep't of Police v. Sitz, 110 S. Ct. 2481, 2491 (1990) (Stevens, J., dissenting) (looking at Maryland data). If not, the *ex ante* reviewer might, based on informed speculation, authorize a new type of search or seizure with the proviso that careful records be kept and that subsequent review take place.

297. 110 S. Ct. 2481 (1990).

298. The checkpoint was set up by the Saginaw County Sheriff's Office, operating under general guidelines established by the Sobriety Check-Point Advisory Commis-

justify the degrec of intrusion involved in the case. The record revealed that only 1.6 percent (2 out of 126) of those stopped at the sobriety checkpoint in question were drunk.[299] Under the proportionality rule, the issue is whether this level of success is sufficient to justify the type of intrusion involved in a roadblock. By comparing the intrusion in *Sitz* with other situations already discussed, we can get a rough sense of why this issue too should have been resolved against the government.

The brief detention of motorists that occurs at the type of roadblock at issue in *Sitz* clearly is not as intrusive as an arrest. Nor is it as invasive as a stop on the street if, as the Court required, every car is stopped (thus reducing the potential for harassment and stigmatization) and the occupants are questioned for only a few moments and allowed to remain in their car (thus reducing the insult to privacy). But even under these circumstances, a significant intrusion occurs. Unlike the permanent checkpoint in *Martinez-Fuerte*, sobriety checkpoints are transient.[300] A driver is thus more likely to be surprised by the checkpoint, and is less able to prepare for or limit the intrusion into privacy it occasions.[301] More importantly, the kind of search for evidence of intoxication authorized in *Sitz* is likely to be far more wide-ranging than the routinized check conducted at an immigration checkpoint. The typical stop in *Sitz* lasted as long as necessary to convince the officer (using whatever criteria he or she wanted) that the driver was not intoxicated (with the average stop taking twenty-five seconds, despite the fact that many drivers were undoubtedly waved on after a very brief encounter).[302] In contrast, the initial stop in *Martinez-Fuerte* consisted of a cursory visual inspection lasting only a few seconds, and the secondary stop, although on average lasting longer than the stops in *Sitz*, could be brought to an end as soon as appropriate documents were produced. As Justice Stevens intimates in his *Sitz* dissent,[303] the roadblock in that case was more invasive than the initial stops

sion, composed of state police, local police forces, state prosecutors, and representatives of the University of Michigan Transportation Research Institute. 110 S. Ct. at 2483–84.

299. *Id.* at 2487.

300. *Id.*

301. *Id.*

302. *Id.* at 2484 (majority opinion).

303. *Id.* at 2492 (Stevens, J., dissenting).

permitted in *Martinez-Fuerte*, and at least as invasive as the secondary stops authorized by that decision.[304]

In justifying the majority's conclusion in *Sitz*, Chief Justice Rehnquist compared the 1.6 percent success rate in that case with the 0.12 percent detection rate at the *initial* stop in *Martinez-Fuerte*.[305] Based on the foregoing, the more relevant comparison in terms of intrusiveness is not this latter figure but the success rate at the secondary referral point, which was twenty percent. Applying the proportionality principle on these facts, the generalized suspicion possessed by police operating the sobriety checkpoint in *Sitz* did not justify their conduct.[306]

C. *Regulatory Inspections*

Often a government search and seizure will be designed to implement regulatory objectives, as opposed to prosecutorial or disciplinary goals. This Article has already alluded to some of these situations.[307] Other examples are as diverse as the government's regulatory interests. For instance, a city may conduct regular health inspections of restaurants and stores, or look for sources of disease, such as rat infestation, in residential areas.[308] Or a state or federal government may want to inspect certain kinds of industries for violations of safety regulations[309] or to ensure that government

304. Note that, in Australia, sobriety checkpoints are operated in a much less intrusive manner. Every driver passing through a given location is stopped, told the reason for the stop, and subjected to a breathalyzer test. If the results are positive, arrest results. If they are negative, the driver is allowed to pass through. The entire length of the detention is one to three minutes. Conversation with members of Monash Law Faculty, Melbourne, Australia (April 1991). This method, which leaves no discretion to the officer and is standard practice for all drivers, would be justifiable on a lower level of certainty than that required for the open-ended detentions involved in *Sitz*.

305. 110 S. Ct. at 2488.

306. Sometimes the "success rate" for a particular investigative technique may be artificially lowered by its deterrent effect. Thus if, prior to the checkpoint conducted in *Sitz*, Michigan had relied on sobriety checkpoints and widely publicized that fact, the 1.6% figure might not have accurately reflected the percentage of drunken drivers who normally drive through that area. However, this potential problem did not affect the data in *Sitz*, since the checkpoint at issue was the first of its kind in the state. *Id.* at 2484. Thus, *Sitz* was a useful "test case." *See supra* note 296.

307. *See supra* note 77 and accompanying text.

