Collective Values and the Fourth Amendment

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The Supreme Court and most commentators treat the Fourth Amendment as creating a 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. Thus, Fourth Amendment literature and jurisprudence is littered with references to the “costs” to society of enforcing the Fourth Amendment in favor of individual claimants. To take the “public interest” seriously in this framework is to put a thumb on the scale in favor of government intrusions.

This Article challenges this dichotomous approach to Fourth Amendment interpretation by identifying a third 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 both categories of claimants – the individual and the government – take positions that advance a variety of collective values. Drawing on First Amendment and Due Process Clause jurisprudence, newly available 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 Court’s current jurisprudence. If the Court is to take the public’s interest seriously, it needs a Fourth Amendment jurisprudence that takes account of these interests, among others, and acknowledges the reality that the “public interest” is multifaceted.

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INTRODUCTION

I. THE TRANSITION TO UNIDIRECTIONAL PUBLIC INTERESTS .................6
   A. Putting Context-Based Reasonableness at the Heart of the Fourth Amendment .................................................................9
   B. Evolution of the Public and Private Interests at Stake in Fourth Amendment Balancing ..................................................14

II. A CONTRAST IN THE COURT’S IMAGINATION OF COLLECTIVE VALUES .....17
   A. Exploring the Ramifications of Randomization ..........................18
   B. Randomized Permitting for Parades in Public Space ...............19
   C. Randomized Determination of Public Benefits Appeals ..........21
   D. Randomized Searches and Seizures ........................................23
   E. The Singularity of the Fourth Amendment’s Exclusionary Rule ..26

III. ARTICULATING THE COLLECTIVE VALUES VINDICATED BY THE FOURTH AMENDMENT ........................................................................................................................................29
   A. Participatory Pluralism: The Deliberative Value of the Fourth Amendment .................................................................30
   B. Criminal Justice Administration: The Efficiency and Accuracy Collective Value of the Fourth Amendment ....................38
   C. Applying a New Model to Take Account of Multifaceted Public Interests ........................................................................41
      1. Revisiting Terry and the abandonment of the probable cause standard .................................................................41
      2. Revisiting the abandonment of the warrant requirement ..47
      3. DNA databanks and other anticipatory searches ...............41

CONCLUSION .........................................................................................51
INTRODUCTION

The Fourth Amendment’s prohibition of unreasonable searches and seizures is arguably the constitutional provision that implicates the most acute conflicts between the State and individuals. Fourth Amendment jurisprudence reflects this tension, and has undergone substantial change from the beginning of the 20th century until the present. This Term, in a series of cases, the Court will

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.

2 In this Article, I will 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.

3 One could surely argue that other provisions of the Constitution – say the Equal Protection or Due Process Clauses of the 14th 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 20% of U.S. residents age 16 or older reported a face-to-face contact with police, usually because of a traffic stop. MATTHEW R. DURSO, ET AL., 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 forty percent of these individuals were frisked. See NEW YORK POLICE DEPARTMENT STOP, QUESTION, AND FRISK DATABASE, 2006, http://www.icpsr.umich.edu/cgi-bin/SDA/ICPSR/hsda?nacjd+21660-0001 [hereinafter NYPD Database]. Over ninety eight percent of such intrusions revealed no contraband. Id. 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, 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. CITY OF NEW YORK, HUMAN RESOURCES ADMINISTRATION, PUBLIC ASSISTANCE RECIPIENTS IN NYC, 1955-2006, http://www.nyc.gov/html/hra/downloads/pdf/HRA_NY yog_P a_1955-2006.pdf.

4 The tension present in the Supreme Court’s Fourth Amendment analysis is a result of its attempt to resolve the competing Warrant Clause – which requires that judicial warrants be particular as to their scope and supported by probable cause – and the Reasonableness Clause – which “secure[s] … against unreasonable searches and seizures.” U.S. CONST., AMEND. IV.
have additional opportunities to further transform the meaning of the Amendment.

However the Court resolves these cases, its analysis of the salient issues will be limited by a significant imaginative failure. Simply put, the Court views Fourth Amendment disputes as a clash between public interests such as law enforcement and individual interests such as privacy and autonomy. On this account, there is room only for tension between these interests – both the public and private interests are unidirectional and in opposition to each other. Enforcing an individual’s Fourth Amendment rights in this context is always viewed as a detriment to the collective because the only relevant “public,” or collective, interests are those that are in tension with vindicating individual liberties. The 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 (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 Amsterdam, Perspectives on the Fourth Amendment, 58 MICH. 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 MICH. 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).

In Callahan v. Millard County, 494 F.3d 891 (10th Cir. 2007), cert. granted sub nom. Pearson v. Callahan, 128 S. Ct. 1702 (March 24, 2008), the Court will consider whether a warrantless search is permissible based on the “consent-once-removed” theory. In United States v. Herring, 492 F.3d 1212 (11th Cir. 2007), cert. granted, 128 S. Ct. 1221 (Feb. 19, 2008), the issue is whether the exclusionary rule should apply when an arrest is made based on an officer’s good faith reliance on false information. Arizona v. Johnson, 170 P.3d 667 (Ariz. Ct. App. 2007), cert. granted, 128 S. Ct. 2961 (June 23, 2008), involves an iteration of the “stop and frisk” rule of Terry v. Ohio, 392 U.S. 1 (1968), and Arizona v. Gant, 162 P.3d 640 (Ariz. 2007), cert. granted, 128 S. Ct. 1443 (Feb. 25, 2008), which will address the scope of the search incident to arrest exception to the warrant and probable cause requirements.

See infra notes.41-56, 66-68, 93-103 and accompanying text.
3 Collective Values and the Fourth Amendment

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 autonomy and also are in tension with the interests in law enforcement that the Court recognizes as legitimate public interests.\(^7\)

The court’s blind spot has distinct ramifications for how it decides cases. In 2006, when the Court 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. The possibility that there could be social costs associated with the search that would not only be borne by the individual parolee did not enter into the equation.\(^8\) At the same time, a majority of the Supreme Court cast doubt on the continued vitality of the exclusionary rule, announced several decades ago to remedy Fourth Amendment violations by police officers.\(^9\) The source of the ambivalence towards the exclusionary remedy is the perception that whenever it is invoked, it imposes a substantial cost on society in the form of permitting a guilty defendant to go free.\(^10\) These are just two examples, among many, of the ways in which the

\(^7\) 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: “members 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.


\(^10\) There are four questions that arise in any Fourth Amendment problem. First, has there been a “search” or a “seizure,” some event of Fourth Amendment significance? If not, then there is no need to analyze the Fourth Amendment implication of the intrusion any further. If there has been such an event, the next logical, but often overlooked, question is whether the individual searched or seized has consented to the intrusion or waived her right to complain that the intrusion
Court’s dichotomous balancing approach influences its resolution of Fourth Amendment disputes. Nonetheless, the tension inherent in the Court’s Fourth Amendment test is taken as a given by the Court and most commentators alike.

