PUBLIC INTEREST(S) AND FOURTH AMENDMENT ENFORCEMENT

*Alexander A. Reinert**

Fourth Amendment events generate substantial controversy among the public and in the legal community. Yet there is orthodoxy to Fourth Amendment thinking, reflected in the near universal assumption by courts and commentators alike that the amendment creates only tension between privately held individual liberties and public-regarding interests in law enforcement and security. On this account, courts are faced with a clear choice when mediating Fourth Amendment conflicts: side with the individual by declaring a particular intrusion to be in violation of the Constitution or side with the public by permitting the intrusion. Scholarly literature and court decisions are accordingly littered with references to the "costs" to society of enforcing the Fourth Amendment in favor of individual claimants. Taking the "public interest" seriously in this framework predictably favors government intrusions.

This Article challenges this dichotomous approach to Fourth Amendment interpretation by identifying a new dimension of the public's interest: important collective values that are in harmony, rather than in tension, with individual liberties. The multidimensional approach advanced here recognizes that there are many kinds of public interests, some of which are advanced and some of which are impeded by Fourth Amendment intrusions. Drawing on First Amendment and Due Process Clause jurisprudence, empirical data, and historical materials, this Article uses as examples two categories of collective interests—participatory pluralism and efficient and accurate administration of the criminal justice system—that are implicated by Fourth Amendment questions but are ignored by the Supreme Court's current jurisprudence. If the Court is to take the public's interest seriously, it needs a Fourth Amendment jurisprudence that takes into account these interests, among others, and acknowledges the reality that the "public interest" is multifaceted.

* Assistant Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. E-mail: areinert@yu.edu. I owe thanks to Richard Bierschbach, Erica Hashimoto, Max Minzner, Kevin Stack, and the Cardozo School of Law Junior Faculty Forum, among others, for helpful comments and feedback on earlier versions of this paper. All errors of commission and omission remain my own.

TABLE OF CONTENTS

INTRODUCTION

The Fourth Amendment prohibits unreasonable searches and seizures.[1] Fourth Amendment events often captivate the public, as attested

1. The full text of the Amendment reads:

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

U.S. CONST. amend. IV.

to by the high-speed car chase at issue in *Scott v. Harris*,[2] the student strip search challenged in *Safford Unified School District No. 1 v. Redding*,[3] and the 2009 arrest by a Cambridge, Massachusetts, police officer of Henry Louis Gates, Jr., a prominent professor at Harvard University.[4] The attention garnered by each of these acute conflicts between the State[5] and individuals is just one indication of the amendment's importance in framing the constitutional order.[6] While these Fourth Amendment events generate strong feelings on all sides, they also are interpreted through a particular legal orthodoxy that this Article will explore and critique: the view that there is inexorable conflict between the private interests (privacy, autonomy, and the like) that are invaded by Fourth Amendment intrusions and the public interests (usually safety, security, and prosecution of criminals) that are advanced by such intrusions.[7]

2. 550 U.S. 372 (2007). Video of the incident that formed the basis of the lawsuit in *Harris* has been posted on multiple Web sites, including the Supreme Court's Web site and YouTube (in at least three versions). Supreme Court of the United States, Audio/Video Resources, Scott v. Harris-Video, http://www.supremecourt.gov/media/media.aspx (last visited May 27, 2010); YouTube, Police Chase—Scott v. Harris, http://www.youtube.com/watch?v=DBY2y2YsmN0 (last visited May 27, 2010); YouTube, Scott v. Harris (Car 1), http://www.youtube.com/watch?v=auw_VAczrTw (last visited May 27, 2010); YouTube, Scott v. Harris (Car 2), http://www.youtube.com/watch?v=cmx8gzx1N1k& (last visited May 27, 2010).

3. 129 S. Ct. 2633, 2641–42 (2009).

4. Gates's arrest was national news even before President Barack Obama entered the fray. *See* Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES, July 21, 2009, at A13. The President's comments regarding the arrest only heightened interest in the encounter. *See* Peter Baker & Helene Cooper, *President Tries to Defuse Debate over Gates Arrest: Regretful Obama Eases Criticism of the Police*, N.Y. TIMES, July 25, 2009, at A1; Helene Cooper, *Obama Criticizes Arrest of a Harvard Professor*, N.Y. TIMES, July 23, 2009, at A20.

5. In this Article, I use "state" and "government" interchangeably, as a generic reference to any governmental unit that has the capacity to engage in Fourth Amendment significant conduct, i.e., searches or seizures.

6. One could surely argue that other provisions of the Constitution—say the Equal Protection or Due Process Clauses of the Fourteenth Amendment—are equally prominent in the regulation of citizen-state relations; but for sheer scale, it is hard to overlook the Fourth Amendment. Looking solely at contact with a police officer, in 2005 about 19% of U.S. residents age sixteen or older reported a face-to-face contact with police, usually because of a traffic stop. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 1 (2007). In New York City alone, more than half a million individuals were stopped and questioned in 2006 by police, and about 40% of these individuals were frisked. *See* N.Y. CITY POLICE DEP'T, NEW YORK POLICE DEPARTMENT (NYPD) STOP, QUESTION, AND FRISK DATABASE, 2006, http://dx.doi.org/10.3886/ICPSR21660 [hereinafter NYPD DATABASE] (view "FRISKED" variable). Over 98% of such intrusions revealed no contraband. *Id.* (view "CONTRABN" variable). The numbers from 2006 reflect a trend of increasing intrusive police contact on the streets of New York. *See* Al Baker, *Police Data Shows Increase in Street Stops: Disputing Complaints of Aggressive Tactics*, N.Y. TIMES, May 6, 2008, at B1 (reporting that police stops have steadily increased from 97,296 in 2002 and were on pace to top 600,000 in 2008). By contrast, the number of public assistance recipients in New York City—whose access to benefits would be mediated by the Due Process Clause, in part—has steadily declined from a high of 1.1 million in 1995 to 400,000 in 2006. OFFICE OF PROGRAM REPORTING, ANALYSIS & ACCOUNTABILITY, CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION PUBLIC ASSISTANCE RECIPIENTS IN NYC 1955–2006, http://www.nyc.gov/html/hra/downloads/pdf/HRA_NYC_PA_1955-2006.pdf.

7. The coverage of the Gates arrest provides one window into the rhetoric behind the orthodoxy, with articles reflecting the clash between Officer Crowley's stated interest in his and the public's

Thus, although Fourth Amendment jurisprudence has undergone substantial change from the beginning of the twentieth century until the present[8] and every Term of the Supreme Court presents the Court with additional opportunities to further transform the meaning of the amendment,[9] in each resolution of these Fourth Amendment cases the Court's analysis of the salient issues has been limited by a significant imaginative failure. Simply put, the Court views (and has viewed for the past several decades) Fourth Amendment disputes as a tension-filled clash between public interests, such as law enforcement, and individual interests, such as privacy and autonomy. These public and private interests are predictable and always at odds with each other.[10] Striking down a particular Fourth Amendment intrusion in this context is always viewed as imposing a social cost because the only relevant public interests are those that are in tension with vindicating individual liberties.[11] The Court does not have space in its analysis for public interests—what I call collective values—that are tied to individual interests in privacy and

safety and Gates's surprise and irritation at being questioned regarding his presence in his home. *See* Abby Goodnough, *Sergeant Who Arrested Professor Defends Actions*, N.Y. TIMES, July 24, 2009, at A3; Don Van Natta, Jr. & Abby Goodnough, *After Call to Police, 2 Cambridge Worlds Collide in an Unlikely Meeting*, N.Y. TIMES, July 27, 2009, at A13; Michael Wilson & Solomon Moore, *As Officers Face Heated Words, Their Tactics Vary*, N.Y. TIMES, July 25, 2009, at A1. I examine, in greater detail below, the limited legal thinking that is at the heart of the orthodoxy. *See infra* notes 37–76 and accompanying text.

8. The tension in the Supreme Court's Fourth Amendment analysis that has received the most attention is its attempt to resolve the Warrant Clause (which requires that judicial warrants be particular as to their scope and supported by probable cause) with the Reasonableness Clause (which "secure[s] . . . against unreasonable searches and seizures"). U.S. CONST. amend. IV. Judges and scholars have openly clashed about whether the two requirements set out in the amendment should be read conjunctively or disjunctively; that is, whether an intrusion can be reasonable if it is not supported by probable cause and a specific warrant. *See, e.g.*, Florida v. White, 526 U.S. 559, 568–69 & n.2 (1999) (Stevens, J., dissenting) (collecting cases in which clauses were treated conjunctively); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762–63 (1994); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 791–93 & nn.6–18 (1999) (discussing the "conjunctive" and "disjunctive" interpretations among scholars and judges); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393–94 (1974); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 627 (1995); David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 996–99 (1998); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1175–76 (1988); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 384–85 (1988); Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 130 (1989).

9. Last Term, several cases implicated Fourth Amendment principles. *See* Safford v. Redding, 129 S. Ct. 2633 (2009) (permissibility of strip search of public school student); Arizona v. Gant, 129 S. Ct. 1710 (2009) (scope of the search incident to arrest exception to the warrant and probable cause requirements); Pearson v. Callahan, 129 S. Ct. 808 (2009) (qualified immunity and "consent-once-removed" theory); Arizona v. Johnson, 129 S. Ct. 781 (2009) (iteration of the "stop and frisk" rule of *Terry v. Ohio*, 392 U.S. 1 (1968)); Herring v. United States, 129 S. Ct. 695 (2009) (application of exclusionary rule when an arrest is made based on an officer's good faith reliance on false information).

10. *See infra* notes 44–64, 69–71, 97–107, and accompanying text.

11. *See, e.g.*, *Herring*, 129 S. Ct. at 700–01 (describing "cost" of exclusionary rule—namely "letting guilty and possibly dangerous defendants go free").

autonomy and that are in tension with the interests in law enforcement that the Court recognizes as valid public interests.[12]

The Court's blind spot has distinct ramifications for how it decides cases. When the Court recently held for the first time in its history that a citizen traveling on a public street may be stopped and subjected to a full-scale search without any individualized suspicion, solely because of that individual's status as a parolee, the Court relied on the parolee's limited expectation of privacy and the "substantial" governmental interest advanced by the search.[13] The possibility that approving the suspicionless search would impose socially relevant costs on individuals other than the parolee did not enter into the equation.[14] At the same time, a majority of the Court has cast doubt on the continued vitality of the exclusionary rule, announced several decades ago to remedy Fourth Amendment violations by police officers.[15] The source of the ambivalence towards the exclusionary remedy is the perception, affirmed just last Term, that whenever invoked, the rule imposes a substantial cost on society in the form of permitting a guilty defendant to go free.[16] These are just two examples, among many, of the ways in which the Court's dichotomous balancing approach influences its resolution of Fourth Amendment disputes.[17]

Just as the Court has had ample opportunities to interpret and apply the Fourth Amendment, so too have scholars lavished it with considerable attention. One of the central issues that has divided commentators is the validity of the Court's shift from a presumptive warrant and probable cause requirement to a more flexible "totality of the circumstances" balancing test.[18] Debate has focused on whether the Court's turn away from the traditional requirement of probable cause for all searches and seizures is consistent with the text, history, and purpose of the Fourth Amendment, which is read to preserve individual rights of privacy and

12. Similar observations have been made about the Court's approach to unenumerated rights, in which members of the Court share the same assumption "that the claims of liberty and the claims of community are in ineluctable conflict." JoEllen Lind, *Liberty, Community, and the Ninth Amendment*, 54 OHIO ST. L.J. 1259, 1277–79 (1993) ("In *Bowers*, the proponents of community values had more votes than the defenders of individual liberty, so Hardwick's claim to freedom from communal interference in his sex life was rejected. But the fundamental structure of the decision was dictated by the same factor found in *Lochner*, *Carolene Products*, and *Griswold*—the liberty/community paradigm. In each case, the position of the majority or of the dissent can be linked to one of the values in this foundational constitutional polarity."). The problem with the paradigm is apparent: "[M]embers of the Court . . . believe that liberty and community are opposites and that the claims of individuals can only be vindicated by subtracting from the claims of community." *Id.* at 1280.

13. Samson v. California, 547 U.S. 843, 850–53 (2006).

14. *Id.*

15. Hudson v. Michigan, 547 U.S. 586, 599 (2006) (holding that the exclusionary rule does not apply to violations of the "knock-and-announce" rule).

16. *Herring*, 129 S. Ct. at 700–01.

17. *See infra* notes 106–16, 225–27 and accompanying text for a discussion of more consequences of the dichotomy.

18. *See* sources cited *supra* note 8.

autonomy.[19] Opinions expressed on both sides, however, treat the Court's reasonableness balancing test as a black box—balancing either is or is not appropriate under the Fourth Amendment, according to these competing narratives.[20] Little attention, however, has been paid to how the balancing test itself is calibrated and applied.

This Article takes a different approach by accepting the Court's basic framework—that Fourth Amendment inquiries should focus on reasonableness rather than traditional requirements of a warrant and probable cause—and looking inside the black box of reasonableness. I critically engage the conventional wisdom of the relevant interests implicated by the Fourth Amendment and argue that there are dimensions to the public interest that, to date, have been ignored by the Court and given short shrift by commentators.[21] Instead of accepting the notion that individual Fourth Amendment interests are always at cross-purposes with the public's interest, I argue that both the individual *and* the collective may benefit from limiting Fourth Amendment intrusions; therefore, the Court's balancing test should incorporate collective values that are both advanced and hindered by Fourth Amendment enforcement. A revised understanding of the Fourth Amendment as serving important collective values—values that arise from close consideration of the Fourth Amendment's history, comparisons to other constitutional provisions such as the First Amendment and Due Process Clause, and empirical evidence—will result in a more complete balance.

The Article proceeds in a straightforward fashion. Part I reviews the changes in Fourth Amendment jurisprudence from the Court's landmark decisions in *Camara v. Municipal Court of San Francisco*[22] and *Terry v. Ohio*,[23] to the present, paying particular attention to the Court's emerging balancing test and its limited vision of the collective and individual interests at stake in that test. Part II highlights the ways in which Fourth Amendment law, with its narrow conception of collective interests, departs from other areas of constitutional interpretation that also implicate public-regarding interests. In particular, this Part demonstrates that the Court's Free Speech Clause and Due Process Clause jurispru-

19. For insightful critiques of the Court's Fourth Amendment jurisprudence, see generally Amar, *supra* note 8; Amsterdam, *supra* note 8; Clancy, *supra* note 8; Harris, *supra* note 8; Luna, *supra* note 8; Strossen, *supra* note 8 (arguing that Fourth Amendment rights should be enforced through categorical rules rather than through ad hoc balancing).

20. *See, e.g.*, Clancy, *supra* note 8, at 599–601 (arguing that individualized suspicion should be an intrinsic part of reasonableness, but accepting the "governmental interests" prong at face value). For additional discussion, see *infra* notes 231–33 and accompanying text.

21. One notable exception is Andrew Taslitz, who has put forth a respect-based theory of the Fourth Amendment, building largely on principles of equality, which is intended to lead to an "expanded sense of the social costs as well as the social benefits of search and seizure, and an overriding commitment to honoring the equal humanity of *all* the American people." Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2358–59 (2002).

22. 387 U.S. 523 (1967).

23. 392 U.S. 1 (1968).

dence contemplates competing public interests with a complexity that is not found in Fourth Amendment law. In both free speech and due process cases, for instance, courts recognize that requiring certain procedures or regulating certain speech can both advance and hinder important public interests.[24] This textured understanding of collective values enriches the Court's analysis and makes the Court's simplistic Fourth Amendment balancing test look anomalous. Part III attempts to resolve this anomaly by considering how a collective Fourth Amendment value might be articulated and applied in the Court's analysis, without abandoning the reasonableness framework that the Court has placed at the heart of the matter. Drawing on historical materials and empirical data, this Part argues that collective values in pluralist civic participation and efficient and accurate criminal justice administration are implicated in Fourth Amendment questions but are ignored by current jurisprudence. Part III concludes by suggesting ways in which Fourth Amendment jurisprudence can take account of these interests by examining past and current Fourth Amendment disputes with a more complete appreciation of the multifaceted collective values at stake.