308. *See, e.g.*, Frank v. Maryland, 359 U.S. 360, 362 (1959), *overruled by* Camara v. Municipal Court, 387 U.S. 523 (1967) (quoting BALTIMORE CITY CODE art. 12, § 112, which requires that "[e]very dwelling and every part thereof shall be kept clean and free from any accumulation of dirt, filth, rubbish, garbage or similar matter, and shall be kept free from vermin or rodent infestation").

309. *See, e.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (dealing with Occupational Health and Safety Act § 8(a), 29 U.S.C. § 657(a) (1985), which permits inspec-

restrictions on sales of certain types of products (for example, liquor or weapons) are met.[310]

When such inspections are nonconsensual and nonexigent,[311] a decisionmaker divorced from agency activity should authorize them. Although it may argue for less formal procedures,[312] the mere fact that the inspectors are not police does not exempt them from the law enforcement orientation that precludes police objectivity in deciding whether a search or seizure is necessary. Such monitoring is required because it will make the agency justify itself, thus helping to prevent personal vendettas and pretextual inspections.[313]

However, as *Camara* and other Court decisions have recognized, the level of certainty that health or safety problems exist in a particular residence or business need not be very high.[314] Justice White's opinion in *Camara* gave three reasons for this conclusion:

> First, such programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any

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tions of the work area of most large companies in the United States, for the purpose of locating safety and health hazards and ensuring conformance with OSHA regulations).

310. *See, e.g.*, Colonnade Catering Corp. v. United States, 397 U.S. 72, 73–74 (1970) (dealing with 26 U.S.C. § 5146(b) (1989), which provided that Treasury agents may enter and inspect the premises of retail dealers in liquors to inspect certain records, documents, and inventory).

311. Most regulatory inspections are not of an emergency nature. However, a few are. *See, e.g.*, Michigan v. Tyler, 436 U.S. 499 (1978) (immediate searches of burned down premises to discover cause of fire); Jacobsen v. Massachusetts, 197 U.S. 11 (1905) (inspections for purposes of discovering contagion that might spread quickly).

312. *See supra* text accompanying notes 121–123.

313. As the Court stated in Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978), "[t]he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." The Court has also noted the possibility that inspectors may serve as a "front" for the police. Abel v. United States, 362 U.S. 217, 229–30 (1960).

For some types of inspections, the absence of discretion exception to the warrant requirement, *see supra* text accompanying notes 98–103, may be applicable. *See, e.g.*, Dome Realty, Inc. v. City of Paterson, 83 N.J. 212, 240, 416 A.2d 334, 350 (1980) (inspectors certifying that unoccupied premises are occupiable by new tenant have "no discretion regarding which dwellings are to be searched. . . . Under the ordinance an inspection occurs only when the landlord requests one. It is restricted to a determination of compliance with each of the several standards contained in the housing code." (citations omitted)). Note, however, that even when this exception is applicable, a judge should evaluate the reasonableness of the statute authorizing the inspection. *See supra* text accompanying note 126.

314. In addition to the Court's ruling in *Camara*, see *supra* text accompanying notes 246–250; *Barlow's*, 436 U.S. at 321 & n.17 (allowing a warrant to issue for an OSHA inspection upon a showing that the requested inspection is part of a general enforcement plan based on "neutral criteria" such as "accident experience and the number of employees exposed in particular industries").

> other canvassing technique would achieve acceptable results. . . . Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.[315]

The first reason given by the Court may or may not be a makeweight,[316] depending upon what is meant by "public acceptance," a phrase to which we will return in a moment. Justice White's second reason describes the harm severity/difficulty-of-detection rationale, which this Article has argued should be considered only in unusual cases. Residential inspections of the type addressed in *Camara* might be one of these rare cases: without entering the house, determining whether it might be in violation of health or safety codes is often almost impossible. Nonetheless, for reasons given below, resort to this rationale is probably unnecessary and thus, given the drawbacks associated with it,[317] inadvisable.

Justice White's final rationale for permitting house inspections on less than traditional "probable cause" is that they are less intrusive, in two ways: first, such inspections do not focus on those parts of the home most likely to house personal or intimate items or activities; and second, their purpose is not to find evidence of crime, but rather is motivated by a desire to discover and correct conditions that otherwise might harm the individual. The second reason may be the most important. While inspectors will not rifle through desk drawers or snoop through closets, they will often see the inside of one's house, traditionally viewed as one's private sphere. In the process, intimate or personal items may inadvertently be discovered, even when notice of the inspection is given. But the searched party may still perceive such inspections to be relatively noninvasive if they are primarily regulatory in nature.[318]

Research indicates that the motivation behind a search is extremely relevant to the level of intrusion associated with it.[319] Of

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315. 387 U.S. at 537.

316. Professor LaFave, for one, discounts this reason, noting that in Frank v. Maryland, 359 U.S. 360, 384 n.2 (1959), the dissenters had referred to a "history of acquiescence." 3 W. LAFAVE, *supra* note 232, at 603.

317. The drawbacks of relying on this rationale are discussed *supra* in the text accompanying notes 179–197. Here, such reliance, in practice, removes any suspicion requirement, even of a generalized nature, thus creating a disincentive to obtain better statistical analysis of what outward factors correlate with health and safety violations.

