Rebalancing the Fourth Amendment

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Fourth Amendment decisions primarily rely on balancing tests. None of these tests account for the fundamental flaw that skews the balance in these cases. The Fourth Amendment aims to protect the privacy of all individuals against government intrusion but is always presented to courts by a criminal defendant whose hands are dirty. Thus, when a court considers a balance of privacy interests against a government’s interest in effective law enforcement, the government wins almost every time. Without mitigation of the central weakness in Fourth Amendment balancing—that a criminal defendant is protecting the rights of all of society—these constitutional inquiries fail to protect broader privacy rights and equal protection interests implicated by the Fourth Amendment.

This Article takes an in-depth look at this fundamental flaw with an original and comprehensive analysis of Supreme Court cases and proposes a new model of the Fourth Amendment that alleviates this problem. This Article reveals that since 1990 the Supreme Court sided with government interests in approximately 8 out of 10 criminal procedure cases. It also discovers that parties fail to present data to courts, which leaves courts lacking appropriate information. This leads to what I refer to as “blind balancing.” Indeed, blind balancing demonstrates several dangers—specifically common sense errors, inconsistencies between similar cases, and reliance on hypothetical threats. After identifying these problems, this Article considers a new model for the Fourth Amendment. This model envisions a major shift in Fourth Amendment balancing towards considering broader statistical data and facts to inform decisions and educate courts to consider not only the defendant before them but the rights of society implicated in every case.
# Table of Contents

Introduction .........................................................................................................................3
I. Judicial Balancing As Blind Justice ..............................................................................7
   A. Brief History of Balancing .......................................................................................8
   B. Brief History of Fourth Amendment Balancing ....................................................10
II. A Study of Supreme Court Balancing ........................................................................12
   A. Government Interests Trump Individual Rights ..................................................13
   B. Judges Overestimate Potential Risks .....................................................................16
   C. Disparities between Defendants .........................................................................20
III. Informed Balancing ....................................................................................................23
   A. Data Analysis by the Court ..................................................................................24
      1. Data as Legislative Fact ......................................................................................24
      2. Supreme Court Use of Data ...............................................................................26
      3. Additional Data May Matter ...............................................................................30
   B. Informed Balancing ...............................................................................................32
      1. The Role of Information ......................................................................................32
      2. An Informed Balance .........................................................................................35
   C. Critiques of Informed Balancing ..........................................................................38
      1. Judicial Role and Morality ................................................................................38
      2. Evaluating Risk and Preventing Crime .............................................................40
      3. Accountability and Bias ....................................................................................41
   D. The Importance of Information .............................................................................43
Conclusion ........................................................................................................................46
INTRODUCTION

Anthony Henry, an eighth grader in Brownsville, New York, was walking to school before 8 a.m. when a big Jeep pulled up alongside him. Five police officers jumped out and told him to put his hands up. The officers frisked him, threw his books out of his backpack onto the ground, and questioned him about drugs and gang members. He denied knowing anyone in a gang and so they took him home to verify. His mother confirmed that her son was not involved in drug or gang activity, and hardly acknowledging the error, one officer just patted him on the head and said, “My bad.” By the time his mother drove the frightened boy to school he had already missed first and second period.1 On June 3, 2011, Alvin, a Latino teenager, was stopped and frisked by the police.2 He had no guns or contraband, and during this encounter, when he asked why he was being arrested, the officers threatened to punch him, calling him a “F***** mutt.”3 These isolated searches, while inappropriate, warrant no remedy under our current constitutional scheme because these individuals were innocent.

In the above situations, the Fourth Amendment is implicated but the privacy and potential equal protection violations go unnoticed by any court. And in the isolated case where the search reveals contraband and a person can claim a Fourth Amendment violation, courts generally hold that the harms to individual privacy are outweighed by government interests for effective law enforcement. The court never considers the situations of the countless other innocent individuals searched, rather only the one who has acted illegally. This is the fundamental flaw of the Fourth Amendment—that a criminal defendant represents the rights of all of society, yet often the information before the court relates only to the individual defendant. This flaw is due to a problem—not yet articulated by any scholars—as to why the harm to all individuals is not considered in the Fourth Amendment balance. The problem starts with parties failing to give broader data and context to privacy concerns and it ends with judges making decisions based on common sense.4 This is what I refer to as “blind balancing.” Yet this practice of blind balancing—the process of decision making based simply on common sense and a gut assessment of risk, without consideration of data, evidence, or empirical studies—has gone virtually unexamined by legal scholars despite its prevalence in

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1 Ailsa Chang, For City’s Teens, Stop and Frisk is Black and White (WNYC radio broadcast May 29, 2012).
4 This may be part of a broader problem of making law through cases that sometimes have bad facts. See Frederick Schauer, Do Cases Make Bad Law?, 73 U. CHI. L. REV. 883 (2006) (arguing that not just bad cases but all cases create the possibility of making bad law).
many areas of the law. And while this Article tackles the Fourth Amendment as a case study of blind balancing, it recognizes that there are many other areas of constitutional law where this analysis is equally applicable.

Fourth Amendment blind balancing is particularly problematic due to the nature of the privacy concerns at stake. The important privacy rights enshrined in the Fourth Amendment are protected by individuals who are seen as criminals in the eyes of the court. Indeed, the rights of all to be free from police intrusion are protected by an individual with contraband she seeks to suppress. This is how the majority of Fourth Amendment cases are presented to the court. But the Fourth Amendment extends beyond protection of criminal defendants—it also seeks to protect innocent citizens. And because the harmed party is identified as a criminal at the outset, the balance starts skewed in favor of the government. Thus, the Fourth Amendment model must counterbalance this intrinsic preference that favors government interests over the interests of all individuals affected by Fourth Amendment violations.

The preference for government and the disparities caused by blind balancing in the Fourth Amendment context can be extensive. Innocent individuals, particularly minorities, endure more than their fair share of intrusive searches by police without any constitutional recourse. Blind balancing also

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2. See infra note 7.

3. Elkins v. United States, 364 U.S. 206, 218 (1960) (“Courts can protect the innocent against [police] invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.”); Arnold H. Loewy, The Fourth Amendment as a Device for Protecting the Innocent, 81 Mich. L. Rev. 1229, 1272 (1983) (“Criminals or those who possess evidence of crime are allowed to object to the manner in which such evidence was obtained only because the search or seizure may have created an unjustifiably high risk of an intrusion upon an innocent person’s privacy.”).

4. This preference invokes the question of whether there are any differences between determining constitutional rights and legislation and regulation, as some have argued that judicial creation of rights does not “depend on . . . some qualitatively different, privileged source of democratic validation.” Darryl J. Levinson, Rights Essentialism and Remedial Equalization, 99 Colum. L. Rev. 857, 937 (1999).

5. Peter Goldberger, Consent, Expectations of Privacy, and the Meaning of “Searches” in the Fourth Amendment, 75 J. Crim. L. & Criminology 319, 331 (1984) (depending on whether the court focuses on “search” or “consent,” the court can come to different outcome); Daniel M. Harris, Back to Basics: An Examination of the Exclusionary Rule In Light of Common Sense and the Supreme Court’s Original Search and Seizure Jurisprudence, 37 Ark. L. Rev. 646, 649–50 (1983–1984) (concluding that it is impossible to administer justice equally among guilty defendants because the exclusionary rule allows criminals to go free because of mistakes by law enforcement officials, but convicts other criminals).

6. Tonja Jacobi, The Law and Economics of the Exclusionary Rule, 87 Notre Dame L. Rev. 585, 588, 617 (2011) (showing that the Court’s remedies to unconstitutional searches provide no remedy to the innocent and do nothing to protect minorities from racist police officers); Loewy, supra note 7, at 1272 (stating that the exclusionary rule “has been restricted so much that it fails to offer innocent citizens the protection to which they should be entitled under the fourth amendment”); N.Y. Civil Liberties Union, STOP-AND-FRISK 2011: NYCLU BRIEFING (May 9, 2009) available at http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf (finding that approximately 90% of people stopped by police were innocent and that minorities made up a disproportionate
leads to government interests trumping individual rights in most criminal procedure cases. It can also lead to an overestimation of risk in the criminal context. Often, courts use common sense to assess the risk to police or society, and if data were considered they would be proven wrong. The Fourth Amendment generally involves the balancing of individual rights to privacy with the right of society to be safe. The risks to safety can often be exaggerated where the government relies on hypothetical threats or common sense rather than threats grounded in evidence.11

The primary consideration in Fourth Amendment balancing is reasonableness, from the first probable cause determination by a lower court to determinations of constitutionality at the Supreme Court.12 Reasonableness does not take into account the probability that the search is likely to yield the evidence police are justified to search for. Instead, a search can be reasonable even if the chances of finding what the police are looking for are one in ten thousand, or statistically unlikely. Usually, judges allow their common sense notions of what is suspicious and their concept of the import of government interest to define reasonableness rather than requiring that searches be supported by data.

For an example where relevant data can be informative and possibly change the Fourth Amendment balance, consider the stop-and-frisk scenarios at the beginning of this introduction. Indeed, many judges would uphold such stop-and-frisks of youth like Alvin and Antony in high-crime neighborhoods, given an officer’s reasonable suspicion. Officer safety would certainly trump a defendant’s right to privacy in these isolated cases. However, some broader information may change this reasonableness determination in an individual’s case. Indeed, if there was evidence that police conducted 500,000 such searches each year, 80% of which targeted minorities,13 and if only .1% of them amounted to discovery of a gun14 and 1.75% of contraband,15 this would certainly weaken the government’s

amount of the stops by police; see also Josephine Ross, Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 315, 315–16, 321 (2012) (suggesting a legal fiction arises when police are allowed to search a person based on the person’s choice to allow the search, when in reality no person would reasonably feel free to refuse the search. Unfortunately, “[t]he usual Fourth Amendment constraints on police intrusions simply do not apply when courts determine that the stop was really a consensual encounter.” Social science can “help[] judges to properly adjudicate motions involving the ‘free-to-leave’ test.”).

11 Even judges have written that judicial discretion should be guided by more than common sense. Ball v. City of Chicago, 2 F.3d 752, 755 (1993) (Judge Posner commenting that there should at least be some “loose and approximate, guidelines for the exercise of that discretion”); Henry J. Friendly, Indiscretion about Discretion, 31 EMORY L.J. 747, 768–70 (1982) (“Discretion is not unbridled; it is exercised under law.”).

12 New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (“The fundamental command of the Fourth Amendment is that searches and seizures be reasonable . . . .”); Tennessee v. Garner, 471 U.S. 1, 7–8 (1985) (noting “the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted”); Dunaway v. New York, 442 U.S. 200, 219 (1979) (White, J., concurring) (noting that “the key principle of the Fourth Amendment is reasonableness—the balancing of competing interests”).


arguments for officer safety and change the balance of factors. It would also be appropriate to consider other factors as well, such as the drop in crime rates in New York, and any data that links the increase of stop-and-frisk to the decrease in violent crime. At the very least, the broad information on both sides would inform the balance of factors and provide an important (and otherwise nonexistent) argument in favor of privacy rights, possibly changing the result in the case.

This Article identifies blind balancing as a central flaw in Fourth Amendment jurisprudence. The lack of scholarly discussion of this common practice is unfortunate, as blind balancing routinely allows common sense errors to overestimate the risk of harm, allows disparities between defendants, and favors the government in most cases. And more fundamentally, it prevents courts from considering the Fourth Amendment rights of a broader swath of society than just the criminal defendant before them.

After exploring blind balancing, this Article proposes a new model of Fourth Amendment balancing. Under this approach, called “informed balancing,” discretion resides with judges to make individualized decisions, but the process is guided by use of the current best evidence available on policy matters that can be reasonably measured. Particularly, the Fourth Amendment and other constitutional areas where the Court aims to determine reasonable intrusions on privacy or liberty rights as balanced against governmental interests and public safety, informed balancing has the potential to create a more even assessment by

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6 REBALANCING THE FOURTH AMENDMENT

only .15% of all stops and general weapons in only .94% of all stops. Contraband—such as drugs or stolen property—was seized in only 1.75% of stops.

15 Id.

16 And indeed these arguments, when considered, have been successful. See Ligon v. City of New York, No. 12 Civ. 2274, at *4, *10 (S.D.N.Y. Jan. 8, 2013) (finding in a New York stop-and-frisk case that “while it may be difficult to say where, precisely, to draw the line between constitutional and unconstitutional police encounters, such a line exists, and the NYPD has systematically crossed it when making trespass stops outside TAP buildings in the Bronx”); Joseph Goldstein, Police Stop-and-Frisk Program in Bronx is Ruled Unconstitutional, N.Y. TIMES (Jan. 8, 2013), http://www.nytimes.com/2013/01/09/nyregion/judge-limits-nypd-stop-and-frisk-program-in-bronx.html?pagewanted=1&_r=2&.

17 Floyd v. City of New York, Order Granting in Part and Denying in Part Defendants’ Summary Judgment Motion (Aug. 31, 2011) (since the mid-1990s, New York has seen a drop in crime rates, and since 2003, violent crime has dropped approximately 76%. But statistics also show that although young black and Latino men account for only 4.7% of the city’s population, they accounted for 41.6% of stops in 2011 and were less likely to be frisked than whites and were less likely to be found with a weapon.); New NYCLU Report Finds NYPD Stop-and-Frisk Practices Ineffective, Reveals Depth of Racial Disparities, NYCLU (May 9, 2012), http://www.nycul.org/news/new-nycul-report-finds-nypd-stop-and-frisk-practices-ineffective-reveals-depth-of-racial-dispar (finding that “[b]lack and Latino New Yorkers were more likely to be frisked than whites and were less likely to be found with a weapon.”).


19 RICHARD FALLON, IMPLEMENTING THE CONSTITUTION 8 (1997) (discussing the importance of the Supreme Court considering “human psychology, institutional sociology, prevailing values, history and economics—to implement constitutional norms at acceptable costs”).
considering broader societal concerns for equal protection, privacy, and fairness. Informed balancing requires a consideration of wider information contained in statistical data, clinical evidence, and experience, rather than common sense alone. This shift in balancing also welcomes parties to present relevant scientific and empirical data, while still maintaining the importance of considering individual circumstances in making a determination. While the nature of Fourth Amendment balancing should remain flexible and individualized, it does not have to be blind to broader societal concerns expressed in relevant evidence and social science data that consider the rights of all members of society.

This Article proceeds as follows. Part I provides a brief description of modern judicial balancing, identifying the phenomenon of blind balancing and its effects. It relies on a comprehensive original study of 600 Supreme Court opinions from 1990 to 2012 and a close analysis of all Fourth Amendment opinions in that time period to identify the dangers of judicial balancing in the Fourth Amendment context. Part II proposes a model of informed balancing which may better educate judges by requiring relevant data and broader context from litigants, forcing courts to consider not just the criminal defendant before them but the constitutional rights of a broader swath of society. Part III relies on the original study, which reveals that the lack of broad relevant data presented to the Supreme Court by parties often leads to the Supreme Court relying on common sense to support its opinions. It concludes by discussing the role of information in addressing the privacy and equal protection concerns of society captured by the Fourth Amendment.

I. JUDICIAL BALANCING AS BLIND JUSTICE

Judicial balancing involves identifying, valuing, and comparing competing interests or values to determine constitutional doctrine and its application. A balance is the opposite of a standard or general rule to be applied in every case. A balance usually considers community interests in examining the constitutionality of a law or government action. In Fourth Amendment cases, a typical balance looks at whether an individual’s rights to privacy in the sanctity of her home outweigh the government’s desire to keep society free of crime. Judicial


21 Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1179 (1989) (noting that in “the real world of appellate judging, it displays more judicial restraint to adopt such a course than to announce that, ‘on balance,’ we think the law was violated here—leaving ourselves free to say in the next case that, ‘on balance,’ it was not”).