I. THE TRANSITION TO UNIDIRECTIONAL PUBLIC INTERESTS IN FOURTH AMENDMENT ANALYSIS

The approach to the Fourth Amendment critically examined in this Article—application of a balancing test that finds only tension between individual and collective interests—is a modern phenomenon.[25] For much of the history of Fourth Amendment interpretation, the relationship between its two clauses—the Warrant Clause and the Reasonableness Clause—was simple: searches or seizures that did not comply with the Warrant Clause's requirements of probable cause and magistrate

24. *See infra* Part II.B–C.

25. No Supreme Court case fully considered the meaning and application of the Amendment until 1886, when the Fourth and Fifth Amendments were interpreted to enforce the overlapping and mutually enforcing principle that the government may not use a defendant's words, or effects, as evidence in a criminal trial. Boyd v. United States, 116 U.S. 616, 630 (1886). Under this framework, the government's attempt to subpoena and use documents or other property as evidence was "unreasonable" absent a claim that the government maintained a proprietary interest in the property of higher priority than the person from whom the property was obtained. *Id.* at 623–24; *see also* Gouled v. United States, 255 U.S. 298, 308–09 (1921). This analysis held true even where the seizure was supported by probable cause. *Gouled*, 255 U.S. at 308–09. Over the next several decades, this understanding of the Fourth Amendment eroded, albeit fitfully. Different aspects of *Boyd* have gradually been disapproved of by the Court. The Fourth Amendment's application to subpoenas was first limited by *Hale v. Henkel*, 201 U.S. 43, 73 (1906). Purely evidentiary (but "nontestimonial") materials, as well as contraband and fruits and instrumentalities of crime, were permitted to be searched and seized under proper circumstances by *Warden v. Hayden*, 387 U.S. 294, 306–07 (1967). The Court's decision in *Katz v. United States*, 389 U.S. 347, 351 (1967), confirmed that even testimonial evidence could be seized and used consistent with the Fourth Amendment. At the same time, *Boyd*'s implied limitation of the Fourth Amendment to only criminal cases also was rejected in favor of a broader reading that contemplated application of the amendment's protections to civil searches. *See* Camara v. Municipal Court of San Francisco, 387 U.S. 523, 530–31 (1967).

screening were unconstitutional.[26] Reasonableness was equated with compliance with the Warrant Clause's mandates. This is not to say that Fourth Amendment doctrine was static. From the beginning of the twentieth century until 1960, the Court announced an exclusionary rule for evidence discovered in violation of the Fourth Amendment,[27] first refused and then decided to extend the exclusionary rule to the states,[28] held that the Fourth Amendment did not apply to some civil proceedings,[29] and held that warrants were not needed for certain kinds of arrests or searches.[30] With all of these expansions and contractions, however, one proposition emerged with some constancy: evidence could not be used in criminal proceedings unless the search or seizure of the evidence was supported by probable cause.[31]

In this framework, there was no consideration of competing "public" or "private" interests—an intrusion either was consistent with the Warrant Clause, in which case it was constitutional, or it was not.[32] Two cases decided in the mid 1960s—*Camara v. Municipal Court of San Francisco*[33] and *Terry v. Ohio*[34]—altered this framework. *Camara* approved a warrantless home safety inspection justified by something other than traditional probable cause,[35] and *Terry* approved the use in a criminal trial

26. The Court, in *Weeks v. United States*, 232 U.S. 383, 398 (1914), announced the rule in federal criminal cases that the use of evidence seized in violation of the Fourth Amendment's warrant and probable cause requirements violated the Constitution. Even in announcing *Weeks*, however, the Court implied in dicta that at least one version of a suspicionless search—the authority to search an arrestee for evidence of a crime when the initial seizure of the arrestee was valid—was consistent with the Fourth Amendment despite its failure to meet the probable cause requirement. *See* Chimel v. California, 395 U.S. 752, 755–60 (1969) (reviewing history of search incident to arrest). For several decades, the only other exception to the traditional requirements of the Fourth Amendment that was regularly endorsed by the Court was the "automobile exception"—which permitted warrantless searches of automobiles (at first in exigent circumstances, and later as a matter of course), so long as probable cause existed to believe that contraband or evidence of criminal activity would be found in the car. Chambers v. Maroney, 399 U.S. 42, 51 (1970); Carroll v. United States, 267 U.S. 132, 153 (1925). These two doctrines—the automobile exception and the search incident to arrest—occupied the field for several decades as the lone exceptions to the general requirement that all searches and seizures, at least for criminal purposes, be conducted pursuant to a warrant and supported by probable cause.

27. *Weeks*, 232 U.S. at 398.

28. Wolf v. Colorado, 338 U.S. 25, 26 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

29. Frank v. Maryland, 359 U.S. 360, 372 (1959), *overruled by Camara*, 387 U.S. at 530–31.

30. *E.g.*, Draper v. United States, 358 U.S. 307, 310–11 (1959).

31. *Id.* at 310.

32. As early as 1931, the Court spoke of a "reasonableness" analysis with no precise "formula," which required that each case "be decided on its own facts and circumstances." Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931). Even so, at this time the Court read the first and second clauses of the Fourth Amendment as mutually reinforcing, with the first clause extending to everyone ("those suspected or known to be offenders as well as the innocent") and the second clause meant to "protect against all general searches" by prohibiting warrants issued on "loose, vague or doubtful bases of fact." *Id.* at 356–57.

33. 387 U.S. 523 (1967).

34. 392 U.S. 1 (1968).

35. *Camara*, 387 U.S. at 534. *Camara* addressed searches by city housing inspectors, an issue which had bitterly divided the Court on two previous occasions. *See* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 263–64 (1960) (affirming lower court decision by an equally divided Court); Frank v. Maryland, 359 U.S. 360, 374 (1959) (5-4 decision) (Douglas, J., dissenting). In *Frank*, the Court reviewed an

of evidence discovered as a result of a warrantless search and seizure that was justified by a quantum of suspicion less than probable cause.[36] Their reasoning signaled the beginning of the end of the Warrant Clause's centrality to Fourth Amendment inquiries.

A. Putting Context-Based Reasonableness at the Heart of the Fourth Amendment

Camara and *Terry* ushered in the era that is extant today: overall reasonableness, based on the "totality of the circumstances" and the balance between public and private interests,[37] is the touchstone of Fourth Amendment inquiry. In *Camara*, the Court held that neither a specific warrant nor traditional probable cause was necessary to support a search of a home[38] because the private homeowner's interest in privacy was outweighed by the public's interest in health and safety.[39] The Court de-

arrest of a homeowner for refusing entry to an inspector from the Baltimore City Health Department, who had no warrant but had probable cause to suspect the existence of health code violations. The homeowner argued that, absent a warrant, the city health inspector had no authority to insist on inspecting his home. The *Frank* Court suggested, consistent with the Court's initial understanding of the Fourth Amendment, that the protections of the Fourth Amendment overlapped in significant degree with the Fifth Amendment privilege against self-incrimination because both protect the innocent from being "confounded with the guilty." *Id.* at 363 (majority opinion) (citation omitted). Because the searches at issue did not seek evidence to use in a criminal prosecution, the Court viewed the homeowner's right not to implicate the privacy protected by the Fourth Amendment but to involve the homeowner's obligation to conduct himself in a manner consistent with community standards. *Id.* at 366. Four Justices dissented, led by Justice Douglas, who noted that, until *Frank*, the Fourth Amendment had been interpreted to protect against civil as well as criminal searches. *Id.* at 375 (Douglas, J., dissenting). But the dissenters also objected, importantly, to the general reasonableness analysis endorsed by the majority, which focused on the interests in social welfare vindicated by the challenged searches. *Id.* at 382.

36. *Terry,* 392 U.S. at 30–31. *Terry* involved a street encounter between a Cleveland policeman and three individuals whom he considered to be acting "suspicious," although the officer did not have probable cause to believe any individual had committed or engaged in the commission of a crime. *Id.* at 5–6. Anthony Thompson has presented a thoughtful critique of the *Terry* decision, analyzing the Court's failure to address the race of the suspects and the investigating officer in its reasoning, and the degree to which race informed the "suspicion" aroused by the suspects. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962–63, 966–67 (1999).

37. *E.g.*, Samson v. California, 547 U.S. 843, 848 (2006) ("'[U]nder our general Fourth Amendment approach' we 'examin[e] the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." (quoting United States v. Knights, 534 U.S. 112, 118 (2001))).

38. *Camara*, 387 U.S. at 534. The Court acknowledged that the suspicion would not be "individualized" in the traditional Fourth Amendment sense, because the knowledge sufficient to justify a search would not necessarily require "specific knowledge of the condition of the particular dwelling." *Id.* at 538. As a result, warrants could be issued for searches of particular areas, so long as "reasonable legislative or administrative standards for conducting an area inspection are satisfied," such as standards which consider "the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area." *Id.* It was this aspect of *Camara* to which the three dissenters expressed the most objection. They believed that the majority created a "newfangled" warrant requirement that degraded rather than enhanced Fourth Amendment protections. *Id.* at 547–48 (Clark, J., dissenting).

39. The Court described the public interest at issue in *Camara* to be "to prevent even the unintentional development of conditions which are hazardous to public health and safety." *Id.* at 535 (majority opinion).

termined that a modification of the probable cause requirement would have to be accepted to accommodate the balance between public need and individual rights implicated by the searches.[40]

Terry considered a different variation of the trend to reasonableness instituted by *Camara*—the stop and frisk of a suspect on the street without a warrant and without probable cause.[41] Relying on *Camara*'s reasonableness analysis—balancing the need to search against the invasion entailed by the search[42]—the *Terry* Court determined that neither a warrant nor probable cause was necessary for the stop and frisk.[43] The public interests identified by the Court were solving crimes and ensuring officer safety, interests so important that requiring probable cause was inappropriate.[44] Although probable cause was not considered a requirement, the Court looked to the severity of the intrusion on individual rights occasioned by the "stop" and "frisk," and concluded that these actions are significant enough invasions to justify requiring some variant of individualized suspicion to believe that a suspect is dangerous.[45]

The transition from *Camara* and *Terry* to the current status quo—in which a "totality of the circumstances" balancing test is the window to determining whether *any* search or seizure must be supported by individualized suspicion and/or approved through the warrant process—was fitful. In the years immediately following *Camara* and *Terry*, the Court appeared ambivalent about adopting a general reasonableness analysis for all Fourth Amendment intrusions.[46] Indeed, *Camara* was repeatedly cited by dissenting and concurring opinions seeking to impose a general reasonableness analysis in place of the traditional warrant and probable

40. *Id.* at 534–35.

41. *Terry*, 392 U.S. at 7–8. *Terry*'s first task was to unpack the terms "seizure" and "search" contained in the Fourth Amendment, and interpret them in light of the "stop" and "frisk" at issue in *Terry*. The State had argued that a "stop" and "frisk" does not implicate the Fourth Amendment because they are not full-scale arrests and searches. *Id.* at 28–30. Rather than accept this distinction, the Court found that "the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness." *Id.* at 18 n.15. This consideration was consistent with the *Camara* Court's rejection of the distinction between searches for criminal investigative purposes and civil regulatory purposes. *See Camara*, 387 U.S. at 530–33.

42. *Terry*, 392 U.S. at 21.

43. *Id.* at 20.

44. *Id.* at 22–24.

45. *Id.* at 24–25, 27. The standard of individualized suspicion adopted by the *Terry* Court has come to be known as "reasonable suspicion." *See* Illinois v. Caballes, 543 U.S. 405, 415 (2005) (Souter, J., dissenting).

46. In *Chimel v. California*, 395 U.S. 752, 764–65 (1969), for instance, announced one year after *Camara*, the Court noted that although the Fourth Amendment uses a reasonableness standard, the warrant and probable cause requirements give content to that standard. *See also* Chambers v. Maroney, 399 U.S. 42, 51 (1970) (noting that the Fourth Amendment generally requires probable cause and the issuance of a warrant, except in exigent circumstances, such as searching a car stopped on the highway).

cause requirements.[47] Eventually, however, the Court placed reasonableness at the heart of its Fourth Amendment analysis as the way of determining whether the traditional requirements of probable cause and a warrant are necessary to support a Fourth Amendment intrusion, or whether some lesser standard of individualized suspicion, with or without a warrant, suffices.[48]

In 1977, for instance, the Court decided *Pennsylvania v. Mimms*,[49] a case involving the suspicionless stop and subsequent frisk of an automobile driver. The Court relied upon *Terry* for the proposition that reasonableness is the "touchstone" of Fourth Amendment analysis, and that public-private balancing is the gateway to reasonableness.[50] In *Mimms*, as in *Terry*, the public interest was the "legitimate and weighty" interest in officer safety, while the private interest was the de minimis intrusion of asking a driver who is already stopped to step out of her car.[51] Balancing the two against each other, the Court found it unnecessary to require that the officer have any individualized suspicion to order a driver to submit to the frisk.[52]

After *Mimms*, the "reasonableness" framework expanded to widely different circumstances: it was invoked to approve of the detention of an occupant of a house while the police executed a search warrant for the house;[53] to permit the search of the passenger compartment of a car on

47. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 900 (1975) (Burger, C.J., concurring in the judgment) ("I would hope that when we next deal with this problem we give greater weight to the reality that the Fourth Amendment prohibits only '*unreasonable* searches and seizures' and to the frequent admonition that reasonableness must take into account all the circumstances and balance the rights of the individual with the needs of society."); Vale v. Louisiana, 399 U.S. 30, 36 (1970) (Black, J., dissenting) ("A warrant has never been thought to be an absolute requirement for a constitutionally proper search. Searches, whether with or without a warrant, are to be judged by whether they are reasonable . . . .").

48. Some commentators have used rather strong language to describe this transition. *See* Sundby, *supra* note 8, at 385 (describing *Camara* and *Terry* as beginning "something of a Faustian pact").

49. 434 U.S. 106 (1977).

50. *Id.* at 108–09.

51. *Id.* at 110–11.

52. *Id.* at 111–12.

53. Michigan v. Summers, 452 U.S. 692 (1981). Justice Stevens, writing for the Court, focused on the "reasonableness" analysis that founded the Court's decisions in *Terry*, *Adams v. Williams*, 407 U.S. 143 (1972), and *Brignoni-Ponce*, which considered seizures short of arrest that were warrantless and based on less than probable cause. *Summers*, 452 U.S. at 697–701. Justice Stevens argued that these cases "demonstrate that the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*." *Id.* at 700. The dissenters, on the other hand, launched the first broadside in the coming debate over what would be the "special needs" exception to the Fourth Amendment, arguing that the *Terry* case and the broader checkpoint cases have in common the "presence of some governmental interest independent of the ordinary interest in investigating crime and apprehending suspects, an interest important enough to overcome the presumptive constitutional restraints on police conduct." *Id.* at 707 (Stewart, J., dissenting). In *Terry*, the interest was the safety of the officer, and in *Brignoni-Ponce* it was preventing illegal entry into the country. *Id.* at 707–08. The interests identified by the Court in *Summer* (preventing flight and orderly completion of search) are nothing more than "ordinary police interest in discovering evidence of crime and apprehending wrongdoers." *Id.* at 709. In the dissenters' view, there was no authority for the proposition "that the police can engage in searches and seizures without probable cause simply because to do so

less than probable cause;[54] to uphold the warrantless and suspicionless search of a shoulder bag carried by an arrestee *after* the suspect had arrived at the police station, even though the bag was no longer accessible to the arrestee;[55] to authorize the warrantless search of all containers in a vehicle that officers had probable cause to believe contained contraband,[56] even after the container had been removed from the vehicle and therefore was not at risk of being destroyed;[57] to allow the seizure of an individual crossing international borders whom the officer had reasonable suspicion to believe was smuggling drugs through his alimentary canal;[58] to permit a protective sweep of a house in which an arrest had taken place, without probable cause or reasonable suspicion to believe that weapons were present in the searched areas;[59] to extend *Mimms*-type intrusions to passengers;[60] to allow the suspicionless search of a passenger's belongings when there was probable cause to believe that contraband was present in a car;[61] to uphold a warrantless search unsupported by probable cause of the home of an individual on probation;[62] and to permit the warrantless arrest of an individual for an offense punishable only by a fine.[63] In most of these cases, the Court arrived at its outcome by balancing the perceived social benefits of the Fourth Amendment intrusion—almost always grounded in law enforcement interests—against the distinctly individual interests that the Court considered to be at stake.[64]

enhances their ability to conduct investigations which may eventually lead to probable cause." *Id.* at 709–10.

