The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures

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I. INTRODUCTION

The requirement of some level of individualized suspicion operates to limit the government's discretionary authority to search and seize. Individualized suspicion, also called particularized suspicion, serves to preclude arbitrary and general searches and seizures and mandates specific justification for each intrusion. It places the focus of the inquiry concerning the permissibility of a search or seizure upon the circumstances presented by the private party or object of the search or seizure; if and only if the individual or object provides a reason for governmental inquiry may the government intrude. Thus, the justification for the government's actions are not based upon circumstances within the control of the government. The principle of individualized suspicion limits not only the circumstances under which the government may initiate actions but also the scope and details of the search or seizure by ensuring that the intrusion actually performed is reasonably related to the circumstances that justified the initial interference.

Although the concept of individualized suspicion has an ex-

1. The concept of individualized suspicion should not be confused with the concepts of probable cause or articulable suspicion of criminal behavior. While one of those two latter requirements is usually necessary to seize a person, the presence of either alone is not sufficient to justify the seizure. In addition, there must be individualized suspicion. See 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.6(c), at 49 (1987). For example, the police arrive at the scene of a crime, observe a crowd, and believe that one of the members of the crowd has committed an obvious crime; however, they do not know which one. Thus, there is ample probable cause to believe that a crime has occurred but no individualized suspicion identifying a specific person as a suspect. See, e.g., Ybarra v. Illinois, 444 U.S. 85, 88-91 (1979).

2. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) ("Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider 'whether the . . . action was justified at its inception'; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'") (quoting Terry v. Ohio, 392 U.S. 1, 20 (1967)).
plicit constitutional basis only in the particularity requirement contained in the Warrant Clause of the Fourth Amendment, it historically has been required of all searches and seizures. Exceptions to the requirement of individualized suspicion were few and grounded on a showing of necessity. In recent years, however, the Supreme Court has sanctioned an increasing variety of suspicionless searches and seizures, and suspicionless intrusions now occur in many aspects of everyday life. The expanding list of permissible suspicionless actions has coincided with a radical alteration by the Supreme Court of the constitutional balancing test that regulates dispensing with individualized suspicion. There has been a drift toward unprincipled "reasonableness" analysis and an abandonment of requiring that the governmental actions be premised on a showing of need. These trends could result in suspicionless searches and seizures becoming ubiquitous, thereby significantly degrading interests long considered within the core protections of the Fourth Amendment.

This Article examines the role of individualized suspicion as an element of a reasonable search or seizure. In Part II, the origins and historical importance of the principle of individualized suspicion are explored. That Part also examines the extent to which the framers intended to incorporate into the Fourth Amendment the need to establish individualized justification for a search or seizure. The Supreme Court has considered when individualized suspicion is required in a diverse number of circumstances, and those decisions are detailed in Part III. That Part also demonstrates that exceptions to the rule requiring individualized suspicion have become numerous. Part IV details the principal factors the Supreme Court utilizes in assessing whether individualized suspicion is required and shows that the current test fails to fulfill the goal of properly assessing the role individualized suspicion should play. Part V posits that, without individualized suspicion as a guide, suspicionless search and seizure practice will expand dramatically and significantly impact on all aspects of daily life. Part V brings together the lessons of the preceding Parts and draws the conclusion that individualized suspicion is both an inherent element of the
framers' concept of what constituted a reasonable search and seizure and a needed objective guide for courts in assessing the reasonableness of an intrusion. Based on that conclusion, this Article maintains that individualized suspicion is a vital element of all reasonable searches and seizures. This Article concludes in Part VI that, if the historical context and purpose of the Fourth Amendment's use of the term "unreasonable" is understood and respected, combined with a recognition that a principled reasonableness analysis, with individualized suspicion as a core component, is necessary to guide courts and law enforcement officials, then suspicionless searches and seizures will remain aberrational, founded upon a strong showing of governmental necessity.