23 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 87, 355–356, 413 (2012) (“The words [of the Constitution] are to be taken in their natural and obvious sense.” The Fourth Amendment is an “example of encompassingly broad language” includes rights not given at the time the Constitution was ratified. Some may argue that constitutional determination must be a consideration of an
Balancing in the Fourth Amendment context occurs in almost every Fourth Amendment decision, starting from the lower court and through any constitutional appeal. A judicial balance has historically grown out of a consideration of an individual’s privacy rights, not in a vacuum, but with a broader consideration of societal welfare. But at the same time, judges are not legislators tasked with making public policy and must consider an individual’s claims as a discrete matter.

Nevertheless, an examination of the Fourth Amendment cases below demonstrates that the focus of courts is often not solely on individual rights but on overall societal wellbeing. However, though the focus of judicial balancing is largely societal welfare, it does not consider a full panoply of information. Judges often consider the individual situation and the impact of a potential ruling in a particular case on others, without considering all of the relevant factors.

To further complicate things, judicial reasoning when using a balancing test is usually overly reliant on hypothetical scenarios and oftentimes leads to unfairness to the defendant, particularly when the court weighs all factors equally where one factor may actually be more significant than the others combined.

Instead of consistency, Fourth Amendment balancing tests often lead to divergent standards among jurisdictions, ending in disparate results among similar defendants.

The first section below draws a brief history of judicial balancing and the increasing importance in decisions of social welfare over individual rights. The following section briefly describes Fourth Amendment balancing.

A. Brief History of Balancing

Balancing took hold in the eighteenth century as judges went from considering the law alone, to considering social circumstances and pragmatic
realities surrounding the law in an effort to improve societal welfare. Now, it is safe to say, all judges, regardless of their judicial philosophy, balance in some cases.

Historically, judicial balancing was problematic as it was not appropriate to consider general welfare in making judicial decisions. Societal welfare was the prerogative of the legislature, not judges. Though balancing is a critical part of constitutional decision making today, the first introduction of balancing into constitutional jurisprudence caused substantial opposition. However, today it has universal application in many areas of the law. Judges balance factors in favor of both sides with little controversy and with the ultimate goal of determining how best to identify the interests of society.

Despite criticism that balancing undermines constitutional rights, and allows the judiciary to engage in a legislative function, the Supreme Court has expanded the use of balancing to more and more areas of law.

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Fiss, The Supreme Court, 1978 Term – Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 30 (1979) (the Court’s role is not to resolve disputes but to give “proper meaning to our public values”).

31 Aleinikoff, supra note 19, at 952–62 (discussing the various pressures that opened the door for balancing to enter constitutional law); Jared A. Goldstein, Equitable Balancing in the Age of Statutes, 96 VA. L. REV. 485, 547 (2010) (discussing the societal changes that led to balancing entering the common law and statutory law).

32 See Aleinikoff, supra note 19, at 958 (arguing that the adoption of constitutional balancing was not inevitable); Ronald J. Bacigal, Making the Right Gamble: The Odds on Probable Cause, 74 MISS. L.J. 279, 323 (2004) (arguing that the Court should abandon its probable cause balancing test); Goldstein, supra note 27 (arguing that the Court should abandon equitable balancing in statutory cases); Jonathan C. Lipson, On Balance: Religious Liberty and Third-Party Harms, 84 MINN. L. REV. 589, 664 (2000) (arguing that the court should “mend the distortions to our religious liberty jurisprudence by restoring judicial balancing in competitions between religious actors and private parties”).

33 Henkin, supra note 19, at 1023.

34 See supra notes 19–25 and accompanying text.


36 Richard A. Posner, The Incoherence of Antonin Scalia, THE NEW REPUBLIC, Aug. 24, 2012, at 4 (noting that even textualists “consider the range of commonsensical but non-textual clues to meaning that come naturally to readers trying to solve an interpretive puzzle”); SCALIA & GARNER, supra note 22, at 193 (acknowledging that “[d]etermining what is reasonably implied [by the words of statute] takes some judgment” and demonstrating that sometimes judges rely on common sense interpretations).

37 As a result, constitutional balancing became a way for law to respond to real world interests. Aleinikoff, supra note 19, at 958–60. Furthermore, because balancing is so sensitive to the specifics of a particular case, it accommodated gradual change, rejected absolutes, and kept all parties in the game, thus providing flexibility without sacrificing legitimacy. Id. at 961; see, e.g., State v. Hamdan, 665 N.W.2d 785, 800 (Wis. 2003) (“In analyzing reasonableness, one must balance the conflicting rights of an individual to keep and bear arms for lawful purposes against the authority of the State to exercise its police power to protect the health, safety, and welfare of its citizens.”).

38 McFadden, supra note 29, at 636–38.

39 Id. at 641–42.

40 Aleinikoff, supra note 19, at 944; Henkin, supra note 19, at 1022; McFadden, supra note 19, at 587 (noting the “recent appearance and rapid growth [of the balancing test] mark [it] as one of the most significant developments in judging practice in the twentieth century”).
B. Brief History of Fourth Amendment Balancing

In the context of criminal procedure, the Supreme Court has made it clear that balancing is the “key principle of the Fourth Amendment.” Indeed, these balancing decisions are made daily by lower courts and appellate courts, both state and federal. Accordingly, courts have used balancing as the primary tool to determine “the scope of the Fourth Amendment,” “the definition of a search,” “the reasonableness of a search,” “the meaning of probable cause,” “the level of suspicion required to support stops and detentions,” “the scope of the exclusionary rule,” “the necessity of obtaining a warrant,” and “the legality of pretrial detention of juveniles.” In general, Fourth Amendment questions balance the depth of an intrusion into a person’s rights against the government’s need for the practice.

Although Fourth Amendment balancing tests on their face seem intuitively simple, they have led to some troubling results. Scholars have criticized Fourth Amendment balancing as being a sham, unpredictable, the Supreme Court’s “tar baby,” and a theoretical embarrassment. Justice Scalia himself criticized Fourth Amendment law as being so fact-specific that opinions merely reflect “variation.” The case law is criticized as being confusing, not binding in future cases, too subjective, failing to capture core values, and lacking clear guidance to police officers seeking to know their own limits. Indeed, Fourth

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43 United States v. Place, 462 U.S. 696 (1983); Aleinikoff, supra note 19, at 964–65.
44 New York v. Class, 106 S. Ct. 960 (1986); Aleinikoff, supra note 19, at 964–65.
46 Camara v. Municipal Court, 387 U.S. 523 (1967); Aleinikoff, supra note 19, at 964–65.
50 Schall v. Martin, 467 U.S. 253 (1984); Aleinikoff, supra note 19, at 964–65.
53 Roger B. Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 IND. L.J. 329 (1973) (noting that complaints about the disarray of Fourth Amendment law have long been a staple of legal scholarship); Morgan Cloud, Pragmatism, Positivism, and Principles in Fourth Amendment Theory, 41 UCLA L. REV. 199, 204 (1993); David E. Steinberg, Restoring The Fourth Amendment: The Original Understanding Revisited, 33 HASTINGS CONST. L. Q. 47, 47 (2005).
56 Id. at 479.
Amendment balancing tests have caused confusion, and have failed to predictably protect core values.

A further aggravating factor is that the remedy for Fourth Amendment violations is in flux and there is no viable remedy for race-biased Fourth Amendment searches. The remedy to a violation of the Fourth Amendment has historically been the exclusionary rule. This provides that any evidence obtained through a search or seizure that violates the privacy of a defendant is not used against the defendant. The exclusionary rule has deterred police from violating privacy rights of both the guilty and innocent alike. However, over time the exclusionary rule has been weakened as it becomes a balancing test that no longer requires exclusion of bad evidence in every case. These exceptions to the exclusionary rule have resulted in much of the evidence found contrary to the Fourth Amendment remaining admissible. Thus, the exclusionary rule may not serve the deterrent effect that it once served, and so it fails to protect innocent people from unconstitutional searches. What is more, equal protection cases have indicated that police can have racist motivations in searching individuals without violating the Fourth Amendment. And though the equal protection clause is still theoretically a remedy, recent cases have dramatically limited the ability of defendants to prove racial bias in such searches. Indeed, the disparities

62 Illinois v. Rodriguez, 497 U.S. 177 (1990) (stating that the exclusionary rule dictates that “no evidence seized in violation of the Fourth Amendment will be introduced at . . . trial”).
63 Albert W. Alschuler, Demisequecentenial: Studying the Exclusionary Rule: An Empirical Classic, 75 U. CHI. L. REV. 1365, 1371 (2008) (“Studies by Canon and others have revealed a substantial increase in the use of search warrants following Mapp v Ohio.”); Bradley Canon, The Exclusionary Rule: Have Critics Proven that it Doesn’t Deter Police?, 398, 401 JUDICATURE 398 (1979) (showing that “compliance with the Fourth Amendment increased significantly” in the years following Mapp v. Ohio).
64 Davis v. U.S., 131 S. Ct. 2419, 2427 (2011) (“For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.”); Herring v. U.S., 555 U.S. 135 (2009) (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”); Hudson v. Michigan, 547 U.S. 586 (2006) (stating that the exclusionary rule should only be applied where its deterrence benefits outweigh its social costs).
65 See, e.g., Davis, 131 S. Ct. at 2427 (limiting the exclusionary rule to situations where the deterrence benefits of suppression outweigh the “heavy costs” of suppressing the evidence and setting “the criminal loose in the community without punishment”).
66 See Herring, 555 U.S. at 140, 144; David A. Harris, What Criminal Law and Procedure Can Learn From Criminology: How Accountability-Based Policing Can Reinforce-Or Replace-The Fourth Amendment Exclusionary Rule, 7 OHIO ST. J. CRIM. L. 149, 154 (2009) (citing a 2004 study that showed that “Fourth Amendment violations, some quite egregious, showed up in almost a third of all the observed police investigations”).
67 Whren v. U.S., 517 U.S. 806 (1996) (refusing to consider the “actual motivations of the individual officers involved” in a Fourth Amendment search despite stating that the “Constitution prohibits selective enforcement of the law based on considerations such as race.”).
68 McCleskey v. Kemp, 481 U.S. 279 (1987) (showing potential racial bias in sentencing). In this case, the Court rejected as evidence of racial bias the use of a detailed statistical study showing a racial bias in sentencing. The Court held that the defendant must “prove that the decisionmakers in his case acted with discriminatory purpose.” However, the Court limited the defendant’s ability to do so because the Court upheld the policy to grant government officers “wide discretion,” which suggests “the impropriety of . . . requiring prosecutors to defend
caused by Fourth Amendment jurisprudence have even more dire effects since the only available remedy allowed is not often applied and is not likely to protect the innocent. Despite the importance of balancing to Fourth Amendment decisionmaking, it fails to protect the privacy rights of innocent members of society, including minorities.

The next section explores the realities of modern judicial balancing by the Supreme Court in the Fourth Amendment context.

II. A STUDY OF SUPREME COURT BALANCING

To assess the Supreme Court’s use of balancing in criminal procedure cases, I analyzed all cases from 1990 to 2012 that contain references to the Fourth, Fifth, Sixth, or Eighth Amendment.69 That search returned over 600 cases. Cases that did not actually involve questions of criminal procedure were eliminated, and the remaining cases (about 350) were analyzed for evidence of balancing. In some instances, it was easy to make a determination, as the Court explicitly stated it was “balancing,” “weighing,” or engaging in a “cost benefit analysis.” However, in other cases, the Court failed to use such language, but nevertheless reasoned in a manner that reflected a balance of competing interests. These cases were also included, though admittedly their inclusion represents an exercise in judgment with which reasonable minds may disagree.70

Courts have the daunting task of weighing competing interests against each other in balancing rights. Nowhere are the stakes more severe than in the context of criminal procedure.71 Balancing tests are convenient and theoretically appealing to a court in the position of weighing these competing interests.72 And in theory, a well-articulated balancing test should produce consistent results among defendants and across jurisdictions, but this has proven to be rarely the case. There are three distinct problems identified with Fourth Amendment balancing tests: 1) government interests typically trump individual rights; 2) balancing tests inflate risk of harm by using hypothetical threats without relying on broader relevant data;

their decisions.” Thus, the defendant, who could show a pattern of discrimination, was not allowed to do so, nor was he allowed to provide evidence of the particular prosecutor’s possible racial bias because the Court stated that it was inappropriate to make the prosecutor defend his decision.

69 While the focus of this Article is the Fourth Amendment, a broader initial search of balancing in the criminal procedure context was warranted to ensure that all potential search and seizure cases were captured.

60 This research started with a general search for United States Supreme Court cases from 1990–2012 involving the Fourth, Fifth, Sixth, or Eighth Amendments conducted on WestlawNext which produced 652 results. These cases were examined for questions of criminal procedure and those that did not involve such questions were then removed leaving 350 cases to analyze more closely. From there, a six research assistants scrutinized the cases for either explicit or implicit application of a balancing test. Some cases actually used the word “balancing,” “weighing,” or “cost-benefit analysis.” Others, more subtly employed reasoning that implied the balancing of competing interests. The research assistants kept meticulous spreadsheets documenting identifiers such as the rule’s cost, the rule’s benefit, any data relied upon by the Court, sources of contention, and who prevailed in the case.

71 See J. Alexander Tanford, Rape Victim Shield Laws and the Sixth Amendment, 128 U. PA. L. REV. 544, 545 (1980) (commenting that “[t]here is no more serious undertaking of the state than accusing a person of a crime, with the concomitant threat of loss of liberty or life.”).

and 3) balancing creates disparities between similarly situated defendants. This section demonstrates the challenges of the Court’s current balancing approach by relying on the Fourth Amendment Supreme Court cases in this study.

A. Government Interests Trump Individual Rights

To those familiar with modern criminal procedure jurisprudence, it should not come as a surprise that government interests typically trump individual rights. From 1990 to 2012, a review of Supreme Court opinions on criminal procedure matters indicates that individual rights have overcome government interests in just twenty percent of cases where the court balanced these interests. However, not all governmental interests are created equal. It turns out that the stated need for effective law enforcement seems to persuade the Court more often than any other interest, and is invoked in over half of cases (55%) since 1990.

The Supreme Court relied on the need for effective law enforcement most often in ruling for the government. For example, in *Florence v. Board of Chosen Freeholders of Burlington*, the Court considered a constitutional challenge to suspicionless strip searches of suspects charged with minor crimes before introducing them into the jail’s general population. In holding the searches constitutional, the Court gave considerable weight to three separate law enforcement factors: eliminating gang violence, preventing the introduction of contraband; and finally, providing meaningful relief to parties. Thus, I start my analysis of Supreme Court balancing here.

Laurence Tribe has been an outspoken critic of this trend. Tribe, supra note 24, at 596, David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 Va. L. Rev. 1521, 1523 (1992) (“Because the threshold question regarding the existence of constitutional rights has become infected with the government's countervailing interests, those individual rights have lost much of their vitality, if not their very existence.”). After the debates over balancing in the 1950s and late 1980s, it appears that the entirety of the Court was then and is now strong in their desire to balance with an eye towards the government and is invoked in over half of cases since 1990.