This Article critically engages the given wisdom about the relevant interests implicated by the Fourth Amendment and argues that there is a dimension to the public interest that to date has been ignored by the Court and most commentators. Instead of accepting the notion that individual Fourth Amendment interests are always at cross-purposes with the public’s interest, I argue here that both the collective and the individual may benefit from enforcement of the Fourth Amendment – and that therefore the Court’s balancing test should incorporate collective values that are both advanced and retarded by Fourth Amendment enforcement. In particular, a revised understanding of the Fourth Amendment as serving important collective values – such as civic participation and accurate and efficient criminal procedures – separate and apart from securing individual privacy and autonomy, will result in a more complete balance. These particular collective values are not meant to be exhaustive, but they 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 newly available empirical evidence.

There is a deep and comprehensive scholarship surrounding the Fourth Amendment. One of the central issues that has divided the Court and 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” violation of the Amendment. If the right to challenge the search or seizure has been preserved, the third question is whether the Government acted unconstitutionally. And finally, if the search or seizure was unconstitutional, the appropriate remedy must be determined. Samson and Hudson are devoted to the third and fourth questions, respectively.

See infra notes 93-103, 188-90 and accompanying text for a discussion of more consequences of the dichotomy.

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).
balancing test. 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 autonomy. Advocates on either side, 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, but little attention 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. Part I reviews the changes in Fourth Amendment jurisprudence from the Court’s landmark decisions in Camara v. Municipal Court of the City and County of San Francisco and Terry v. Ohio, 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. Part II highlights the ways in which Fourth Amendment law departs from other areas of constitutional interpretation in its narrow conception of collective interests. In particular, this Part demonstrates that the Court’s First Amendment and Due Process Clause jurisprudence contemplates competing public interests that are not take account of in Fourth Amendment law. As a result, the Court’s simplistic Fourth Amendment balancing test looks anomalous. Part III of this Article will attempt to resolve this anomaly by considering how a collective Fourth Amendment value might be articulated and taken into account in the Court’s analysis, without abandoning the reasonableness framework which the Court has

13 See sources cited supra note 4.
14 For insightful critiques of the Court’s Fourth Amendment jurisprudence, see generally Amar, supra note 4; Amsterdam, supra note 4; Clancy, supra note 4; Harris, supra note 4; Luna, supra note 4; Strossen, supra note 4 (arguing that Fourth Amendment rights should be enforced through categorical rules rather than through ad hoc balancing).
15 See, e.g., Clancy, supra note 4 at 599-601 (arguing that individualized suspicion should be an intrinsic part of reasonableness, but accepting “governmental interests” prong at face value). For additional discussion, see infra notes 104-106 and accompanying text
placed at the heart of the matter. Drawing on newly available empirical data, and historical materials, 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 full appreciation of the multifaceted collective values they implicate.

I. THE TRANSITION TO UNIDIRECTIONAL PUBLIC INTERESTS

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. For most 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 which did not comply with the Warrant Clause’s requirements of probable cause

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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 (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 630; Gouled v. United States, 255 U.S. 298 (1921). This analysis held true even where the seizure was supported by probable cause. 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 Supreme Court. The Fourth Amendment’s application to subpoenas was first limited by Hale v. Henkel, 201 U.S. 43 (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 (1967). The Court’s decision in Katz v. United States, 389 U.S. 347 (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 City and County of San Francisco, 387 U.S. 523, 530-31 (1967).
and magistrate screening were unconstitutional.\textsuperscript{19} 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 20th century until 1960, the Court announced an exclusionary rule for evidence discovered in violation of the Fourth Amendment,\textsuperscript{20} first refused and then decided to extend the exclusionary rule to States,\textsuperscript{21} held that the Fourth Amendment did not apply to some civil proceedings,\textsuperscript{22} and held that warrants were not needed for certain kinds of arrests or searches.\textsuperscript{23} 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.\textsuperscript{24}

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.\textsuperscript{25} Two cases decided in the mid

\textsuperscript{19} The Supreme Court in \textit{Weeks v. United States}, 232 U.S. 383 (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 \textit{Weeks}, however, the Court implied in \textit{dicta} that at least one version of a suspicionless search – the authority to search an arrestee for evidence of crime where the initial seizure of the arrestee was valid – was consistent with the Fourth Amendment despite its failure to meet the probable cause requirement. \textit{See} \textit{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 which 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. 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 warrant and supported by probable cause.

\textsuperscript{20} \textit{Weeks}, 232 U.S. at 398.


\textsuperscript{23} \textit{E.g.}, \textit{Draper v. United States}, 358 U.S. 307 (1959).

\textsuperscript{24} \textit{Id.} at 310.

\textsuperscript{25} 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-
1960s -- *Camara v. Municipal Court of the City and County of San Francisco* and *Terry v. Ohio* -- altered this framework. *Camara* approved a warrantless home safety inspection justified by something other than traditional probable cause, and *Terry* approved the use in a criminal trial of evidence discovered as a result of a warrantless search and seizure that was justified by a quantum of suspicion less than probable cause. Their reasoning signaled the

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.


28 *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 (1960) (affirming lower court decision by an equally divided Court); *Frank*, 359 U.S. at 367. In *Frank*, the Court reviewed an arrest of a homeowner for refusing entry to an inspector from the Baltimore City Health Department, who had no warrant but 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 Supreme 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-incriminating because both protect the innocent from being “confounded with the guilty.” 359 U.S. at 363. 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 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 376 (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 (Douglas, J., dissenting).

29 *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. 392 U.S. 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 (1999).
Collective Values and the Fourth Amendment

beginning of the end of the centrality of the Warrant Clause 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, is the touchstone of the 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 because the private homeowner’s interest in privacy was outweighed by the public’s interest in health and safety. The Court determined 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.

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. Relying on Camara’s reasonableness

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30 E.g., Samson v. California, 547 U.S. 843, 848 (2006) (“Under our general Fourth Amendment approach we examine the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment.”) (internal quotation marks and alterations omitted).

31 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.” Camara, 387 U.S. at 358. 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 multifamily 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 which degraded rather than enhanced Fourth Amendment protections. Id. at 547–48 (Clark, J., dissenting).

32 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 534.

33 Id.

34 392 U.S. at 7-8. Terry’s first task was to unpack the terms “seizure” and “search”
analysis – balancing the need to search against the invasion entailed by the
search\textsuperscript{35} – the \textit{Terry} Court determined that neither a warrant nor probable cause
was necessary for the stop and frisk. The public interests identified by the Court
were solving crimes and assuring an officer’s safety, interests which were so
important that requiring probable cause was inappropriate.\textsuperscript{36} But while 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 were significant enough invasions to justify requiring some
variant of individualized suspicion to believe that a suspect is dangerous.\textsuperscript{37}

The transition from \textit{Camara} and \textit{Terry} to the current status quo – in which
a “totality of the circumstances” balancing test is the window to determining
whether \textit{any} search or seizure must be supported by individualized suspicion
and/or approved through the warrant process – was fitful. In the first several years
after \textit{Camara} and \textit{Terry}, the Court appeared ambivalent about adopting a general
reasonableness analysis for all Fourth Amendment intrusions.\textsuperscript{38} Indeed, \textit{Camara}
was repeatedly cited by dissenting opinions seeking to impose a general

contained in the Fourth Amendment, and interpret them in light of the “stop” and “frisk” at issue in
\textit{Terry}. The State had argued that a “stop” and “frisk” do not implicate the Fourth Amendment
because they are not full-scale arrests and searches. \textit{Id.} at 18. 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.” \textit{Id.} at 19. This consideration was consistent with the \textit{Camara}’s rejecting the
distinction between searches for criminal investigative purposes and civil regulatory purposes. \textit{See}
\textit{Camara}, 387 U.S. at 530-33.