II. HISTORICAL CONTEXT OF THE FOURTH AMENDMENT

A. Introduction

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\(^3\)

The Amendment contains two clauses joined by the conjunction "and." The Supreme Court has viewed the essence of the reasonableness mandate of the first clause as a balancing test: the individual expectation of privacy is weighed against the governmental interest in investigating and preventing crime.\(^4\) The second clause, commonly called the Warrant Clause, provides, inter alia, that places searched and the persons and things to be seized must be particularly described and that the search or seizure be supported by probable cause. These particularity and

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probable cause specifications combine to make individualized suspicion necessary to justify a search or seizure when a warrant is utilized and limit the scope of the permissible intrusion.

The relationship of the two clauses has been the subject of much debate. The second clause clearly imposes certain procedural requirements on the issuance of warrants. Of bitter dispute is whether it can be fairly read to impose substantive requirements on all searches and seizures. If the second clause is designed to modify the first and impose such substantive requirements, then the Amendment would seem to mandate that only searches of specified places and seizures of particularly described persons or things are reasonable and, hence, constitutional. On the other hand, if the requirements of the Warrant Clause are not needed for warrantless searches and seizures, that is, that they must only be reasonable within the meaning of the first clause of the Fourth Amendment, then individualized suspicion arguably is not necessarily mandated. This Article does not purport to resolve the debate over the relationship of the clauses because resolution is unnecessary in light of a third view provided here: given the historical context surrounding the framing of the Fourth Amendment and the need for a principled analysis for assessing reasonableness, individualized suspicion should be considered an inherent quality of reasonableness.

To achieve an understanding of the Fourth Amendment and the concept of reasonableness, as well as some insight regard-


6. See Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry, 72 Minn. L. Rev. 383, 384-85 (1988) (recognizing the need to define reasonableness "to reflect the amendment's underlying values and purposes" and that a reasonableness concept without definitional restraints "can allow the range of acceptable government intrusions to expand and overwhelm the privacy interests at stake").
ing the relationship of the two clauses, it is necessary to know both the historical abuses the framers sought to prevent and the process by which the Amendment reached its final form. It is also important to recall the types of abuses perpetrated to understand why the probable cause and particularity requirements were only mandated for warranted actions. History discloses a notorious and systematic exploitation of governmental power to engage in suspicionless searches and seizures in England and in the American colonies in the decades immediately preceding the American Revolution.\(^7\) As will be discussed, the historical record overwhelmingly supports the view that the Amendment was designed solely or primarily to address searches and seizures pursuant to a warrant because the colonials were concerned only about those actions. Although the second clause was designed to impose substantive requirements for warrants to issue, the plain language of the Amendment simply does not impose those requirements for all searches and seizures. It merely requires that searches and seizures be reasonable, without defining that term. Thus, it cannot be unequivocally stated, as a matter of grammatical analysis, that the Amendment mandates the requirements of the second clause for all searches and seizures.

This does not end the inquiry. Historical analysis is important for a second reason. While the plain language of the Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an *inherent* quality of reasonable searches and seizures.\(^8\) Indeed, history discloses that the chief vice the

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8. *See infra* notes 17-25, 129-34, and accompanying text.
framers sought to prevent was suspicionless searches and seizures. The Supreme Court has considered the historical context to be a primary source for understanding the Amendment. Thus, in interpreting whether a search or seizure is reasonable, reference should be made to the meaning that the framers gave to the term. If one adopts the view that, in interpreting the Amendment, the framers’ intent should be effectuated, it follows that an important, if not dispositive, element of the analysis of whether a search or seizure is reasonable must be whether the action was performed pursuant to individualized suspicion.