Since 1990, the Court’s criminal procedure cases invoked this factor over 55% (27/49) of the time, though it was also commonly used before this time. See, e.g., *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1518–19 (2012) (assisting efforts to eliminate gang violence); id. at 1519 (preventing the proliferation of contraband); id. at 1521–22 (avoiding the imposition of an undue burden on prison administration); *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011) (avoiding deterring officers from performing duty); Maryland v. *Shatzer*, 130 S. Ct. 1213, 1221–22 (2010) (avoiding deterring police from obtaining sincere voluntary confessions); *Berghuis v. Thomskins*, 130 S. Ct. 2250, 2260 (2010) (providing clear guidance to officers in the face of ambiguity); id. (avoiding placing undue burden on police work); *Herring v. United States*, 555 U.S. 135, 141 (2009) (avoiding letting potentially guilty and dangerous criminals go free as a result of mere isolated negligence in bookkeeping); *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (allowing police officers to react quickly to threats); *Arizona v. Gant*, 556 U.S. 332, 345 (2009) (providing police with a clear rule).
contraband, and avoiding the imposition of an undue standard on prison administration.\textsuperscript{78} \textit{Florence} allowed a substantial intrusion on individual liberty with a strip search.\textsuperscript{79} Nevertheless, without a consideration of evidence on the necessity for strip searches to satisfy government interests, the stated need for effective law enforcement overcame individual rights.\textsuperscript{80}

Determining the constitutionality of suspicionless searches, such as in cases of traffic checkpoints, is another balancing test in which the government’s need for effective law enforcement dominates other interests.\textsuperscript{81} For the purpose of checking sobriety, stemming the flow of illegal immigration, or interrupting the flow of narcotics, traffic checkpoints are used by the government to search individuals and ferret out crime.\textsuperscript{82} Although the Court purports to balance the government interest against an individual’s expectation of privacy, oftentimes, the government purpose becomes inflated in a balancing test.\textsuperscript{83} The number of arrests made bolster the state’s argument, although the arrests themselves may constitute the product of a constitutionally questionable instrument.\textsuperscript{84} and provide no comparison to the number of arrests made without checkpoints or data on the effectiveness of such checkpoints. As a result, government checkpoints allow searches that might otherwise be constitutionally suspect if evidence of their effectiveness were considered along with government interests.

Other common government interests that frequently persuade the court include officer safety (18%),\textsuperscript{85} public safety (28%),\textsuperscript{86} and judicial economy (30%).\textsuperscript{87} While not as prevalent as appeals to effective law enforcement, these interests are equally convincing to the Court when it considers invasions of individual liberty. In other cases, the physical dangers of drugs\textsuperscript{88} and the safety of

\textsuperscript{78} \textit{Florence}, 132 S. Ct. at 1518–19, 1521–22.
\textsuperscript{79} \textit{Atwater}, 532 U.S. at 346–47.
\textsuperscript{80} The erosion of fundamental constitutional rights at the hands of cost-benefit analysis is of grave concern to some. Tribe, supra note 24, at 596.
\textsuperscript{81} Edwin J. Butterfoss, A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess, 40 CREIGHTON L. REV. 419 (2007).
\textsuperscript{82} Id. at 471.
\textsuperscript{83} Id. at 467. Charles Fried, Two Concepts of Interests: Some Reflections on the Supreme Court’s Balancing Test, 76 HARV. L. REV. 755, 763 (1963).
\textsuperscript{84} Id.
\textsuperscript{85} More than 18\% (9/49) of the court’s balancing cases have invoked this factor since 1990. Arizona v. Johnson, 555 U.S. 323, 330 (2009) (risk protects police from armed persons; unquestioned command minimizes risk of harm to officer); Hudson v. Michigan, 547 U.S. 586, 598 (2006) (avoids requiring officers to wait and give greater opportunity against them).
\textsuperscript{86} More than 28\% (14/49) of the court’s balancing cases have invoked this factor since 1990, though it was frequently used before then. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1518 (2012) (promotes inmate health); Arizona v. Johnson, 555 U.S. at 330–32 (risk protects public from armed criminals; risk of harm to vehicle occupants minimized when police have complete command); Herring v. United States, 555 U.S. 135, 141 (2009) (prevents the release of dangerous criminals).
\textsuperscript{87} Just over 30\% (15/49) of the court’s balancing cases have invoked this factor since 1990, though the court considered it in earlier cases, too. Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) (promotes judicial economy by avoiding difficulties of proof); Maryland v. Shatzer, 130 S. Ct. 1213, 1220 (2010) (conserves judicial resources regarding difficult determinations of voluntariness); Montejo v. Louisiana, 556 U.S. 778, 783–85, 794 (2009) (avoids difficulties in creating new rule; \textit{Miranda} already sufficiently protects right); Arizona v. Gant, 556 U.S. 332, 346–47 (2009) (removes uncertainty in \textit{Belton}).
\textsuperscript{88} \textit{Veronica Sch. Dist.} 477, 515 U.S. at 661 (upholding suspicionless urinalysis).
police and prison personnel overcame individual liberty rights.\textsuperscript{89} In all of these balancing tests, there was no consideration of broader evidence considering the likelihood of threats to police officers, but rather a simple stated threat by the government was sufficient to persuade the court.

However, on occasion, the government fails to persuade the Court to rule in favor of its security interests.\textsuperscript{90} In one instance, the government lost because the interests it was seeking to further were found to be illegitimate.\textsuperscript{91} In a few other cases, the government lost because it found itself on the wrong end of a balance weighing competing governmental (and not private) interests.\textsuperscript{92} And in eight instances, the government lost because the threat to fundamental liberty interests was too great.\textsuperscript{93} Thus, in a handful of cases individual rights prevail over government interests, though these cases constitute the exception to the rule.

In a small minority of Fourth Amendment cases (12\%) involving a balance, individual privacy concerns overcame government interests.\textsuperscript{94} For instance, in \textit{Florida v. J.L.}, the Court declined to create a firearm exception to \textit{Terry} that would allow a stop-and-frisk even if the tip failed to meet pre-search reliability standards.\textsuperscript{95} In addition to upsetting the balance struck in \textit{Terry},\textsuperscript{96} creating an exception “would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search” just by making an anonymous false report.\textsuperscript{97} Similarly, the Court in \textit{Winston v. Lee} held that the Fourth Amendment prohibits a state from compelling a suspect to undergo surgery under general anesthetic to remove a bullet lodged in his chest in an effort to obtain evidence.\textsuperscript{98} The evidentiary value of the bullet was eclipsed by the risks posed by the procedure to the suspect’s health,\textsuperscript{99} as well as the nature,\textsuperscript{100} and invasive scope

\textsuperscript{89} Wilkinson, 545 U.S. at 228 (declining to require state to implement further procedures to guard against inmates being improperly placed in a high security prison).
\textsuperscript{90} The government lost 22\% (11/49) of criminal procedure cases engaging in cost benefit analysis since 1990.
\textsuperscript{91} Chandler v. Miller, 520 U.S. 305, 322 (1997) (symbolic interest of being tough on drugs); see also City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (finding that “checkpoint program [that was] indistinguishable from general interest in crime control” was invalid).
\textsuperscript{94} Fourth Amendment concerns overcame governmental interests in 12\% (6/49) of criminal procedure cases engaging in balancing since 1990. Safford Unified Sch. Dist., 557 U.S. 364 (protecting students from unjustified intrusions); Gant, 556 U.S. 332 (protecting individual privacy from unbridled police discretion).
\textsuperscript{95} Florida v. J.L., 529 U.S. at 272. See infra text accompanying notes 105-11 for discussion of \textit{Terry} v. Ohio.
\textsuperscript{96} Id. (Recognizing that “[f]irearms are dangerous, and [that] extraordinary dangers sometimes justify unusual precautions,” the Court explains that \textit{Terry} responds to the “serious threat that armed criminals pose to public safety.”).
\textsuperscript{97} \textit{Florida v. J.L.}, 529 U.S. at 272.
\textsuperscript{98} 470 U.S. 753, 755 (1985).
\textsuperscript{99} Id. at 764. The surgery risked permanent damage to the suspect’s body, as well as infection.
of the procedure.\textsuperscript{101} Likewise, in Arizona v. Gant, the Court adopted a narrow reading of Belton, motivated in part by fear that the alternative would have “create[d] a serious and recurring threat to the privacy of countless individuals.”\textsuperscript{102} The Court found the very possibility of giving police unbridled discretion to look through private effects to be extremely offensive to the privacy protected by the Fourth Amendment.\textsuperscript{103} These cases demonstrate that when core values protected by the Constitution are threatened in a significant manner, those interests have a chance to overcome even strong governmental interests. However, the overwhelming message in Supreme Court Fourth Amendment jurisprudence makes clear that when individual rights are balanced against governmental interests, personal liberty generally loses.\textsuperscript{104}

A review of Fourth Amendment cases before the Court between 1990 and 2012 demonstrates that in a balance with the government’s concern for effective policing and officer safety, individual rights typically lose. And the balance often favors the pursuit of effective law enforcement, which can be verified with evidence and broader public data, but as shown above, rarely is.

**B. Judges Overestimate Potential Risks**

Judges often rely on anecdotal information or hypotheticals rather than evidence, which may lead to an overestimation of potential risks in Fourth Amendment cases.\textsuperscript{105} When the risk of danger is present, it is much more likely for the Court to overestimate this risk in a balance, allowing a sacrifice of individual liberty.\textsuperscript{106} This occurs even if there is little evidence or contradictory evidence of the likelihood of the threat of harm.

A potential problem with a balancing approach not informed by data is that it ends up being rooted in hypotheticals that do not mirror reality.\textsuperscript{107} This can allow for implicit bias or a diminishment of individual privacy rights because the court does not consider the full picture of privacy concerns for a broader number of

\textsuperscript{100} Id. While one surgeon stated the surgery would take 15-20 minutes, another predicted it could take up to 2.5 hours.

\textsuperscript{101} Taking control of the suspect’s body, inducing a state of unconsciousness, and probing beneath the skin was seen as an extensive intrusion. Id.

\textsuperscript{102} 556 U.S. 332, 344–45 (2009).

\textsuperscript{103} Id. at 345.

\textsuperscript{104} Christian Halliburton, Leveling the Playing Field: A New Theory of Exclusion for a Post- PATRIOT Act America, 70 Mo. L. REV. 519, 542 (2005) (discussing Fourth Amendment doctrines as distorting the structures prescribed by the Bill of Rights by giving the government an advantage over the individual); David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 SUP. CT. REV. 271, 298, 301, 308 (1997) (three of the four decisions dealing with traffic stops and search and seizures during the Supreme Court’s 1995–1997 terms “gave significant latitude to law enforcement” and demonstrate a pronounced pattern of ruling in favor of the government). See also id. at 301 (“Far more often than not, federal judges find the inferences drawn and actions taken by law enforcement officers reasonable, and deny suppression motions challenging those inferences and actions.”).

\textsuperscript{105} Jeffrey J. Rachlinski, Evidence Based Law, 96 CORNELL L. REV. 901, 919 (2011).

\textsuperscript{106} See, e.g., Craig S. Lerner, The Reasonableness of Probable Cause, 81 TEX. L. REV. 951, 958–59, 971 (2003) (noting that in the preventative detention context, safety of others has surpassed importance of individual liberty and overshadowed requirements of probable cause in favor of the government’s interest).

\textsuperscript{107} Albert W. Alshuler, Preventative Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process, 85 MICH. L. REV. 510, 511 (1986).
citizens not before them. It can also result in courts overestimating the risk of harm that may result and favoring the government more often for this reason.

The test of Terry v. Ohio demonstrates an early Supreme Court tangle with balancing that has increased the legitimacy of overestimation of risk. In Terry, an officer watching three men conferring outside of a store suspected the men of “casing a job” and stopped the men, frisking one of them.\textsuperscript{108} Although the officer did not have probable cause that the men had guns before stopping them, he found a gun in the first man’s overcoat, which prompted him to pat down the other two men.\textsuperscript{109} The Court found that this was a search and seizure,\textsuperscript{110} and analyzed the reasonableness of the officer’s action by balancing the governmental interest against the intrusion to the citizen.\textsuperscript{111} The Court emphasized the risk of harm to officers and noted how many officers are injured on the job each year. It placed great emphasis on the potential risk to officers if they were not able to conduct such searches without actually considering the instances where such intrusions are necessary. And while the circumstances in Terry may have warranted the search, Terry stop-and-frisk has allowed vast numbers of police to intrude on countless innocent individuals’ privacy,\textsuperscript{112} based on little to no evidence of any threat of harm.\textsuperscript{113}

In many stop-and-frisk cases, judges rely on the Terry doctrine to include speculative risks to justify a warrantless search of an individual. For example, in State v. Lombardi, the Supreme Court of Rhode Island held that the “slight intrusion” of patting down a defendant did not violate the defendant’s Fourth Amendment rights where the officer was not seeking to arrest the defendant, but was simply offering him a ride home because he was too intoxicated to drive.\textsuperscript{114} Though the officer testified that the defendant did not appear to be armed and dangerous,\textsuperscript{115} he frisked the defendant.\textsuperscript{116} The Court justified this frisk in surmising that “an ordinary pen or pencil, when plunged into the neck of the police officer by an intoxicated passenger seated in the back seat of the police cruiser, would have been as lethal as any hand gun.”\textsuperscript{117} Thus, even though the individual did not appear to be armed, and no evidence of such hypothetical pen stabbings was recounted, the Court permitted the frisk. This demonstrates an example of the Court entertaining a hypothetical situation to justify an otherwise unreasonable search.

The unfounded hypothetical used by the court in Lombardi is not the only

\textsuperscript{108} See Terry v. Ohio, 392 U.S. 1, 7 (1968).
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 19.
\textsuperscript{111} Id. at 21.
\textsuperscript{112} Craig S. Lerner, The Reasonableness of Probable Cause, 81 TEX. L. REV. 951, 999 (2003); see also Brown v. Texas, 443 U.S. 47, 51-53 (1979) (analyzing the reasonableness of the seizure by introducing a balancing test weighing the gravity of the public concerns served by the seizure and the degree to which the seizure advances the public interest, against the severity of the interference with individual liberty, and reversing the conviction based on an absence of reasonable suspicion of misconduct).
\textsuperscript{113} See infra Part III.A.3, for a discussion of these statistics.
\textsuperscript{114} State v. Lombardi, 727 A.2d 670, 674 (R.I. 1999).
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
example of courts using unlikely scenarios to justify otherwise unjustifiable searches. In People v. Armenta, a California court used the possibility that a person might have a “rubber water pistol loaded with carbolic acid or some other liquid, which if used by a suspect could permanently blind an officer,” to justify a pat-down search.\(^{118}\) While these two cases may seem like anomalies, there are many others where courts justify frisks based on hypothetical threats.\(^{119}\)

In addition to using unlikely-to-ever-occur hypotheticals, courts often use other speculative reasoning to uphold searches of citizens. For example, courts often uphold searches when the only indication the officer had that a weapon might be present was that the person may have been in possession of narcotics,\(^{120}\) the suspect was wearing baggy clothing or had something in his pocket,\(^{121}\) or the individual reached for something in a car (that could have been identification) after being pulled over.\(^{122}\) Without relying on data to support government interests, what results is a lack of specific guidance to police who do not know their limits and to judges who overestimate the threats faced by officers in comparison to individual rights.

In some cases, the mere possibility of great danger creates a sufficient justification to curtail individual liberty.\(^{123}\) In Wilkinson v. Austin, the Court deemed a risk of violence as especially weighty where inmates were placed in a

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\(^{118}\) People v. Armenta, 73 Cal. Rptr. 819, 821 (Cal. Ct. App. 1968), disapproved of by People v. Collins, 463 P.2d 403, 406–07 (Cal. 1970). The court in Collins stated that an officer must be able to “point to specific and articulable facts” that a suspect is armed with an atypical weapon and that Armenta “is disapproved of insofar as it conflicts with” this view. People v. Collins, 463 P.2d at 406–07. However, later California cases continue to engage in fanciful speculation to justify a police officer’s actions. See, e.g., People v. Wood, F054304, 2008 Cal. App. Unpub. LEXIS 8276 (Cal. Ct. App. 2008), at 11–12 (justifying search of defendant because he was parked in front of a residence that was being searched and he “could have come up behind the officers in the process of executing the search warrant”).

\(^{119}\) See, e.g., United States v. Oliver, 550 F.3d 734 (8th Cir. 2008) (upholding a search because “if Oliver was armed and dangerous and the officer did not search him, he “could have turned and shot the officer”); United States v. Raymond, 152 F.3d 309 (4th Cir. 1998) (upholding the search of the defendant because he got out of a two-door car from the backseat “somewhat awkwardly” while holding a cup full of soda and then “clutched his stomach” and “awkwardly leaned against the car”); United States v. Simmons, 567 F.2d 314 (7th Cir. 1977) (upholding the search of an area around a nude woman because “women are not unknown as accomplices in serious crimes”).