318. In residential inspection cases, criminal prosecution, if it occurs at all, typically comes only after the resident has been given the opportunity to correct the violation. *See Camara*, 387 U.S. at 531. Occasionally, a criminal complaint will be filed immediately after a violation is discovered, but it too will be withdrawn if the problem is promptly rectified. *Id.*

319. Small, *supra* note 119, at 64.

course, as already pointed out,[320] merely calling a search "regulatory" or "administrative" in nature does not lessen its intrusiveness. When the purpose of the government action is to punish or shame (as with searches for infractions of school disciplinary rules), it is likely to be seen as intrusive even if it does not result in criminal prosecution. But if the object is to facilitate and aid (as in fire, safety, and health inspections), then the typical reaction may be different. As in the airport frisk scenario presented earlier,[321] people subjected to such inspections may be grateful for the intrusion even if nothing is discovered; this may be what the Court meant when it stated that regulatory searches have a "long history of public acceptance." If this perception is correct,[322] residential inspections may be justifiable based on a very low level of generalized suspicion without resorting to the difficulty-of-detection rationale.

The same type of analysis might apply to businesses subject to health and safety regulations. Typically, those parts of a business that are inspected are even less likely to be associated with intimate activities than are the areas of a house subject to regulation. And, one would hope, business owners should welcome government attempts to improve working conditions or ensure conformance with valid regulations. Thus, one might conclude that, like residential inspections, these inspections should not be subject to a stringent certainty threshold.

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320. *See supra* text accompanying notes 115–119.

321. *See supra* text accompanying notes 198–200.

322. *But cf.* Justice Clark's dissent in *Camara*, which described a voluntary inspection program in Oregon in which one out of six persons refused entry to inspectors. 387 U.S. at 552–53 (Clark, J., dissenting). This refusal rate is not low, but it does not disprove the conclusion in the text. Given the voluntary nature of the program, the 83% consent rate (5 out of 6) seems quite high; it is unlikely anything approaching this rate would be obtained from truly uncoerced individuals asked to permit a search of their house or person for evidence of crime.

Note also that if the assumption about people's generally accepting attitudes toward residential inspections is correct, then most of the refusers in the Oregon study must have been persons who were covering up conditions they thought might result in significant repair costs if discovered; accordingly, the refusals should be viewed as evidence of guilt, sufficient to authorize a nonconsensual entry. *See supra* text accompanying notes 201–204. It would be nice to know why the refusers in the Oregon study refused and what percentage of them were covering up code violations.

If one does not accept the rationale advanced in the text for concluding that residential inspections are unintrusive, the proportionality principle would probably require a higher level of certainty for residential inspections than the government is currently able to demonstrate (given the fact that they take place in the home). If so, as the text notes, this might be one of the few situations in which the future harm/difficulty of detection rationale would permit intrusions based on a disproportionate level of certainty.

Although this is probably the correct result in many cases, it cannot be arrived at so easily. First, except for those parts of a business which are truly open to the public[323] rather than to just its employees or management, some degree of privacy is and should be expected.[324] Second, the reality is that business owners are less likely than homeowners to believe that goverument health and safety regulations are designed for their benefit. Workplace inspections are likely to be much more disruptive and expensive;[325] moreover, they occasion considerably more anxiety, given the myriad ways in which a business can incur civil and even criminal liability through violation of complex regulations that are often not well understood or even known about.[326] Consequently, in some industries, the sense of intrusion experienced by inspected business owners, even "innocent" ones, is probably greater than that felt by the typical homeowner subjected to a safety check.

There are two ways in which this heightened sense of invasion might be miniinized. The first, adopted by the Supreme Court in connection with inspections of "heavily regnlated industries,"[327] is to assume that business owners agree to undergo random, surprise

323. *See* Marshall v. Barlow's Inc., 436 U.S. 307, 315 (1978) ("What is observable by the public is observable, without a warrant, by the Government inspector as well."); *see also* Maryland v. Macon, 472 U.S. 463 (1985) (no "search" when a detective entered an adult bookstore and purchased two magazines which later formed the basis for an obscenity prosecution).

324. *See Barlow's*, 436 U.S. at 315 ("The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents.").

325. For instance, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801–840 (1988), underground mines are to be inspected at least four times per year and surface mines twice a year. Such inspections are time-consuming. The mine inspection contested in Donovan v. Dewey, 452 U.S. 594 (1981), had gone on for an hour before it was terminated by the president of the mining company. *Id.* at 597. Moreover, they can result in significant expenditure. In *Dewey*, for instance, the contested inspection was designed to determine whether 25 violations had been corrected. *Id.*

326. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975) (criminal conviction of company president under the Federal Food, Drug, and Cosmetic Act affirmed, based on a finding that he had a responsible relation to the situation, which was rodent activity in a company warehouse located in another city). *See generally* O'Kecfe & Shapiro, *Personal Criminal Liability Under the Federal Food, Drug, and Cosmetic Act: The* Dotterweich *Doctrine*, 30 FOOD DRUG COSM. L.J. 5, 14 (1975) (describing cases where jail sentences have been imposed on a negligence basis).