54. Michigan v. Long, 463 U.S. 1032 (1983). Finding that the search was permissible despite the absence of probable cause to support it, Justice O'Connor relied on *Terry* to focus her analysis on the reasonableness of the search, which was justified by an officer's reasonable belief that a suspect is dangerous and may gain "immediate control of weapons." *Id.* at 1049. The dissenters accused the Court of "distorting *Terry* beyond recognition and forcing it into service as an unlikely weapon against the Fourth Amendment's fundamental requirement that searches and seizures be based on probable cause." *Id.* at 1054 (Brennan, J., dissenting).

55. Illinois v. Lafayette, 462 U.S. 640 (1983). In applying the reasonableness balancing test, the Court noted the government's interest in safety, avoiding theft or accusations of theft, and the desire to confirm the arrestee's identity. *Id.* at 646.

56. United States v. Ross, 456 U.S. 798, 825 (1982).

57. United States v. Johns, 469 U.S. 478, 487 (1985).

58. United States v. Montoya de Hernandez, 473 U.S. 531 (1985). The Court relied on *Camara* and its regulatory search progeny for the proposition that a "reasonableness" framework was at the center of the Fourth Amendment inquiry. *See id.* at 537.

59. Maryland v. Buie, 494 U.S. 325 (1990). The Court acknowledged that normally, the reasonableness balancing test requires a warrant and probable cause to support a search of a house or office, but that the balance shifts when "public interest" obviates the need for strict adherence to the Fourth Amendment's nominal requirements. *Id.* at 331.

60. Maryland v. Wilson, 519 U.S. 408, 415 (1997).

61. Wyoming v. Houghton, 526 U.S. 295, 307 (1999).

62. United States v. Knights, 534 U.S. 112, 122 (2001).

63. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).

64. *See Knights*, 534 U.S. at 119–21 (balancing public interest in supervising probationer against diminished privacy interests of individual probationer); *Atwater*, 532 U.S. at 354–55 (discussing ways in which arrest was "inconvenient and embarrassing" to Atwater); *Houghton*, 526 U.S. at 303–04 (contrasting individual passenger's diminished privacy interests against "substantial" governmental interests in effective law enforcement); *Wilson*, 519 U.S. at 413–15 (balancing public interest in officer safety against "minimal" intrusion on passengers' safety); *Buie*, 494 U.S. at 332–34 (balancing public

In none of the cases did the Court consider whether the relevant social interests might be in tension with each other—whether there might be collective costs to permitting a particular search or seizure in particular circumstances, aside from the threat to individual privacy interests.

B. Evolution of the Public and Private Interests at Stake in Fourth Amendment Balancing

In light of the progression from a Fourth Amendment jurisprudence in which a warrant and probable cause were considered near-presumptive requirements for constitutionality to one in which exceptions to those textual markers are increasingly common, many commentators view the Court's reasonableness balancing test as unprincipled and unpredictable.[65] Without discounting the validity of these critiques, for the purposes of this Article, it is useful to separately consider trends in the Court's treatment of the two different interests at stake in the balancing test—public and private—as well as the relationship between these two interests.

Two shifts are notable in the Court's treatment of the private interests at stake in any Fourth Amendment intrusion. First, the Court has embraced a pronounced rhetorical shift from using the term "probable cause" to the more vague "individualized suspicion" standard.[66] This shift has had substantive consequences, because the "individualized suspicion" standard requires less suspicion, and hence provides less protec-

interest in officer safety against individual privacy interests); United States v. Montoya de Hernandez, 473 U.S. 531, 538–39 (1985) (balancing the "sovereign's interest at the border" against diminished expectation of privacy of entrant); Michigan v. Long, 463 U.S. 1032, 1049–50 (1983); Illinois v. Lafayette, 462 U.S. 640, 646–47 (1983); Michigan v. Summers, 452 U.S. 692, 701–03 (1981); *see also* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2641–42 (2009) (describing harm of student strip search on individual level of embarrassment and indignity).

65. *See* Clancy, *supra* note 8, at 627; Luna, *supra* note 8, at 788 ("Academics of all stripes agree that search and seizure law is a 'mess' . . . ."); Strossen, *supra* note 8, at 1176 (indicating that the balancing test has not "systematically evaluated the marginal law enforcement benefits of challenged searches and seizures," or integrated a "least intrusive alternative" requirement (internal quotation marks omitted)).

66. A year after *Terry* was decided, for instance, the Court refused to permit an exception to the probable cause requirement for searches beyond an arrestee's immediate grab area, deferring to the Fourth Amendment's definition of reasonableness as requiring a warrant and probable cause. *See* Chimel v. California, 395 U.S. 752, 761–62 (1969). Before long, however, the Court was speaking of "individualized suspicion" as the traditional touchstone for Fourth Amendment reasonableness, even as it often declined to hold that such suspicion is always required to justify a Fourth Amendment intrusion. *See* Chandler v. Miller, 520 U.S. 305, 308 (1997); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989); New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985); *Summers*, 452 U.S. at 703; Delaware v. Prouse, 440 U.S. 648, 654–55 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976). Even those Justices who dissented from the Court's increasing abandonment of the probable cause requirement sometimes accepted this shift in language. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 668 (1995) (O'Connor, J., dissenting); Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 457 (1990) (Brennan, J., dissenting). Indeed, in a recent Court decision, the Court completed its entire analysis without ever using the term "probable cause," relying instead only on "individualized suspicion." Illinois v. Lidster, 540 U.S. 419, 424 (2004).

tion of individual privacy interests, than the probable cause standard.[67] Second, the Court has adopted a conceptual shift in the meaning of "individualized suspicion" to encompass something other than suspicion particularized to an individual on the basis of concrete suspicion of criminal wrongdoing. Instead of requiring that individualized suspicion be grounded in facts particularized "to that person,"[68] the Court has relied on the balancing test to approve of suspicion based on characteristics such as probationary status,[69] associations with others,[70] or even external factors like the neighborhood in which the person is found.[71] In New York City, for example, the most common reason that police give for stopping, questioning, and frisking individuals is that the individual is found in a high crime area.[72] Because "[t]he degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable," *any* information—based on status or other factors—that makes an officer believe that an individual is more likely than an "ordinary" citizen to be committing a crime will tend to lower the degree of suspicion required.[73]

Along with this consistent trend in how the Court has reconceptualized individualized suspicion, the Court also has adopted a limited view

67. *See infra* notes 171–81 and accompanying text.

68. Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

69. *See* United States v. Knights, 534 U.S. 112, 121 (2001). Justice Rehnquist's opinion for the Court relied on "recidivism" statistics purporting to show that probationers are more likely to commit crime than "ordinary" citizens. *Id.* at 120.

70. *See* Wyoming v. Houghton, 526 U.S. 295, 304–05 (1999) (holding that a police officer who has probable cause to search the passenger compartment of a car does not need individualized suspicion as to a passenger's belongings in order to justify a search of those belongings); *see also* Maryland v. Pringle, 540 U.S. 366, 373–74 (2003) (finding that probable cause existed to arrest a car passenger where drugs and money were found in the car, and all occupants initially denied ownership of contraband). Similarly, an occupant's association with a house in which a warrant is being executed is sufficient to justify detaining that occupant while the search is carried out because of the connection between the occupant and the area being searched. *Summers*, 452 U.S. at 703–04.

71. *See* Harris, *supra* note 8, at 996–99 (listing categorical circumstances in which lower courts have permitted stops when an individual is in a "high crime area," does not "fit in" with the economic or racial make-up of the neighborhood, or exhibits a desire to avoid police); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99 (1999) (arguing against use of neighborhood "character" to support stops based on reasonable suspicion).

72. In 2006, New York City Police cited presence in a high crime area as a factor in about 53% of their stop-and-frisk stops. *See* NYPD DATABASE, *supra* note 6 (view "AC_INCID" variable). Notably, almost every precinct was considered a "high crime area" by police officers, for the purpose of justifying stops. *Id.* (cross tabulating "AC_INCID" and "PCT" variables shows that only six out of seventy-four precincts reporting data justified a stop by reference to area's high crime incidence less than 40% of the time).

73. *Knights*, 534 U.S. at 121 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)). Although the Court in *Knights* was considering a suspect's status as a probationer, there is nothing in the logic of the opinion that would prevent an officer from considering other, more objectionable, static characteristics—race, age, gender, class—to make probabilistic assessments. The Court's decision in *Whren v. United States* calls into question whether the Fourth Amendment would permit a challenge based on using some of these static characteristics to justify intrusion on privacy and security. 517 U.S. 806, 813 (1996) (holding that pretextual stops do not violate Fourth Amendment).

of the social interests at stake in any Fourth Amendment intrusion. Most importantly, the Court's reasonableness balancing test presumes that the government's interest in excusing compliance with the warrant and probable cause requirements is coextensive with the public's interest. Thus, the Court frames an individual's interest in avoiding unwanted government intrusion as being adversarial to society's interest, be it in solving crime or in vindicating some non-law-enforcement "special need."[74] This is both an analytical and rhetorical bias, and it reflects the Court's failure to view the protections given by the Fourth Amendment as vindicating a valuable social interest. The balancing test—and the "balancing" language itself—assumes that the interests of "the people" and the individual will always be in tension with each other. It fails to imagine the possibility that society's interests could themselves be in conflict. In combination with the shift in the meaning of individualized suspicion, the result is a Fourth Amendment doctrine that systematically underenforces the substantive values served by the warrant and particularized suspicion requirements.[75] Thus, as John Junker has noted, since *Mapp*, the Court has relied on its balancing test to express "a powerful and undeniable preference for collective security over individual privacy."[76]

II. A CONTRAST IN THE COURT'S IMAGINATION OF COLLECTIVE VALUES

In the previous Part, I demonstrated how the Court's reasonableness balancing test is a modern innovation characterized by a polarized treatment of the public and private interests at stake. The failings of this approach may not be self-evident, however. After all, the story of constitutional litigation is, in at least some respects, the struggle of individuals seeking to limit the power of the State by reliance on specific provisions of the Bill of Rights. The classic Fourth Amendment case pits an individual criminal defendant against the government, arguing that a piece of evidence seized from her should not be introduced at a criminal trial. It

74. *See supra* notes 49–64 and accompanying text.

75. One example of the ramifications of a failure to appreciate the collective values in Fourth Amendment enforcement is the Court's increasing emphasis on a rational-basis Equal Protection-type analysis in its Fourth Amendment cases dealing with warrantless and suspicionless searches and seizures. *See* Luna, *supra* note 8, at 789 (reviewing antidiscrimination theory of Fourth Amendment). On this logic, so long as all citizens are subjected to an intrusion without the normal protections of the Fourth Amendment, the regime that creates the intrusion is less objectionable from a Fourth Amendment perspective. *See* United States v. Ortiz, 422 U.S. 891, 895 (1975) ("Where only a few are singled out for a search, as at San Clemente, motorists may find the searches especially offensive."). This is what then-Justice Rehnquist observed as the "misery loves company" theory of the Fourth Amendment, Delaware v. Prouse, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting), and it elevates the stigmatic effect of individual privacy intrusions over the collective effect of mass privacy intrusions. *See id.* at 664, 666. "To comply with the Fourth Amendment, the State need only subject *all* citizens to the same 'anxiety' and 'inconvenien[ce]' to which it now subjects only a few." *Id.* at 666.

76. John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1121 (1989).

is not surprising that Justice Frankfurter once referred to those who would enforce the Fourth Amendment as "not very nice people."[77] It is an uphill battle to suggest that there are positive values to be supported by upholding the right of an individual claimant to be free of a particular warrantless or suspicionless intrusion.

An examination of the Court's analysis of disputes between the government and individuals in the context of other constitutional provisions takes us some distance up that hill. As I show in this Part, the Court's approach to free speech and due process questions, among others, reflects a textured view of the public interest. When the Court adjudicates those rights, it recognizes that there could be tension between competing public interests, some of which favor the individual claimant and some of which favor the government. In this light, the lack of such recognition in Fourth Amendment jurisprudence looks anomalous.

A. Exploring the Ramifications of Randomization

The contrasting approaches to collective values are best illustrated by imagining three different hypothetical policies implemented by a municipality, say New York City. In the first program, New York City adopts a permitting program for individuals who wish to use public space for gatherings of one kind or another—political, religious, social, etc. This program requires individuals who intend to organize a gathering of more than twenty people to seek a permit. The permit requires payment of a nominal fee, information as to when and where the gathering will occur, the estimated number of people involved, and what public resources the organizers expect will be necessary to ensure that the gathering occurs safely and peacefully. Requests for permits are rejected or accepted based solely on a lottery system—four out of every ten permit applications are randomly rejected for no reason.[78]

The second hypothetical program is similar, except that it involves appeals of denials of public benefits. New York City has a system for distributing public benefits to qualifying individuals and for withdrawing assistance when particular conditions are met. Appeals may be taken from the denial of public benefits, and certain requirements must be met to pursue an appeal—forms must be filled out, fees paid, information provided, etc.—but the appeals are resolved in much the same way as the hypothetical permitting requirement. Four out of every ten appeals are rejected, based solely on a randomized lottery.

77. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting); *see also* Illinois v. Gates, 462 U.S. 213, 290 (1983) (Brennan, J., dissenting) ("Rights secured by the Fourth Amendment are particularly difficult to protect because their advocates are usually criminals." (internal quotation marks omitted)).

78. The percentage of rejections is immaterial for the purposes of this Article. It could be one out of every ten or nine out of every ten that is rejected.

Finally, New York City implements a roadblock on certain roads or highways. The roads are selected at random, and when cars pass through the roadblock area, a random selection of cars—four out of every ten—are directed to a secondary area where the drivers are questioned and searched. If police officers discover evidence of unlawful behavior, they will issue citations or make an arrest.

These three hypotheticals principally implicate different constitutional concerns: the right to speak protected by the First Amendment, the right to fair procedures protected by the Due Process Clause, and the right to privacy and freedom of movement protected by the Fourth Amendment. In each of the hypotheticals, the ability of individual stakeholders to access the rights protected by each of these constitutional provisions is mediated by a randomizing process, and one might expect courts to therefore analyze the implicated rights in similar ways. But there are substantial differences in how the Supreme Court, and lower courts in turn, characterizes these rights. As I discuss in detail below, courts confronted with facts similar to the first two hypotheticals will approach the rights at stake with an understanding that there are broader social interests at stake that both favor and disfavor the relevant governmental policy. In the final example, however, courts view the social interests at stake as only favoring governmental intrusions, and courts contrast that broad social interest with the individual stakeholder's interest in privacy.[79]

B. Randomized Permitting for Public Gatherings

It is beyond cavil that the public has an overriding interest in vindication of individuals' First Amendment rights: "That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."[80] But how would the Court analyze the hypothetical permitting practice described here? The Court would surely begin with the observation that permitting systems are not per se objectionable.[81] It would simultaneously observe that permitting systems that allow for arbitrary or standardless suppression of speech are inconsistent with the First Amendment.[82] If the permitting regulations are designed to make reasonable determinations to restrict speech based on time, place, and man-

79. It should be emphasized that I am not arguing here that the relevant rights implicated in the three hypotheticals are equivalent in importance (assuming one could create such a continuum of rights). Nor am I arguing that the interests—both collective and individual—are the same in each instance. But the way in which courts talk about the rights, I argue, is different. And that difference is hard to justify.