\(^{120}\) See, e.g., United States v. Oates, 560 F.2d 45, 62 (2d Cir. 1977) (stating that to “substantial dealers in narcotics firearms are as much tools of the trade as are most commonly recognized articles of narcotics paraphernalia); People v. Thurman, 257 Cal. Rptr. 2d 517 (Cal. Ct. App. 1989) (justifying the “brief, relatively private intrusion” of searching a defendant who was “quietly seated on a sofa” in a “nonthreatening” manner because the officer was executing a search warrant of a residence for narcotics); Brown v. State, 641 S.E.2d 551 (Ga. Ct. App. 2006) (upholding search because police officer testified that “weapons and drugs they go together usually [sic]”).

\(^{121}\) See, e.g., People v. Collier, 83 Cal. Rptr. 3d 458 (Cal. Ct. App. 2008) (justifying a search of defendant because the officer “was concerned about his safety” based on the defendant’s size, baggy clothing, and because the officer believed the defendant, or another passenger in the car “may have been smoking marijuana”); Davis v. State, 658 S.E.2d 788 (Ga. Ct. App. 2008) (upholding search of Davis where an officer turned his car around and approached Davis after observing that Davis “moved his hand to his right waistband and gave it a quick upward tug”).

\(^{122}\) United States v. Bohanon, 629 F. Supp. 2d 802 (E.D. Tenn. 2009), aff’d, 420 F. App’x 576 (6th Cir. 2011) (upholding a search because defendant looked nervous, had a criminal record, and his hand was “near a pocket in the [car] door that was large enough to conceal a weapon”); People v. Rogers, No. D034303, 2002 WL 27609 (Cal. Ct. App. 2002) (upholding the search of defendant’s vehicle because he was not handcuffed in the patrol car he could have returned to his car and accessed a gun).

high security facility. Indeed, the Court determined that no additional protections were required for inmates placed in this prison without procedural protections since these inmates would risk nothing in performing further criminal conduct, thus the threat to guards and prison staff justified the curtailing of liberty. However, the Court here did not consider the statistics on prison violence in such circumstances either in Ohio or elsewhere. The Court heavily deferred to the opinions of prison administrators who determined that the procedures were constitutionally adequate. Again, the Court here did not require the parties to assess the risk of danger but took the government’s word on its determination of risk.

The Supreme Court itself has recognized that the more acute the risk of danger, the less reliability it requires to infringe on individual rights. For example, “a report of a person carrying a bomb need [not] bear the indicia of reliability [the Court] demand[s] for a report of a person carrying a firearm before . . . police . . . [can] conduct a frisk.” However, the presence of data or examples of a risk actually occurring may carry weight in at least some cases. For example, in *Treasury Employees v. Von Raab*, Justice Scalia attacked the government’s justifications for their lack of “even a single instance in which any of the speculated horribles actually occurred.” Indeed, Justice Scalia demonstrates that there are some instances where the Court requires a demonstration of the risk of violence. Though in many cases, the Court relies on the government to estimate this risk without serious consideration of any counterargument based on relevant data.

In fact, in some judicial determinations, decisions are made not based on relevant evidence and informed risk calculation, but on gut instinct or something else much less consistent. If judges considered the data on crime in a particular context they would be able to base release decisions on reality rather than on a hypothetical risk. The miscalculation of risk in the Fourth Amendment context

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125 Id.
126 Id.
128 Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1519 (2012) (inmates assault correctional staff more than 10,000 times each year); Chandler v. Miller, 520 U.S. 305, 319 (1997) (evidence of a real problem “would have shore[d] up an assertion of special need”); Maryland v. Wilson, 519 U.S. 408, 413 (1997) (5,762 officer assaults and 11 officer deaths in one year during traffic pursuits and traffic stops); id. at 416 (Stevens, J., dissenting) (Stevens attacks the majority’s rule because there is “not even a scintilla of evidence of any potential risk” to officers, suggesting that with sufficient evidence he would have supported the holding).
129 Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 683 (1989) (Scalia, J., dissenting) (“[A]n instance, that is, in which the cause of bribe-taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use. Although the Court points out that several employees have in the past been removed from the Service for accepting bribes and other integrity violations, and that at least nine officers have died in the line of duty since 1974, there is no indication whatever that these incidents were related to drug use by Service employees.”).
130 See 41 TEX. PRAC., CRIMINAL PRACTICE AND PROCEDURE § 21:29 (3d ed.) (describing a case where a judge’s reason for denying bail was that he “felt” like the defendant was a danger to the community and didn’t base his reasoning on any other facts or data. The appeals court frowned upon the judge’s methodology but upheld his decision anyway.).
131 See, e.g., Galen v. County of Los Angeles, 477 F.3d 652, 656 (9th Cir. 2007) (upholding increase of bail in a case where a man is charged with domestic abuse where the evidence offered up was that the defendant lived in a
tracks similar overestimations of risk in other areas.\textsuperscript{132} A reconsideration of whether (and how) to account for evidence is in order along with a consideration of whether this leads to more fairness for defendants. While judges should certainly retain discretion in constitutional decisions, blinding themselves to evidence and relying on hypotheticals may not be necessary.

\textbf{C. Disparities between Defendants}

Fourth Amendment cases, including drug testing, suspicionless searches, and highway checkpoint cases all demonstrate the disparities created between defendants by balancing tests.

A large proportion of individuals arrested in America test positive for illegal substances,\textsuperscript{133} and drug use is often a consideration in criminal cases.\textsuperscript{134} However, courts and police respond dissimilarly to drug crimes and balancing of privacy rights in the drug context. Although it is recommended that a large percentage of defendants receive drug treatment, for instance, some defendants receive a sentence when others receive treatment.\textsuperscript{135} Not only that, but case law demonstrates that courts do not consistently balance individual rights to privacy when it comes to drug testing.

\textsuperscript{132} Wickard v. Filburn, 317 U.S. 111, 114 (1942) (holding that a man growing wheat for personal consumption was subject to a constitutional regulation based on the hypothetical that if everyone decided to grow their own wheat this would really affect the national economy, without considering that the nation is specialized and most people would not grow their own wheat if given the chance); Pearson v. Bridges, 334 U.S. 366 (2001) (basing decision of future damages on hypothetical situation where even though each scenario had a 30% or less chance of occurring, the jury awarded the full amount of damages of each hypothetically needed medical treatment, including a liver transplant).

\textsuperscript{133} Office of National Drug Control Policy, Executive Office of the President of the United States, The National Drug Control Strategy 18 (1997). For men arrested, the percentage testing positive for drugs ranged from 51% to 83%, and females arrested ranged from 41% to 84%. Douglas A. Smith & Christina Polsenberg, Criminology: Specifying the Relationship Between Arrestee Drug Test Results and Recidivism, 83 J. Crim. L. & Criminology 364 (1992) (analyzing data collected by the District of Columbia’s Pretrial Services Agency and the National Institute of Justice’s Drug Use Forecasting program showing that over 50% of arrestees tested positive for drugs).

\textsuperscript{134} In 2004, 18% of federal inmates and 17% of state inmates admitted to committing their crimes to obtain drug money. U.S. Dep’t of Justice, Drugs and Crime Facts 3 (2006), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/dcf.pdf. In 2007, 14,831 homicides were known to be narcotics related. Id. at 4. See also John S. Goldkamp et al., Criminology: Pretrial Drug Testing and Defendant Risk, 81 J. Crim. L. & Criminology 585, 585-589 (1990) (discussing various laws that allow judges to take various criterion into consideration—sometimes including drug use—in bail and pretrial release decisions); Sarah French Russell, Rethinking Recidivist Enhancements: the Role of Prior Drug Convictions in Federal Sentencing, 43 U.C. Davis L. Rev. 1135 (2010) (discussing sentence enhancements brought about by qualifying drug convictions under federal law).

Since 1988, the Court has reviewed seven cases involving Fourth Amendment challenges to random drug testing.\textsuperscript{136} In the course of its decisions, invocation of balancing has led the Court to different outcomes in substantially similar scenarios.\textsuperscript{137} For example, in \textit{Chandler v. Miller}, the Court struck down a Georgia statute mandating drug tests for all state office candidates.\textsuperscript{138} The statute’s requirements were relatively noninvasive, permitting drug testing with private physicians and giving candidates complete control regarding the dissemination of the results.\textsuperscript{139} Due to the limited invasiveness, the Court focused on the government’s interest.\textsuperscript{140} It explained that evidence of a real problem would have strengthened the state’s case, but advancing a symbolic interest was an insufficient government interest.\textsuperscript{141} And even though in similar cases, the Court has approved drug tests for state employees in other states, the Court rejected this particular drug test.

In contrast, in \textit{Earls}, the Court upheld suspicionless drug tests for high school students participating in extra-curricular activities.\textsuperscript{142} Beginning with student privacy, the Court reasoned that the scholastic setting implied a reduced expectation of privacy, because students were required to submit to controls that would be inappropriate for adults.\textsuperscript{143} The tests were relatively noninvasive, allowing students to produce their samples in stalls and keeping the results confidential.\textsuperscript{144} Even though there was no particularized evidence of a problem among students involved in extracurricular activities,\textsuperscript{145} various incidents around the school and generalized data convinced the Court that drug use was a serious problem.\textsuperscript{146} The Court concluded that drug tests were an effective means of preventing drug use, and the state’s interest in doing so trumped any privacy concerns.\textsuperscript{147}

In both cases, the privacy concerns were seen as relatively insignificant. In both cases, there was no evidence suggesting that the targeted group suffered from a particularized substance abuse problem. However, in \textit{Chandler}, the Court’s balancing analysis led it to reject suspicionless drug tests, while its balancing analysis in \textit{Earls} produced the opposite conclusion. It’s unclear why deterring drug use in high school students tipped the scales against privacy, while deterring drug use in state officers did not, particularly when government mandated drug

\textsuperscript{138} Chandler, 520 U.S. at 308–09.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 322.
\textsuperscript{142} Bd. of Educ. of Indep. Sch. Dist. No. 92, 536 U.S. at 825.
\textsuperscript{143} Id. at 830–32.
\textsuperscript{144} Id. at 832–33.
\textsuperscript{145} Id. at 835.
\textsuperscript{146} Id. at 834–35.
\textsuperscript{147} Id. at 837.
tests have passed constitutional scrutiny in other contexts.\textsuperscript{148} This difference in treatment of similar drug tests illustrates the disparities caused by Fourth Amendment balancing.

Highway checkpoints are another area of Fourth Amendment law where the use of balancing has produced different outcomes for defendants in similar situations. In \textit{Edmond}, the Court held that suspicionless narcotic interdiction checkpoints violate the Fourth Amendment.\textsuperscript{149} In so doing, the Court categorically rejected checkpoints with the primary purpose of ferreting out “ordinary criminal wrongdoing.”\textsuperscript{150} Four years later, however, in \textit{Lidster}, the Court held that a checkpoint designed to elicit information regarding a hit-and-run accident from the week before did not violate the Fourth Amendment.\textsuperscript{151} The Court began by distinguishing \textit{Edmond}, explaining that its holding was limited to situations where police were searching for evidence of wrongdoing by vehicle occupants.\textsuperscript{152} The Court then engaged in a balancing test that weighed the government’s interest, the degree to which the checkpoint advanced that interest, and the intrusion on individual liberty.\textsuperscript{153} Beginning with the government’s interest, the Court argued that investigating a crime that resulted in a human death was quite important.\textsuperscript{154} Additionally, the manner in which the checkpoint was carried out significantly advanced that concern, taking place about one week after on the same highway and same time of night.\textsuperscript{155} Last of all, the stops were minimally intrusive, for they resulted in stops of a few minutes and just a few seconds of interaction with police.\textsuperscript{156}

While the Court justified its divergent holdings by restricting the broad language of \textit{Edmond}, it is hard to see how asking motorists about a recent crime does not fall into the prohibition on checkpoints meant to uncover evidence of criminal wrongdoing. The checkpoints were quite similar in terms of invasiveness. It seems the Court used its balancing analysis to free itself from its prior holding, thus leaving the rights of motorists dependent on the particular balance struck by the Court. The end result is disparity created in balancing the privacy rights of individuals, without an ability to predict the principles guiding these decisions.

Vehicular searches at the border are another area where the introduction of balancing has left similar defendants with different results. In \textit{Rivas}, the Fifth Circuit held that a suspicionless search where border patrol officers drilled a small

\textsuperscript{148} Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 673–74 (1989) (allowing U.S. Customs Service to continue a program that required employees to provide a urine sample for drug testing when they applied for a position where they would handle classified material); Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 633–34 (1989) (finding constitutional the Federal Railroad Administration’s regulations that require railroads to take blood and urine samples of covered employees after certain accidents, and permitting, but not requiring, railroads to take blood and urine samples of employees who break certain safety rules).
\textsuperscript{149} City of Indianapolis v. Edmond, 531 U.S. 32, 36 (2000).
\textsuperscript{150} Id. at 41–42.
\textsuperscript{152} Id. at 423–24.
\textsuperscript{153} Id. at 427.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 427–28.
hole into a trailer violated the Fourth Amendment. The holding in the case relied on a distinction between routine and non-routine searches, the latter requiring at least reasonable suspicion of wrongdoing. Six years later, the Supreme Court eliminated this distinction in *Flores-Montano* in part by relying on a balance of private and government interests. One year later, the Ninth Circuit, in *United States v. Chaudhry*, confronted the issue of suspicionless exploratory drilling in a truck bed at the border. In reaching its decision, the court focused on two factors: the damage inflicted on the vehicle and the potential impairment of the vehicle’s safe operation. Weighing these factors, the court concluded that a 5/16-inch hole did not cause sufficient destruction nor undermine the vehicle’s safe operation enough to require suspicion for the search.

Before the Supreme Court introduced balancing into this area of the law, both defendants would have prevailed in court. However, once the categorical rule was eliminated in *Flores-Montano*, balancing allowed the court in *Chaudhry* to come to the exact opposite conclusion even though the defendant was practically identical to the defendant in *Rivas*.

This section demonstrates that Fourth Amendment balancing allows government interests to supersede individual rights in most cases, which may lead to an improper calculation of potential risks posed by a defendant, and often allows conflicting outcomes between similar defendants. This unpredictability may violate a core principle of criminal law, namely the principle of legality—policy matters should not be left for judges to determine on an ad hoc and subjective basis. The next section explores an alternative approach—informed balancing—that may mitigate these problems.

### III. Informed Balancing

It is important for judges to consider the individual rights of defendants in considering a case. It is even appropriate for judges to balance these rights with the rights of the public and police to be safe. However, using common sense or judicial gut-instinct alone leads to disparate results, often favoring the government, and allows for overestimation of risk. A balancing test may always lead to some disparity and possibly injustice, but the more objective information expected and used in the decision, the less likely that the decision will be a blind one. The broader the information considered, the less likely that the test will fail to consider the privacy and equal protection concerns of a wider portion of society.

Informed balancing involves a consideration of relevant data and clinical expertise as well as a consideration of individual rights and societal welfare. It is
not just evidence-based,\textsuperscript{163} since it also considers fundamental rights and the legal standards involved, not just best practices. And it retains a large amount of judicial discretion as a judge is not tied to any mathematical formula,\textsuperscript{164} but at the same time parties are expected to provide context for the decisions they ask judges to make. This part will discuss the new concept of informed balancing, or the consideration of data, clinical evidence, and best practices in making a judicial decision. Specifically, the next two sections involve a discussion of how effectively the Court considers data in balancing the rights of individuals and what role this information should play.

\subsection*{A. Data Analysis by the Court}

While there is precedent to support the use of data and clinical expertise by courts in constitutional cases, the Supreme Court has been reticent to rely on data systematically or have it replace common sense judgments.