\textsuperscript{35} \textit{Terry}, 392 U.S. at 21.
\textsuperscript{36} \textit{Id.} at 23–24.
\textsuperscript{37} \textit{Id.} at 24–25, 27. The standard of individualized suspicion adopted by the \textit{Terry} Court
has come to be known as “reasonable suspicion.” \textit{See} \textit{Illinois v. Caballes}, 543 U.S. 405, 415
(2005).

\textsuperscript{38} In \textit{Chimel v. California}, 395 U.S. 752, 761 (1969), for instance, announced one year
after \textit{Camara}, the Court noted that although the Fourth Amendment uses a reasonableness
standard, the warrant and probable cause requirements give content to that standard. \textit{See also}
probable cause and issuance of warrant, except in exigent circumstances, such as the mobility of
car).
reasonableness analysis in place of the traditional warrant and probable cause requirements.\textsuperscript{39} Eventually, however, the Court placed reasonableness at the heart of its Fourth Amendment analysis, as a 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.\textsuperscript{40}

In 1977, for instance, the Court decided \textit{Pennsylvania v. Mimms},\textsuperscript{41} a case involving the suspicionless stop and subsequent frisk of an automobile driver. The Court relied upon \textit{Terry} for the proposition that reasonableness is the “touchstone” of Fourth Amendment analysis, and that public-private balancing is the gateway to reasonableness.\textsuperscript{42} In \textit{Mimms}, as in \textit{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.\textsuperscript{43} 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.\textsuperscript{44}

After \textit{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;\textsuperscript{45} to

\textsuperscript{39} See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 900 (1975) (Burger, C.J., concurring in the judgment) (expressing the “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, 38 (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 . . . .”).

\textsuperscript{40} Some commentators have used rather strong language to describe this transition. See Sundby, supra note 4, at 385 (describing \textit{Camara} and \textit{Terry} as beginning “something of a Faustian pact.”).

\textsuperscript{41} 434 U.S. 106 (1977).

\textsuperscript{42} \textit{Id.} at 108–9.

\textsuperscript{43} \textit{Id.} at 110-11.

\textsuperscript{44} \textit{Id.} at 111.

\textsuperscript{45} Michigan v. Summers, 452 U.S. 692 (1981). Justice Stevens, writing for the Court, focused on the “reasonableness” analysis that had founded the Court’s decisions in \textit{Terry}, \textit{Adams v.}}
permit the search of the passenger compartment of a car on less than probable cause; 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, to authorize the warrantless search of all containers in a vehicle which officers had probable cause to believe contained contraband, even after the container had been removed from the vehicle and therefore was not at risk of being destroyed, to allow the seizure of an individual crossing international borders whom the officer had

46 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 suspect is dangerous and may gain “immediate control of weapons.” 463 U.S. 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.” 463 U.S. at 1054 (Brennan, J., dissenting).

47 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. 462 U.S. at 646.


reasonable suspicion to suspect of smuggling drugs through alimentary canal;\textsuperscript{50} 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;\textsuperscript{51} to extend \textit{Minims}-type intrusions to passengers;\textsuperscript{52} to allow the suspicionless search of a passenger’s belongings when there is probable cause to believe that contraband is present in a car;\textsuperscript{53} to uphold a warrantless search unsupported by probable cause of the home of an individual on probation;\textsuperscript{54} and to permit the warrantless arrest of an individual for an offense that could be only punished by a fine.\textsuperscript{55} 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.\textsuperscript{56} 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 the privacy interests of individuals.

\textsuperscript{50} United States v. Montoya de Hernandez, 473 U.S. 531 (1985). The Court relied on \textit{Camara} and its regulatory search progeny for the proposition that a “reasonableness” framework was at the center of the Fourth Amendment inquiry. 473 U.S. at 537.

\textsuperscript{51} 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. 494 U.S. at 331.

\textsuperscript{52} Maryland v. Wilson, 519 U.S. 408 (1997).


\textsuperscript{55} Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

\textsuperscript{56} \textit{See id.} at 353 (discussing ways in which arrest was “inconvenient and embarrassing” to \textit{Atwater}); \textit{Knights}, 534 U.S. at 119-21 (balancing public interest in supervising probationer against diminished privacy interests of individual probationer); \textit{Houghton}, 526 U.S. at 303-04 (contrasting individual passenger’s diminished privacy interests against “substantial” governmental interests in effective law enforcement); \textit{Wilson}, 519 U.S. at 413-14 (balancing public interest in officer safety against “minimal” intrusion on passengers’ safety); \textit{Buie}, 494 U.S. at 332-34 (balancing public interest in office safety against individual privacy interests); \textit{Montoya de Hernandez}, 473 U.S. at 538-39 (“sovereign’s interest at the border” balanced against diminished expectation of privacy of entrant); \textit{Lafayette}, 462 U.S. at 646-47; \textit{Long}, 463 U.S. at 1049-50; \textit{Summers}, 452 U.S. at 701-03.
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 Fourth Amendment balancing test as unprincipled and unpredictable.\(^{57}\) Without discounting the validity of these critiques, for the purposes of this Article it is useful to consider separately trends in the Court’s treatment of the two different interests at stake in the balancing test -- the public and private interests -- 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.\(^{58}\) This shift has had substantive consequences, because the “individualized suspicion” standard requires less

\(^{57}\) See Luna, supra note 4, at 788 (“Academics of all stripes agree that search and seizure law is a ‘mess’ . . . .”); Clancy, supra note 4, at 627; Strossen, supra note 4, at 1176 (balancing test has not “systematically evaluated the marginal law enforcement benefits of challenged searches and seizures,” or integrated a “least intrusive alternative” requirement).

\(^{58}\) 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 United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976); Delaware v. Prouse, 440 U.S. 648, 654 (1979); Summers, 452 U.S. at 703; New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989); Chandler v. Miller, 520 U.S. 305, 308 (1997). Even those who dissented from the Court’s increasing abandonment of the probable cause requirement sometimes accepted this shift in language. See e.g., V ernonia School Dist. 47J v. Acton, 515 U.S. 646, 668 (1995) (O’Connor, J., dissenting); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 457 (Brennan, J., dissenting).

Indeed, in a recent Supreme 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, 428 (2004).
suspicion, and hence provides less protection of individual privacy interests, than the probable cause standard.\textsuperscript{59} 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,”\textsuperscript{60} the Court has relied on the balancing test to approve of suspicion based on characteristics such as probationary status,\textsuperscript{61} associations with others,\textsuperscript{62} or even external factors like the neighborhood in which the person is found.\textsuperscript{63} Indeed, in New York City, the most common reason that police give for stopping, questioning, and frisking individuals is that the individual is found in a high crime area.\textsuperscript{64} Because “[t]he degree of individualized suspicion required of a search” is a “determination of when there is

\textsuperscript{59} See infra notes 148-54 and accompanying text.