80. Associated Press v. United States, 326 U.S. 1, 20 (1945).

81. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

82. *See* Lovell v. Griffin, 303 U.S. 444, 446 (1938).

ner concerns, and not because of the content of speech, then they will be deemed acceptable.[83]

This allowance for reasonable regulations based on time, place, and manner arises from the Court's consideration of collective interests both in facilitating and regulating speech. On one hand, the Court acknowledges the importance of communicating ideas, both for individual expression and for democratic dialogue; on the other hand, the Court recognizes collective interests in order and security that call for regulation in the appropriate context.[84] First Amendment interests are thus both collective and individual, and the collective interests at stake can both support and cut against governmental regulation.[85]

The particular facts imagined here have never been analyzed by the Court (or any appellate court for that matter).[86] Although the Court has generally required that permitting schemes contain standards so as to guide and constrain the exercise of discretion and permit adequate judicial review,[87] one could imagine an argument that a randomized permitting scheme is constitutionally permissible precisely because it eliminates any need for the exercise of discretion. However such a challenge were resolved, the Court's general approach to First Amendment problems indicates that any such analysis would recognize the multiple dimensions in which the public interest was implicated.[88] Thus, the First Amendment

83. *See Cox*, 312 U.S. at 576.

84. Admittedly, at the time *Cox* was decided, the Court emphasized more the collective interests in security and safety than collective interests in dialogue. *See id.* at 576 (referring to social interests in policing streets, minimizing disorder, preventing confusion, and allowing for use of streets by nonprotesters). Nonetheless, the *Cox* Court was balancing the collective interests in the safety and security of public streets against the "opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Id.* at 574. Moreover, the importance of speech to collective dialogue has been stressed in later opinions. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 62 (1976) (recognizing First Amendment interests in both distributing and consuming adult films); Grayned v. City of Rockford, 408 U.S. 104, 118–19 (1972) (balancing collective interests in preventing disruption of school activities and interest in publicizing "significant grievances" that are reflective of the fact that "public schools in a community are important institutions"); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 163 (1969) (referring to the importance of timing to both the public and the speaker in having political expression heard).

85. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment."). There are many other areas in which the Court has described First Amendment rights as operating at both a collective and individual level. *E.g.*, Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 300 (1981); *In re* Primus, 436 U.S. 412, 426 (1978).

86. One court of appeals has, in dicta, suggested that a lottery system for public news racks could be constitutionally preferable to a system that gave more discretion to public officials. *See* Atlanta Journal & Constitution v. City of Atlanta Dept. of Aviation, 322 F.3d 1298, 1311 (11th Cir. 2003) ("Perhaps a first-come, first-served system, a lottery system, or a system in which each publisher is limited to a percentage of available newsracks would be appropriate vehicles for limiting the official's discretion.").

87. Thomas v. Chi. Park Dist., 534 U.S. 316, 322–23 (2002).

88. The closest that the Court has come to addressing the permissibility of a random scheme similar to that described here is in *Pell v. Procunier*, 417 U.S. 817 (1974). In *Pell*, the Court addressed challenges to California prison regulations that, inter alia, restricted the ability of members of the press to have face-to-face interviews with specific prisoners. The district court had held that such re-

has generally liberal standing requirements[89] precisely because the threat to and vindication of First Amendment rights has ramifications beyond that of the individual claimant.[90] And even as the Court has restricted overbreadth challenges to ones in which the plaintiff can show that a statute is "substantially" overbroad, it has recognized that there are "competing social costs" that favor vigorous enforcement of First Amendment rights on one hand and oppose such enforcement on the other.[91]

Similarly, the Court will consider some speech, e.g., obscenity, to be categorically proscribable because its *social* benefit is outweighed by its *social* cost.[92] In the area of permitting requirements, the Court has also indicated that restrictions may enhance rather than limit speech by ensuring that "multiple uses of limited space" are efficiently coordinated.[93] In short, the Court's First Amendment jurisprudence has ample space to accommodate a multiplicity of public interests that can be both supported and hindered by governmental regulation of speech.

C. Randomized Determination of Public Benefits Appeals

Some might object to comparisons to the First Amendment, perhaps the quintessential example of a civil liberty that is founded in the theory that society receives substantial benefit from protecting individual liberties.[94] But even in the more individualized area of due process,

strictions essentially amounted to a system in which inmates could only be interviewed by members of the press on a random basis. *See* Hillery v. Procunier, 364 F. Supp. 196, 199 (N.D. Cal. 1973). The Court did not specifically address the randomization problem because it found instead that the media has no right to have greater access to prisons than does the public; because the public has no right to request a face-to-face meeting with a particular prisoner, neither does the press. *Pell*, 417 U.S. at 833–34. Therefore, that the media also was given the opportunity to meet with inmates at random, when visiting prisons, was essentially a privilege neither required by the First Amendment nor in violation of the First Amendment. *Id.* at 830–31. But in discussing the stakes at issue, the Court focused on the interest of the public in being informed of the goings on in prison, and not simply the interest of the press in obtaining and disseminating information. *Id.* at 830.

89. *Compare* Meese v. Keane, 481 U.S. 465, 472 (1987) (standing to assert First Amendment claim granted because of potential "chilling" effect), *and* New York v. Ferber, 458 U.S. 747, 768–69 (1982) (describing overbreadth exception for First Amendment challenges), *with* City of L.A. v. Lyons, 461 U.S. 95, 105–10 (1983) (finding lack of standing absent imminent threat of death or serious injury).

90. *See Ferber*, 458 U.S. at 768–69 ("The doctrine is predicated on the sensitive nature of protected expression . . . ."); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 867–70 (1991) (discussing prophylactic theory of overbreadth doctrine).

91. *See* United States v. Williams, 553 U.S. 285, 292 (2008) (explaining that requirement of substantial overbreadth is a result of the need to balance the harm to the "free exchange of ideas" caused by enforcement of overbroad law against the "obvious harmful effects" of invalidating a law that in many applications will be "perfectly constitutional"); *see also* Virginia v. Hicks, 539 U.S. 113, 119–20 (2003).

92. Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007) (noting that speech, like obscenity, can be proscribed "because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas").

93. Thomas v. Chi. Park Dist., 534 U.S. 316, 322 (2002).

94. Among other doctrines, the First Amendment's generally liberal standing requirements contrast with standing in other contexts. *Compare Meese*, 481 U.S. at 472 (standing to assert First Amendment claim granted because of potential "chilling" effect), *and Ferber*, 458 U.S. at 768–69 (de-

represented by my stylized hypothetical about random rejection of public benefits appeals, the Court has demonstrated its understanding of the multifaceted social interests at stake in any dispute between the government and the individual. Perhaps the best example of the Court's textured approach to balancing is found in *Goldberg v. Kelly*,[95] announced at the same time that the landscape of Fourth Amendment jurisprudence was in flux. In *Goldberg*, the Court considered the procedures that should be provided before a State terminates welfare benefits and recognized the fiscal and administrative interest that the public had in limiting the process provided to beneficiaries.[96] But the Court also considered the State's interest in ensuring that eligible recipients received aid, which promoted the public interest in assuring the "dignity and well-being" of all persons and allowing the poor to participate "meaningfully in the life of the community."[97] Although these were all considered public interests, they were also in tension with each other. Nonetheless, the Court embraced a balancing analysis with a complex understanding of the different public interests at stake in the proceeding.

Goldberg is only one in a long line of modern due process cases that applies the same multifaceted approach to the public interest side of the balancing analysis. In the context of parole revocation proceedings, for instance, the Court has recognized that society has multiple interests at stake: (1) imposing restrictions on the liberty of individuals who have been adjudicated guilty of criminal violations, (2) returning the parolee to imprisonment without the burden of criminal adversarial proceedings when the parolee has not met the conditions of parole, (3) the possibility of returning the parolee to "normal and useful life within the law," (4) not revoking parole "because of erroneous information or because of an erroneous evaluation of the need to revoke parole," and (5) "treating the parolee with basic fairness" because this will "enhance the chance of rehabilitation by avoiding reactions to arbitrariness."[98] Again, just as in *Goldberg*, these interests, all collective in nature, each called for the provision of more or less process prior to revoking parole.

Likewise, in the area of government employment, the Court recognizes the overlap between the government's interest in avoiding erroneous termination decisions and the individual's interest in maintaining

scribing overbreadth exception for First Amendment challenges), *with Lyons*, 461 U.S. at 105–10 (finding lack of standing absent imminent threat of death or serious injury). The justification for the more permissive standing for First Amendment claims is precisely because the threat to and vindication of First Amendment rights has ramifications beyond that of the individual claimant. *See Ferber*, 458 U.S. at 768–69 ("The doctrine is predicated on the sensitive nature of protected expression . . . ."); Fallon, *supra* note 90, at 867–70 (discussing prophylactic theory of overbreadth doctrine).

95. 397 U.S. 254 (1970).

96. *Id.* at 264–65.

97. *Id.* at 265–66.

98. Morrissey v. Brewer, 408 U.S. 471, 483–84 (1972).

employment.[99] The Court has accorded similar recognition of multiple and competing public interests, some of which overlap with private interests, in parental rights termination proceedings,[100] child civil confinement proceedings,[101] and school disciplinary proceedings.[102] Nor has the Court confined its expansive view of public interests to due process cases that implicate civil proceedings. Whether considering the shackling of criminal defendants,[103] forcible medication of defendants incompetent for trial,[104] or the right to counsel in criminal appellate proceedings,[105] the Court's due process jurisprudence has consistently reflected an understanding that the balance between public and private interests is complex, overlapping, and multidimensional. Thus, much like my First Amendment hypothetical, although no court has considered a challenge to randomized appeal determinations in the public benefits context, an analysis of such a program would call on these insights about collective values.

D. Randomized Searches and Seizures

To this point, I have endeavored to show that, when confronted with a government program that randomly deprives individuals of particular constitutional rights, the Court will resolve the controversy at

99. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 544 (1985) ("Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. . . . A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls.").

100. Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18, 27 (1981) ("Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision."); Stanley v. Illinois, 405 U.S. 645, 652–653 (1972) ("Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."). Moreover, in *Santosky v. Kramer*, the Court based its decision on the recognition that both the State and parents share an interest in "an accurate and just decision" in the context of parental rights termination proceedings, justifying a heightened standard of proof in such proceedings. 455 U.S. 745, 766 (1982) (quoting *Lassiter*, 452 U.S. at 27).

101. In *Parham v. J.R.*, the Court recognized the State's significant interests in ensuring that costly mental health facilities are only used when genuinely needed, in the context of a challenge to the procedures used by the State to determine whether to admit children deemed by parents to be mentally ill. 442 U.S. 584, 604–05 (1979).

102. In *Goss v. Lopez*, the Court recognized the overlap between the interests of the State and an individual student's interest in avoiding "unfair and mistaken exclusion from the educational process." 419 U.S. 565, 579 (1975).

103. *See* Deck v. Missouri, 544 U.S. 622, 630–32 (2005) (recognizing competing public interests at stake between ensuring safety of courtroom, which shackling enhanced, and providing a dignified judicial process, which shackling undermined).

104. *See* Sell v. United States, 539 U.S. 166, 180 (2003) (recognizing the government's substantial interest in forcibly medicating incompetent defendants for criminal trials on one hand and its "concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one" on the other).

105. In *Halbert v. Michigan*, the Court held that the Due Process Clause required that indigent defendants who had not contested their guilt were entitled to appointed counsel when seeking leave to appeal, because the State had competing interests: on one hand, reducing the judiciary's workload; on the other hand, ensuring that courts had comprehensible leave applications. 545 U.S. 605, 622–23 (2005) (having an attorney also ensured that the court will be informed "when a defendant's case presents no genuinely arguable issue").

least in part by considering the collective costs *and* benefits to enforcing particular individual rights. I now turn to the hypothetical that implicates Fourth Amendment rights: a roadblock in which cars and drivers are randomly stopped and searched by police officers.

In contrast with the hypotheticals discussed above, it does not take much imagination to arrive at the Court's framework. In numerous cases, the Court has confronted roadblocks similar to the hypothetical described.[106] The private interests at stake in Fourth Amendment cases are uniformly treated as undermining public interests.[107] And the public interests at stake are always understood to cumulatively point in one direction.[108] The intrusion being challenged—the seizure and sometimes search associated with a roadblock—is understood to vindicate the public interest and undermine private interests.

The Court's discussion in *Michigan Department of State Police v. Sitz*,[109] which involved a challenge to sobriety checkpoints, exemplifies this approach. The Court took pains to emphasize that the case was "*not* about" any allegations that a particular person was subject to abusive treatment at any particular checkpoint.[110] This emphasis presumably in-

106. *See* Illinois v. Lidster, 540 U.S. 419 (2004) (challenge to roadblock in which all cars passing through were stopped and questioned about recent hit and run incident); City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (challenge to drug-interdiction checkpoint); Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (challenge to highway sobriety checkpoint); *see also* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002) (challenge to drug testing of middle and high school student participants in extracurricular activities); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (challenge to random drug testing of student athletes); Delaware v. Prouse, 440 U.S. 648 (1979) (challenge to random investigative stops of individual motorists); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (challenge to roving immigration stops).

107. *See Lidster*, 540 U.S. at 427 (contrasting degree to which stop "advanced . . . grave public concern" against minimal intrusion on individual liberty); *Sitz*, 496 U.S. at 451–52 (contrasting the "magnitude of the drunken driving program" with the "slight" intrusion on individual motorists); *see also Acton*, 515 U.S. at 654–57, 660–64 (contrasting student athletes' diminished expectation of individual privacy with the "perhaps compelling" governmental purpose); *Brignoni-Ponce*, 422 U.S. at 879–80 (contrasting public purpose of roving patrols with "modest" intrusion on individual liberty). In *Edmond*, the only roadblock case to result in a declaration of unconstitutionality, the Court did not address the balance of public versus private interests, because it implied an individualized suspicion requirement whenever the primary purpose of the checkpoint was to effectuate crime control purposes. 531 U.S. at 41–42. The Court's suspicion of such programs was at least in part motivated by its concern that, otherwise, regular Fourth Amendment intrusions would "becom[e] a routine part of American life." *Id.* at 42. Similarly, when the Court reviewed random stops of individual motorists that were not accomplished through a roadblock, the Court held such a program unconstitutional because of the distinction between stops of individual drivers and stops at checkpoints of multiple drivers. *Prouse*, 440 U.S. at 655–57; *see also* United States v. Villamonte-Marquez, 462 U.S. 579, 592–93 (1983) ("Random stops without any articulable suspicion of vehicles away from the border are not permissible under the Fourth Amendment . . . but stops at fixed checkpoints or at roadblocks are." (citations omitted)).

108. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 238 (1993) ("Why is the Fourth Amendment considered a second-class right? My guess is that the Court sees the typical Fourth Amendment claimant as a second-class citizen, and sees the typical police officer as being overwhelmed with the responsibilities and duties of maintaining law and order in our crime-prone society. This dual perception may explain the Court's reluctance to subject police conduct to vigorous judicial oversight." (footnotes omitted)).

109. 496 U.S. at 450–55.

110. *Id.* at 450.

dicates that the Court would take more seriously an allegation of unreasonable treatment of a particular individual, as opposed to the more general challenge to checkpoints pursued in *Sitz*.[111] Turning to the public interest, the Court found no difficulty in recognizing "the magnitude of the drunken driving problem or the States' interest in eradicating it."[112] And the private interest at stake, given the duration of the stop and the limited investigation that transpired at each stop, was "slight."[113] To the extent that there might have been public interests in tension with the legitimate interest in eradicating drunken driving, the Court declined to examine such interests.[114]

This approach is not limited to the area of randomized roadblocks. As discussed in Part I, in almost every modern Fourth Amendment case, the Court views the values protected by the amendment (privacy and autonomy) to be mediated through an individual liberty perspective and also to be in tension with the collective values at stake (safety and security).[115] There is no room in the Court's Fourth Amendment framework for the textured, multifaceted understanding of collective interests that is exhibited in cases implicating provisions like the First Amendment and Due Process Clause.[116] When compared with these areas of constitutional adjudication, the Court's insistence in Fourth Amendment cases that collective interests are always in tension with individual interests, and never in tension with each other, seems anomalous.