\section*{1. Data as Legislative Fact}

Data analysis and expertise of various fields—sometimes called legislative facts\textsuperscript{165}—have played an important role in criminal cases.\textsuperscript{166} There is early precedent for judges relying on scientific expertise and data.\textsuperscript{167} At least since the early 1900s, social science data has been relevant to the Supreme Court.\textsuperscript{168} Modern criminal cases rely on data and evidence for decisionmaking, though often on the legislative and policy making level rather than on the judicial level.\textsuperscript{169} Empirical data and social science studies have been called “legislative facts.”\textsuperscript{170} Legislative facts are those that help the court make decisions considering

\begin{itemize}
\item \textsuperscript{163} See also Rachlinski, supra note 100, at 901 (rejecting evidence-based decisions, as “[l]aw’s political nature does not render empirical testing of widely held myths a hopeless misadventure but complicates the hope (and the value) of creating an evidence-based law”).
\item \textsuperscript{164} Susan R. Klein, Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining, 84 TEX. L. REV. 2023, 2053 (2006) (noting that “moving substantive sentencing discretion from judges to prosecutors is unlikely to improve transparency or equality.”); Marc L. Miller & Ronald F. Wright, The Black Box, 94 IOWA L. REV. 125 (2008).
\item \textsuperscript{165} Kenneth Culp Davis, Judicial Notice, 55 COLUM. L. REV. 945 (1955).
\item \textsuperscript{166} See, e.g., Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1519 (2012) (using statistics regarding the high number of assaults on prison staff to support its reasoning); Maryland v. Shatzer, 130 S. Ct. 1213, 1222 (2010) (reasoning that allowing the Edwards presumption to continue would be disastrous in light of data regarding the high frequency of recidivism); Maryland v. Craig, 497 U.S. 836, 855 (1990) (noting the “growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court” to support the holding).
\item \textsuperscript{167} A. CHARPENTIER, THE DREYFUS CASE 53 (J. May trans., 1935).
\item \textsuperscript{168} Donald G. Henry, On the Uses of Statistical Evidence in Litigation, 19 INT’L SOC’Y BARRISTERS Q. 405, 405 (1984) (“The introduction of quantitative social science data into the judicial process dates at least to the appearance of the first ‘Brandeis brief’” in 1908.)
\item \textsuperscript{170} Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Process, 55 HARV. L. REV. 364, 402–03 (1942) (stating that the facts which inform a judge’s legislative judgment, such as social and economic data, can be called “legislative facts”); see also Davis, supra note 160, at 945.
The law and social policy. These facts include social studies, statistical data, or anecdotes that legislatures use when making law. They are used by courts to consider the impact of prior and proposed laws to facilitate law making through judicial decisions, by considering legislative history and the public policy basis for legal rules. These facts are universal and do not vary depending on the facts of the case. Adjudicative facts, in contrast, are relevant to the specific facts of the case at hand that help a judge determine how a case should come out.

Empirical data and social science studies may influence judges and help them make more informed decisions. One advantage to data is that it is arguably not troubled by human limitations of “perception, memory, bias, or interest.” Other benefits to relying on social science may include insight into considerations of social impact and educating judges on the possible consequences of their decisions, and the prospect for compliance with the laws.

Some argue that using legislative facts in judicial decisions will turn judging into a legislative or administrative process and “will undermine the legitimacy of the courts.” However, others explain that decisions in constitutional law are not different from the decisions made in statutes and regulations, and thus judicial decisionmaking with constitutional issues is no different from legislative decisionmaking. With this recognition that constitutional rights determined by courts are similar to legislative definitions of rights, these decisions can also depend on empirical and policy considerations. On the other hand, there is certainly evidence of judges relying on studies and other facts that bias them in the decisionmaking process. And indeed courts have been criticized for focusing less on adjudicative facts than on larger more general problems, treating the court like a legislative committee, and introducing new doctrine to parties from the bench. However, with an

172 Id.
173 CHARLES McCORMICK, McCORMICK ON EVIDENCE § 331, at 928 (2D. ED. 1972).
174 Kenneth Culp Davis, Judicial Notice, 55 COLUM. L. REV. 945, 952 (1955) (“Legislative facts are ordinarily general and do not concern the immediate parties.”).
175 Id. (stating that adjudicative facts “are those to which the law is applied” in a court case).
176 Henry, supra note 10, at 406 (at least one survey suggests that lawyers and judges in the United States believe that judges and juries find scientific evidence to be more credible than other evidence.).
177 Id.
179 Ann Woolhandler, Rethinking the Judicial Reception of Legislative Facts, 41 VAND. L. REV. 111, 121 (1988).
180 Levinson, supra note 7, at 937.
181 Id.
183 Id. at 1193 (While the Court will not issue advisory opinions, it will go “far beyond the facts of a case to attempt to settle cases not then before the Court.”).
184 Id. at 1211–16 (“The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court’s decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court’s diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court’s opinion.”).
185 Id. at 1200–02.
REBALANCING THE FOURTH AMENDMENT

expectation of considering relevant data and studies, courts may adopt a more methodical approach to considering data, rather than using data only when it supports their view on an issue.

Another concern with using scientific data is the potential problem of conflicting statistical evidence. This data cannot be tested, is not subject to the rules of evidence, and its methodology is not subject to cross-examination. In addition, courts may misinterpret data, give the data certitude greater than it merits, or twist data to support an outcome it desires in a case. Additional concerns may include the propriety of judges and parties deferring to social scientists, rather than basing decisions strictly on the law. Even if parties assist in gathering data, some facts are not easily discovered through litigation and require more significant fact-finding.

Overall, a concern is that courts may be institutionally ill-suited to appropriately use the information necessary to balance in constitutional cases. This next part discusses how the Supreme Court fares with considering data.

2. Supreme Court Use of Data

In light—or in spite—of these potential issues with consideration of data, courts, particularly in balancing, have overwhelmingly rejected the importance of data and empirical studies in favor of “commonsense judgments.”

The Supreme Court in particular often rejects consideration of data and instead relies on common sense. For instance, in Illinois v. Wardlow, the Supreme Court determined that an officer had reasonable suspicion to stop an individual in a high crime area who fled from the police.

Overall, a concern is that courts may be institutionally ill-suited to appropriately use the information necessary to balance in constitutional cases. This next part discusses how the Supreme Court fares with considering data.

186 See, e.g., Lawrence B. Lindsey, Detecting Discrimination by the Number, 14 ANN. REV. BANKING L. 177, 183 (1995) (stating “what will the judicial process do when confronted with batteries of opposing statisticians and economists?”); and Henry, supra note 10, at 415 (arguing that data’s “complexity makes it incomprehensible to most participants in the trial process”).
187 Miller & Barron, supra note 180, at 1202.
188 Id.; see also supra note 182.
189 Id. at 1212–13 (“The difficulty with Blackmun’s opinion [in Roe v. Wade] is that he states conclusions about medicine with a certitude the data does not support.”).
191 Id. at 114.
192 It is not suggested here that empirical data should be required in every standard criminal procedure case but if it became more of an expectation then parties would be more likely to cultivate this kind of data. Though in some cases, significant fact finding is required, like in United States v. Defreitas, 701 F. Supp. 2d 297, 306 (E.D.N.Y. 2010) and In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157, 172–73 (2d Cir. 2008), the question before the court is whether there is a national security threat that warrants a search, and there is an entire agency (Department of Homeland Security) devoted to resolving these difficult questions.
193 See, e.g., United States v. Cortez, 449 U.S. 411, 418 (1981) (“Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.”); Smith v. Illinois, 469 U.S. 91, 104 (1984) (“Common sense suggests that the police should both complete reading petitioner his rights and then ask him to state clearly what he elects to do, even if he indicated a tentative desire while he was being informed of his rights.”).
195 Id. at 124.
do not have to consider “available empirical studies dealing with inferences drawn from suspicious behavior” and “we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists.”

Thus, the Court’s decision must be based on “commonsense judgments and inferences about human behavior.”

As such, the majority was satisfied to rely on the hypothetical or common sense assessment that fleeing in a high crime area is suspicious, rather than on evidence that may exist on this issue. The dissent came to the opposite conclusion, countering that unprovoked flight is normal in a high crime area. It relied on evidence supporting the reasonableness of flight in these areas, due to crime concerns. The dissent responded to the majority in pointing out that if the Court does not require “scientific certainty” for the conclusion that unprovoked flight can be suspicious at times, then it should not require scientific uncertainty to show that unprovoked flight can occur for “innocent reasons.”

It seems that both sides of the Court in Wardlow acknowledge the potential relevance of data to demonstrate violations or lack of violations of constitutional rights. But neither side is willing to abdicate “commonsense” judgments in favor of scientific certainty in the issues before them. Wardlow does demonstrate that the modern Court is confronted with data and sometimes applies it in constitutional analysis. And while scientific certainty should not be expected from judges, using relevant data as a part of a constitutional balance allows an analysis to be grounded in real issues rather than hypothetical concerns.

The use of data demonstrates that sometimes courts deny individual rights based on threats that are marginal, but persuasive to the Court without a proper consideration of data. The Court’s decision in Michigan Department of State Police v. Sitz provides a useful example of an improper application of data. In evaluating the effectiveness of the state’s sobriety checkpoints, the Court considered its 1.6% success rate, and concluded that it was sufficient to justify the corresponding intrusion on individual privacy. In dissent, Justice Stevens criticized the Court for failing to evaluate the program’s effectiveness, arguing that “the net effect of . . . checkpoints on traffic safety is infinitesimal and possibly negative.” In considering a Maryland program upon which Michigan’s was patterned, he noted a success rate of 0.3% over several years, resulting in 143 arrests from 125 different checkpoints. Even assuming that the 143 arrests

196 Id. at 124–25.
197 Id. at 125.
198 Id. at 132–33 (Stevens, J., dissenting).
199 Id. at 133–34.
200 Id. at 135.
201 But see Winston v. Lee, 470 U.S. 753, 765–66 (1985) (analyzing the evidentiary value of the bullet in terms of its marginal probative effect in light of the considerable evidence already obtained). Tribe criticizes the court’s use of marginal analysis for permitting the court to overturn longstanding constitutional principles, arguing that because these decisions affect who we ought to be as a nation, cost-benefit analysis and utility maximization are ill-suited to the task. Tribe, supra note 24, at 611–14.
203 Id. at 454–55 (two arrests for drunk driving out of 126 stops).
204 Id. at 469 (Stevens, J., dissenting).
205 Id. at 460.
206 Id. at 461.
represented a net increase in the number of drunken driving arrests annually, he argued them to be insignificant compared to the 71,000 arrests made without checkpoints by Michigan police in one year. More troubling, there was no evidence to show that the number of drunken driving arrests would not have been higher if police resources had been used in conventional methods. In fact, Maryland’s own studies questioned the effectiveness of their checkpoints in reducing fatal accidents. Justice Stevens’ use of empirical data demonstrates that the failure of considering broader data that impacts the case at hand may lead the Court to inappropriately evaluate the government’s interest. Without a consideration of data on the effectiveness of checkpoints for reducing drunk driving, it was impossible for the Court to appropriately balance the privacy rights of individuals and the government.

This type of debate among the Justices over data is not unique to Sitz, and was also recently at play in Florence. Indeed, Justice Breyer, considering the empirical effectiveness of strip searches pointed out that such searches only revealed one instance of contraband in 23,000 suspicionless searches in a similar facility. This data, while not determinative, demonstrates that the importance of the government interest may be less than what is initially perceived by Justices. In other words, common sense may dictate that many inmates try to smuggle contraband into jails, but the data shows that this is not necessarily the case. This demonstrates that the consideration of data allows a fuller understanding of the context in which constitutional rights operate. This fuller understanding has the potential to allow broader protections of privacy rights for society.

Despite the importance of data in informed balancing, the Court is often unpersuaded even by relevant data in its consideration of constitutional rights. The Court’s decision in Maryland v. Wilson provides another example of this difficulty. In holding that an officer may order passengers of a stopped vehicle to exit, the Court placed great weight on data that showed 5,762 officer assaults

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207 Id.
208 Id. at 469–70.
209 Id. at 462 (Stevens, J., dissenting) (“Maryland had conducted a study comparing traffic statistics between a county using checkpoints and a control county. The results of the study showed that alcohol-related accidents in the checkpoint county decreased by 10%, whereas the control county saw an 11% decrease; and while fatal accidents in the control county fell from sixteen to three, fatal accidents in the checkpoint county actually doubled from the prior year.”) (citation omitted).
210 The Court’s analysis in Florence v. Board of Chosen Freeholders, 132 S. Ct. 1510 (2012) highlights this problem yet again. The Court was concerned that requiring reasonable suspicion before effecting a strip search would impose too great a burden on the administration of prisons and permit dangerous contraband to enter correctional facilities. Id. at 1521–23.
211 Dissenting from that view, Justice Breyer launched an empirical assault. First, he highlighted a study of a correctional facility in Orange County of 23,000 strip searches that showed that the searches uncovered contraband in only five cases. Id. at 1528 (Breyer, J., dissenting). However, in four of the incidents, there may have been reasonable suspicion, meaning that suspicionless searches revealed only one instance of contraband in 23,000 searches. Id. Data from another facility showed that out of 75,000 searches, there were 16 instances of contraband being found. Id. at 1528–29. However, thirteen of those would have been detected with pat downs and outer-clothing searches and the remaining three instances involved cases where there would have been reasonable suspicion to do the search. Id. at 1529. In effect, there is no data to support the conclusion that requiring reasonable suspicion would increase contraband smuggling. Id.
212 519 US 408 (1997).
and 11 officer deaths occurring during traffic pursuits and stops in just one year.\textsuperscript{213} In his dissent, Justice Stevens criticized the Court for giving weight to this data.\textsuperscript{214} He began by pointing out that the data relied on by the Court aggregated police injury and death from both pursuit and stops, even though pursuit is a situation wherein an officer would be unable to order a passenger to exit.\textsuperscript{215} More problematic, the data did not show how many assaults were caused by passengers.\textsuperscript{216} In addition, it did not show how many passenger assaults were caused from inside the car, nor did it hint at how many assaults could be avoided by ordering a passenger out.\textsuperscript{217} After assuming that passengers account for 25% of officer assaults, Justice Stevens argued that the Court’s \textit{per se} rule would likely only provide some advantage in about 1/20,000 stops.\textsuperscript{218} Since police would likely have reasonable suspicion to order passengers out in truly dangerous situations, Justice Stevens concludes that this tiny benefit cannot justify the intrusion it imposes on passengers.\textsuperscript{219} However, ultimately, the Court was not convinced with Justice Stevens’s analysis of data that placed the risk of harm into broader perspective.

The Supreme Court is often willing to base decisions on assumptions that lack data to support them, even when purportedly weighing the factors on both sides.\textsuperscript{220} The Court frequently engages in balancing without any empirical support to back its reasoning.\textsuperscript{221} Justice Stevens criticized the Court in \textit{Montejo v. Louisiana} for assuming that an alternative ruling imposed high costs to government, finding its conclusion in light of the fact that “several \textit{amici} with interest in law enforcement have conceded that the application of [the alternate rule] rarely impedes prosecution.”\textsuperscript{222} Likewise, in \textit{Hiibel v. Sixth Judicial District Court of Nevada}, Justice Breyer was troubled by the fact that the Court provided no evidence to show that allowing individuals to refuse to disclose their identity had interfered with law enforcement.\textsuperscript{223} And finally, in \textit{Illinois v. Wardlow}, in response to the Court’s complaints regarding the lack of empirical data to aid in the interpretation of suspicious behavior,\textsuperscript{224} Justice Stevens provided statistics on

\textsuperscript{213}Maryland v. Wilson, 519 U.S. 408, 413 (1997).
\textsuperscript{214}Id. at 416 (Stevens, J., dissenting).
\textsuperscript{215}Id. at 418 n.4.
\textsuperscript{216}Id. at 416.
\textsuperscript{217}Id. at 416–17.
\textsuperscript{218}Id. at 418.
\textsuperscript{219}Id. at 420.
\textsuperscript{220}Tribe attacks cost-benefit analysis as merely providing a front for the court to make decisions based on unstated principles. Tribe, \textit{supra} note 24, at 608–09. Easterbrook, however, contends that forcing the court to explain itself is a useful aspect of cost-benefit analysis. Easterbrook, \textit{supra} note 184, at 626.
\textsuperscript{222}Montejo, 556 U.S. at 808 n.3 (Stevens, J., dissenting).
\textsuperscript{223}Hiibel, 542 U.S. at 199 (Breyers, J., dissenting).
bystander victimization, police brutality of minorities, stop to arrest ratios, racial bias, and minority motorist treatment that he argued should have guided the Court. The rest of the Court was not persuaded by this data, and has displayed a tendency not to be persuaded by data, even if pertinent to the decision at hand. While the Supreme Court has not systematically relied on data or evidence in its decisions, the next section describes the potential benefits of such information.