327. The leading case is United States v. Biswell, 406 U.S. 311 (1972), described *supra* note 77. The heavily regulated industries rubric is a category which expands with each new Court case dealing with business searches. For a recent entry, see New York v. Burger, 482 U.S. 691 (1987) (finding that New York junkyards covered by a recently passed state statute are heavily regulated). As Justice Stewart pointed out in Donovan v. Dewey, 452 U.S. 594 (1981), the Court's cases suggest that government can now constitutionally "define any industry as dangerous, regulate it substantially, and provide

searches as a condition of doing business. If, as this Article contends, intrusiveness is the key variable in determining the reasonableness of a search, this "implied consent" rationale is a hoax. A surprise inspection is not made less offensive because its victim has, in effect, been forced to consent to it in advance.[328] While the intensity of government regulation may indicate the extent to which an industry is "dangerous" (thus suggesting that the requisite "generalized" certainty level will be easily achieved), the potential for unnecessary invasions of privacy, harassment, and stigmatization is similar whether one's business is "heavily regulated" or not regulated at all.

A second way of looking at business inspections—which more persuasively shows why at least some of them may be thought of as minimally intrusive—is to consider them from the perspective of the *employees* rather than the employers. Most health and safety inspections, for instance, are more an invasion of the workers' space than of the owner's. Although the owner has legal title to the inspected building, the employees are the people who work in and suffer from an unhealthy or unsafe environment. Viewed from the latter's perspective, the motivation behind a government inspection may well be benign, not punitive.

Consider government inspections of a toxic chemical plant. Although the management of such a company might want to prevent unrestricted government access, the employees of the plant (the occupiers of the space to be inspected) would probably welcome government agents as often as they wish to come.[329] As with the airport frisks analyzed earlier—and in contrast to the Court's "heavily regulated industry" analysis—here the implied consent is likely to be "genuine," and thus likely to support a finding of reduced intrusiveness. In situations where this is so,[330] the same low

for warrantless [and probably suspicionless] inspections of its members." *Id.* at 613–14 (Stewart, J., dissenting).

328. As one court nicely put it, in discussing the state of affairs in the mining industry: "It would be far more accurate to state that [the] legislation and regulations . . . 'entered' [the operator's] business activity" than to state that the operator "subject[ed] himself to governmental supervision and regulation." Marshall v. Wait, 628 F.2d 1255, 1259 (9th Cir. 1980).

329. For interesting examples of how the interests of workers and owners are often in direct conflict where health and safety issues are involved, see Fidler, *The Occupational Health and Safety Act and the Internal Responsibility System*, 24 OSGOODE HALL L.J. 315 (1987). Fidler concludes: "[M]anagcment and workers do *not* . . . have convergent interests in workplace health and safety." *Id.* at 339 (emphasis in original).

330. Of course, this analysis would not apply to many types of business inspections. In some of the cases where it does not, *e.g.*, *Biswell* (which involved search of a single

level of certainty that is sufficient for residential inspections may be appropriate for business inspections.

D. *Drug and Alcohol Testing*

One of the more controversial issues in the United States today is the legality of state-conducted tests to determine whether government employees are using drugs or alcohol.[331] Whether such testing relies on hypodermic needles, urine samples, or breath analysis, it constitutes an infringement of individual interests[332] and, under the approach advocated in this Article, should only be permitted if some degree of suspicion exists. But the United States Supreme Court has indicated that warrantless, suspicionless drug testing is permitted under the Fourth Amendment in any government work environment where the state can show a compelling interest in ensuring that the employees are drug and alcohol free. This Article has already criticized the reasoning of the decisions which support this proposition;[333] to some extent this criticism is repeated and elaborated upon below, but the primary effort here will be to illus-

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proprietor pawn shop under the Gun Control Act of 1968), virtually suspicionless inspections *might* be allowed under a future harm/difficulty of detection rationale. But in others, this rationale is clearly inapposite.

Consider, for instance, the Supreme Court's decision in New York v. Burger, 482 U.S. 691 (1987), upholding a state statute which permits warrantless, surprise inspections of junkyards and vehicle dismantlers at any time during business hours. The purpose of the statute is to allow checks of the junkyard owners' license status and records, and to determine whether any vehicles or parts on the premises were stolen. *See id.* at 694 n.1. The searches authorized by the law are more intrusive than the typical business inspection in that their primary purpose is not to help the owner but to procure evidence of crime; indeed, they may be, and often are, conducted by the police. *Id.* Thus, under the approach advocated in this Article, they should be based on a fairly high level of certainty that the searched junkyard owner is involved in receiving stolen property (and should also require a warrant). There is no indication that such suspicion would be any more difficult to develop than in other cases of street crime: the junkyard could be monitored from off-premises, car thieves could be tracked (after stealing cars "planted" by the police), or suspicion might be derived through "generalized" means. But the Court's sole justification for permitting random, suspicionless searches was that "the State rationally may believe that it will reduce car theft by regulations that prevent automobile junkyards from becoming markets for stolen vehicles and that help trace the origin and destination of vehicle parts." *Id.* at 709. *Burger* is another example of "weak" harm severity/difficulty of detection analysis that borders on evaluating the propriety of an investigative technique solely by looking at whether the government's effectiveness claim sounds plausible. *See infra* text accompanying notes 179–197.