B. Searches and Seizures in England and Its American Colonies Prior to the American Revolution

1. Warrantless Actions

Law enforcement officials in America and in England in

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Based on examining the historical context, the Court has often been steeled in its determination to defend individuals against governmental intrusion. As the Court has stated:

The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Weeks, 232 U.S. at 393.
the period preceding the American Revolution did not have broad inherent authority to search and seize; such actions required authorization, and the warrant system was used primarily to confer that authority.\textsuperscript{10} Warrantless searches and seizures were virtually nonexistent.\textsuperscript{11} Only one type of warrantless seizure may have been common, the seizure of a suspected felon.\textsuperscript{12} Such seizures were rarely made except in hot pursuit of the felon.\textsuperscript{13} "Those were simple times, and felons were ordi-


\textsuperscript{11} \textit{See}, e.g., United States v. Chadwick, 433 U.S. 1, 8 (1977) (explaining that colonials did not oppose warrantless searches in public places because such searches were not in issue at the time.); Tomkovicz, \textit{supra} note 5, at 1133 ("[W]arrantless searches—other than [searches] incident to arrest, were not a fact of colonial life."); \textit{cf.} Chimel v. California, 395 U.S. 752, 761 (1969) (The Fourth Amendment "was in large part a reaction to general warrants and warrantless searches."); United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (The Fourth Amendment was the answer of Revolutionary statesmen to searches without warrants and searches with warrants unlimited in scope.).

The statement in text is limited to the state of the law prior to the American Revolution. There is little available information from the Anglo-Norman period in England:

There is little reason to believe, however, that the authorities, in those cases where official search was necessary, were hampered by any of the limitations and safeguards which we have today. It is most probable that the official badge or commission was sufficient warrant, in everyday administration of the criminal law, for any action of this kind, and that the written warrant was a later development.

\textsuperscript{12} \textit{Lasson}, \textit{supra} note 7, at 22 (footnotes omitted). In the American colonies, the early practice of customs officials "had been to enter buildings forcibly by the mere authority of their commissions as officers." \textit{Id.} at 55. That practice later was opposed by the people, who resisted or sued the officers. \textit{Id.} By the time of Governor Shirley's administration in Massachusetts, the governor had adopted the practice of issuing general writs of assistance. \textit{Id.; see also id.} at 55-56 nn.20-21 (detailing other warrantless actions).

\textsuperscript{13} \textit{Taylor}, \textit{supra} note 7, at 27-28. \textit{See generally 2 Hale, The History of the Pleas of the Crown} 85-104 (1847). Felons were searched as a matter of course incident to their arrest. \textit{Taylor}, \textit{supra} note 7, at 27-29.

\textsuperscript{13} \textit{Taylor}, \textit{supra} note 7, at 28 (citing \textit{2 Pollock & Maitland, The History of English Law} 582-83 (2d ed. 1959)); \textit{see also Payton v. New York}, 445 U.S. 573, 598 (1980) (prevailing seventeenth and eighteenth century practice was to make arrests only when in hot pursuit or when authorized by warrant). The common-law rule per-
narily those who had done violence or stolen property.”14 Based on the lack of warrantless searches and seizures and the fact that the only persons searched or seized without a warrant usually were suspected felons,15 those actions were not the cause of public outcry and litigation.16

mitting the warrantless arrest of a suspected felon “may have reflected an exigent circumstances rationale” based on the common-law assumption that an arrest would occur shortly after the felony was committed:

If the felon was not immediately apprehended, a justice of the peace would issue a warrant directing a hue and cry to be raised, thereby permitting fresh pursuit of the offender from town to town by horse and on foot. Although Hale condoned this practice of issuing warrants, he observed that the law did not require a warrant ‘for the felons may escape before the justice can be found.’ The law did not impose conditions, Hale observed, that would make such pursuit fruitless. Of course, no evidence exists to indicate that the common law proceeded on a case-by-case basis, requiring a warrant at least when time would permit one to be obtained without risk. Nevertheless, the common-law assumption seems to have been that time was of the essence when dealing with the arrest of suspect- ed felons.

Joseph D. Grano, Rethinking the Fourth Amendment Warrant Requirement, 19 AM. CRIM. L. REV. 603, 639 (1982) (footnotes omitted); see also JOSIAH QUINCY, JR., REPORTS OF CASES, 483-84 (1865) (citing Coke’s views on warrantless limitations on seizures of suspected felons).