\textsuperscript{60} Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

\textsuperscript{61} See United States v. Knights, 534 U.S. 112 (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.

\textsuperscript{62} See Houghton, 526 U.S. at 304–5 (holding that passenger’s association with a driver stopped by a police officer was sufficient without any other suspicion to justify search of the passenger’s belongings); see also Maryland v. Pringle, 540 U.S. 366 (2003) (probable cause existed to arrest car passenger where drugs and money were found in car, and all occupants initially denied ownership of contraband). Similarly, an occupant’s association with a house for 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 701-04.

\textsuperscript{63} See Harris, supra note 4, at 996-99 (categorical circumstances in which lower courts have permitted stops include 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).

\textsuperscript{64} In 2006, New York City Police stopped individuals about fifty-three percent of the time based on their presence in a high crime area. See NYPD Data, supra note 3 (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 forty percent of the time).
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 – which 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.  

Along with this consistent trend in how the Court has reconceptualized individualized suspicion, the Court also has adopted a limited view of the social interests at stake in any Fourth Amendment intrusion. Most importantly, the Supreme 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 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.” 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 tests – 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 understanding of the meaning of individualized suspicion, the result is a Fourth Amendment doctrine which systematically underenforces the substantive values served by the warrant and a particularized suspicion requirement.

65 *Knights*, 534 U.S. at 121 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)). While the Court in *Knights* was considering a suspect’s status as a probationer, there is nothing in the logic of the opinion which would prevent an officer from considering other, more objectionable, static characteristics – race, age, gender, class – to make probabilistic assessments. The Supreme 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) (pretextual stops do not violate Fourth Amendment).

66 See *supra* notes 41-56.

67 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 4, at 789 (reviewing antidiscrimination theory of
17 Collective Values and the Fourth Amendment

on its balancing test to expressed “a powerful and undeniable preference for collective security over individual privacy.”

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 both a modern innovation and is 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. And 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. Little wonder that Justice Frankfurter once referred to those who would enforce the Fourth Amendment as “not very nice people.” 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

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 which 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, Prouse, 440 U.S. at 664 (Rehnquist, J., dissenting), and it elevates the stigmatic effect of individual privacy intrusions over the collective effect of mass privacy intrusions. “To comply with the Fourth Amendment, the State need only subject all citizens to the same ‘anxiety’ and ‘inconvenience[ce]’ to which it now subjects only a few.” Id. at 666 (Rehnquist, J., dissenting).


69 United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting); see also Illinois v. Gates, 462 U.S. 213, 290 (1983) (“Rights secured by the Fourth Amendment are particularly difficult to protect because their advocates are usually criminals.”) (Brennan, J., dissenting) (internal quotation marks omitted).
Government and individuals in the context of other constitutional provisions takes us some distance up that hill. As I will show in this Part, the Court’s approach to First Amendment and due process questions, among others, reflects a textured view of the public interest. When the Court is adjudicating 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 is best illustrated by imagining three different hypothetical programs implemented by a city that I will call Gotham. In the first program, Gotham 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 20 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 – that is, four out of every ten permit applications is rejected. 70

The second hypothetical program is much the same, except that it involves appeals of denials of public benefits. Gotham 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.

Finally, Gotham 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 them – four out of every ten – are directed to a secondary

70 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.
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 each 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 Court, and lower courts in turn, characterize 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 – both favoring and disfavoring 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.\(^71\)

**B. Randomized Permitting for Parades in Public Space**

It is beyond cavil that the public has an overriding interest of the public in vindication of the First Amendment rights of individuals: “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 . . . .”\(^72\) But how would the Supreme Court analyze the hypothetical permitting practice described here? The Court would surely begin with the observation that permitting systems are not per se objectionable.\(^73\) It would simultaneously observe that permitting systems which allow for arbitrary or standardless

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\(^71\) 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, I will further argue, that difference is hard to justify.

\(^72\) Associated Press v. United States, 326 U.S. 1, 20 (1945).

\(^73\) *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941).
suppression of speech are inconsistent with the First Amendment. If the permitting regulations are designed to make reasonable determinations to restrict speech based on time, place, and manner concerns, and not because of the content of speech, then they will be deemed acceptable.

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 communicative importance of ideas, both for individual expression and for democratic dialogue; on the other hand, the Court recognizes collective interests in order and security that called for regulation in the appropriate context. First Amendment interests are thus both collective and individual, and the collective interests at stake can both support and cut against governmental regulation.

Although the Court has not directly passed on the question of the permissibility of a random scheme similar to that describe here, its decision in

75 See Cox, 312 U.S. at 576.
76 Admittedly, at the time Cox was decided, the Court emphasized more the collective interests in security and safety than collective interests in dialogue. See 312 U.S. at 576 (referring to social interests in policing streets, minimizing disorder, preventing confusion, and allowing for use of streets by non-protesters). 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.” 312 U.S. at 574. Moreover, the importance of speech to collective dialogue has been stressed in later opinions. See Young v. American Mini Theatres, Inc., 472 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).

77 See Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (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/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 300 (1981); In re Primus, 436 U.S. 412, 426 (1978).

78 One Court of Appeals has, in dicta, suggested that a lottery system for public news
Collective Values and the Fourth Amendment

Pell v. Procunier\textsuperscript{[79]} offers some insight into the relevant considerations. In Pell, the Court addressed challenges to California prison regulations which, 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 restrictions essentially amounted to a system in which inmates could only be interviewed by members of the press on a random basis.\textsuperscript{[80]} The Court did not specifically address the randomization problem, because it found instead that the media have no right to have greater access to prisons than does the public; and because the public has no right to request a face-to-face meeting with a particular prisoner, neither does the press.\textsuperscript{[81]} 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.\textsuperscript{[82]} 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.\textsuperscript{[83]}

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.\textsuperscript{[84]} But even in the

\textsuperscript{79} 417 U.S. 817 (1974).


\textsuperscript{81} Pell, 417 U.S. at 833-34.

\textsuperscript{82} Id. at 830-31.

\textsuperscript{83} Id. at 830.

\textsuperscript{84} Among other doctrines, the First Amendment’s generally liberal standing requirements stand as a contrast to standing in other contexts. Compare Meese v. Keane, 481 U.S. 465 (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 Los Angeles v. Lyons, 461 U.S. 95 (1983) (finding lack of standing absent imminent threat of death or serious injury). The justification for the more
more typically individualized area of due process, 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*,

*Goldberg* was only one in a long line of modern due process cases which applied the same multifaceted approach to the public interest side of the balancing analysis. In the context of parole revocation proceedings, for instance, the Court recognized that society had 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 where the parolee has been unable to meet 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


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86 *Id.* at 264-65.
87 *Id.* at 265-66.
chance of rehabilitation by avoiding reactions to arbitrariness.”88 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.