3. Additional Data May Matter

In some situations where judges balance, broader data could create more informed decisions. More informed decisions reduce the risk of blind balancing that is prevalent in Fourth Amendment cases. For instance, in Terry stop-and-frisk cases, police often frisk individuals based on the fact that the suspect has allegedly committed a crime associated with carrying a weapon or is armed and dangerous. In applying these standards, courts often hold that protective frisks are permissible to ensure officer safety when the officer has reasonable suspicion that the crime committed involved or is associated with a weapon. Though in determining what is reasonable, many courts deem a frisk to always be “reasonable” because the nature of the crime “suggest[s] the presence” of a weapon. Crimes where frisks have been deemed reasonable, regardless of circumstance, include burglary, drug crimes, bank fraud, aggravated assault, and car theft. In some of these crimes, data exists to show how often a weapon is statistically used during the crime. For instance, around 30% of

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225 Id. at 131–33 nn.6–10 (Stevens, J., dissenting).
226 See, e.g., United States v. Bustos-Torres, 396 F.3d 935, 943 (8th Cir. 2005) (“Because weapons and violence are frequently associated with drug transactions, it is reasonable for an officer to believe that a person may be armed and dangerous when the person is suspected of being involved in a drug transaction.”); United States v. Johnson, 364 F.3d 1185, 1194–95 (10th Cir. 2004) (upholding a Terry stop where the defendant was suspected of involvement with “drug dealing, kidnapping, or prostitution” which “are typically associated with some sort of weapon, often guns.”). But see T.P. v. State, 585 So.2d 1020, 1022 (Fla. Dist. Ct. App. 1991) (noting that “[g]eneral ‘safety concerns’ of an officer involved in an investigative stop will not justify the frisk of a citizen even where the suspected crime is associated with weapons.”).
227 United States v. Barnett, 505 F.3d 637, 640 (7th Cir. 2007).
228 Id.; United States v. Moore, 817 F.2d 1105, 1108 (4th Cir. 1987) (reasonable for officer responding to burglar alarm to stop and frisk suspect).
229 See, e.g., United States v. Lopez, 441 Fed. Appx. 910, 914–915 (2011) (unpublished) (holding that “it was reasonable for the officers to believe that the suspect may have been armed and dangerous” where the defendants “conducted a car-switch transaction . . . which often involve large amounts of drugs and armed participants.”); United States v. Blackshear, 2011 WL 5129952, *7 (holding that officers’ “examination of the Jeep for safety reasons was justified” because they “had reason to believe that Defendants were engaged in a narcotics transaction and that such transactions are frequently associated with guns.”).
230 United States v. Edwards, 53 F.3d 616, 618 (3d Cir. 1995) (holding that a frisk was reasonable where “fraud occurred at a bank in broad daylight” and thus “the perpetrators might have armed themselves to facilitate their escape if confronted.”).
231 Trice v. United States, 849 A.2d 1002, 1005–06 (D.C. 2004) (frisk in stabbing case; where “officer has a reasonable articulable suspicion of a crime of violence, or that the person lawfully stopped may be armed and dangerous, then a limited frisk for weapons is likewise permissible and may be ‘immediate and automatic.’”) (quoting Terry v. Ohio, 392 U.S. 1, 33, (Harlan, J., concurring)).
232 United States v. Bullock, 510 F.3d 342, 347 (D.C. Cir. 2007) (holding that because the driver could not produce registration information and could not identify owner, the police officer had reasonable suspicion that he had stolen the car and “car theft is a crime that often involves the use of weapons and other instruments of assault that could jeopardize police officer safety, and thus justify[d] a protective frisk”).
officer assaults simply involved using the body as a weapon). A 238 carjackings, handheld firearms are the weapons of choice.”). Of carjacking suspects in Savannah used weapons); Wing, Analysis of Police Records In a Southeastern City http://bjs.ojp.usdoj.gov/content/pub/pdf/c02.pdf; Michael E. Donahue et al., 236 (ranging from 27.6% of crack cocaine cases to 7.8% of marijuana cases in federal court).

Table 18 (Sep. 2010), 235 in 31 percent of all murders, robberies, and assaults i http://bjs.ojp.usdoj.gov/content/pub/pdf/cv08.pdf; F. Georgann Wing, 234 Putting the Brakes on Carjacking or Accelerating It? The Anti-Car Theft Act of 1992, 28 U. RICH. L. REV. 385, 390 n.33 (1994) (“Firearms were used in 31 percent of all murders, robberies, and assaults in 1991.”).


236 UNITED STATES SENTENCING COMMISSION, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2010, at 7 (July 2012), available at http://www.uscc.gov/Research/Research_Publications/2012/FY10_Overview_Federal_Criminal_Cases.pdf (ranging from 27.6% of crack cocaine cases to 7.8% of marijuana cases in federal court).

237 These statistics are not even gathered by the FBI.

Supreme Courts’ rejection of data in many cases is appropriate. As such, the next section explores the role of information in judicial decisions and how it may mitigate the fundamental flaw—and bias in favor of the government—that diminishes privacy rights under the Fourth Amendment.

B. Informed Balancing

A fundamental problem in Fourth Amendment balancing is that judges know whether the defendant had contraband before determining whether the search was constitutional. This information has a tendency to sway the court to favor the government the majority of the time. To offset this natural bias in Fourth Amendment decisionmaking, the rights of innocent members of society must be taken into account with a more informed balance. When judges take a broader view of Fourth Amendment privacy rights, consider evidence of potential racial targeting, or realize that such searches may not be reasonable given statistical information, they may be more likely to invalidate the search. This broader view achieves the goal of improving societal welfare as a whole, which is the reason balancing became an important judicial tool for constitutional violations. The next two sections discuss the role that information has played in Fourth Amendment decisions as well as how it may mitigate the existing flaws through informed balancing.

1. The Role of Information

Without additional information on societal interests, a Fourth Amendment balance places great emphasis on a defendant’s criminal wrongdoing. A core problem with Fourth Amendment balancing is that without additional information, it is difficult for judges to determine what society’s expectations of privacy are, and thus they either rely on common sense, or defer to the executive branch. The central question in determining an individual’s privacy rights is whether society would have an expectation of privacy in a certain act or place. Judges usually rely on their own experience and background in determining what is reasonable to expect in terms of privacy. Without gathering additional facts and relevant experience or data, it is difficult for courts to provide an informed opinion on an issue. This problem is evidenced in Fourth Amendment cases discussed above where the Court defers to prison officials in determining whether strip

239 See Loewy, supra note 6.
240 See, e.g., Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 633 (1989) (holding that a railroad could require its employees to take drug tests because such testing was “not an undue infringement on the justifiable expectations of privacy”).
241 This phenomenon is partially described by Anthony O’Rourke in claiming that criminal procedure decisionmaking is a type of delegation and judges may choose how much discretion to give to law enforcement in deciding whether to make permissive or restrictive doctrinal rules. See Anthony O’Rourke, Structural Overdelegation in Criminal Procedure, 103 J. CRIM. L. & CRIMINOLOGY (forthcoming 2013).
searches are necessary\textsuperscript{242} and whether procedures pose a threat to prison safety,\textsuperscript{243} and defers to police on whether road checkpoints are necessary for police work.\textsuperscript{244}

Judicial balancing aims to weigh protecting individual rights with improving societal welfare.\textsuperscript{245} Many courts have asserted that, after considering the law, of course, common sense is the best way to determine these rights.\textsuperscript{246} However, with the increasing availability of data and scientific advances that provide relevant information in deciding the relative importance of rights on both sides, it may be time to consider additional outside data.\textsuperscript{247} It may never become the goal to reach scientific certainty in judicial decisions, but it is unlikely that that we will approach that extreme anytime soon. Indeed, judicial balancing may benefit from improved information. And parties may play an even more important role in educating courts with pertinent evidence and data supporting the issues they litigate. With increased information providing judges improved perspective, litigants are not left to trust the whims of common sense. If the Court is expected to consider reliable information in addition to common sense, the quality of this information may also improve, which could improve rights of defendants.

Even if the Court acknowledges the importance of data analysis in its decisions, it is unclear in what circumstances it will be relevant and whether the Court can even be compelled to consider it. A relevant question here is whether there are any constitutional implications of considering public data with respect to the application of constitutional law to an individual. For instance, an officer is permitted to stop and frisk an individual on the street if the officer reasonably believes that the individual is armed and dangerous. This lower standard of scrutiny under the Fourth Amendment is justified due to concerns for officer safety. To determine whether a frisk is proper, the court can rely on testimony from the government and defendant about the particular circumstances in a given stop. An officer can testify that she was in a particularly high crime neighborhood and that the defendant appeared to have a weapon in his backpack. The defendant can testify that he was on his way home from school with friends and made no

\textsuperscript{242} Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1513–14 (2012) ("In addressing this type of constitutional claim courts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security.").

\textsuperscript{243} Hudson v. Palmer, 468 U.S. 517, 530 (1984) (holding that a prisoner has no reasonable expectation of privacy to protect his cell from searches conducted randomly as prison officials see fit).

\textsuperscript{244} Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 454 (1990) (noting that "the choice among . . . reasonable alternatives [for apprehending intoxicated drivers] remains with the governmental officials . . . including . . . police officers"); United States v. William, 603 F.3d 66, 69–70 (1st Cir. 2010) (noting that "whether and where to establish a stop is primarily a judgment for state or local officials"); Brouhard v. Lee, 125 F.3d 656, 660 (8th Cir. 1997) ("Choices between reasonable law enforcement techniques are properly left to politically accountable officials, not the courts.").

\textsuperscript{245} See Youngberg v. Romeo, 457 U.S. 307, 320 (1982) (in determining whether a substantive right protected by the due process clause has been violated, it is necessary to balance “the liberty of the individual” and “the demands of an organized society.”). See supra Part II.A.

\textsuperscript{246} See, e.g., Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) ("Courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.").

\textsuperscript{247} See Allison Orr Larson, Confronting Supreme Court Fact Finding, 98 VA. L. REV. (forthcoming 2013) (discussing the increasing reliance of the court on extra-record information, including legislative facts).
threatening motions towards anyone. What if there was evidence, though, that police in this jurisdiction performed an excessive number of stop-and-frisks on young people? And in only 1% of stop-and-frisks in this particular locale was a defendant armed?\textsuperscript{248} What if 80% of these stop-and-frisks were targeted at minority defendants, even where the population was predominantly white?\textsuperscript{249} Should these questions be relevant in this constitutional consideration? And if data on these issues exists, should the court be compelled to consider it in determining whether the Fourth Amendment was violated? These questions are at the heart of determining what factors a judicial balance should consider.\textsuperscript{250}

With informed balancing, considering information about the big picture of stop-and-frisk and the relevance of broad data about such intrusions would be relevant in examining the government’s interest in officer safety. A claim of officer safety in frisking a young black male walking home from school is placed in perspective when the court considers the volume of such frisks, how seldom weapons are found, and the fact that an overwhelming number are targeted at minorities. Yet, courts are willing to ignore such informative data in favor of a judge’s gut sense of a case or officers’ testimony about anecdotal experiences in particular neighborhoods. In considering the issue of whether outside data is relevant to judicial decisions, it is important to consider that outside information does play a major role in constitutional determinations. But currently, anecdotal information and judicial common sense are given priority over clinical evidence, statistical data, and best practices.

Most Fourth Amendment cases balance the need for effective law enforcement against an individual’s reasonable expectation of privacy.\textsuperscript{251} This is the stated concern that dominates more than half of Fourth Amendment cases and influences the cases coming out in favor of the government. And the other large portion of cases focuses on public safety and officer safety. Effective law enforcement practices and public safety risks are matters that are easily measured with data.\textsuperscript{252} In fact, many police stations in the country have moved to a model of evidence-based policing and track most of their actions, including searches, crimes

\textsuperscript{248}These facts are not far from the currently litigated case, Floyd v. City of New York, 82 Fed. R. Serv. 3d 833 (S.D.N.Y. 2012) (detailing that only one person in sixty-nine stops conducted by NYPD between 2004 and 2009 actually had possession of a gun.).

\textsuperscript{249}See, e.g., Fagan Report, supra note 13, at 20 (in New York City, over 81.52% of suspects stopped between 2004 and 2009 were Black, and only slightly more than 10% were White.).


\textsuperscript{251}See supra note 74; Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1513–14 (2012) (balancing the need of officers to prevent gang violence and prisoners’ right to privacy by allowing visual search of a prisoner); Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177 (2004) (balancing the utility of providing officers with useful information against an individual’s right to privacy in disclosing his or her identity).

\textsuperscript{252}ROBERT C. DAVIS, RAND CENTER ON QUALITY POLICING, SELECTED INTERNATIONAL BEST PRACTICES IN POLICE PERFORMANCE MANAGEMENT 13 (2012) (arguing that modern technological advances now enable police departments to release performance data which may have previously been cost-prohibitive).
REBALANCING THE FOURTH AMENDMENT

reported and apprehended, and other safety risks to the public.\textsuperscript{253} Certainly, officer safety is critical to Fourth Amendment considerations, but the only way to perform a proper balance in these cases is if there is an accurate picture of the interests of the government, which is provided by a review of evidence in each case. Otherwise, common sense dictates that government interests, particularly officer safety, will always outweigh an individual’s right to privacy.

These changes may not necessarily change the result in Fourth Amendment cases from the government winning eighty percent of Fourth Amendment cases and defendants only winning twenty percent. Indeed, I make no normative statement on where the proper calibration of this scale falls. The important thing is that the process that is used is based on evidence, not speculation or common sense. Without evidence to put safety concerns into proper perspective, courts will be unable to make fair determinations in these cases. The next section takes a closer look at creating a more informed Fourth Amendment model that relies less on common sense and more on data.

2. An Informed Balance

Informed balancing involves relying on the best available data and a consideration of costs in making individual decisions in legal cases. It is parallel to evidence-based practice that is the norm in other fields such as medicine and business, but adds the additional public policy considerations relevant to analyzing the law.\textsuperscript{254} While evidence-based practice currently dominates medicine,\textsuperscript{255} historically there was resistance to it because doctors did not want to lose their discretion and their ability to use common sense.\textsuperscript{256} There is similar resistance in the legal world to relying more on data than intuition. To gain perspective on how judicial decisions are made versus medical ones, an example is appropriate. If a man is charged with drug possession, he will be brought before a judge. The judge may simply look at the crime with which he is charged and determine based on

\textsuperscript{253} LAWRENCE W. SHERMAN, POLICE FOUNDATION, IDEAS IN AMERICAN POLICING: EVIDENCE-BASED POLICING 4–5 (1998) (explaining that evidence-based policing includes data-intensive performance tracking to feed results back to researchers who then further refine policing guidelines); Jim Bueermann, Being Smart on Crime With Evidence-based Policing, 269 NAT’L INST. JUST. J. 14, 14 (2012), available at https://www.ncjrs.gov/pdffiles1/nij/237723.pdf (listing a number of police stations that have incorporated evidence-based policing techniques).