331. A computer search solely for legal articles about drug testing published in the past two years revealed over fifty pieces.

332. These techniques are described in Skinner v. Railway Labor Exeeutives' Ass'n, 489 U.S. 602, 624–27 (1989). Their intrusiveness is evaluated further, *infra* text accompanying notes 344–346.

333. *See supra* text accompanying notes 179–192.

trate how the ideas developed in this Article might apply to the two fact situations that faced the Court.

National Treasury Employees Union v. Von Raab[334] is the case, alluded to earlier, in which the Court upheld a drug test program administered by the Customs Service. This program requires testing of anyone who applies for or seeks promotion to a customs job connected with interdicting drugs or use of arms.[335] The Court found that the program, which clearly permits suspicionless testing, was necessary to safeguard against employment of agents who, "because of their own drug use, [become] unsympathetic to their mission of interdicting narcotics" or impaired while using their weapons.[336]

In short, the Court relied on the harm severity/difficulty of detection rationale. Use of this rationale should be sparing, and was clearly not called for here. As Justice Scalia pointed out in his dissent in *Von Raab*, the government made no showing that *any* harm, much less severe harm, results from drug use by customs agents.[337] Recognizing this fact, the Court had to fall back on the assertion that, because drug-induced impairment might become a substantial problem for the Customs Service sometime in the future, a drug testing program should be in place now to prevent it.[338] For rea-

334. 489 U.S. 656 (1989).

335. *Id.* at 677.

336. *Id.* at 670.

337. *Id.* at 683 (Scalia, J., dissenting) ("What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of *even a single instance* in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribetaking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use." (emphasis in original)).

338. The Court stated:

> The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, [citing *Camara*] and of motorists who are stopped at the checkpoints we approved in [*Martinez-Fuerte*]. The Service's program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect those employees who use drugs. Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.

Id. at 674–75 (citations omitted). The Court's reliance on *Camara* and *Martinez-Fuerte* is to no avail: in both of those cases, the government, although it should have been more specific, at least demonstrated that a significant problem existed (in the first case, widespread hazardous violations, 387 U.S. at 551, and in the second, "formidable" numbers of illegal immigrants, 428 U.S. at 552). In *Von Raab*, it did not.

sons described earlier,[339] deterrence justifications such as this have no place in search and seizure analysis separate from an assessment of how intrusive the deterrent might be. And because the evidence in *Von Raab* indicated that people who apply for or become customs agents are extremely unlikely to engage in drug use, they should not be subject, absent "individualized" suspicion, to even the least intrusive type of test.[340]

On the other hand, as already noted, *Skinner v. Railway Labor Executives' Association*[341] illustrates a situation in which a government drug test program might have been justified. *Skinner*, it will be remembered, involved a program which required drug and alcohol testing for all railway workers involved in an accident or suspected of having violated certain rules (such as failing to heed a signal). In contrast to the paucity of information provided in *Von Raab* about the anticipated harm, in *Skinner* the government presented historical data suggesting a nontrivial probability that such workers are impaired by drug or alcohol use.[342] Because the statistical information was not presented with the proportionality inquiry in mind, it does not clearly make out a good case under that principle. But the potential for showing sufficient "generalized suspicion" was surely there.[343]

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339. *See supra* text accompanying notes 193–195.

340. The specific test at issue in *Von Raab* was urinalysis, which requires the employee to remove outer garments and personal belongings, and to produce a urine sample behind a partition, while a monitor of the same sex "remains close at hand to listen for the normal sounds of urination." 489 U.S. at 661. Much less offensive is a breathalyzer test, but this method only provides information about blood-alcohol content, *see* Comment, *supra* note 189, at 710, and thus was not at issue in *Von Raab*. Even the breathalyzer test should not be permitted if *no* suspicion exists.

341. 489 U.S. 602 (1989).

342. A Federal Railway Administration study found that from 1972 to 1983 "the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor. . . ." *Id.* at 607 (quoting 48 Fed. Reg. 30726 (1983)). The same study connected "an additional 17 fatalities to operating employees working on or around rail rolling stock that involved alcohol or drugs as a contributing factor." *Id.* Finally, 23% of the railways' operating personnel were "problem drinkers." *Id.* at 607 n.1.

343. Most useful would have been information about the number of railway accidents in the 11-year period studied by the FRA, *see supra* note 342. Had the 21 accidents attributable to substance abuse been a significant percentage (say over 20%) of the total number of accidents during that period, then the government would have had a strong case for subjecting all those responsible for any accidents to testing, or at least for the less intrusive types of tests (*e.g.*, breathalyzer and perhaps urine tests). If the percentage were insufficiently high, then the state should not have been able to use these devices. However, other less intrusive alternatives may exist. *See supra* text accompanying notes 189–192.