14. TAYLOR, supra note 7, at 28.

15. In England, persons found about during the night, called “night-walkers,” were subject to seizure, but the authorities are divided as to whether any suspicion was needed. See Minnesota v. Dickerson, 113 S. Ct. 2130, 2140 (1993) (Scalia, J., concurring) (recounting that common-law and night-walker statutes permitted stop of suspicious persons); Lawrence v. Hedger, 128 Eng. Rep. 6, 6-7 (1810) (holding that watchmen may detain persons walking the streets at night where reasonable grounds exist to suspect a felony); 2 HALE, supra note 12, at 89 (holding that a constable could arrest only suspicious nightwalkers); id. at 96 (concluding that watchmen between Ascension Day and Michaelmas could “arrest such as pass until the morning, and if no suspicion, they are then to be delivered, and if suspicion be touching them, they shall be delivered to the sheriff”); Leagre, supra note 9, at 408-11 (collecting authorities and concluding that it was unclear whether or not suspicion was needed for a seizure).

16. TAYLOR, supra note 7, at 39.

While the colonists did not object to warrantless searches, the reason for the absence of such objection was that such searches, except perhaps in the context of lawful arrests, simply did not exist. The power to search required authorization, and for this reason, the English created writs of assistance, which authorized searches that otherwise could not have taken place . . . . [N]o evidence has been found to suggest that searches, except in the context of an arrest, occurred in eighteenth century England or
Even when a warrant was not required, individualized suspicion usually was. A constable’s power *ex officio* to arrest for felonies varied with the amount of information he had. When a felony was “certainly committed,” the constable could arrest the felon. It was immaterial whether the constable saw the felony committed or had only a “complaint or information.” Similarly, when the constable ascertained that a felony had been committed and he had “probable grounds” that a specific person was the perpetrator, the constable could arrest the suspect without a warrant. Another circumstance where a

America without the authorization of some kind of warrant.

Grano, *supra* note 13, at 617; see also *id.* at 621 (“[H]istory indicates that warrantless felony arrests did not cause consternation.”); cf. United States v. Chadwick, 433 U.S. 1, 8 (1977) (“The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America.”); Chimel v. California, 395 U.S. 752, 761 (1969) (The Fourth Amendment “was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists.”).


18. 2 HALE, *supra* note 12, at 90 (emphasis omitted). A constable could also arrest without a warrant when a felony had not been committed but was in danger of being committed. For example,

[j]f A. hath wounded B. so that he is in danger of death, and A. flies and takes his house, and shuts the doors, and will not open them, the constable of the vill where it is done, or upon hue and cry, may break the doors of the house to take him, if upon demand he will not yield himself to the constable.

*Id.* at 94. In this example, there is no question as to the identity of the person, and it is, therefore, similar to the first example in the text.

19. *Id.* at 91.

20. *Id.* at 91-92; accord Payton v. New York, 445 U.S. at 605 (White, J., dissenting); see also Samuel v. Payne, 99 Eng. Rep. 230 (K.B. 1780) (recognizing as defense to false imprisonment claim, stemming from constable’s arrest of plaintiff, fact that arrest was based on allegations that plaintiff had stolen goods). The constable was required to “inquire and examine the circumstances and causes of the suspicion” of the victim, and the victim had to be present during the arrest. 2 HALE, *supra* note 12, at 91-92. Hale maintained that the constable had to be allowed this latitude, for otherwise “many felons would escape.” *Id.* at 92.
warrantless arrest was allowed was by hue and cry, which was the ancient common-law process of soliciting civilian assistance to apprehend suspected felons.\textsuperscript{21} A party who sought to raise a hue and cry for a suspect would go to the village constable "and give him notice of a felony committed, and give him such reasonable assurance thereof as the nature of the case [would] bear."\textsuperscript{22} The description of the suspect had to be as detailed as possible:

If he knows the name of him that did it, he must tell the constable the same. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances that he knows, which may conduce to his discovery. If the thing be done in the night, so that he knows none of these circumstances, he must mention the number of persons, or the way they took. If none of all these can be discoverd [sic], as where a robbery, or burglary, or felony is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make hue and cry after such as may be probably suspected as being persons vagrant in the same night, for many circumstances may \textit{ex post facto} be useful for discovering a malefactor, which cannot be at first found.\textsuperscript{23}