III. ARTICULATING THE COLLECTIVE VALUES VINDICATED BY THE FOURTH AMENDMENT

In Parts I and II of this Article, I have suggested both that the Court's Fourth Amendment jurisprudence is inattentive to all the dimensions of the "public interest"—i.e., to the possibility that there is a benefit to the collective—when limiting individual privacy intrusions, and that

111. *Id.*

112. *Id.* at 451.

113. *Id.*

114. *Id.* at 453–54 ("Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferrable [sic] as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.").

115. *See supra* notes 49–64 and accompanying text.

116. The same point might be made about the Equal Protection Clause—that is, when the Court enforces the Equal Protection Clause in favor of individual claimants, it sees itself as doing more than just vindicating individual interests. The Court's decision in the recent public education diversity cases offers an example. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 731–32 (2007) (plurality opinion); *id.* at 795–97 (Kennedy, J., concurring in part and concurring in judgment). On the other hand, JoEllen Lind has argued that, in the context of unenumerated rights, the Court is also engaged in a dichotomous "liberty/community" analysis: in the Court's view, an individual's interest in autonomy is vindicated whenever an unenumerated right is recognized, whereas the community's interest in goals that require the sublimation of autonomy is vindicated when an unenumerated right is not accorded constitutional recognition. Lind, *supra* note 12, at 1259–60, 1265–66.

this lack of imagination is anomalous in light of how the Court approaches other constitutional rights (using as examples cases implicating the Free Speech Clause and Due Process Clause). In this Part, I will build off of these observations by putting forward a vision of collective values and the Fourth Amendment that seeks to fill the gap in the Court's imaginative failure. I do so with some trepidation. There is no shortage of suggestions for modifying the Court's Fourth Amendment jurisprudence. Some commentators advocate a return to the pre-*Camara* universe in which the exceptions to the warrant and probable cause requirements were generally limited to exigent circumstances.[117] Others have criticized the Court's tendency to rely on diminished expectations of privacy to justify searches on less than probable cause.[118] And there are numerous critiques of the Court's individual privacy analysis as applied in the totality of the circumstances balancing test, including its lack of historical and textual support;[119] its failure to incorporate individual interests other than privacy;[120] its fluidity, which allows it to be expanded by "liberal" courts and restricted by "conservative" courts;[121] and the extent to which it may be determined by considerations of "technology, empiricism, and government regulation," leading to a smaller zone of privacy interests that are protected against Fourth Amendment intrusion.[122]

Although each of these criticisms is sound, none addresses the extent to which current analysis has failed to account for the value to the collective of limiting Fourth Amendment intrusions. There are two collective values that I will focus on in this Part: (1) pluralist participation in civic society, and (2) the efficiency and accuracy of criminal justice systems. What I am calling the Fourth Amendment's participatory value is, in some ways, similar to the collective values protected by the First Amendment—I will argue here that Fourth Amendment intrusions can undermine the participation of communities in civic society, thereby imposing costs to society above and beyond the intrusion on privacy of par-

117. *See* Strossen, *supra* note 8, at 1175–76 (arguing that Fourth Amendment rights should be enforced through categorical rules rather than through ad hoc balancing).

118. *See* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 333–37 (1998) (describing the Court's "chameleon-like" approach to evaluating expectations of privacy).

119. For an argument that history supports the warrant preference, see generally Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997). For an argument that history opposes the Court's reasonableness analysis, see generally Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). For an argument against the Court's use of common law in modern Fourth Amendment cases, see generally David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

120. *See* Clancy, *supra* note 118, at 339–44 (security); Luna, *supra* note 8, at 825–31 (sovereignty); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 318 (focusing on "informational privacy" has failed to take account of the "humiliation and subjugation that can accompany investigatory detentions"). *See generally* Taslitz, *supra* note 21 (arguing that Fourth Amendment should incorporate principles of respect, and should protect against insult and humiliation).

121. Clancy, *supra* note 118, at 339.

122. *Id.* at 339–44 (footnotes omitted).

ticular individuals. The efficiency and accuracy values discussed here are similar to those that the Court recognizes in the due process context[123]—that is, the Court's one-sided balancing test has the effect of decreasing the marginal utility of Fourth Amendment intrusions, thereby imposing costs on society in terms of the efficiency and accuracy of criminal justice systems.

A. Participatory Pluralism: The Deliberative Value of the Fourth Amendment

The First Amendment is understood, without controversy, as both imposing collective costs and producing collective values because of its perceived connection to political deliberation.[124] It appears beyond constitutional dispute that the free expression of individuals reinforces collective values in a deliberative democracy. If one considers history[125] and recent experience, however, it is apparent that similar values, such as civic participation and pluralist deliberation, inform and are at stake in individual Fourth Amendment cases.

The Fourth Amendment was adopted in large part because of colonial resentment of the general warrants that were routinely used by British authorities.[126] The colonists' opposition to general warrants was

123. The Court's procedural due process jurisprudence is particularly concerned with fairness and efficiency in the criminal context. *See* Rivera v. Illinois, 129 S. Ct. 1446, 1455 (2009) (describing difference between "structural errors," which implicate fairness and accuracy and therefore are not subject to harmless error review, and other errors); United States v. Williams, 553 U.S. 285, 303–04 (2008) (nothing that statutes are vague when they do not provide sufficient notice of prohibited conduct or when they pose a potential for "seriously discriminatory enforcement"); *see also* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009) (requiring recusal of state judge where an objective observer would conclude that there was a risk of actual bias or prejudgment).

124. For Lind, Habermasian theory offers the key insight that "true dialogue between members of the polity is a necessary feature of any legitimate governmental system and that that dialogue, that communicative action, presupposes certain conditions between the members of the polity," including political rights like free speech. *See* Lind, *supra* note 12, at 1316.

125. Reliance solely on the history of the Fourth Amendment at the Founding is fraught with difficulties. As with other constitutional provisions, many scholars dispute the value of looking to original intent to understand the meaning of the Fourth Amendment. *See* Maclin, *supra* note 108, at 208–09 (suggesting that history of how the Fourth Amendment was drafted suggests that relying solely on the text of the amendment is error); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 823–24 (1994) (questioning value of looking to original intent when, even if such intent could be ascertained, "almost no one" argues that we should be "bound for all time" to such understandings, and in the specific case of the Fourth Amendment, the reference to reasonableness "positively invites constructions that change with changing circumstances"). And even those that do consider original intent are in disagreement as to its meaning. Steiker, *supra*, at 823 (summarizing dispute between Professors Amar, Strossen, and Maclin regarding the Framers' understanding of meaning of Fourth Amendment). Examples of discord between current doctrine and understanding at time of the Framers include ex post justification of search (if search recovered contraband, then it could not be challenged at common law) and the idea that, with or without a warrant, government could only search for items in which it had a superior property interest—items with mere evidentiary value could not be searched for or seized. *Id.* at 826–27. But understanding the history of the amendment at the very least helps inform our understanding of its purpose in the constitutional framework.

126. *E.g.*, Steagald v. United States, 451 U.S. 204, 220 (1981); *see also* Maclin, *supra* note 108, at 201–02 (discussing how the Fourth Amendment intended to limit government oppression).

not based solely on a penchant for protecting individual privacy, however. For centuries before the Revolutionary War, colonists recognized that general warrants could be used to target political and religious dissenters.[127] Early protesters against general warrants realized that with the power to search homes without particularized suspicion came the power to suppress opponents of Charles I,[128] to confiscate and destroy Protestant and dissident Catholic texts,[129] or to suppress publications that were "offensive to the state."[130] During this pre-Revolutionary era, the most developed legal theory in opposition to general warrants rested on the rights secured by the Magna Carta, which advocates claimed limited an "infinite power of surveillance" that was intended to "stifle the press" or to "suppress[] dissent."[131] In this context, the move to the specific warrants required by the Fourth Amendment was a radical response to the English and colonial experience with general warrants, and the concern that they could be used abusively by the government to suppress pluralist political and religious discourse.[132]

The colonial concern with the potential that general warrants could be abused has been mirrored in more modern experiences with police intrusions. For instance, there has been a long and documented history of racism among police forces, the use by law enforcement of race as a proxy for criminality, and the "more aggressive and intrusive policing of black and other minority neighborhoods."[133] It is difficult to talk about the Fourth Amendment, and the impact of Fourth Amendment intrusions, without addressing the history of racially discriminatory police practices.[134] The effects of these kinds of intrusions illustrate the collective values that are at stake in Fourth Amendment enforcement. Communities in which intrusions are focused experience alienation from law enforcement, even among individuals who are not themselves subjected

127. All Fourth Amendment scholars owe a great debt to William Cuddihy, whose dissertation offers a detailed account of the social, political, and doctrinal ground upon which the Fourth Amendment was adopted. *See* William John Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602–1791 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with author). This work details the early resistance to general warrants, both in England and the Colonies, where they were viewed as a tool for suppression of dissent. *E.g.*, *id.* at 8–22.

128. *See id.* at 19–22.

129. *See id.* at 106–09.

130. *See id.* at 109–10.

131. *Id.* at 237–39, 327–41 (documenting use of general searches between 1640 and 1700 to stifle political and religious dissenters and to censor the press).

132. *Id.* at 559–62, 693–700.

133. Steiker, *supra* note 125, at 840–41.

134. *See id.* at 824 (noting that the height of Fourth Amendment protections was established at a time when legacy of race discrimination was being addressed by society); Taslitz, *supra* note 21, at 2269 (exploring the connection between slavery and denying Fourth-Amendment-type rights to slaves). Steiker argues that the Court's seminal Fourth Amendment cases reflect the Court's "growing awareness of racial discrimination in law enforcement," citing *Powell v. Alabama*, 287 U.S. 45 (1932), and *Brown v. Mississippi*, 297 U.S. 278 (1936), as Due Process Clause precursors to the Warren Court's Fourth Amendment revolution. Steiker, *supra* note 125, at 841–42; *cf.* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1470 (1985) (arguing that *Miranda* was a response to the racial turmoil of the 1960s).

to such intrusions.[135] As a result, entire communities experience "distrust and cynicism" about "the entire criminal justice system," making their members less likely to cooperate with the criminal justice system in a myriad of ways, from serving as witnesses to serving as jurors in criminal cases.[136] This experience has been focused primarily on racial and ethnic communities who perceive, in many cases accurately,[137] that law enforcement resources are targeted in discriminatory ways,[138] but the effect on these communities reflects the values at stake for any community and goes beyond the cumulative effect of such searches on individuals.[139]

Reflecting this, an individual's experience of being subjected to Fourth Amendment intrusions is magnified upon learning that others have had similar experiences, creating alienation from the criminal jus-

135. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 386–92 (1998).

136. David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 268–69 (1999).

137. Race-based targeting of African American and Latino communities has been well-documented. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE 21, 25 (1999) (reporting on disparate race of individuals who are searched on buses and stopped by police in Los Angeles). For a variety of reasons, however, complaints of police misconduct as a result of that conduct is rare. *See* CHARLES J. OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 24, 52–53 (1995) (pointing to factors that lead to a lack of complaints regarding race-based policing).

138. *See* Harris, *supra* note 136, at 267 ("Sophisticated analyses of stops and driving populations in [New Jersey and Maryland] showed racial disparities in traffic stops that were 'literally off the charts.'" (citation omitted)). Andrew Taslitz has suggested a "respect-based" Fourth Amendment jurisprudence that would recognize the particular burdens of Fourth Amendment intrusions on racial and ethnic minorities. *See* Taslitz, *supra* note 21, at 2275 (advocating a Fourth Amendment jurisprudence that focuses on respect that might "alter outcomes by putting human dignity and the realities of historical and modern day experience at center stage"). Some of Taslitz's suggestions—e.g., interpreting Fourth Amendment principles by virtue of "communal experiences and attitudes" of minority communities, ensuring that intrusions are based on characteristics particular to the individual searched or seized—are in harmony with the suggestions made in this Article. *Id.* at 2282–84 & nn.157–67. But Taslitz's focus is on ensuring that the Fourth Amendment is seen as "informed by equality values" in ways similar to the Fourteenth Amendment. *Id.* at 2287.

139. To some extent, this response may be related to equality concerns, because of the impact upon individuals when group membership is relied upon by the State to distribute burdens unequally. *See* ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 134–35 (1999) (citing to *Beauharnais v. Illinois*, 343 U.S. 250 (1952), as an example of the Court recognizing that individual members of a group suffer when the group's status is devalued). Taslitz builds a link between the treatment of rape survivors in court to disregard for women as a group in general:

> But the chain of causation works the other way too: harm to the individual harms the group. . . .
>
> But groups are defined not only by their members' self-concepts but also by how others define the group. In particular, a group's identity can inhere in the eyes of an oppressor group. The oppressive Others' vision of the oppressed ties the group's fate to the individual's: the awareness of the Other creates a common interest for each member of the group. It is an interest in the sense that each person comes to care about how each member is treated, for because each person is treated as indistinguishable from each other person, how your neighbor is treated counts as a strong indication of how you will be treated, or would have been treated had you been there instead of your neighbor. This interest is common because it is true for each person who thinks about it because it is not based on subjective but objective conditions—namely, how the Other is reacting toward each member of the group as a group member, not as an individual.

Id. at 135 (footnotes omitted).

tice system at the very least.[140] But even beyond its effect on one's relationship to law enforcement, it strikes at the heart of civic participation, leading to avoidance of public places and "core community activities."[141]

This is one part of the way in which there is an interest in pluralist participation that is at stake in Fourth Amendment questions—when members of communities experience repeated invasions of their privacy on an individual level, it affects the level at which any member of the community is prepared to participate in collective activity that is beneficial to society. For some, increased suspicion and cynicism towards law enforcement may affect willingness to assist in public-regarding activities like jury service.[142] For others, the fear and paranoia among communities that experience intensified surveillance reduces other forms of civic participation, such as participation in community-based organizations.[143]

The effect of post–September 11 intrusions on Arab, Muslim, and South Asian communities offers one recent example of the relationship between Fourth Amendment events and civic participation. For instance, in the wake of widely held reports of law enforcement tracking and prosecuting donations to particular Islamic charities in this country,[144] civic participation of Muslim communities steeply declined.[145] A minority of individuals have even altered their use of the Internet as a result of the perception that they are targeted for government surveillance because of their religion and ethnicity.[146] Finally, there is some evidence

140. Katheryn Russell discusses the particular effect of imposing suspicionless search and seizure regimes on the African American community. KATHERYN K. RUSSELL, THE COLOR OF CRIME 44–45 (1998). In addition, that attitudes towards and faith in the criminal justice system vary according to race has been well-established. OGLETREE ET AL., *supra* note 137, at 8 (66% of black adults believe African Americans charged with crime are treated more harshly in the criminal justice system than white persons charged with crimes; 34% of whites share this view; 60% of white adults think police do a good job fighting crime; 39% of African Americans and 44% of Latinos agree).

141. JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM 52 (1997). In addition, Armour argues that African Americans who enter public places "stifle self-expression" so as not to draw unwanted attention to themselves. *Id.*

142. *See* RUSSELL, *supra* note 140, at 44, 46.

143. *See* sources cited *infra* notes 145, 147.

144. *See* Tracey Maclin, *"Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror*, 73 MISS. L.J. 471, 479–93 (2003) (discussing the Department of Justice's direction to local police departments to question immigrant men from a designated list of Middle Eastern countries). As Tracey Maclin has noted, even reputed vigorous civil libertarians have endorsed profiling based on language, national origin, and gender in the post–September 11 context. *See id.* at 473 & nn.5–7.

145. *See id.* at 502–03 (describing reports of fear and paranoia among the Arab population in the United States in the aftermath of the Department of Justice sweep); *Drop in Gifts to Muslim Charities Is Attributed to U.S. Scrutiny*, N.Y. TIMES, Dec. 13, 2001, at B7 (reporting that the drop in donations was attributed to government scrutiny of charities); Laurie Goodstein, *Muslims Hesitating on Gifts as U.S. Scrutinizes Charities*, N.Y. TIMES, Apr. 17, 2003, at B1 (describing Muslims' fear of donating to charities and attracting scrutiny from the FBI); Neil MacFarquhar, *Fears of Inquiry Dampen Giving by U.S. Muslims*, N.Y. TIMES, Oct. 30, 2006, at A1 (reporting on the decrease in contributions arising from fear of government surveillance).