Similarly, 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 employment.89 The Court has accorded similar recognition of multiple and competing public interests, some of which overlap with private interests, in parental right termination proceedings,90 child civil confinement proceedings,91 and school disciplinary proceedings.92 Thus, the Court’s due process jurisprudence has consistently reflected an understanding that the balance between public and private interests is complex, overlapping, and multidimensional.

D. *Randomized Searches and Seizures*

To this point, I have endeavored to show that, when confronted with a


89 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 544-45 (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.”).

90 Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 27-28 (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 spits 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).

91 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, 605 (1979).

92 In *Goss v. Lopez*, the Court recognized the overlap between the interests of the State and an individual student’s interest in avoiding “mistaken exclusion from the educational process.” 419 U.S., 579 (1975).
government program that randomly deprives individuals of particular constitutional rights, the Supreme Court will resolve the controversy at least in part by considering the collective costs and benefits to enforcing particular individual rights. I now turn to the hypothetical which 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 roadblock cases similar to the hypothetical described. The private interests at stake in Fourth Amendment cases are uniformly treated as undermining public interests. And the public interests at stake are always


94 See Lidster, 540 U.S. at 427-28 (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 879-880 (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 as 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.”)
understood to cumulatively point in one direction.\textsuperscript{95}

The Court’s discussion in \textit{Michigan v Sitz},\textsuperscript{96} which involved a challenge to sobriety checkpoints, exemplifies this approach. The Court took pains to emphasize that the cases was “\textit{not} about” any allegations that a particular person was subject to abusive treatment at any particular checkpoint.\textsuperscript{97} This emphasis presumably indicates 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 \textit{Sitz}.\textsuperscript{98}

Turning to the public interest, the Court found no difficulty in recognizing the “magnitudes of the drunken driving problem or the State’s interest in eradicating it.”\textsuperscript{99} And the private interest at stake, given the duration of the stop and the limited investigation that transpired at each stop, was “slight.”\textsuperscript{100} 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.\textsuperscript{101}

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

\textsuperscript{95} See Maclin, \textit{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)).

\textsuperscript{96} 496 U.S. at 450-55.

\textsuperscript{97} \textit{Id.} at 450 (emphasis in original).

\textsuperscript{98} \textit{Id.}

\textsuperscript{99} \textit{Id.} at 451.

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} \textit{Id.} at 453-54 ("Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable 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.").
mediated through an individual liberty perspective and also to be in tension with the collective values at stake – safety and security. 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. 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.

E. 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 that the exclusionary rule – with its presumed cost to truth seeking at criminal trials – to be a good explanation of why the Fourth Amendment has an anomalous approach to conceptions of the public’s interest. Even scholars who are otherwise critical of the Supreme Court’s Fourth Amendment jurisprudence appear to accept the dichotomy between individual liberty and collective interests. Such scholars describe the exclusion of

102 See supra notes 41-56 and accompanying text.

103 The same point might be made about the Equal Protection Clause – that is, that 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 Community Schools v. Seattle School Dist. No. 1, 127 S. Ct. 2738, 2758 (2007) (plurality op.); id. at 2796 (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 also is 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 which require the sublimation of autonomy is vindicated when an unenumerated right is not accorded constitutional recognition. Lind, supra note 7, at 1259-60, 1265-66.

104 See DAVID COLE, NO EQUAL JUSTICE 6 (1999) (inequality in criminal justice system 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.”); Carol S. Steiker, Second Thoughts About First Principles, 107 HARV. L. REV. 820, 820 (1994) (grouping Fourth, Fifth, and Eighth Amendments together as examples of individual rights imposing “social costs”); Taslitz, supra note 12, at 2286 (Describing the Fourth
And Justices of the Supreme Court have through the years rhetorically indicated substantial discomfort in engaging in Fourth Amendment enforcement. 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 and foremost, 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 – which is the question that is 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 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”).

Junker, supra note 68, 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 104, at 848 (describing exclusionary rule as “award[ing] windfalls to guilty criminal defendants while offering nothing at all to the innocent whose rights are equally violated”); William Stuntz, Warrants and Fourth Amendment Remedies, 77 Va. L. Rev. 881, 912-13 (1991) (noting that warrant clause is justified in part because of concern that if searches are only judged after they have occurred, there is risk that 4A will be underenforced because person seeking to enforce it will appear to “deserve[] punishment, not relief”).

See United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (describing those who would enforce Fourth Amendment as “not very nice people”) (Frankfurter, J., dissenting). Several Supreme Court decisions have cut down on the scope of the exclusionary rule. 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) (Fourth Amendment claims are not a basis for habeas); Harris v. New York, 401 U.S. 222 (1971) (no exclusionary rule when statement obtained in violation of right to counsel is used to impeach testimony of defendant); Walder v. United States, 347 U.S. 62 (1954) (No 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, 341 (1939) (limiting 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.
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.\textsuperscript{107}

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 cost a criminal conviction are ones for which the punishment would not have exceeded a year in prison.\textsuperscript{108} 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.\textsuperscript{109} 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.\textsuperscript{110}

\textsuperscript{107} Indeed, this lack of incentive among the innocent is one of the primary justifications for the exclusionary rule. \textit{Cf.} Walder, 347 U.S. at 64-65.


\textsuperscript{110} 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. \textit{See, e.g.}, Wallace v. Kato, 127 S. Ct. 1091 (2007) (reviewing Section 1983 action brought by individual who had confessed after unlawful arrest and against whom charges had been dropped after exclusion of confession).
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 this lack of imagination is anomalous in light of how the Court approaches other constitutional rights – using as examples the First Amendment and Due Process Clause. In this section, 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. Others have criticized the Court’s tendency to rely on diminished expectations of privacy to justify searches on less than probable cause. And there are numerous critiques of the Supreme Court’s individual privacy analysis as applied in the totality of the circumstances balancing test, including its lack of historical and textual support, its failure to incorporate individual interests other than privacy, its fluidity, which allows it to be expanded by “liberal” courts and

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111 See Strossen, *supra* note 4 at 1175-76 (arguing that Fourth Amendment rights should be enforced through categorical rules rather than through ad hoc balancing).


114 See Clancy, *supra* note 112, at 339-44 (security); Luna, *supra* note 4, at 825-31 (sovereignty); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth*
restricted by “conservative” courts, 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 which are protected against Fourth Amendment intrusion.\(^\text{115}\)

Although each of these criticisms is sound, none addresses the extent to which current Fourth Amendment analysis has failed to account for the value to the collective of enforcing Fourth Amendment interests. There are two collective values that I will focus on in this Part: pluralist participation in civic society and 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 particular individuals. And the efficiency/accuracy values discussed here are similar to those that the Court recognizes in the Due Process context – 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.

\[A. \text{ Participatory Pluralism: The Deliberative Value of the Fourth Amendment}\]

The First Amendment is understood, without controversy, as both imposing collective costs and producing collective values because of its perceived connection to political deliberation.\(^\text{116}\) It appears beyond constitutional dispute that the free expression of individuals reinforces collective values in a deliberative

\footnotesize{\textit{Amendment}, 1997 SUP. CT. REV. 271, 318 (focus on “informational privacy” has failed to take account for the “humiliation and subjugation that can accompany investigatory detentions”); Taslitz, \textit{supra} note 12 (arguing that Fourth Amendment should incorporate principles of respect, and should protect against insult and humiliation).