Once a certainty level is established, the difficult issue, again, is gauging the level of intrusion involved in the government action—here, blood, urine, and breathalyzer tests. In both *Skinner* and *Von Raab*, the Court's treatment of the intrusiveness issue consisted almost entirely of the familiar-sounding conclusion that government employees have a lowered expectation of privacy vis-a-vis testing because they know information about their on-the-job fitness will be elicited.[344] This reasoning is merely another version of the spurious ("nongenuine") implied consent rationale encountered in the business inspection cases: being told you will be subject to a search does not make it less intrusive. Any employer is entitled to make sure its employees are fit for the job. But this truism does not justify every technique the government devises to test fitness.

Under the proportionality principle, a more sensitive appraisal of the privacy and autonomy interests infringed by drug and alcohol testing is necessary. Like residential inspections, such testing might be characterized as "facilitative" in nature because the individual who tests positive is often treated rather than punished.[345] But, in contrast to the inspection context, even a truly beneficent motivation is unlikely to diminish the sense of privacy invasion occasioned by testing for psychoactive substance use. First, such testing is more likely to embarrass and stigmatize than inspections of the home, both because it is conducted at the workplace and because it involves a search of the person. Second, unlike faulty wiring or leaky plumbing, drug and alcohol use is something that, for all sorts of reasons, people want to keep private. Third, the government's role in the two situations is very different. Regulatory inspections are often welcomed in part because government expertise is needed

344. *Von Raab*, 489 U.S. at 672 ("Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms."); *Skinner*, 489 U.S. at 627 ("More importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."). Note how, under the Court's analysis, the "strong" government interest in avoiding the harm caused by substance abuse not only weighs down the government's side of the scales but also lightens the individual's.

345. Roughly 60% of the Fortune 500 companies have employee assistance programs (EAPs), which give employees who test positive the opportunity to undergo rehabilitation as a condition of keeping their jobs. BNA, ALCOHOL & DRUGS IN THE WORKPLACE: COSTS, CONTROLS, AND CONTROVERSIES 40 (1986) (quoting a National Institute on Alcohol Abuse and Alcoholism survey).

to ascertain whether health or safety codes are being violated.[346] In contrast, people do not require government intervention to alert them to the fact that they are using drugs or alcohol; if they need help, they can seek it on their own. In short, the intrusion associated with substance abuse testing is significantly greater than that associated with residential inspections and, accordingly, the certainty threshold should be much higher.

A second aspect of both *Skinner* and *Von Raab* was their rejection of a warrant requirement. In *Skinner*, the Court gave two reasons for this holding that are of concern here.[347] The first was the rapidity with which drug or alcohol dissipates from the bloodstream.[348] Clearly, to the extent a warrant cannot be obtained before a given test or test program (as will often be the case after a railway accident), the exigency principle would apply and a warrant should not be required. However, the Court also relied on the absence of discretion rationale, pointing out that the governing regulations require *all* railway workers involved in an accident or safety violation to be tested.[349] Thus, according to the Court, judicial authorization is unnecessary even in the absence of exigency.

This latter justification for dispensing with *ex ante* review falls short. It may be that no discretion is exercised by the railway officials who conduct the tests, thus making judicial oversight before each individual administration useless. Indeed, when "generalized" suspicion is relied upon, every individual who fits the general category of suspects—*e.g.*, those involved in railway accidents—*must* be tested for the certainty level to have any relevance. Even so, the reasonableness of the testing *program* should still be analyzed by someone who is not involved in the procedure. Unless an independent authority makes the determination, based on the type of general data referred to above, that the requisite probability is present, a routine post-accident testing program like that involved in *Skinner* should not be inaugurated.

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346. *See* Camara v. Municipal Court, 387 U.S. 523, 537 (1967) ("Many . . . conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself.").

347. The third reason was the "special needs" justification that employers should not be burdened with a warrant requirement. *See Skinner*, 489 U.S. at 623–24. For a discussion of this aspect of *Skinner*, see *supra* text accompanying notes 115–123.

348. *Skinner*, 489 U.S. at 623.

349. *Id.* at 621–22 ("[I]n light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate.").

E. *Undercover Activity*

Investigation by undercover agents has always been an important component of law enforcement in the United States, and its use has increased tremendously with the growth of organized crime and the drug trade. Nonetheless, it is essentially unregulated. As noted earlier,[350] in a series of decisions the United States Supreme Court has held that the Fourth Amendment does not apply to this investigative technique—whether performed by persons or by institutions such as banks or phone companies—because citizens assume the risk that anyone they deal with might reveal their confidences.