146. *See* Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 375, 390–91 (2007).

that the federal government's focus on Pakistani Muslims after September 11 has had a detrimental effect on that group's identification with larger American society and civic participation, prompting some individuals to cease participating at all in overt political activities.[147]

There are several aspects of Fourth Amendment intrusions, above and beyond the privacy-invading elements, that contribute to these effects. First, many Fourth Amendment intrusions occur in public space—*Terry* and its progeny, for instance, are almost invariably about stops in public places, on public streets.[148] Empirical data from New York City, one of the few cities or states that collects such data, confirms this anecdotal observation.[149] In 2006, more than 70% of the *Terry* stops by the New York City Police Department took place outside or in public places like subway stations.[150] A public Fourth Amendment intrusion leaves an impression, especially one that is perceived as wrongful or unjustified.[151] It reinforces the lack of control that an individual has over where and when he is going when he is in public.[152] It is fundamentally disruptive of participation in public life, and it creates hesitance about participating further.[153] Thus, the experience of being stopped or searched is not just an experience of having one's privacy being intruded upon; it is an experience of domination, of the State exerting forcible compulsion upon an individual, and often that individual experiences that compulsion through the lens of group membership, which affects "broadly held social

147. JUNE HAN, DISCRIMINATION & NAT'L SEC. INITIATIVE, "WE ARE AMERICANS TOO": A COMPARATIVE STUDY OF THE EFFECTS OF 9/11 ON SOUTH ASIAN COMMUNITIES 11–18 (2006), http://www.geocities.ws/dnsinitiative/911_Report.pdf. This impact is not isolated to the United States. In France, scholars have suggested that the use of race as a basis for stopping and questioning individuals in Paris has been responsible in part for the alienation and stigmatization of immigrant communities, leading to violent conflict between certain communities and the police. *See* OPEN SOC'Y INST., PROFILING MINORITIES: A STUDY OF STOP-AND-SEARCH PRACTICES IN PARIS 21 (2009), http://www.soros.org/initiatives/justice/focus/equality_citizenship/articles_publications/publications/search_20090630/search_20090630.Web.pdf.

148. *See supra* notes 41–64 and accompanying text.

149. New York City is the only major city that has made public an extensive set of data regarding on-the-street encounters between police officers and individuals. Some cities in Vermont have recently begun to collect similar data. *See* John Briggs, *Vermont Police Departments Collecting Racial Data on Stops*, BURLINGTON FREE PRESS, Aug. 2, 2009, at B1. Similar data has been collected in parts of Miami-Dade County for limited periods of time. *See* Karen F. Parker, Brian Stults & Erin Lane, *A Spatial and Contextual Analysis of Policing: Examining Black, White and Hispanic Stop Rates*, J. CRIME & JUST. (forthcoming 2010) (manuscript at 10–11), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/1/7/4/7/2/pages174725/p174725-1.php. Portland, Oregon, also has published statistical reports regarding traffic stops by police. *See* Portland Police Bureau, Traffic Stops Data Collection, http://www.portlandonline.com/police/index.cfm?c=42284.

150. NYPD DATABASE, *supra* note 6 (view "INOUT" variable). Nearly 8% of the stops took place in the city's transit authorities. *Id.* (view "TRHSLOC" variable).

151. *See* William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 24–25 (2001).

152. *Id.* at 24.

153. *See* ARMOUR, *supra* note 141, at 52.

meanings."[154] As Andrew Taslitz has argued, "Ignoring the disrespect inherent in some police conduct is done at the polity's peril."[155]

Second, and more mechanically, because many Fourth Amendment intrusions occur in public, they not only symbolize domination of the State over the individual, but also interfere directly with freedom of movement.[156] In so doing, they interfere with the exercise of other rights, particularly rights of assembly.[157] Individuals who feel less secure in public spaces as a result of an increase in Fourth Amendment intrusions will hesitate to speak out for fear of attracting more attention to themselves.[158] It is thus accurate to say that in some respects the Fourth Amendment serves the democratic goal of resistance.[159] More strikingly, such public Fourth Amendment intrusions have the potential to lead to violent encounters between the citizen and law enforcement—thus, officers have been found to be significantly more likely to use force against African Americans, although this rate is also affected by neighborhood characteristics.[160]

Finally, most Fourth Amendment intrusions not conducted pursuant to the traditional Warrant Clause requirements uncover no evidence of wrongdoing or contraband. That is, most people subjected to the modern kinds of intrusions—suspicionless or reduced suspicion stops or searches—are innocent of misconduct.[161] Being stopped and subjected to a Fourth Amendment intrusion for no apparent reason can have several consequences. An individual may believe that she was unfairly stopped on the basis of inappropriate considerations (such as race, etc.),[162] she may believe that she did something to "deserve" being

154. *See* Taslitz, *supra* note 21, at 2280.

155. *Id.* at 2358.

156. *See* Heffernan, *supra* note 151, at 24–25 (outlining individual privacy, liberty, and property interests at stake in Fourth Amendment intrusions); *see also* Delaware v. Prouse, 440 U.S. 648, 657 (1979) (describing way in which Fourth Amendment intrusion interfered with freedom of movement).

157. Indeed, residents of American cities hosting events such as the Republican National Convention can appreciate the extent to which Fourth Amendment intrusions can have the effect of suppressing speech and assembly. Joe Garofoli, *Police Raid Homes, Headquarters of Protesters*, S.F. CHRON., Aug. 31, 2008, at A17; Liliana Segura, *RNC Raids Have Been Targeting Video Activists*, ALTERNET, Sept. 1, 2008, http://www.alternet.org/rights/97110/rnc_raids_have_been_targeting_video_activists_/.

158. *See* ARMOUR, *supra* note 141, at 52.

159. *See* David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 96 (2006) (referring to Ian Shapiro's "spirit of democratic oppositionalism").

160. Douglas A. Smith, *The Neighborhood Context of Police Behavior*, *in* 8 CRIME AND JUSTICE: A REVIEW OF RESEARCH 313, 329 (Albert J. Reiss, Jr. & Michael Tonry eds. 1986).

161. For instance, of the more than half a million individuals stopped, questioned, and frisked on New York City streets in 2006, only 4% were arrested. *See* NYPD DATABASE, *supra* note 6 (view "ARSTMADE" variable). DNA databanks have similarly low hit rates. In Virginia, for instance, which gathers samples from felony arrestees and convicted offenders, from the inception of the databank in 1993 until the end of December 2009, there were 6024 hits from 303,498 total samples, for a hit rate of 1.98%. VA. DEP'T OF FORENSIC SCIS., DNA DATABANK STATISTICS (2009), http://www.dfs.virginia.gov/statistics/index.cfm. Most of the hits assisted in the prosecution of property crimes rather than murder, rape, or other violent crimes. *Id.*; *see also* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 734–35 (2007) (majority of hits in the United Kingdom were for property crimes).

162. *See* Taslitz, *supra* note 21, at 2355.

stopped,[163] or she may find the intrusion trivial and insignificant.[164] For those who fall into the first two camps, and there is reason to believe that many would,[165] the effect on one's relationship to the state is substantially altered.[166] Many will either alter their behavior so as to attract less attention, or experience resentment and anger at law enforcement,[167] either of which will affect one's participation in civic society.[168]

B. Criminal Justice: The Fourth Amendment and the Collective Value of Efficiency and Accuracy

Just as the Fourth Amendment vindicates collective values that are parallel to the First Amendment, it also serves collective values parallel to those protected by the Due Process Clause. Recall that the Court recognized in the context of the Due Process Clause the public interest in public benefits being provided to the "right" people—that is, society has an interest in ensuring that the procedures given to individuals with public benefits will result in the correct distribution of benefits.[169] Similarly, society has an interest in ensuring that Fourth Amendment intrusions are effective in revealing evidence of antisocial behavior.[170] This is so for several reasons.

First, as the Court relies on its reasonableness balancing test to reduce the standard necessary to conduct searches of individuals, from

163. *See id.*

164. *See id.*

165. *See* Sklansky, *supra* note 120, at 312–14 (observing that minority drivers experience being pulled over or ordered out of a car differently).

166. Racial groups targeted for searches or seizures learn from such treatment that "[t]heir value as individuals [is] equated to the value of their racial group," which because of the harsh treatment is negligible. Taslitz, *supra* note 21, at 2315–16 (describing the effect of World War II internment on Japanese Americans as "stemm[ing] directly from race-based search and seizure practices, teaching lasting lessons about the connection between the Fourth Amendment and human respect"); *id.* at 2356 (arguing that ignoring group conceptions of justice in Fourth Amendment invasions increases isolation of particular groups, reduces social status of the groups, and results in a "reduced respect for the rule of law"); *see* Andrew Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 758–65 (1999) (describing the harm of the majority's perception that a particular individual belongs to an "inferior" group).

167. Speaking of riots in Cincinnati in response to police shootings of a motorist, one resident explained:

> The riots are not just a reaction to the killing of an African American male, but to the injustice to our people for so long. . . . Just walking down the street I get asked [by police], 'What are you doing?' I pay taxes like they do. I should be able to walk down a public street.

Amy DePaul & Peter Slevin, *Cincinnati Officials Impose Curfew; Mayor Acknowledges Race Woes as City Acts to Quell Violence*, WASH. POST, Apr. 13, 2001, at A1 (alteration in original); *see also* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 93, 157–59 (1968) (noting that police practices were one of the complaints that led to riots of 1967).

168. *See* Sklansky, *supra* note 120, at 317 (arguing that recent Fourth Amendment cases show little concern for the effect that racial profiling has on minority communities). As Professor Sklansky notes, African Americans tend to see traffic stops "as a systematic, humiliating, and often frightening form of police harassment," which send a discrete message of subordination. *Id.* at 312.

169. Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1969).

170. William G. Buss, *Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 768 (1974).

probable cause to reasonable suspicion to even no suspicion in certain circumstances, this by definition tolerates and encourages less efficient searches.[171] Consider, for example, the difference between the probable cause standard and the "reasonable suspicion" standard from *Terry*. "Probable cause," not "individualized suspicion," is the relevant constitutional standard found in the text of the Fourth Amendment.[172] And probable cause, although not subject to a mathematically precise definition, has a long pedigree of judicial interpretation.[173] Not having a "technical" meaning, it is described as those facts and circumstances which would "warrant a man of reasonable caution [to believe] that an offense has been or is being committed."[174]

The "reasonable suspicion" standard announced in *Terry*,[175] though not defined in fixed terms, not only lowered the quantum of evidence necessary to justify an intrusion,[176] but also permitted intrusions based on a lower quality (or reliability) of evidence.[177] By approving a lower standard for intrusions from probable cause to reasonable suspicion, the Court also implicitly permitted an increase in the number of fruitless searches or seizures.[178] That is, as the probability required to justify an intrusion diminishes, the likelihood that individuals innocent of any anti-

171. Interestingly, the Court has relied at times upon the public's interest in conserving resources in upholding a Fourth Amendment intrusion. *See* Wyman v. James, 400 U.S. 309, 318–19 (1971) (acknowledging the public's interest in assuring that funds are appropriately spent).

172. U.S. CONST. amend. IV.

173. Nearly sixty years ago, the Court outlined a general approach to probable cause that located it somewhere between "bare suspicion" and the evidence that would be required to "justify condemnation or conviction." Brinegar v. United States. 338 U.S. 160, 175 (1949) (internal quotation marks omitted). More recently, the Court has sought to concretize matters somewhat, by describing probable cause as requiring a "fair" or "substantial" chance of discovering evidence of criminality, with reasonable suspicion requiring a "moderate chance." Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009).

174. *Brinegar*, 338 U.S. at 175–76 (internal quotation marks omitted). More recently, the Court described the probable cause standard as "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232 (1983).

175. This standard was first articulated in *Terry v. Ohio*. 392 U.S. 1, 27 (1968) ("Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.").

176. *See* Illinois v. Wardlow, 528 U.S. 119, 123 (2000) ("'[R]easonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence . . . ."); Daniel R. Dinger & John S. Dinger, *Deceptive Drug Checkpoints and Individualized Suspicion: Can Law Enforcement Really Deceive Its Way into a Drug Trafficking Conviction?*, 39 IDAHO L. REV. 1, 8–9 (2002) (noting that reasonable suspicion is a lower standard than probable cause, must be made on a case-by-case basis, and requires the articulation of specific facts which show that criminal activity has occurred or is about to occur).

177. *See* Alabama v. White, 496 U.S. 325, 330–31 (1990) ("Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.").

178. *See infra* text accompanying notes 186–208.

social activity will be subjected to intrusions that reveal no contraband increases.[179] At the same time, because reasonable suspicion requires a lower quantum of suspicion than probable cause, more individuals will be candidates for a search or seizure based on reasonable suspicion than for an intrusion based on probable cause.[180] Moreover, because intrusions based on reasonable suspicion are generally required to be less extensive than full-scale searches, the effectiveness of such frisks is even further reduced.[181] The overall effect, then, of moving from probable cause to reasonable suspicion, and from reasonable suspicion to no suspicion at all, is to reduce the utility of such intrusions, while simultaneously expanding the scope of such intrusions.

There is also a cost in terms of the criminal justice system's accuracy. As the ability to search expands and law enforcement officials conduct more searches, the officers' level of performance diminishes.[182] That is, even using the same standard, as a law enforcement agency performs numerically more searches, they become less successful at them. This has several effects. First, it can engender cynicism and bad faith amongst the public.[183] Second, it can create information overload, making it difficult to prosecute actual wrongdoers in several ways: by creating false leads, by overloading police laboratories, and by taking up valuable investigative time processing multiple searches.[184] Third, it has the potential to create what is often referred to as "tunnel vision" or "confirmatory bias," leading to wrongful convictions: as more Fourth Amendment intrusions lead to the generation of more evidence, there is a greater possibility that law enforcement will focus attention on the wrong suspect.[185]

179. We could refer to this, loosely, as Type I error because it indicates that the reasonable suspicion standard generates more false positives than the probable cause standard.

180. We can arbitrarily assign numbers to reasonable suspicion and probable cause—say that probable cause requires at least a 30% likelihood of finding contraband, whereas reasonable suspicion requires at least a 10% likelihood of finding contraband. In any given population, then, some finite number of individuals will exhibit behavior that justifies a search based on probable cause, whereas some larger number of individuals will exhibit behavior that justifies a frisk based on reasonable suspicion.

181. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 456 n.62 (1990).

182. *See* Max Minzner & Christopher M. Anderson, *Do Warrants Matter?* 18 (Cardozo Legal Studies Research, Paper No. 212, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1073142 (showing that there is a strong inverse relationship between the number of searches performed by the United States Attorney's offices and the success rate of the searches). Data from the New York City Police Department are suggestive of the same relationship. Personal communication from Max Minzner (Aug. 14, 2008).

183. Minzer & Anderson, *supra* note 182, at 22–24.

184. *See* U.S. DEP'T OF JUSTICE OFFICE OF INSPECTOR GEN., REVIEW OF THE TERRORIST SCREENING CENTER, at xi (2005) (finding incomplete and inaccurate information was contained on Terrorist Watch List); Philip Shenon, *Report Finds Flaws in Terrorist Watch List*, N.Y. TIMES, Mar. 18, 2008, at A16; *Crime Labs Struggle with Flood of DNA Samples* (NPR Broadcast Dec. 12, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=17128750; DNA.gov: Backlog of DNA Samples, http://www.dna.gov/statistics/backlog (last visited May 27, 2010).

185. Bruce MacFarlane, *Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System* 32–33 (2008), http://www.canadiancriminallaw.com/articles/articles pdf/Wrongful-Convictions.pdf.

C. Applying the New Model to Fourth Amendment Disputes

It is not enough to just point out a missing element of the Court's Fourth Amendment analysis. For the critique to have force, it is important to demonstrate ways in which the collective value of the Fourth Amendment could have meaning in particular cases. For this Section, I consider some historical cases, suggesting ways in which they could be reconceptualized in light of the suggestions herein, as well as current and future cases. Although I do not mean to suggest that any particular outcome would be reached based on my proposed approach to Fourth Amendment inquiries, I do maintain that changing the way courts discuss and conceptualize the Fourth Amendment will have substantive force.