What could be done by hue and cry was based on the particularity of the description. If the hue and cry was "not against a person certain" but only by "description of his stature, person, clothes, horse, [etc.]," the constable or other person following the hue and cry could arrest "the person so described, whether innocent or guilty . . . ."\textsuperscript{24} However, if the suspect was "neither known nor describable [sic] by person, clothes, or the like," only such persons as there was "probable cause to suspect" could be arrested.\textsuperscript{25}

\begin{footnotesize}
\begin{enumerate}
    \item 2 Hale, supra note 12, at 98.
    \item \textit{Id.} at 100.
    \item \textit{Id.} at 100-01 (footnote and numbers of sentences omitted).
    \item \textit{Id.} at 103.
    \item \textit{Id.}
\end{enumerate}
\end{footnotesize}
2. Warrants and Writs of Assistance

Scholars seeking the origin of search and seizure warrants have traveled into a "foggy land."
Their origin seems based on several "fairly distinct forms of English legal practice." One form included the common-law warrant to arrest felons and the common-law warrant to search for stolen goods, the latter being "the source of most of the procedural safeguards, against the abusive use of warrants, with which we are familiar today." Another type of practice stemmed from the crown's practice of issuing warrants and writs of assistance, premised on its own authority, to search and seize. A third pattern of practice evolved to use warrants to enforce the mandates of acts of Parliament.

The first form of practice included the common-law search warrant, which was a purely judicial device that had none of the abusive features associated with the warrants designed to facilitate governmental and institutional interests. This warrant, which "crept into the law by imperceptible practice," was a

27. Id.
28. See generally 2 Hale, supra note 12, at 105-20.
29. Taylor, supra note 7, at 24; see also M. H. Smith, The Writs of Assistance Case 17 (1978) (The common law courts recognized only searches for stolen goods and searches authorized by Parliament's legislation).
30. Taylor maintains that the last two forms were statutory in origin and resulted in "the great litigations of the 1760s with which the names Otis and Wilkes were linked." Taylor, supra note 7, at 24. His view fails to acknowledge the presence of crown-issued warrants, for which there never was a statutory basis. Presumably, Taylor's mention of the Otis and Wilkes litigation each stands for one of the two statutory forms. Yet the Wilkes case resulted from a warrant issued by the executive on its own authority. Cf. id. at 26 (recognizing that the crown issued warrants on its own authority in the Wilkes case but maintaining that the original source of the authority was statutory). Taylor also failed to acknowledge the existence of the common-law arrest warrant.
31. 2 Hale, supra note 12, at 150; Taylor, supra note 7, at 27.
32. Entick v. Carrington, 19 Howell's St. Tr. 1029, 1067 (1765). A requirement of particularity has ancient origins. Under Roman law, "the victim of a theft, before he could institute a search in the house of a suspect, had to describe with particularity the goods he was seeking." Lasson, supra note 7, at 17. In England, common-law search warrants for stolen goods were well established by the middle of the 16th century. See
"hybrid criminal-civil process." The victim of a theft had to state under oath before a justice of the peace the basis for his belief that his goods would be found in a specified place; if probable cause was established, "the justice would issue a warrant authorizing the victim to go with a constable to the specified place and, if the goods were found, to return [with] the goods and the suspected felon before the justice, for . . . disposition of the matter." There also existed the common-law arrest warrant for felons. An arrest warrant was a command to the sheriff of the county or the marshal of the court to apprehend a felon and bring the felon to court. This warrant was issued upon a showing similar to that necessary for a search warrant; it was issued by the court after examining the requesting party under oath and reducing that examination into writing concerning whether a felony had been committed and the party’s grounds for suspicion. The person suspected of the crime had to be named.