It cannot be denied that one risks public revelation of private thoughts any time one takes on a confidante. Once again, however, the Court's assumption of the risk/implied consent analysis takes on an air of fantasy. We "assume the risk" that people may look through unshuttered house windows or break into an unlocked or poorly secured house, yet, to date, the Supreme Court has rightfully refused to deny Fourth Amendment protection in such situations. The Court's analysis in its undercover cases (and in a number of other cases defining the word "search")[351] is based on a dangerous premise: that we should expect no privacy from the government when we do not expect it from others.[352] If this premise were taken seriously, the only sphere of privacy still protected from unnecessary government intrusion would be what we kept to ourselves.

However, establishing that the Court's analysis is bankrupt does not necessarily rule out the results it has reached in its undercover cases. Again, the key variable in deciding whether, and how much, to regulate a particular search or seizure is its level of intrusiveness. Undercover work is quite different from the other types of

350. *See supra* text accompanying notes 78–80.

351. *See, e.g.*, Florida v. Riley, 488 U.S. 445 (1989) (helicopter over yard); Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (plane over fenced-in factory yard); California v. Ciraolo, 476 U.S. 207 (1986) (plane over fenced-in private yard); Oliver v. United States, 466 U.S. 170 (1984) (search of private fields demarcated by fence and "No Trespassing" sign).

352. *See* Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387, 397 (1981) ("Expectations of privacy that are unreasonable with respect to ordinary citizens are not necessarily unreasonable with respect to intrusions by the government."). Many state courts have recognized this difference, at least to the extent they have been unwilling to follow the U.S. Supreme Court's holding in United States v. White, 401 U.S. 745 (1971), that a person's expectations of privacy are not violated when the police plant a bug on an informant. *See, e.g.*, State v. Glass, 583 P.2d 872 (Alaska 1978), *aff'd on rehearing*, 596 P.2d 10 (Alaska 1979); People v. Beavers, 393 Mich. 554, 227 N.W.2d 511, *cert. denied*, 423 U.S. 878 (1975).

government investigations examined in this Article, in that the victim of the search does not know a search is occurring: the target of an undercover search is unaware his or her privacy is being invaded, does not feel harassed by the government, and will not experience any embarrassment or stigma connected with a mistaken investigation (unless it is foolishly made public). Thus, one might argue that, under the proportionality principle, regulation of undercover activity is not required.

Such analysis is flawed, however, because it fails to consider the overall impact of undercover work on people's security from investigative abuses by the government. Ultimately, this type of search is more inimical to individual interests than any of the other types of searches and seizures discussed in this Article. Because it allows the government to use personal and commercial relationships for investigative purposes unbeknownst to the target, it opens up to government inspection virtually *all* of those affairs that are shared with anyone else. By comparison, the typical search or seizure is much narrower in scope, if only because the individual is alerted to it and can take precautions against disclosure. Furthermore, undercover activity is more likely than other types of searches to occasion prolonged insinuation into people's privacy. In the typical search and seizure scenario, the target can minimize the intrusion by consenting to particular actions or proving his or her innocence in some way. When the government proceeds covertly, however, these options are not available.

Added to this denigration of individual interests is the damage undercover police work causes to the democratic state's objective of remaining legitimate. First, because it relies on fraud and deceit, covert investigation undermines trust in the government. More importantly, it increases distrust of *everyone*, since anyone could be a government agent. Ironically, the end result of extensive undercover activity, as we have seen in totalitarian countries, is too much privacy. Thus, undercover activity undercuts both the state's interest in maintaining the allegiance of its citizenry and its objective of nurturing an open, democratic society.[353]

353. Admittedly, this concern that undercover activity will damage the fabric of society is more realistic when the substantive criminal law makes relevant information that usually comes from arguably "innocent" private transactions. *Cf.* UK RSFSR (Russian Criminal Code), art. 7 (1972) (making criminal "anti-Soviet" remarks) (repealed 1988). But, as experience in this country demonstrates, as crime increases, so does the scope of the substantive law, in ways that are, at the least, perturbing. *See, e.g.*, 18 U.S.C. §§ 1961–1968 (1988) (Racketeering Influenced and Corrupt Organization Act, permitting prosecutions against corporations as well as organized crime for a wide

Because of these possible effects, one might argue that undercover activity should be banned; indeed, in some of its guises it comes perilously close to the hypothetical mind-reading device described earlier in this Article.[354] At the least, judicial authorization should be obtained prior to any nonexigent undercover activity. Moreover, in applying the proportionality principle, the particularly intrusive nature of this activity should be recognized. Thus, simply requiring the government to meet whatever requirements it would have to meet if the police were operating in the open will often be insufficient. For instance, one might be tempted to conclude that covert work which involves casual conversation on the street should be permitted if police possess the level of suspicion required to authorize a street stop. But, because its target does not suspect the government is involved, this type of street encounter will often constitute more of a privacy invasion than would the typical stop, and thus warrants a greater level of certainty.[355] For the same reason, if

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array of illegal activities); 31 U.S.C. § 5311–5314 (1988) (mandating reporting of deposits of $10,000 or more). The techniques used to gather evidence under such statutes often use "undercover" agents, of both the human and "institutional" variety, in ways that affect normally "law-abiding" organizations and persons. Moreover, regardless of the substantive law, decisions permitting suspicionless subpoenas of financial records, United States v. Miller, 425 U.S. 435 (1976), and phone numbers, Smith v. Maryland, 442 U.S. 735 (1979), can have real effect on "innocent" behavior.