1. Revisiting Terry *and the Abandonment of the Probable Cause Standard*

When the Court announced *Terry*, its specific decision was to permit a Fourth Amendment intrusion when police officers possess reasonable suspicion, a less rigorous standard than probable cause.[186] The Court had before it three individuals who were in possession of dangerous weapons,[187] but who were asserting privacy interests protected by the Fourth Amendment. In such a context, it would not be surprising to focus on the individual "bad actors" in front of the Court—people who were self-evidently threats to the social order. At the time of *Terry*, the Court had no way of knowing how much disutility it was creating, nor how far it was expanding the reach of law enforcement to perform such intrusions. But it should have known that its decision would increase both the potential denominator of searched individuals—that is, that individuals who could be subjected to a search would increase—and that there would be an increase in the percentage of fruitless searches.[188] The precise effect of a decision like *Terry* is difficult to estimate, because it depends on a number of variables.[189] But data from the New York Police Department's Stop, Frisk, and Question program offer some insights.

These data show that in 2006,[190] 506,491 stops were made.[191] Of those who were stopped, 43%, or 217,179 individuals, were frisked.[192] Of those who were frisked, contraband was found in 5915 cases, or 2.7% of the time, and a weapon was found in 1642 cases, or about 0.8% of the

186. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968).

187. *See id.* at 8.

188. *See id.* at 36 n.3 (Douglas, J., dissenting).

189. Some of these variables include the distribution within the population of factors supporting reasonable suspicion or probable cause, the ability of law enforcement to make observations of the relevant factors, and the resources and strategy of law enforcement in conducting searches or frisks.

190. Although the police department has presumably been conducting *Terry* stop and frisks since the decision was announced, only the data from 2006 have been made available to researchers.

191. NYPD DATABASE, *supra* note 6 (view "YEAR" variable).

192. *Id.* (view "FRISKED" variable).

time.[193] After accounting for the overlap in cases in which both a weapon and contraband were found, of the 217,179 individuals frisked,[194] a weapon and/or contraband was found in 3.4% of the instances in which officers found reasonable suspicion to justify a stop and frisk.[195]

By the raw numbers, these data tell us that under the reasonable suspicion standard, 209,000 innocent individuals were stopped and frisked by police officers, so that about 7500 instances of contraband and/or weapons possession could be detected.[196] The data also tell us something about what it means to be stopped and frisked. Almost three-fourths of the stops took place outside,[197] and of the 131,000 stops that occurred inside, 29% took place on transit authority property and 41% took place on housing authority property.[198] Thus, a very high percentage of stops took place in very public places—outside on the street or in public areas like subway stations or public housing.

We also can learn something from the reason that individuals were selected to be stopped and/or frisked. Table 1 and Figure 1 show the explanations offered for why particular individuals were stopped, and Table 2 and Figure 2 show the reasons that officers gave for performing a frisk of particular individuals.[199] Over half of the stops and frisks were because the individual was in a high crime area.[200] And 32% were stopped and frisked because of the time of day in which they were encountered by police.[201] Twenty-three percent were stopped for an unspecified reason.[202]

193. *Id.* (cross tabulate "FRISKED" and "CONTRABN" variables and "FRISKED" and "WEPFOUND" variables).

194. There were 263 instances in which both a weapon and contraband were found. *Id.* (cross tabulate "CONTRABN" and "WEPFOUND" variables).

195. *Id.* (add 5915 contraband cases and 1642 weapon cases, subtract 263 overlaps, and divide by 217,179).

196. *Id.*

197. *Id.* (view "INOUT" variable).

198. *Id.* (cross tabulate "INOUT" and "TRHSLOC" variables).

199. Tables 1 and 2 were generated by cross tabulating the "FRISKED" variable with each of the variables assigned for reasons for stops or frisks. *Id.*

200. *Id.* (cross tabulate "FRISKED" and "AC_INCID" variables).

201. *Id.* (cross tabulate "FRISKED" and "AC_TIME" variables). Interestingly, there is some correlation, though less than one would expect, between the time of day that an individual was stopped and the explanation that the individual was stopped because of the time of day. That is, although a greater proportion of those stopped between the hours of 2:00 a.m. and 4:00 a.m. were stopped because of the time of day (40%), between 25% and 30% of the individuals stopped between the hours of 6:00 a.m. and 8:00 p.m. also were stopped because of the time of day. *Id.* (cross tabulate "AC_TIME" and "TIMESTP2" variables).

202. *Id.* (view "CS_OTHER" variable).

TABLE 1
REASONS OFFERED FOR STOPPING INDIVIDUALS, NYPD (2006)[203]

Reason Given	No. of Stops	Percent of Stops
Area Has High Crime Incidence	268,622	53.0%
Furtive Movements	186,080	46.7%
Time of Day Fits Crime Incidence	159,493	31.5%
Casing a Victim or Location	135,245	26.7%
Other	116,608	23.0%
Fits Relevant Description	92,456	18.3%
Suspect Acting as a Lookout	83,358	16.5%
Evasive Response to Questioning	83,329	16.5%
Actions Indicative of a Drug Transaction	51,659	10.2%
Suspicious Bulge	44,373	8.8%
Actions of Engaging in a Violent Crime	28,753	5.7%
Wearing Clothes Commonly Used in Crime	19,237	3.8%
Associating with Known Criminals	15,687	3.1%
Carrying Suspicious Object	14,360	2.8%

203. Because officers can record more than one explanation for a stop or frisk, the percentages in Tables 1 and 2 will sum to more than 100.

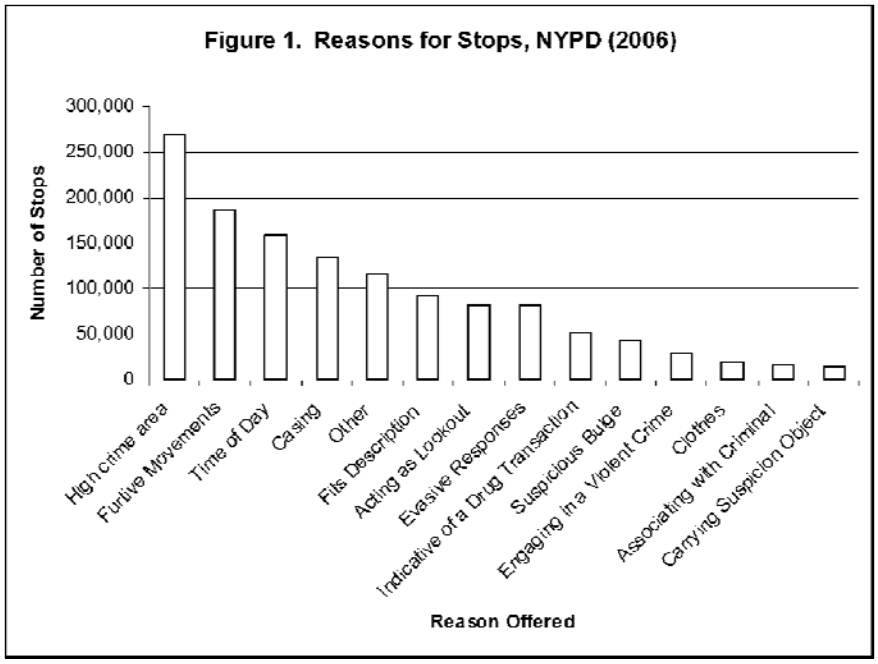
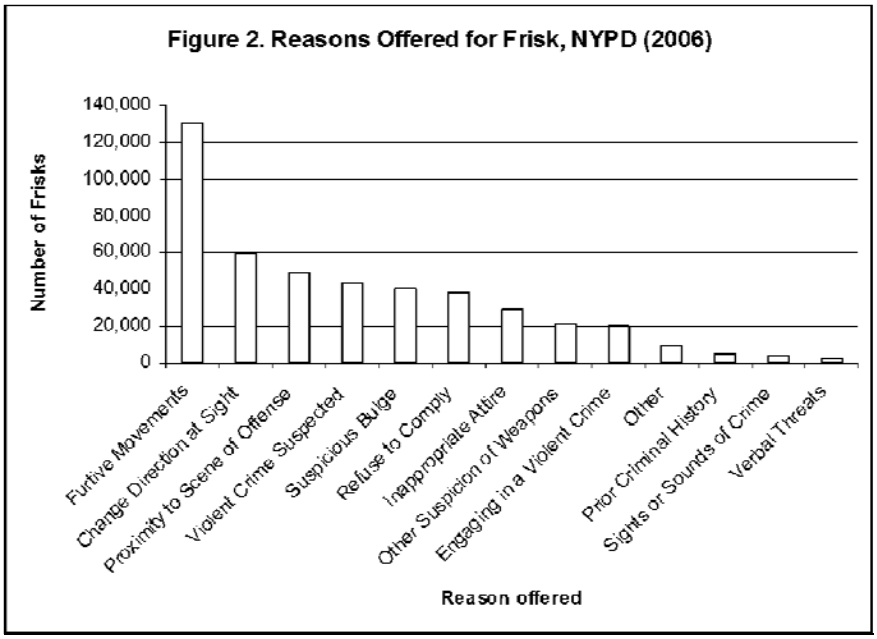


TABLE 2
REASONS OFFERED FOR FRISKING INDIVIDUALS, NYPD, 2006[204]

Reason Given	No. of Frisks	Percent of Frisks
Furtive Movements	130,277	60.0%
Change Direction at Sight	59,591	27.4%
Proximity to Scene of Offense	49,408	22.7%
Violent Crime Suspected	43,337	20.0%
Suspicious Bulge	39,969	18.4%
Refuse to Comply with Officer's Directions	38,909	17.9%
Inappropriate Attire for Season	29,336	13.5%
Other Suspicion of Weapons	20,807	9.6%
Actions of Engaging in a Violent Crime	19,922	9.2%
Other	9578	4.4%
Knowledge of Suspect's Prior Criminal History	4721	2.2%
Sights or Sounds of Criminal Activity	3675	1.7%
Verbal Threats by Suspect	2444	1.1%

204. Because officers can record more than one explanation for a stop or frisk, the percentages in Tables 1 and 2 will sum to more than 100.



These data are revealing in multiple ways. They tell us that most law enforcement intrusions based upon the *Terry* model are public, on-the-street encounters. The vast majority result in neither arrest nor the discovery of contraband or weapons. The most common justifications for the intrusions are ones based not on the particular characteristics of the individual being stopped, but on the character of the neighborhood in which the stop occurs.

These observations, in combination with what is already known about the effects of searches and seizures, illustrate the collective values at stake in *Terry* that were not acknowledged by the Court.[205] First, the move to a reasonable suspicion standard made searches both less effective and more expansive—more people were searched with less success.[206] This obviously relates to the accuracy and efficiency values inherently present in Fourth Amendment inquiries. But it also, in combination with

205. Notably, the Court was conscious of the possibility that reducing the standard for permissible intrusions could result in harassment of African American communities, but it neglected to take this collective value into account because it viewed the only stakeholders in the case as the individuals seeking exclusion of the evidence seized as a result of the frisk. *See* Terry v. Ohio, 392 U.S. 1, 14–15 (1968). The Court asserted that

> [t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.

Id. (footnote omitted).

206. *See* NYPD DATABASE, *supra* note 6 (cross tabulate "FRISKED" and "CONTRABAND" variables, and "FRISKED" and "WEPFOUND" variables).

the fact that most of the intrusions occurred in public spaces and were often justified on the basis that the neighborhood in which the search occurred was a high crime area, suggests that the searches could be having the effect of subordinating particular communities within New York City.[207] The public embarrassment and humiliation occasioned by these searches, targeted in particular communities, can function to reduce and retard civic participation.[208]

On this account, in light of the data and history, the reasonableness balancing test applied in *Terry* looks incomplete. The Court could not have focused as easily on the costs to the three individuals standing before it, challenging the particular searches, to the exclusion of the communities that would be subjected to additional searches under the *Terry* analysis. This is not to say that the outcome would have been, or should have been, different in the particular case, but the analysis would have been more complete if the *Terry* Court had exhibited consciousness of these collective values and taken them seriously.

2. Revisiting the Abandonment of the Warrant Requirement

Terry represents the Court's decision to alter the standard for individualized suspicion for a particular intrusion. But the Court also has applied its reasonableness balancing test to excuse the absence of a warrant in many cases.[209] In so doing, the Court has articulated a limited, notice-oriented approach to the purpose of a warrant. In the Court's view, the warrant's purpose is to "advise the citizen that an intrusion is authorized by law and limited in its permissible scope and to interpose a neutral magistrate between the citizen and the law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'"[210]

Empirical data suggest that doing away with warrants has costs above and beyond those associated with individual notice. Available data, summarized in a provocative paper by Max Minzner, suggest that warranted searches have a recovery rate of at least 80%, whereas warrantless searches have a recovery rate of between 12% and 53%.[211] In other words, it appears that there is something about obtaining a warrant that is correlated with much higher success rates.[212]

207. *See* Harris, *supra* note 8, at 977.

208. *See* Harris, *supra* note 136, at 298–99.

209. *See* United States v. Knights, 534 U.S. 112, 118–19 (2001); Atwater v. City of Lago Vista, 532 U.S. 318, 326–27 (2001); United States v. Johns, 469 U.S. 478, 487–88 (1985); Illinois v. Lafayette, 462 U.S. 640, 644 (1983); United States v. Ross, 456 U.S. 798, 822–24 (1982).

210. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 667 (1989) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

211. *See* Max Minzner, *Putting Probability Back into Probable Cause* 11–14 & chart 1 (Benjamin N. Cardozo Sch. of Law Jacob Burns Inst. for Advanced Legal Studies Working Paper No. 240, 2008), *available at* http://papers.ssrn.com/abstract=1157111.

212. There could be many explanations for this correlation, but that is beyond the scope of this Article. Because seeking a warrant has its own costs, officers may only expend resources when they have evidence that makes them very secure in the conviction that they will find evidence. It could also

Thus, again, if the Court were to apply a balancing test that considered all of the varied collective values at stake in doing away with warrants in a particular case, it would have to consider the evidence that warrants benefit the collective public in ways that the Court has not imagined. By encouraging more accurate searches, the warrant vindicates social interests in accuracy and efficiency, independent of the individual interest in receiving adequate notice.

3. DNA Databanks and Other Anticipatory Searches

If the model for Fourth Amendment decision making suggested here is going to have any force, however, if it is going to avoid being "more duct tape on the Amendment's frame and a step closer to the junkyard,"[213] then it is not enough to show how it might be applied to long-past cases.[214] It should also be useful for analyzing Fourth Amendment problems that the Court is likely to confront in the future. For the purposes of this discussion, I focus my attention on what I call "anticipatory" searches—searches that are not related to any ongoing law enforcement investigation but that are intended to gather evidence or serve as a deterrent to future criminal activity. Low-tech versions of anticipatory searches are similar to the search of the parolee in *Samson v. California*.[215] They are conducted not because the officer suspects any particular wrongdoing, but because they are part of a regulatory scheme that calls for the gathering of such information,[216] or because they are based on individual decisions of law enforcement to conduct the search.[217] Full-scale versions of such searches include suspicionless searches of individuals on public transit systems,[218] and high-tech versions encompass DNA databanks.[219] Suspicionless intrusions with a long

be that some warrantless searches are consent searches, which may reduce the average quantum of suspicion that justifies such searches.

213. Luna, *supra* note 8, at 787–88; *see also* Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 343–44 (2005) (asserting that the balancing methodology is essentially "legislative in form"); Sundby, *supra* note 8, at 383 (describing the situation as "dire, with the Court retaining a semblance of coherent [F]ourth [A]mendment analysis only by resorting to exceptions or an ill-defined balancing test," rendering analysis "more makeshift, lacking continuity in design and purpose").

214. Of course, some of the same issues present in *Terry* and its progeny were reviewed by the Court last Term. *See* cases cited *supra* note 9.

215. 547 U.S. 843, 846–47 (2006).

216. *See* Wyman v. James, 400 U.S. 309, 319–23 (1971) (upholding the constitutionality of home visits for welfare recipients).