\(^{115}\) \textit{See} Clancy, \textit{supra} note 112, at 339-44.

\(^{116}\) In this sense, Habermasian theory offers the key insight that “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. \textit{See} Lind, \textit{supra} note 7, at 1316.
democracy. If one considers history and recent experience, however, it is apparent that similar values, such as civil 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. The colonists’ opposition to general warrants was 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. 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 to confiscate and

117 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 95, at 208-09 (suggesting that history of how 4A was drafted suggest that relying solely on the text of the Amendment is error); Steiker, Second Thoughts, supra note 104, at 824 (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. Id. at 823 (summarizing dispute between Professors Amar, Strossen, and Maclin regarding Framers’ understanding of meaning of Fourth Amendment). Examples of discord between current doctrine and understanding at time of Framers’: ex post justification of search (if search recovered contraband, then it could not be challenged at common law); and 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.

118 E.g., Steagald v. United States, 451 U.S. 204, 220 (1981); see also Maclin, supra note 95, at 201-02 (Fourth Amendment intended to limit government oppression)

119 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 J. 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.

120 Id. at 19-22.
destroy Protestant and dissident Catholic texts,\textsuperscript{121} or to suppress publications that were “offensive to the state.”\textsuperscript{122} 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.”\textsuperscript{123} 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.\textsuperscript{124}

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.”\textsuperscript{125} Indeed, 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.\textsuperscript{126} 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 distrust of law enforcement, even among individuals who are not themselves subjected to such

\textsuperscript{121} Id. at 106-09.
\textsuperscript{122} Id. at 109-10.
\textsuperscript{123} Id. at 237-39, 327-341 (documenting use of general searches between 1640 and 1700 to stifle political and religious dissenters and to censor the press)
\textsuperscript{124} Id. at 559-562; 693-700.
\textsuperscript{125} Steiker, supra note 104, at 840-41.
\textsuperscript{126} See id. at 824 (noting that height of Fourth Amendment’s protections established at time when legacy of race discrimination was being addressed by society); Taslitz, supra note 12, at 2269 (exploring 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 104, 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).
33 Collective Values and the Fourth Amendment

intrusions. 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 myriad ways, from serving as witnesses to serving as jurors in criminal cases. This experience has been focused primarily on racial and ethnic communities who perceive, in many cases accurately, that law enforcement resources are targeted in discriminatory ways, but the effect on these communities reflects the values at stake for any community and goes beyond that accumulated effect of such searches on individuals.

129 Race-based targeting of African-American and Latino communities has been well-documented. See E.g., Cole, supra note 104, at 21, 25 (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).
130 See Harris, supra note 128, 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.’”). 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 12, at 2275 (advocating a Fourth Amendment jurisprudence which 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 paper. Id. at 2282-2284 and nn. 157-167. 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.
131 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 as 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
Indeed, one 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 justice system at the very least. But even beyond its affect 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.”

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 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-
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.

132 Katheryn Russell discusses the particular effect of imposing suspicionless search and seizure regimes on the African American community. KATHRYN 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 129, at 8 (66% of black adults believe African-Americans charged with crime are treated more harshly in 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).

133 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.
regarding activities like jury service. 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. For instance, in the wake of widely held reports of law enforcement tracking and prosecuting donations to particular Islamic charities in this country, civic participation of Muslim communities steeply declined.

There are several aspects of Fourth Amendment intrusions, above and beyond the privacy-invading elements, that contribute to these effects. First, and most mechanically, because many Fourth Amendment intrusions occur in public, they do not only symbolize domination of the State over the individual, but they also interfere directly with freedom of movement. In so doing, they interfere with the exercise of other rights, particularly rights of assembly. Individuals who feel less secure in public space as a result of an increase in Fourth Amendment intrusions will hesitate to speak out in the fear of attracting more

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134 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 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. Id. at 473 & nn. 5-7.


137 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. Joe Garofoli, 5 Arrested, Dozens Detained in Pre-RNC Raids, S.F. CHRON., Aug. 31, 2008; Liliana Segura, RNC Raids Have Been Targeting Video Activists (Sept. 1, 2008) http://www.alternet.org/rights/97110/rnc_raids_have_been_targeting_video_activists_/.
attention to themselves. It is thus accurate to say that in some respects the Fourth Amendment serves the democratic goal of resistance.\textsuperscript{138}

Second, 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.\textsuperscript{139} 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.), or she may believe that she did something to “deserve” being stopped, or she may find the intrusion trivial and insignificant. For those who fall into the first two camps, and there is reason to believe that many would,\textsuperscript{140} the effect on one’s relationship to the State is substantially altered.\textsuperscript{141} Most will either alter

\begin{itemize}
\item \textsuperscript{138} 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”).
\item \textsuperscript{139} For instance, of the more than half a million individuals stopped, questioned, and frisked on New York City streets in 2006, only four percent were arrested. \textit{See NYPD Database, supra} note 3 (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 June 2008, there were 4,922 hits from 284,334 total samples, for a hit rate of 1.7 percent. \textit{Virginia Department of Forensic Sciences, DNA Databank Statistics} (2008), available at 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. \textit{Id.}; \textit{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).
\item \textsuperscript{140} See Sklansky, \textit{supra} note 114, at 312-14 (observing that minority drivers experience being pulled over or ordered out of a car differently).
\item \textsuperscript{141} Racial groups targeted for searches or seizures learn from such treatment that their “value as individuals [are] equated to the value of their racial group,” which because of the harsh treatment is negligible. Taslitz, \textit{supra} note 12, at 2315-16 (describing effect of World War II internment on Japanese-Americans as “stem[ming] directly from race-based search and seizure practices, teaching lasting lessons about the connection between the Fourth Amendment and human respect”); \textit{id.} at 2355 (arguing that ignoring group conceptions of justice in Fourth Amendment invasions increase isolation of particular groups, reduces social status of the groups, and results in a “reduced respect for the rule of law”); Andrew Taslitz, Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong, 40 B.C.L. REV. 739, 758-65
\end{itemize}
Collective Values and the Fourth Amendment

their behavior so as to attract less attention, which will affect the individual’s willingness to participate in greater society, or experience resentment and anger at law enforcement, which also would affect one’s participation in civic society. Finally, in many ways, Fourth Amendment intrusions are examples of domination by the State over particular individuals in a public space – *Terry* and its progeny, for instance, are almost invariably about stops in public places, on public streets. Empirical data from New York City is confirmatory of this anecdotal observation. In 2006, more than seventy percent of the *Terry* stops by the New York City Police Department took place outside or in public places like subway stations. A public Fourth Amendment intrusion leaves an impression, especially one that is perceived as wrongful or unjustified. It reinforces the lack of control that an individual has over where and when he is going when he is in public. It is fundamentally disruptive of participation in public life, and it creates hesitance about participating further. Thus, the experience of being stopped or

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142 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,” said Christopher Johnson, 16, as he stood on the church steps. “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; see also U.S. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 143- 44, 302-04 (1968) (police practices one of the complaints that led to riots of 1967).