354. *Supra* text accompanying note 169. In rebuttal, one might argue that much undercover activity should be permitted on little or no suspicion, despite its intrusive nature, because it is used to detect types of underground or superficially legitimate activity (*e.g.*, organized crime, drug dealing, prostitution) that are otherwise hard to detect. Such an argument once again demonstrates the insidiousness of the difficulty of detection rationale. In virtually all the undercover cases decided by the Court, the police had some suspicion before they started their undercover work. *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 298 (1966) ("Partin ultimately cooperated closely with federal authorities only after he discovered evidence of jury tampering [by Hoffa]."). The fact that certain illegal activity is most effectively investigated covertly should not lead to elimination of a suspicion requirement.

355. Professor Stuntz has suggested that when the street encounter consists of nothing more than proposing a drug transaction (which the target can quickly dismiss), the degree of intrusion is significantly reduced (and the degree of trust accorded noncriminal acquaintances is not damaged). Personal communication with author (March 14, 1991). If a short conversation about a drug deal is all that transpires, I would agree. Usually, however, the police are not interested merely in nabbing a person for a small drug sale or purchase. In the course of going after the big fry, significantly greater intrusions may occur, including contacts which result in revelation of information unrelated to the transaction and entry into the target's home or business. *See, e.g.*, United States v. White, 401 U.S. 745 (1971) (conversations between informant and the defendant at various locations, including the home of the defendant, electronically transmitted to government agents acting without a warrant); On Lee v. United States, 343 U.S. 747 (1952) ("bugged" informer sent into defendant's laundry by narcotics agents acting without a warrant). Of course, as suggested above, *supra* note 354, this escalating series

the intent is to gain deceitful entry into a person's house, a greater showing of certainty than that required for the usual house search may be required. And if the undercover activity is to be prolonged—as occurred in one case where the agent, as the defendant's chauffeur, had access to the defendant's house for a six month period[356]—the government's burden would need to be even more demanding.

CONCLUSION

Freed from the constraints of Fourth Amendment language and precedent, this Article has proposed a reconceptualization of search and seizure law along both procedural and substantive lines. Procedurally, it has focused on the prevention of improper government action by proposing that law enforcement officers be required, prior to all nonexigent searches or seizures, to seek authorization from a decisionmaker (not necessarily legally trained) who is sufficiently isolated from the action in question to make an independent evaluation of it. Substantively, this Article has proposed that the justification for a search or seizure, whether pursuant to authorization or not, should depend entirely (except in rare cases where prevention of danger is otherwise impossible) on a congruence between its intrusiveness and the degree of certainty that the proposed action will be successful.

Although the principal focus of this Article is to explicate and justify the exigency and proportionality principles described above, it has also tried to show that these principles are consonant with the language of the Fourth Amendment. Through the simple expedient of redefining "probable cause" to mean that cause which makes probable the reasonableness of the intrusion associated with the search or seizure, the exigency and proportionality principles could be applied consistently with the plain meaning of the amendment.

At the same time, this Article has examined the conflict between these two principles and current Fourth Amendment jurisprudence as promulgated by the United States Supreme Court. In particular, this Article has criticized the Court's adoption of the "lesser expectation of privacy" and "special needs" exceptions to the warrant requirement, and its willingness, in analyzing the reasonableness of a search or seizure, to exaggerate the state's interests

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of intrusions may well be justified by escalating certainty, and sufficient exigency (after the first confrontation) to obviate the need for a warrant.

356. United States v. Baldwin, 621 F.2d 251 (6th Cir. 1980), *cert. denied*, 450 U.S. 1045 (1981).

(by relying on the "severity of the harm," "difficulty of detection," and "official distraction" rationales) and to trivialize the individual's interests (through distorting the notions of "implied consent" and "assumption of the risk").

This Article has also continued, in a modest way, the effort to refine analysis of both the certainty threshold and the concept of intrusiveness. It has argued that "generalized" (as opposed to "individualized") suspicion can properly be considered in determining the validity of a search or seizure, and has provided some examples of how statistical information may be relevant to this determination. It has also contended that measuring the intrusiveness of a search or seizure is a multifaceted task which should include analysis of a police action's potential for privacy infringement, harassment, and false stigmatization. Relevant to these interests is the extent to which those subjected to the search or seizure believe it will benefit them, a factor which may involve consideration of the severity of the criminal problem being investigated, its difficulty of detection, and the motivation behind the investigation.

The approach outlined in this Article makes more sense than the United States Supreme Court's approach, both theoretically and practically. Theoretically, it better balances the competing state and individual interests. Practically, although unlikely to provide clear guidelines for the courts or the police, it asks them to consider fewer factors, and thus ultimately is likely to be less confusing and less difficult to administer. Finally, because it asks questions that are often susceptible to empirical investigation, it may facilitate, more so than current doctrine, sensible regulation of search and seizure.