217. In *Samson*, the officer knew that Mr. Samson was on parole and decided to search him based solely on that status. 547 U.S. at 846–47.

218. *See* MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006).

219. *See* Nicholas v. Goord, 430 F.3d 652, 656 (2d Cir. 2005); United States v. Sczubelek, 402 F.3d 175, 176–77 (3d Cir. 2005); Padgett v. Donald, 401 F.3d 1273, 1275 (11th Cir. 2005); United States v. Kincade, 379 F.3d 813, 816–17 (9th Cir. 2004) (en banc); Green v. Berge, 354 F.3d 675, 676 (7th Cir. 2004); Groceman v. Dep't of Justice, 354 F.3d 411, 412–13 (5th Cir. 2004); Boling v. Romer, 101 F.3d 1336, 1339–40 (10th Cir. 1997); Jones v. Murray, 962 F.2d 302, 303 (4th Cir. 1992).

pedigree, such as sobriety checkpoints,[220] arguably fall within this category as well. And as technology becomes more and more capable of giving law enforcement the tools to gather information on a mass scale, such intrusions have attained greater importance.[221]

Each of the elements of the Court's modern Fourth Amendment analysis described in Part I.B has contributed to courts' acceptance of these types of searches. For instance, the Court's increasingly probabilistic understanding of individualized suspicion permits the government to argue that, even as the need for a search may be speculative as to any particular individual, it may be justified as to large populations.[222] DNA databanks that focus on felons or arrestees generally justify their programs by citing the increased recidivism or future criminality of the subjects of the search.[223] And searches like those in *Samson* are justified by the likelihood that those targeted will commit crimes in the future.[224]

But most critically, under the Court's current balancing framework, lower courts have little difficulty upholding such anticipatory search regimes. On the private interest side of the balancing, courts often find that the subjects of such searches have diminished expectations of privacy or that the searches are otherwise minimally intrusive.[225] And on the public interest side of the balancing, the law enforcement interests or other public interests are always viewed as substantial.[226] Without an appreciation and understanding of the social values vindicated by the Fourth Amendment, courts faced with a challenge to mass speculative intrusions or anticipatory searches and seizures will apply a narrow balancing analysis. The greater the population encompassed by the search or seizure regime, the more the regime will serve the public interest. And paradoxically, as more individuals are encompassed by a search regime, under the Court's equal protection approach to the Fourth Amendment,[227] the intrusion on individual interests is diminished because there will be less opportunity for individuals to be subject to a stigmatizing search or seizure. Because the Court has articulated a ba-

220. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990); *see also* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (upholding suspicionless checkpoints in certain circumstances for the purpose of upholding vehicle registration laws); United States v. Martinez-Fuerte, 428 U.S. 543, 560, 566, 663 (1976) (upholding checkpoints for controlling immigration at or near the border).

221. *See* Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1325–26 (2008) (examining State's increasing reliance on innovative technologies to monitor individuals).

222. This is sometimes referred to as "group suspicion" or "collective suspicion." *E.g.*, Michael Book, *Group Suspicion: The Key to Evaluating Student Drug Testing*, 48 U. KAN. L. REV. 637, 651 (2000).

223. *See, e.g.*, *Nicholas*, 430 F.3d at 669; *Kincade*, 379 F.3d at 838–39.

224. *See supra* notes 215–21 and accompanying text.

225. *See* Samson v. California, 547 U.S. 843, 850–51 (2005).

226. *See id.* at 853–55 (acknowledging the interest in reducing recidivism, promoting "positive citizenship" among parolees); Wyman v. James, 400 U.S. 309, 318–19 (1971) (acknowledging the interest of dependent child in receiving assistance and public's interest in assuring that funds are appropriately spent).

227. *See supra* note 75.

lancing test in which the public and private interests at stake are always at odds with each other, courts fail to analyze whether speculative intrusions, and mass anticipatory intrusions in particular, impose any cost to society, separate and apart from costs to the individual being searched or seized. The result is the anomaly that intrusions which generate evidence for criminal prosecutions have become less objectionable as they become more speculative and pervasive.

How might a focus on the collective values inform the intrusions described at stake in current Fourth Amendment disputes? The Court's balancing test could explicitly account for the effect on the collective of permitting a particular intrusion, and also consider the speculative nature of the government's interest. Although the balancing test already allows for considering the scope of the intrusion on the individual, it does not consider the "scale" of the intrusion on the collective.[228] This would include consideration of how many other individuals will be affected by the holding of the particular case, whether those individuals are part of a discernable community that will be stigmatized as a group by the intrusions, and whether the interest put forth by the government justifies the scale of the intrusion, paying attention to whether the government's asserted interest is principally speculative. Where there is less than probable cause, or less than individualized suspicion, this change will force courts to consider the effects of its ruling on others who have not acted in a way to justify any suspicion. And where the interest of the government is directed towards investigating or deterring future criminal or antisocial behavior, the speculative nature of this interest will weigh heavily against permitting the intrusion.[229]

The Court's balancing test could also acknowledge the effect of particular kinds of intrusions on pluralist deliberation. If the intrusion will subject large numbers of people to subjugation in public spaces, then courts should consider this in the balance of public and private interests. If the intrusion will create fear and anxiety among a large number of the public, and the intrusion is expected to reveal little evidence of wrongdoing, then this can be considered a cost of authorizing the government's conduct. Most important, however, is that the Court be open to the possibility that the public's interests may be multidimensional, and that this can affect the reasonableness balance.

228. Maclin, *supra* note 144, at 502–03 (describing reports of fear and paranoia among Arab population in the United States in aftermath of Department of Justice sweeps).

229. Such an approach might reveal the difference between the searches upheld in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989), which were principally speculative and forward-looking, and the searches upheld in *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), which were justified by the exigent and contemporaneous circumstances of a railway accident.

D. The Singularity of the Fourth Amendment's Exclusionary Rule

One might accept all that has been argued in this Article to this point, and still consider the Court's treatment of Fourth Amendment questions to be without controversy because of the singularity of the exclusionary rule as a remedy for privacy intrusions. That is, one might believe the exclusionary rule—with its presumed cost to truth seeking at criminal trials—to be a good explanation of why the Court has taken an anomalous approach to conceptions of the public's interest in Fourth Amendment cases. Even scholars who are otherwise critical of the Court's Fourth Amendment jurisprudence appear to accept the dichotomy between individual liberty and collective interests.[230] Such scholars describe the exclusion of evidence seized or discovered in violation of the Fourth Amendment as invariably benefiting guilty individuals.[231] And Justices of the Court have through the years rhetorically indicated substantial discomfort in engaging in Fourth Amendment enforcement.[232]

For several reasons, the uniqueness of the exclusionary remedy should not suffice to explain the Court's one-dimensional approach to the public interest at stake in Fourth Amendment cases. First, it is important to distinguish the social utility of the exclusionary remedy from the substance of the right itself. Whether the right has been violated—

230. *See* COLE, *supra* note 137, at 6 (arguing that the inequality in criminal justice system is caused by need to balance the protection of constitutional rights, which "make the identification and prosecution of suspected criminals more difficult," against the "protection of law-abiding citizens from crime"); Steiker, *supra* note 125, at 820 (grouping Fourth, Fifth, and Eighth Amendments together as examples of individual rights imposing "social costs"); Taslitz, *supra* note 21, at 2286 (describing the Fourth Amendment as "subvert[ing] the truth, keeping truthful evidence from the jury to promote other values, such as protecting privacy, property, and free movement from unjustified invasion").

231. *See* Junker, *supra* note 76, at 1111 ("In part, the prominence of the exclusionary rule derives from the fact that its use always dramatically subordinates the search for truth in favor of the protection of individual privacy and operates to the immediate benefit of an otherwise inculpated criminal defendant."); Steiker, *supra* note 125, at 848 (describing the exclusionary rule as "award[ing] windfalls to guilty criminal defendants while offering nothing at all to the innocent whose rights are equally violated"); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 912–13 (1991) (noting that the warrant clause is justified in part because of a concern that if searches are only judged after they have occurred, there is risk that the Fourth Amendment will be underenforced because person seeking to enforce it will appear to "deserve[] punishment, not relief").

232. *See* United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (describing the frequent recipients of Fourth Amendment protection as "not very nice people") (Frankfurter, J., dissenting). Several Court decisions have cut down on the scope of the exclusionary rule. *See generally* United States v. Leon, 468 U.S. 897 (1984) (refusing to enforce exclusionary rule where police officers relied in good faith on a faulty warrant); Stone v. Powell, 428 U.S. 465 (1976) (holding that Fourth Amendment claims are not a basis for habeas corpus relief); Harris v. New York, 401 U.S. 222 (1971) (refusing to apply the exclusionary rule when the statement obtained in violation of right to counsel is used to impeach testimony of defendant); Walder v. United States, 347 U.S. 62 (1954) (refusing to apply the exclusionary rule when statement obtained in violation of Fourth Amendment is used to impeach testimony of defendant); Nardone v. United States, 308 U.S. 338 (1939) (limiting the exclusionary rule to fruits of the poisonous tree). The *Leon* Court spoke directly of the "substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights"; that is, "that some guilty defendants may go free or receive reduced sentences as a result." 468 U.S. at 907. And in *Powell*, the Court described the exclusionary rule as having "long-recognized costs" because it "deflects the truthfinding process and often frees the guilty." 428 U.S. at 490–91.

the question answered by the Court's balancing analysis—is an inquiry distinct from what remedy is appropriate to vindicate that right. This is especially true in light of the fact that the vast majority of Fourth Amendment intrusions are experienced by innocent individuals, who simply do not have the incentive to bring their complaints to the Court's attention.[233]

Moreover, there are reasons to doubt the judicial and academic consensus that the exclusionary rule always functions as a harm to society. As Tracey Maclin has noted, the empirical data suggest that, when evidence is excluded, it is almost always in cases involving drug or weapon possession, and rarely in cases involving crimes of violence; most of the offenses in which researchers believe that exclusion costs a criminal conviction are ones for which the punishment would not have exceeded one year in prison.[234] Although these crimes are undoubtedly important to prosecute, exclusion may not function in each and every case to keep a guilty person on the street.[235] And as Maclin argues, whatever the provenance of the exclusionary rule given the history of the Fourth Amendment, individuals in law enforcement have repeatedly indicated that they could not take the Fourth Amendment seriously absent the sanction of exclusion.[236] Thus, the singularity of the exclusionary rule as a remedy for Fourth Amendment violations is not sufficient to justify the Court's limited analysis of the Fourth Amendment right.

CONCLUSION

There is precedent for a vision of the Fourth Amendment that focuses on both the social benefits *and* costs inherent to a particular search or seizure regime. The Supreme Court's treatment of the Fourth Amendment in the early twentieth century embraced this understanding

233. Indeed, this lack of incentive among the innocent is one of the primary justifications for the exclusionary rule. *Cf. Walder*, 347 U.S. at 64–65.

234. *See* Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 43–44 (1994) (citing Thomas Y. 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; Wayne R. LaFave, *"The Seductive Call of Expediency":* United States v. Leon*, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895); *see also* Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 36 (1987).

235. Although it is outside the scope of this Article, it may also be that, as an empirical matter, application of the exclusionary rule does not always benefit factually guilty individuals. For instance, when a confession obtained as a result of an unconstitutional arrest is excluded, the result may be that a fundamentally unreliable piece of evidence is not available, reducing the prospect of an erroneous conviction. *See, e.g.*, Wallace v. Kato, 549 U.S. 384 (2006) (reviewing § 1983 action brought by individual who had confessed after unlawful arrest and against whom charges had been dropped after exclusion of confession).

236. *See* Maclin, *supra* note 234, at 68–69 (citing Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24 (1980); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 126 (1992)); *see also* Kamisar, *supra* note 234, at 21–22.

of its purpose, if not explicit adoption of the formulation proposed in this Article. Justice Brandeis, writing in dissent in 1928 for a position that was later adopted by the Court, framed the Fourth Amendment in the context of the Constitution's larger political scheme:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.[237]

And there is consensus that Justice Jackson's exposure to the privacy-invading elements of Nazism while prosecuting war crimes in Nuremburg transformed his view of the Fourth Amendment's warrant requirement.[238] In a vigorous dissent in *Brinegar v. United States*, he adverted to deprivation of Fourth Amendment rights as capable of "crushing the spirit of the individual and putting terror in every heart," and the capacity of such deprivations to lead to the deterioration of the "human personality, . . . dignity and self reliance."[239] The connection between vigorous enforcement of privacy through the Fourth Amendment and resistance to fascism was also recognized in states that debated wiretapping laws.[240]

There is also more recent indication from the Court that aspects of the Fourth Amendment's protection can be viewed from a collective point of view. When the Court has described who is protected by the

237. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

238. Steiker, *supra* note 125, at 842–43.

239. 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting) ("Fourth Amendment freedoms . . . are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.").

240. In New York State, comments such as the following were made in support of a specific constitutional provision regulating wiretapping:

> I wonder how many members of this Convention can realize—as I can—what life is like in a country [Germany] where you look over your shoulder before you make the most innocent remark to a friend; when you take for granted that your telephone is hooked up with police headquarters; when you have every reason to believe that there is a dictaphone somewhere in your private lodging . . . .
>
> That, you may say, was Germany and this is America; and in America we can assume that the constituted authorities will exercise the right to tap wires and to place Dictaphones . . . discretely and only when they are hot on the trail of some real desperado—that you and I will escape. Who can guarantee that—in the case of all police authorities and under all circumstances? The answer is: No one. No single person. But we, as a people, we can pass mutual guarantees to each other that the authorities will indulge in these practices only under careful judicial restraints.

Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 83 (1996) (quoting comments of State Convention Commissioner Lithgow Osborne).

right—"the people"—the Court has defined the term by reference to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[241] The Court has recognized that individual and associational privacy interests are connected to each other so as to provide a buffer zone restricting governmental surveillance of individuals where such surveillance impairs associational or political privacy.[242] Yet when the Court recognizes the harmful effects of mass searches, it is usually based on the sheer number of individuals who will experience a threat to privacy, but not on the collective effect such intrusions may have on the social fabric.[243]

In conclusion, there is room for a textured understanding of the public interests at stake in any Fourth Amendment intrusion. In the current political context, with lingering fear of another terrorist attack leading public figures to call upon Americans to redefine our understanding of privacy,[244] we would benefit from a renewed conversation regarding the social benefits *and* costs imposed by the Court's current Fourth Amendment balancing scheme. This is particularly true given the technological innovations that are expanding daily the scope and reach of searches and seizures. Continuing to have a limited appreciation of the social values implicated by these Fourth Amendment intrusions will ultimately make the amendment less meaningful to both individuals and society.

241. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

242. *See* William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 44–45 (2000).

243. *See* Arizona v. Gant, 129 S. Ct. 1710, 1720 (2009) (rejecting extension of car search exception because of "serious and recurring threat to the privacy of countless individuals").

244. The USA Patriot Act was initially passed and subsequently extended based on legislators' belief that central assumptions about privacy had to be reworked in the aftermath of the September 11th attacks. *See* Nathan Watanabe, Note, *Internment, Civil Liberties, and a Nation in Crisis*, 13 S. CAL. INTERDISC. L.J. 167 (2003). And with respect to the Fourth Amendment in particular, suggestions have been made that the exclusionary rule be further limited in light of terrorist concerns. *See* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 1019–22 (2003) (arguing that probable cause should be judged by a reasonableness standard, and therefore require less evidence depending on the gravity of the offense or the social benefit obtained by the search); Steven Minert, Comment, *Square Pegs, Round Hole: The Fourth Amendment and Preflight Searches of Airline Passengers in a Post-9/11 World*, 2006 BYU L. REV. 1631, 1660–66 (arguing that risk of terrorism justifies a sui generis exception to Warrant Clause requirements for suspicionless preflight searches of airplane passengers); Matt J. O'Laughlin, Comment, *Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, 70 UMKC L. REV. 707, 716 (2002) (proposing that, just as reasonableness is determined by balancing "individual rights against the interests of the state," the applicability of the exclusionary rule also should be determined by such balancing).