\textsuperscript{254} Jeffrey J. Rachlinski, Evidence-Based Law, 96 CORNELL L. REV. 901, 922 (2011) (medicine and business have similar challenges and goals, but cultural commitments like the public policy issues of the death penalty and tort reform “have a much more superficial influence on these fields.” On the other hand, public policy has more influence on the empirical analysis of law because law “is a form of politics” and “is really about governing society.”).

\textsuperscript{255} For examples of critiques of evidence-based practice in medicine, see Gary Taubes, Looking for the Evidence in Medicine, 272 SCI. 21, 22 (1996) (a criticism to evidence-based medicine is that “medicine can’t always be done by cookbook”-based, good clinical practice will involve “elements of inference and judgment leavened by experience.” Evidence-based medicine is helping doctors “do what they have always done: assess the available evidence.”).

\textsuperscript{256} Gordan Guyatt et al., Evidence-Based Medicine: A New Approach to Teaching the Practice of Medicine, 268 JAMA 2420, 2421, 2423 (1992) (noting that a profusion of published articles, textbooks, and seminars describing methodological advances in clinical practice is manifestation of a new paradigm shift in medical practice called evidence-based medicine which recognizes the limitations of relying on “intuition, experience, and understanding” in making strong inferences in clinical practice).
that crime whether he should be released or detained before his trial. In some jurisdictions where resources allow, the judge will conduct a risk assessment that will also consider family history, ties to the community, whether the individual has a job or a family, and other factors that may weigh in this consideration of whether to release the man. But the judge will ask the primary question: is this person safe to release to the public or is he dangerous? The answer the judge comes to is based on unknown factors and varies by the judge. Some judges will rely on their own experience of what has worked with defendants in the past. Some judges rely on common sense, which results in a different decision for every judge.²⁵⁷ A few may be familiar with the empirical studies nationally, or the norm in their jurisdiction, and consider these in their decision. Many will not consider the age of the defendant even though this information has been shown to be extremely predictive of whether the defendant is likely to fail to appear or commit another crime while released before trial. Even less consider the costs to the county or city of detaining this individual,²⁵⁸ the costs to society of such an individual’s loss of income,²⁵⁹ or future collateral consequences.²⁶⁰ This balance will lead to disparate release choices by judges all over the country.

But compare now an emergency medicine doctor who admits a drug patient who has overdosed on heroin. In deciding how to treat the patient, the medical literature seems to indicate that the doctor follow a treatment plan based on the evidence, which in this case currently shows that treatment with naloxone is the best course.²⁶¹ Doctors rely on evidence that includes patients of all ages, genders, and races and that shows the treatment outcome that is best for all of those individuals. While a doctor can and certainly should examine the particular patient and create a custom treatment plan for the individual, relying on her experience with such cases, she is also required to consider the relevant information on this issue, established by scientific study and data. Interestingly, evidence-based practice was not always accepted in medicine and there was serious opposition to it at first in favor of relying on individual experience.²⁶² Doctors are not permitted,

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²⁵⁷ See, e.g., Illinois v. Gates, 462 U.S. 213, 230 (1983) (discussing the decision before a magistrate in determining whether there is a “probable cause that a crime will occur as a ‘common sense, practical question’”).
²⁵⁸ See Rucker Johnson & Steven Raphael, How Much Crime Reduction Does the Marginal Prisoner Buy?, 55 J.L. & ECON. 275, 277 (2012) (analyzing the effect that incarceration has on crime rates, and finding that “recent increases in incarceration rates have generated much less value for investment in terms of crime rate reduction”).
²⁶¹ Vilke GM, Buchanan J, Dunford JV & Chan TC, Are Heroin Overdose Deaths Related to Patient Release after Prehospital Treatment with Naloxone?, 3 PREHOSP. EMERGENCY CARE 183 (1999); David A. Wampler et al., No Deaths Associated with Patient Refusal of Transport After Naloxone-Reversed Opioid Overdose, 15 PREHOSP. EMERGENCY CARE 320, 320–21 (2011) (explaining that naloxone is a pure opioid antagonist used for direct reversal of the effect of opioid overdose).
²⁶² See, e.g., STEFAN TIMMERMANS & MARC BERG, THE GOLD STANDARD: THE CHALLENGE OF EVIDENCE-BASED MEDICINE AND STANDARDIZATION IN HEALTH CARE 142 (2003) (identifying critics’ arguments against evidence-base medicine to include the dehumanization of health care by reducing practitioners to rule-followers preoccupied with legalities rather than holistic patient care).
when there is clear evidence to the contrary for most individuals, to follow their own course with a particular patient based on common sense or a gut feeling. It seems silly to discuss granting this sort of discretion to doctors in treating medical emergencies, but we grant this type of discretion to every judge in the country in determining the fate of criminal defendants in pretrial release, in sentencing, and in constitutional balancing of rights. Judges are not held to a standard that requires consideration of the best evidence on the particular issue with which they are confronted. Granted, judges are generalists and not experts in a particular field like doctors,263 however, it is still possible to further guide them in their decisions by outlining accurately the risks and considerations to make based on broader evidence about groups of defendants.

The burden of obtaining evidence to support government interests will fall on the government. Thus, it starts with police. Police must collect evidence (as they typically do) to justify intrusions on the privacy of citizens. Both parties and judges have an obligation and interest in relying on this data under an informed balancing model. Courts may not have been institutionally well-suited to gather the evidence necessary (though evidence demonstrates that they are now much better suited with internet advances),264 but they can expect broader data from parties. For instance, courts may allow frisks of individuals with particular characteristics, like looking shifty, sweating, and wearing black leather gloves, based on common sense that these individuals may have committed or are about to commit a crime. However, if that happens in only one in a million cases, these frisks would probably be unreasonable. But the court can only rely on its discretion unless parties provide this broader information to inform the balance.265 Judges then are expected to rely on relevant data as their role changes from common sense decisionmakers to evidence-based decisionmakers, and they retain their discretion but are held to a higher and more objective standard. A more informed balance by judges may not rid judges from any cognitive biases that they may hold,266 but studies show that informing judges with relevant information and data may change outcomes in certain cases.267 But at the very least, it should make

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263 Matthew D. Alder & Eric A. Posner, New Foundations of Cost-Benefit Analysis 1 (2006) (noting also that judges historically, as they are now, were generalists that depended on expert testimony and that the judicial system was decentralized).
264 Allison Orr Larsen, Confronting Supreme Court Fact Finding, 98 VA. L. REV. 1255, 1262 (2012) (“[I]n the last decade or so, questions of legislative fact are being researched ‘in house’—that is without reliance on the parties or amici—at an astonishing rate. While surely some in house research by the Justices and their staff has always occurred, the internet makes it easier and faster and more convenient.”).
265 This presupposes that such evidence exists in such cases, and of course in some Fourth Amendment cases there may not be any such relevant evidence. The evidence presented by each of the parties may be biased, but if both parties present data a more accurate picture should prevail.
267 See Teneille R. Brown, Jim Tabery & Lisa Aspinwall, The Double-Edged Sword: Does Biomechanism Increase or Decrease Judges’ Sentencing of Psychopaths?, 337 SCI. 846, 846–49 (2012) (this article examines the impact and influence biomechanism of a psychopath has on judges’ perception and sentencing of an accused suspect. Results from the study suggest that judges were inclined to view the characteristics of the psychopath biomechanism provided as mitigating and not aggravating factors in terms of liability for the crime. Where a
them more accountable to explain the evidence with which they are confronted and ultimately make them less likely to settle on decisions based on hypothetical speculation or common sense. Thus, informed balancing has the potential to improve the information on both sides, and possibly create an expectation that judges rely less on common sense or hypotheticals in determining constitutional rights. Thereby also increasing the predictability of how a balancing test will come out.

Aside from the lack of judges’ expertise, there are certainly other reasons to hesitate in considering evidence and costs in a determination of an individual’s constitutional rights. The next section discusses the main critiques of informed balancing.

C. Critiques of Informed Balancing

If informed balancing is a viable approach to judicial decisionmaking, three major critiques must be addressed. First, and most importantly, a judge’s role is not to consider public policy, and it is imprudent and possibly immoral for judges to consider costs and evidence as they are ill-equipped to make such determinations. Second, informed balancing may not appropriately evaluate risk any better than ordinary balancing, or be any better at preventing crime. Finally, judges lack skill in considering specialized information and so considering it may infuse bias in decisions.

1. Judicial Role and Morality

One major obstacle to judges considering outside information in determining rights is that a judge’s role is to decide discrete individual cases, not public policy. Indeed, the argument is that judges are to consider a petitioner’s claims separate from others or from the concerns of a broader society as it is the legislator’s prerogative to make public policy. But the assumption that decisions about constitutional rights, sentencing, and release are based solely on an individual’s case without reference to others is false. Indeed, the focus in constitutional protection in the criminal arena has been nominally focused on individual punishment or individual welfare (of the victim), but in actuality it is focused on overall societal welfare. As demonstrated above, the realities of decisionmaking today include balancing of all rights implicating society. For

suspect’s biomechaisim is viewed as a mitigating factor, judges reduced the suspect's criminal liability and consequently reduced the sanctions imposed on the suspect). 268 Republican Party of Minn. v. White, 536 U.S. 765, 803–804 (2002) (Ginsberg, J., dissenting) (“Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide “individual cases and controversies” on individual records.”).

instance, in constitutional rights, courts often consider the impact on public safety and government legitimacy, and consider other community factors and expectations in making decisions. However, this lack of acknowledgement of what courts are actually doing has led to a focus on societal welfare without a consideration of a full panoply of information. And it has led to less informed decisions by judges. Judges often consider the individual situation, and then consider the impact of a potential ruling from the current case on future cases, by relying on common sense or speculation and not considering all of the relevant data involved. By considering the factors with fuller information, including potential costs and the best evidence available, courts will be able to more accurately measure and reflect societal welfare in their decisions.

Of course, some policies that substantially advance fairness and equality would unambiguously fail a cost-benefit analysis and fail to garner adequate evidence, but that does not mean these goals are unworthy of society’s attention. Indeed, this methodology, according to critics, may exclude abstract values like fairness and equality, and may attempt to quantify concepts that cannot morally be valued, human life being the most prominent example. The result, according to some critics, creates an implicit bias towards conservative and libertarian policy preferences, ignoring unquantifiable values like liberty and equality. However, conducting an analysis of costs and evidence does not tie the hands of judges—judges must still consider constitutional rights and take fairness into account to justify policies that may not necessarily offer the highest net benefit.

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271 See, e.g., Gall v. United States, 552 U.S. 38, 57 (2007) (considering whether defendant will be a danger to society in determining sentencing); Skipper v. South Carolina, 476 U.S. 1, 5 (1986) (considering future danger to the community as a factor in sentencing).
273 United States v. Salerno, 481 U.S. 739, 754 (1987) (allowing detention pretrial where arrestees are deemed to “pose a threat to the safety of individuals or to the community which no condition of release can dispel”).
274 A similar critique is that it is not morally appropriate to consider costs when determining the fate of an individual defendant. Critics in other contexts have charged that considering costs excludes abstract values from consideration that, while difficult to quantify, are of fundamental importance to organizing a just society. Alder and Posner name just a few, including that cost-benefit analysis “discounts important values” such as the “claims of poor people and future generations and neglects concerns about rights.” ALDER & POSNER, supra note 260, at 4. However, there may not be much of a difference between balancing costs and benefits of a certain decision with or without monetary value. LISA HEINZERLING & FRANK ACKERMAN, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 165–66 (2004), or relevant data.
275 See JACK M. BEERMAN, ADMINISTRATIVE LAW: WHAT MATTERS AND WHY 167 (2011); CASS SUNSTEIN, RISK AND REASON 124–26 (2002); Vining & Weimer, supra note 197, at 1–2.
276 Broadly speaking, liberal policy makers tend to focus on fairness and equality while conservative/libertarian policy makers focus on economic efficiency. JONATHAN HAIJD, THE RIGHTEOUS MIND, WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2012) (arguing that liberals relate fairness to equality while conservatives identify fairness with economic proportionality, i.e., you reap what you sow).
277 Shepley W. Orr, Values, Preferences, and the Citizen-Consumer Distinction in Cost-Benefit Analysis, 6 POL. PHIL. & ECON. 107, 115 (2007) (contending that cost analyses seek for “efficient outcomes [that] may be unjust or morally undesirable”).
While officially the judicial role is one where judges consider individual rights alone, balancing in most cases involves a broader consideration of societal welfare. Thus, considering costs and evidence in judicial determinations does not violate the prescribed role of judges but only provides the potential to help judges make more informed decisions on how society is affected, while still protecting valuable individual rights.

2. Evaluating Risk and Preventing Crime

Informed balancing may help overcome inappropriate evaluations of risk that occur in judicial decisions. Put simply, people tend to overestimate the risk posed by a crime or recent event. Highly publicized events are likely to lead to individuals perceiving great risk for something that is actually low risk. And judges, who even if they are not elected are subject to public opinion, are not immune from the overwhelming influence of public fear. This type of overestimation has crept into pretrial detention decisions, search and seizure, Terry stops, and othercriminal procedure areas particularly in the wake of a defendant being charged with a highly publicized crime. And indeed, balancing is very susceptible to the whims of public opinion. In situations such as this, informed balancing can stem the tide of fear by providing the public with empirical evidence to support a court’s decision and allow these decisions to be made rationally.

In addition, a focus on including and obtaining relevant scientific information may improve efforts at crime prevention. If judges consider the improvement of societal welfare, this may create a shift towards prevention rather than solely on desert. For instance, with sentencing, there is room for judges to rely on empirical data to make evidence-based decisions based on the given risk and predicted harm posed by a particular person or sub-group. More emphasis

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279 Id. at 6–7.
280 Id.
281 Id.; see also id. at 78–79.
282 Fagan Report, supra note 13, at 52–55, 63(concluding that the results from a study of New York City stop and frisk methods “challenge the viability of the current regime for assessing the presence of specific and articulable suspicion in a pedestrian stop” where at least thirty-one percent of all Terry stops were either facially unconstitutional or were lacking sufficient information regarding the stop to make a complete determination of the constitutionality of the stop. Specifically, the high use of “furtive movements” and “high-crime area” by police officers in justifying the legality of the stop “raises doubts that about whether stops based on these factors are valid markers of reasonable and articulable suspicion.”).
283 See SUNSTEIN, supra note 271, at 6–7, 78–79; Andrew E. Taslitz, Racial Profiling, Terrorism, and Time, 109 PENN ST. L. REV. 1181, 1201 (2005) (proposing that cognitive and social forces make it hard to accurately predict defendants’ risks and the end result is that judges tend to overestimate risks.). See also Chris Guthrie et. al., Blinking on the Bench: How Judges Decide Cases, 93 CORNELL L. REV. 1, 29 (2007) (arguing that judges rely heavily on intuition in judicial decision making that can affect the way a judge views the defendant and the evidence).
285 Id.
286 J.C. Oleson, Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing, 64 SMU L. REV. 1329, 1353 (2011) (noting that "[e]mpirical data can provide judges with essential information about the factors associated with increased risks of future crime; research about these variables can provide a theoretical context for understanding risk."); Michael Marcus, MPC—The Root of the Problem: Just Deserts and Risk
on evidence by judges should also force prosecutors and defense to collect information on broad trends in the sentencing of minority groups, juveniles, and other groups. The focus here would be to determine how to best resolve these cases with the least cost on society, biggest reduction in recidivism, and adequate punishment to serve the demands of justice.287 For instance, if a judge is sentencing a person previously convicted of three drug crimes and charged with a fourth, versus a person charged for the first time with a drug crime, the analysis may be different if the judge considers the likelihood of each of these various individuals recidivating or posing a danger to society, or potential effective punishments or treatments that may treat the underlying problem. And the impacts on public safety can improve as judges are informed about the risks posed by each individual and as they consider these risks in determining a sentence.288

Another added benefit to an informed balance is a targeted standard for determining government interest. Currently, it is unclear whether the standard to judge government interest in Fourth Amendment cases is a national, regional, or local community standard.289 Courts have relied on each of these standards when supporting their arguments.290 When decisions are based solely on balancing and common sense assessments, constitutional decisions do not require a precise level of accuracy. When decisions are based on evidence, parties can hold courts more accountable to dictate a standard and provide relevant evidence in considering public safety concerns within that particular area.