A second form of practice evolved from the crown’s issuance of warrants and writs of assistance. Prior to the 1660s, the power to search and seize was exercised by the executive without legislation. The authority to do so was neither found

generally id. The process is now obsolete, although it existed in the United States "well into the 19th century." TAYLOR, supra note 7, at 182 n.17. Warrants for stolen goods were originally issued as general warrants, but that practice had given way to requiring special warrants by the middle of the 18th century. See SMITH, supra note 29, at 336-39; see also Grumon v. Raymond, 1 Conn. 39, 43-46 (1814) (recognizing that a search warrant for stolen goods must limit search to particular places where reasonable to suspect goods are and to such persons reasonably suspected); Frisbie v. Butler, 1 Kirby 213, 215 (Conn. 1787) (same).

33. TAYLOR, supra note 7, at 24-25.
34. Id. See generally Gerstein v. Pugh, 420 U.S. 103, 116 n.17 (1975); 2 HALE, supra note 12, at 149-52.
35. 2 HALE, supra note 12, at 105-09; accord 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 177 (1797).
36. 2 HALE, supra note 12, at 105.
37. Id. at 111.
38. Id. at 112, 114.
in the common law nor in any statute; instead, it was a manifestation of "residual police power untrammeled by doctrine or methodology and exercised at the royal discretion in the interest of good public order." This prerogative authority was enforced through the Court of Star Chamber and other tribunals amenable to the requirements of executive government.

These executive warrants did not have the restrictions on issuance associated with the common-law warrants. For example, in England during the reign of Charles I, the crown issued writs of assistance authorizing the search for and seizure of smuggled goods. The writs were issued without any suspicion of illegal activity and permitted those holding a writ to go anywhere they chose. Each writ charged all officers of the crown with assisting those executing it and empowered messengers "to enter into any vessel, house, warehouse, or cellar, search in any trunk or chest and breach any bulk whatsoever . . . ."

The crown's inherent authority atrophied during the middle of the 17th century. In 1641, an act of Parliament abolished the Court of Star Chamber and other tribunals identified with the Stuart kings' use of arbitrary power. With the crown's centers of power abolished, only the common-law courts had jurisdiction. However, the common-law courts recognized the power of only Parliament to make law and were unwilling to enforce the crown's asserted prerogative to search and seize.

41. SMITH, supra note 29, at 20-21; cf. LASSON, supra note 7, at 29 (Charles I issued general warrants to seize named persons, not because the person had committed a specific offense, but because the person had incurred the displeasure of the monarch.).
42. LANDYNSKI, supra note 5, at 23 (quoting LASSON, supra note 7, at 30).
43. SMITH, supra note 29, at 20-22.
44. Id. at 21-22; 1 Cuddihy, supra note 40, at 43.
45. SMITH, supra note 29, at 20.
46. Id. at 21.
A common law court would not regard it as wrong for a householder to bar the way of someone whose only claim to be allowed to come in and search was a piece of paper issued on the bare executive fiat of the crown.

Under Charles II's predecessors it had been different. In those days the doctrinal inhibitions of the common law courts did not have this limiting effect on governmental action . . . . The common law courts' insistence upon statute as the one and only external source of law had brought them a powerful ally. From now on they and they alone would be the forum in which executive government must make good its claims to power.47

As a result, executive government in England increasingly relied upon the exclusive legislative power of Parliament.48

A second development accelerated the diminution of the prerogative authority of the crown. Shortly after Charles II's restoration to the throne, "certain unregenerate elements in London [gathered] arms in preparation for an insurrection."49 The crown, on its own authority, ordered that a diligent search be made for the arms and that subversives be seized.50 Numerous persons were imprisoned, their houses searched, and their goods taken away. As a consequence of opposition to these measures, the king issued a proclamation on January 17, 1661, commanding ""all Officers and Souldiers [sic], and all other Persons whatsoever . . . to forbear to molest or trouble any of Our good Subjects, either in their Persons or Estates, and not to presume to apprehend any Armes [sic] whatsoever, or to search any Houses, without a lawful Warrant . . . .""51 The king further proclaimed that warrants ""be always directed to some Constable, or other known Legal Officer.""52