143 *See* Sklansky, *supra* note 114, 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 “systematic, humiliating, and often frightening form of police harassment,” which send a discrete message of subordination. *Id.* at 313.

144 *See supra* notes 34-55 and accompanying text.

145 *NYPD Database, supra* note 3 (view “INOUT” variable).
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 meanings.” As Andrew Taslitz has argued, “[i]growing the disrespect inherent in some police conduct is done at the polity's peril.”

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

Just as the Fourth Amendment vindicates collective values that are parallel to the First Amendment, we can also see that it vindicates 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, that society had an interest in ensuring that the procedures given to individuals on public benefits would result in the correct distribution of benefits. Similarly, society has an interest in ensuring that Fourth Amendment intrusions are effective in revealing evidence of antisocial behavior. This is so for several reasons.

First, as the Court relies on its reasonableness balancing test to reduce the standard necessary to, say, conduct searches of individuals, from probable cause, to reasonable suspicion, to even no suspicion in certain circumstances, by definition the Court is tolerating and encouraging more searches that also are less efficient. Take 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. And probable cause, while not subject to a mathematically precise definition, has a long pedigree of judicial interpretation.

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146 See Taslitz, supra note 12, at 2280.
147 Id. at 2358.
148 Interestingly, the Supreme 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) (public’s interest in assuring that funds are appropriately spent).
149 Nearly sixty years ago, the Supreme Court outlined a general approach to probable cause which located it somewhere between “bare suspicion” and the evidence which would be
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.”

The “reasonable suspicion” standard announced in *Terry*, while not defined in fixed terms, lowered not only the quantum of evidence necessary to justify an intrusion, but also permitted intrusions based on a lower quality (or reliability) of evidence. By approving a lowering of the standard for intrusions from probable cause to reasonable suspicion, the Court also implicitly permitted an increase in the number of fruitless searches or seizures – that is, as the probability required to justify an intrusion diminishes, the likelihood that individuals innocent of any antisocial activity will be subjected to intrusions that reveal no contraband will increase. At the same time, because reasonable

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150 Id. 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).

151 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.”).

152 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 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).

153 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.”)

154 We could refer to this, loosely, as Type I error, because it indicates that 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 would be candidates for an intrusion based on probable cause. 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. The overall effect, then, of moving from probable cause from reasonable suspicion, and from reasonable suspicion to no suspicion at all, is to reduce the utility of such intrusions, at the same time that the scope of such intrusions will expand.

There is also a cost in terms of accuracy of the criminal justice system. As the ability to search expands, as law enforcement officials conduct more searches, they actually perform worse. 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. 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. Third, it has the potential create what is often

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155 See Max Minzner and Christopher M. Anderson, Do Warrants Matter, at 16, 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 (August 14, 2008).

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.

C. Applying a New Model to Take Account of Multifaceted Public Interests

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, and current and future cases. While 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, by changing the way in which courts might talk about the Fourth Amendment, it will also change how courts conceptualize the rights at stake – that is, that even if the change is rhetorical at first, it can come to have substantive force

1. Revisiting Terry and the abandonment of the probable cause standard

When the Court decided Terry, its specific decision was to permit what it considered to be a Fourth Amendment intrusion on a standard for individualized suspicion less rigorous than probable cause. The Court had before it three individuals who were in possession of dangerous weapons 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 are 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 the State to perform such intrusions. But it should have known that it was increasing both the potential denominator of searched individuals – that is, that individuals who could be subjected to a search would increase – and that it was increasing the percentage of searches that would result

in no contraband. How many more is difficult to estimate, because it depends on a number of variables. But the data from the New York Police Department’s Stop, Frisk, and Question program offer some insights.

These data show that in 2006, 506,491 stops were made. Of those who were stopped, forty-three percent, or 217,000, individuals were frisked. Of those who were frisked, contraband was found in 5,915 cases, or 2.7 percent of the time, and a weapon was found in 1,642 cases, or about 0.8 percent of the time. After accounting for the overlap in cases in which both a weapon and contraband were found, of the 217,000 individuals frisked, a weapon and/or contraband was found in 3.4 percent of the instances in which officers found reasonable suspicion to justify a stop and frisk.

What do these data tell us? By the raw numbers, what they tell us is that under the reasonable suspicion standard, 209,000 innocent individuals were stopped and frisked by police officers, so that about 7,500 instances of contraband and/or weapons possession could be detected. The data also tell us something about what it means to be stopped and frisked. Almost three-fourths of the stops took place outside, and of the 131,000 stops that occurred inside, twenty nine percent took place on transit authority property and forty one percent took place on housing authority property. Thus, a very high percentage of stops took place in very public places – outside on the street or in public areas like subway stations

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158 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.

159 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.

160 NYPD Database, supra note 3 (view “YEAR” variable).

161 Id. (View “FRISKED” variable).

162 Id. (cross tabulate “FRISKED” and “CONTRABN” variables and “FRISKED” and “WEPFOUND” variables).

163 There were 263 instances in which both a weapon and contraband were found. Id. (cross tabulate “CONTRABN” and “WEPFOUND” variables).

164 Id. (view “INOUT” variable).

165 Id. (cross tabulate “INOUT” and “TRHSLOC” variables).
or public housing.

We also can learn something from asking the reason that individuals were selected to be stopped and/or frisked. Table 1 gives the explanations offered for why particular individuals were stopped and Table 2 shows the reasons that officers gave for performing a frisk of particular individuals.166 Over half of the stops and frisks were because the individual was in a high crime area.167 And thirty two percent were stopped and frisked because of the time of day in which they were encountered by police.168 Twenty-three percent were stopped for an unspecified reason.169

166 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.
167 Id. (cross tabulate “FRISKED” and “AC_INCID” variables).
168 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 am and 4 am were stopped because of the time of day (40%), between 25% and 30% of the individuals stopped between the hours of 6 am and 8 pm also were stopped because of the time of day. Id. (cross tabulate “AC_TIME” and “TIMESTP2” variables).
169 Id. (view “CS_OTHER” variable).
TABLE 1. REASONS OFFERED FOR STOPPING INDIVIDUALS, NYPD, 2006

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

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170 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**