3. Accountability and Bias

A potential concern with informed balancing is that it may not allow accountability for the decisionmaker who can blame data for her decision, which may be rooted in bias. A consideration of costs and evidence may be complex and

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287 Kristin N. Henning, Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform, 98 CORNELL L. REV. 383, 388 (2013) (asserting that prosecutors “track charging decisions according to race and geographic neighborhood” in order to work with the community on how these decisions impact juveniles).

288 Christopher Slobogin & Lauren Brinkley-Rubenstein, Putting Desert In Its Place, 65 STAN. L. REV. 77, 82 (2013) (“Under these hybrid approaches, Joe might receive a sentence somewhere between five and nine years (depending on his individual culpability) or might simply be given a maximum sentence of nine years, with the precise time of release dictated by the risk of reoffending that he poses.”)

289 See Samson v. California, 547 U.S. 843, 855 (2006) (“Petitioner observes that the majority of States and the Federal Government have been able to further similar interests in reducing recidivism and promoting reintegration, despite having systems that permit parolee searches based upon some level of suspicion. Thus, petitioner contends, California's system is constitutionally defective by comparison. Petitioner's reliance on the practices of jurisdictions other than California, however, is misplaced. That some States and the Federal Government require a level of individualized suspicion is of little relevance to our determination whether California's supervisory system is drawn to meet its needs and is reasonable, taking into account a parolee's substantially diminished expectation of privacy.”).

uncertain, \(^{291}\) and may disguise a decisionmaker’s bias from others. Thus, far from limiting arbitrary decisionmaking, evidence-based analysis may provide “a false veneer of scientific analysis that hides contestable value choices and political bias.”\(^{292}\) A decisionmaker may also not have the technical skills to evaluate the results of such an analysis and may overly rely on experts or litigants for interpretation of evidence.\(^{293}\) This may involve value judgments that reflect personal bias, not the will of the people or elected representatives. And its results from a review of evidence may not be determinative.\(^{294}\) There is also the threat of informed decisions becoming standardized across jurisdictions, and removing discretion from judges. This has the potential to remove discretion or individual considerations from decisions which are inherent in Federal Sentencing Guidelines and other standardized tools.\(^{295}\)

Indeed, informed balancing also has the potential to allow courts to abdicate responsibility for choice.\(^{296}\) As Larry Tribe points out, using Roe v. Wade,\(^{297}\) as an example, in Roe, the Court held that a state has a compelling interest in a fetus once it is “viable.” The Court then relied on medical evidence to determine what it means to have a viable fetus.\(^{298}\) As Tribe points out, this is a definition instead of a reason. The Court was able to avoid providing a rationale for its decision by deferring to others’ expertise.\(^{299}\) One cause for alarm is that the Court—by abdicating responsibility—can engage in judicial activism under the guise of evidence.\(^{300}\) Accordingly, courts can use cost-benefit or evidence-based analyses to weigh neutrally issues that have underlying values and then abdicate responsibility for their decision.\(^{301}\) Thus, Courts making constitutional decisions based on evidence have to be wary of keeping foremost their role to apply the law to protect rights, rather than formulaically considering data or costs.\(^{302}\)

\(^{291}\) For example, depending on the methodology employed, researchers have quantified the average social cost of a burglary to be as low as $2,500 and as high as $25,000. Jeffery A. Butts & John K. Roman, Juvenile Crime Interventions, in INVESTING IN THE DISADVANTAGED 105 (David L. Weimer and Aidan R. Vining eds., 2009); see also BEERMAN, supra note 271, at 167 (noting that federal agencies employ different estimates for the value of preserving human life or preventing injury).

\(^{292}\) BEERMAN, supra note 271, at 167; see also STEPHEN BREYER, REGULATION AND ITS REFORM 83-91 (1982) (noting that complex evaluative factors may allow agencies to hide biases behind ostensibly objective selection criteria).

\(^{293}\) SUNSTEIN, supra note 271, at 109–10.

\(^{294}\) In the criminal law context, for example, researchers struggled for years to show that increasing police presence actually decreases crime. The difficulty stems from the fact that municipalities dispatch additional officers in response to increased crime. Teasing out the true relationship between these two factors requires advanced statistical techniques and precinct-level data collected over a long period of time. W. DAVID ALLEN, CRIMINALS AND VICTIMS 21–22 (2011).


\(^{296}\) Tribe, supra note 24, at 168.

\(^{297}\) 410 U.S. 113 (1973).

\(^{298}\) Roe v. Wade, 410 U.S. 113, 163 (1973); Tribe, supra note 24, at 168–69.

\(^{299}\) Tribe, supra note 24, at 169.

\(^{300}\) Id. at 170.

\(^{301}\) Tribe, supra note 24, at 597.

\(^{302}\) Tribe, supra note 24, at 171.
Despite the weaknesses of considering data and costs, ideally, judgments should be made with reference to the best information. 303 The next section provides a few examples about the importance of information in constitutional decisionmaking.

D. The Importance of Information

Too often judicial decisions are a response to anecdotal evidence that exaggerates the risk of a perceived harm. Non-specialists generally hold mistaken perceptions about risk, and judges are not particularly adept at excluding this bias from decisions. 304 This problem has been recognized in the legislative realm, but not in the judicial realm. 305 Judges, like other decisionmakers, are also subject to the whims of public concern, 306 implicit bias, 307 and the tradition of relying on common sense rather than on the experience of skilled experts. As demonstrated in the examples of drug testing for welfare benefits and searches, relying on blind balancing—or common sense determinations—unguided by data and scientific evidence may be problematic.

In a poignant example of the importance of data in Fourth Amendment cases, a law in Florida (and one recently passed in many other states) requires drug testing in order for individuals to receive welfare benefits. 308 The costs of the drug tests were enormous and only 2.6% of the applicants failed the drug test, demonstrating that drug abuse among welfare applicants was not as problematic as legislators anticipated. 309 Not only are these laws potential Fourth Amendment

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303 SUNSTEIN, supra note 289, at 110.
304 For example, the 1970 Clean Air Act proposed a 90% reduction in emissions from new cars within ten years. The law resulted from dueling proposals between the Nixon Administration and Senator Edmund Muskie, who each wanted to out-do the other. Congress did not consider whether a reduction of that magnitude was technologically possible, or whether cars that met the new standard would be generally affordable or safe. CASS SUNSTEIN, RISK AND REASON 18 (2002).
308 Alvarez, supra note 5; see also Welfare Drug Screening Law Costs Oklahoma Thousands of Dollars, KOKH FOX 25 – Oklahoma City, Nov. 15, 2012, available at
violations (and have been challenged as such), but they did not lead to fewer welfare cases as was predicted. This illustration of the use of data under the Fourth Amendment demonstrates that data often does not match even policy maker’s perceptions. When the government relies on evidence, more informed decisions result that may also better protect constitutional rights.

Another telling example of the importance of information is that a consideration of whether searches are reasonable depends on the location of the search. Currently, there is no consideration of the likelihood of finding contraband in determining whether a Fourth Amendment search is reasonable, but localized information on this is available and can be helpful. Police nationally find contraband in less than a quarter of all searches, but this number varies by location. For example, in 2011, Missouri police found contraband in 22.52% of searches. However, many locales find contraband in far fewer searches. Indeed, in San Diego, police reported finding contraband in only 8.4% of searches, while New York City found contraband in fewer than 2% of searches. What this New York data illustrates is that police in New York stopped 3,000 people in order to find one gun. And a national survey of the United States demonstrates that when police conduct a search after making a traffic stop, the police rarely find contraband. The survey found that when the police searched the driver of the car they stopped, the


310 This drug testing of welfare recipients was later held to be an infringement of Fourth Amendment rights. See Lebron v. Wilkins, 277 F.R.D. 466 (M.D. Fla. 2011).


313 CORDNER ET AL., supra note 307, at 31.


315 Perhaps even more unsettling, a 2011 report found that the number of people the NYPD stopped increased by over 500,000 from 2003 to 2011, but the number of guns found increased by a mere 176. See N.Y. CIVIL LIBERTIES UNION, supra note 10, at 14 (reporting that in 2003, the NYPD recovered 604 guns in 160,851 stops, while in 2011, the NYPD recovered only 780 guns in 685,724 stops. This means that police in New York searched about 3000 people to find one gun).
police found contraband in a mere 2.1% of searches.\textsuperscript{316} When the police would search the car, they found contraband in 1.6% of searches.\textsuperscript{317} Thus, in some states and cities, police will search four or five innocent people before finding any contraband, while in other places the police will search hundreds or even thousands of people before finding any contraband. The likelihood of finding contraband should be considered in the balancing test that determines the reasonableness of a search. And, according to this data, the reasonableness may differ based on the geographic location.

It is possible that when police start tracking information, individuals will adjust their behavior. For instance, with random drug testing, employees may be less likely to take drugs as they did previously. Or in contrast, with fewer stop and frisks, more individuals may carry drugs and weapons as they are no longer deterred. There is a possibility that important factors will change if police conduct fewer searches and conduct them more randomly. The key here is that the government must track crime rates and public safety concerns as key variables with any changes in law enforcement practice. The important factors here are public safety and effective law enforcement. And luckily these can be tracked with careful police data. And if a change in police practice is linked to increasing crime rates, police can consider an evidence-based way to adjust their practices to respond. Leaving these decisions to common sense assessments is no better for public safety than it is for constitutional rights.

Indeed, bias must be carefully considered with informed balancing. It may turn out that the balance of evidence suggests that rooting out crime should result in selectively searching minorities.\textsuperscript{318} Even if evidence supports this sort of practice, judges have the obligation to the Constitution first and should not allow this. With an informed model based on data, these biased decisions by judges or officers would be open and easier to root out than when there is no expectation that data be consulted in the decision.

Consideration of evidence allows a decisionmaker to assess the true magnitude of a problem, take into account the relevant data around the issue, and chose the best response.\textsuperscript{319} In that respect, an informed decision may actually enhance accountability and democracy,\textsuperscript{320} allowing a decision based on a fuller consideration of the concerns on both sides and of society.\textsuperscript{321} And the results of an evidentiary analysis do not compel government action. Indeed, a decisionmaker may still proceed with a choice that has a negative net social benefit, due to the fundamental rights at stake and the conflict with the law. But at least the decision

\textsuperscript{317} Id. However, when the police would search both the driver and the vehicle, police found contraband in 14.3% of searches. Id.
\textsuperscript{318} See Katherine Y. Barnes, Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling, 54 DUKE L.J. 1089 (2005).
\textsuperscript{319} SUNSTEIN, supra note 271, at 27.
\textsuperscript{320} ALDER & POSNER, supra note 319, at 101.
\textsuperscript{321} SUNSTEIN, supra note 271, at 34–35, 39.
is one backed by a rational process after a full consideration of the data and relevant evidence.\textsuperscript{322}

CONCLUSION

An iconic symbol in the law is blind justice. The impartial lady justice blindfolded and holding the scales of justice invokes an image of an unbiased arbiter. The goal of blind justice is a judge that does not express bias towards particular defendants but applies the law fairly in every case. Blind justice, as it turns out in practice, also involves judges participating in blind balancing. Blind balancing—determining the rights of parties without consideration of relevant evidence or statistical data on either side—has spread as a common judicial norm in constitutional jurisprudence. Blind balancing explicitly rejects scientific certainty and is rooted in judicial decisions based on common sense and a balance of incomplete factors. Its results in the Fourth Amendment context, as this Article illuminates, have been astounding. Black and white teens walk home from school on a similar route; the white youth walks home uninterrupted while the black youth is stopped and frisked at least 60 times by police by the time he is eighteen.\textsuperscript{323} Police intrude on the privacy of many individuals in their homes, cars and with drug testing, creating fear and sometimes harm, rarely uncovering any illegal activity.\textsuperscript{324} Minorities are targeted with searches and as a result are arrested and imprisoned more often for drug crimes equally committed by all races.\textsuperscript{325} In all of the above situations, the Fourth Amendment is implicated but these privacy and potentially equal protection violations go unnoticed by any court. Blind balancing has allowed government interests to trump individual rights in an overwhelming number of cases, led to disparities between similar defendants, and allowed overestimation of risks, leading to unfairness for defendants. As it turns out, blind justice may not actually achieve the fairest result.

While no balancing test is perfectly fair or predictable, without consideration of relevant evidence and data to ground such information, it is tempting for the government to inflate its own interest or for judges to rely on

\textsuperscript{322}Id. at 7.
\textsuperscript{323}See, e.g, Second Amended Complaint, Floyd v. City of New York, 08 Civ. 01034 (SAS) (S.D.N.Y. 2008); Julie Dressner & Edwin Martinez, The Scars of Stop-and-Frisk, N.Y. TIMES (Jun. 12, 2012), http://www.nytimes.com/2012/06/12/opinion/the-scars-of-stop-and-frisk.html?_r=0. (Tyquan Brehon, a young black man in Brooklyn without a criminal record reports being stopped more than 60 times before age 18).
\textsuperscript{324}Andrew Lee Scott Dead: Lake County Police Fatally Shoot Wrong Man While Hunting Murder Suspect, HUFFINGTON POST (July 17, 2012, 3:58 PM), http://www.huffingtonpost.com/2012/07/17/andrew-lee-scott-dead_n_1679408.html (reporting an incident where the police shot and killed a man after the police knocked on the wrong door in the middle of the night and did not identify themselves as police officers).
\textsuperscript{325}Shima Baradaran, Race, Prediction & Discretion, 81 GEO. WASH. L. REV. 157 (2013); L. Song Richardson, Arrest Efficiency and the Fourth Amendment, 95 MINN. L. REV. 2035, 2037–38 (2011) (In Los Angeles, Minnesota, New York, and other areas despite the fact that minorities were targeted for stops much more often than whites, the ratio of whites who were found with contraband, evidence, and drugs compared with overall number of whites stopped was higher than such ratios of minority groups. In other words, police were more likely to find contraband when stopping a white person than when stopping a person of minority race.).
anecdotes or their gut instinct. Judges balance the opposing sides in a case to
determine which side is most deserving. When judges claim to be balancing they
are often considering the costs and benefits of an issue for both parties and society.
Often this analysis lacks relevant factors and is not complete. And often judicial
balancing ignores broader evidence that provides context to the individual case at
hand.

This Article rejects Fourth Amendment blind balancing. A data culture
change would help to reform balancing in lower courts and appellate courts, both
federal and state. Courts balance constitutional rights daily. They rely on broader
data when it suits their interest. None of this is rigorous because the key in
balancing is common sense. Common sense is problematic when the judge is
staring in the face of a criminal and focusing her decision on his rights. Without
considering the broader picture of those harmed by her ruling, a judge cannot
appropriately weigh these constitutional problems. By instead relying on informed
balancing, judges consider precedent, and where relevant, a balance of the best
data, studies, and judicial experience in deciding a particular case. Although
balances by their nature may not ever be exact, a more informed balance, grounded
with particular data and evidence on the issue at hand, would be a step in the right
direction. And not only would informed balancing be more fair, but it may also
lead to a more robust protection of privacy rights and a consideration of the
broader racial implications affected by the Fourth Amendment because it would
look beyond the defendant at bar to consider important societal trends. While
the nature of constitutional decisionmaking should certainly remain flexible and
individualized, it cannot afford to be blind or unaffected by important information.
And with a more informed balance, Fourth Amendment decisions can be
rebalanced with data replacing gut instinct.

326 Christopher Slobogin & Joseph E. Shumacher, Reasonable Expectations of Privacy and Autonomy in Fourth
Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society”, 42 DUKE L.J.
727, 775 (1993) (arguing that the judiciary should remind themselves of their own personal distance from police
investigation, intrusiveness of police action, and sometimes community values).