<table>
<thead>
<tr>
<th>Reason Given</th>
<th>No. of frisks</th>
<th>Percent of Frisks$^{171}$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Furtive Movements</td>
<td>130,277</td>
<td>60%</td>
</tr>
<tr>
<td>Change Direction at Sight</td>
<td>59,591</td>
<td>27.4%</td>
</tr>
<tr>
<td>Proximity to Scene of Offense</td>
<td>49,408</td>
<td>22.7%</td>
</tr>
<tr>
<td>Violent Crime Suspected</td>
<td>43,337</td>
<td>20.0%</td>
</tr>
<tr>
<td>Suspicious Bulge</td>
<td>39,969</td>
<td>18.4%</td>
</tr>
<tr>
<td>Refuse to Comply With Officer’s Directions</td>
<td>38,909</td>
<td>17.9%</td>
</tr>
<tr>
<td>Inappropriate Attire for Season</td>
<td>29,336</td>
<td>13.5%</td>
</tr>
<tr>
<td>Other Suspicion of Weapons</td>
<td>20,807</td>
<td>9.6%</td>
</tr>
<tr>
<td>Actions of Engaging in a Violent Crime</td>
<td>19,922</td>
<td>9.2%</td>
</tr>
<tr>
<td>Other</td>
<td>9,578</td>
<td>4.4%</td>
</tr>
<tr>
<td>Knowledge of Suspect’s Prior Criminal</td>
<td>4,721</td>
<td>2.2%</td>
</tr>
<tr>
<td>Sights or Sounds of Criminal</td>
<td>3,675</td>
<td>1.7%</td>
</tr>
<tr>
<td>Verbal Threats by Suspect</td>
<td>2,444</td>
<td>1.1%</td>
</tr>
</tbody>
</table>

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$^{171}$ 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 we already know about the effects of searches and seizures, illustrate the collective values at stake in *Terry* that were not acknowledged by the Court. First, the move to a reasonable suspicion standard made searches both less effective and more expansive – more people were searched with less success. This obviously relates to the accuracy/efficiency value inherent present in Fourth Amendment inquiries. But it also, in combination with 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. The public embarrassment and humiliation occasioned by these searches, targeted in particular communities, can function to reduce and retard civic participation.

On this account, in light of the data and history, *Terry* looks different. And 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

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172 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 wholesale harassment by certain elements of the police community, of which minority groups, particularly Negros, 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.”) (footnote omitted).
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. 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.’”

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 percent, whereas warrantless searches have a recovery rate of between 12 and 53 percent. In other words, it appears that there is something about obtaining a warrant that is correlated with much higher success rates.

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 in

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176 There could be many explanations for this correlation which are beyond the scope of this paper. 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 be that some warrantless searches are consent searches, which may reduce the average quantum of suspicion that justifies such searches.
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,” then it is not enough to show how it might be applied to long-past cases. 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 will focus my attention on what I call “anticipatory” searches – searches that are not related to any ongoing law enforcement investigation but which 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*. 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, or because they are based on individual decisions of law enforcement to conduct the search. Full-scale versions of such searches include

177 See Luna, supra note 4, 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 (2004) (balancing methodology is essentially “legislative in form”); Sundby, supra note 4, at 383 (describing situation as “dire, with the Court retaining a semblance of coherent Fourth Amendment analysis only by resorting to exceptions or an ill-defined balancing test,” rendering analysis “more makeshift, lacking continuity in design and purpose”).

178 Of course, some of the same issues present in *Terry* and its progeny are due to be reviewed by the Court in the coming Term. *Arizona v. Johnson*, 170 P.3d 667 (Ariz. Ct. App. 2007), cert. granted, 128 S. Ct. 2961 (June 23, 2008), involves an iteration of the “stop and frisk” rule of *Terry v. Ohio*, 392 U.S. 1 (1968), and *Arizona v. Gant*, 162 P.3d 640 (Ariz. 2007), cert. granted, 128 S. Ct. 1443 (Feb. 25, 2008), which will address the scope of the search incident to arrest exception to the warrant and probable cause requirements.


181 In *Samson*, the officer knew that Mr. Samson was on parole and decided to search him
suspicionsless searches of individuals on public transit systems and high-tech versions encompass DNA databanks. Suspicionless intrusions with a long pedigree, such as sobriety checkpoints, arguably fall within this category as well. Indeed, 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.

Each of the elements of the Court’s modern Fourth Amendment analysis described in Part I.B, supra, 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. DNA databanks which focus on felons or arrestees generally justify their programs on the increased recidivism or future criminality of the subjects of the search. And searches like those in *Samson* are justified by the likelihood that those targeted will commit crimes in the future.

But most critically, under the Court’s current balancing framework, lower courts have little difficulty upholding such anticipatory search regimes. On the

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182 See MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006).
183 See Nicholas v. Goord, 430 F.3d 652 (2d Cir. 2005); United States v. Szubelek, 402 F.3d 175 (3d Cir. 2005); Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005); United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc); Green v. Berge, 354 F.3d 675 (7th Cir. 2004); Groceman v. Dept. of Justice, 354 F.3d 411 (5th Cir. 2004); Boling v. Romer, 101 F.3d 1336 (10th Cir. 1997); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
185 See Erin Murphy, Paradigms of Restraint, 57 Duke L. J. 1321 (2008) (examining State’s increasing reliance on innovative technologies to monitor individuals).
187 See, e.g., Nicholas, 430 F.3d at 669; Kincade, 379 F.3d at 838-39.
188 See supra notes 178-184 and accompanying text.
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. And on the public interest side of the balancing, the law enforcement interests or other public interests are always viewed as substantial. 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, 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 balancing 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 to consider the speculative nature of the government’s interest. While 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. This would include consideration of how many other individuals

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189 See Samson, 547 U.S. at 850-51.
190 See id. at 853-55 (interest in reducing recidivism, promoting “positive citizenship” among parolees); Wyman, 400 U.S. at 318–19 (interest of dependent child in receiving assistance and public’s interest in assuring that funds are appropriately spent).
191 See supra note 67.
192 Maclin, supra note 134, at 502-03 (describing reports of fear and paranoia among Arab population in US in aftermath of DOJ sweeps).
will be affected by the holding of the particular case, whether those individuals are part of a discernible 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 anti-social behavior, the speculative nature of this interest will weigh heavily against permitting the intrusion.\footnote{Such an approach might reveal the difference between the searches upheld in \textit{Von Raab}, which were principally speculative and forward-looking, and the searches upheld in \textit{Skinner}, which were justified by the exigent and contemporaneous circumstances of a railway accident.}

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 experience 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 to be 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.

\textbf{CONCLUSION}

There is precedent for a vision of the Fourth Amendment that focuses on both the social benefits \textit{and} costs inherent to a particular search or seizure regime. The Supreme Court’s treatment of the Fourth Amendment in the early 20th century embraced this understanding 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.194

And after Justice Jackson returned from prosecuting war crimes at Nuremburg, there is consensus that his view of the Fourth Amendment’s warrant requirement was transformed by his exposure to the privacy-invading elements of Nazism.195 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.”196 ‘The connection between vigorous enforcement of privacy through the Fourth Amendment and resistance to fascism was also recognized in States that debated wiretapping laws.197


195 Steiker, Second Thoughts, supra note 104, at 842-43.

196 *Brinegar v. United States*, 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.”)

197 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
And there is more recent indication from the Supreme 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 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.”\textsuperscript{198} And 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.\textsuperscript{199}

So there is room for a textured understanding of the public interests that are 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,\textsuperscript{200} we would benefit from a

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.


\textsuperscript{200} 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 11 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, 1019-1022 (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 B.Y.U. 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.
renewed conversation regarding the social benefits and costs imposed by the Supreme Court’s current Fourth Amendment balancing scheme. This is particularly true given the technological innovations that are daily expanding 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.

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).