47. Id. at 21-22 (footnotes omitted).
48. Id. at 22.
49. Id. at 23.
50. Id.
51. Id. (emphasis added). The lawful warrant contemplated by the proclamation presumably was a warrant authorized by common law. Id. at 24.
52. Id. at 24. Smith suggests that this proclamation was part of a compromise with Parliament. A few months after the proclamation, Parliament enacted a law exempting from liability those men acting on behalf of the king during the disorders. Without that
The third form of practice, statutory authorization for searches and seizures, has been traced back to the fourteenth century. The legislation, through the seventeenth century, was "uniformly characterized by the granting of general and unrestricted powers."\textsuperscript{53} For example, in 1335, "inkeepers in English port cities were authorized to search their guests for counterfeit monies."\textsuperscript{54} As another example, in the fifteenth century, Parliament gave several organized trades the authority to make general searches for and seize goods that did not meet trade standards.\textsuperscript{55} The 1660s occasioned numerous statutory enactments on the powers of entry onto private property.\textsuperscript{56} For example, legislation regulating certain trades permitted the trades' authorities "to enter premises in order to inspect specimens of the product."\textsuperscript{57}

Legislation enabling customs searches and seizures was adopted in 1662,\textsuperscript{58} authorizing searches without suspicion\textsuperscript{59}

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law, the men could have been subject to an action for damages at common law. \textit{Id.} Smith states that the compromise was suggested by the events: "[T]he king's men would be rescued just this once, but the king had to make it plain beyond all possibility of retraction that such gross violations of hearth, home, and property should never happen again." \textit{Id.} Smith also notes the inelasticity of the common law:

Had the courts of common law been disposed to acknowledge new categories of preemptory entry and search the indemnifying legislation would have been unnecessary. After all, what more deserving a cause than suppression of a violent insurrection? . . . [Yet] the contemporary mood did not encourage expectations of judge-made extensions to the law of entry and search.

\textit{Id.} at 24-25.

\textsuperscript{53} LASSON, \textit{supra} note 7, at 23. \textit{See generally} 1 Cuddihy, \textit{supra} note 40, at 31-38; \textit{1 id.} at 91-174 (discussing colonial legislation to 1761).

\textsuperscript{54} TAYLOR, \textit{supra} note 7, at 25; \textit{see also} LASSON, \textit{supra} note 7, at 23.

\textsuperscript{55} TAYLOR, \textit{supra} note 7, at 25; LASSON, \textit{supra} note 7, at 23-24.

\textsuperscript{56} SMITH, \textit{supra} note 29, at 17-18 (providing examples of statutory authorizations to search and seize). \textit{See generally} 1 Cuddihy, \textit{supra} note 40, at 51-72 (discussing legislation of the era and concluding that it gave "virtually unlimited power of search and seizure").

\textsuperscript{57} SMITH, \textit{supra} note 29, at 17.

\textsuperscript{58} Parliament had passed legislation in 1660, which had similarities to the requirements of the common-law search warrant. LASSON, \textit{supra} note 7, at 37; \textit{see also} SMITH, \textit{supra} note 29, at 12 n.5 (indicating that customs forfeiture was always statutory in nature). The 1662 act did not apply to the American colonies. \textit{Id.} at 95.

\textsuperscript{59} The legislation did provide some limitations: the searcher had to be an autho-
anywhere the searcher desired to look. Pursuant to the statute, writs of assistance were issued. Writs were not issued as a result of any information that contraband was stored at a specified place; instead, the customs officials could search wherever they chose. "The discretion delegated to the official was therefore practically absolute and unlimited." The writ was a simple directive in the form of a document in the name of the king that "ordered a wide variety of persons to help the customs man make his search." The power to search derived from the statute; the writ was merely "a necessary precondition for exercise of the power." The writs were akin to "per-

rized person and accompanied by a law enforcement officer; the search had to be performed during daylight hours; and only in the case of resistance could doors, chests, and other locked areas or containers be broken. Id. at 25-31.

60. TAYLOR, supra note 7, at 26. Section 5(2) of the Act of Frauds of 1662 provided:

And it shall be lawful to or for any Person or Persons, authorized by Writ of Assistance under the Seal of his Majesty's Court of Exchequer, to take a Constable . . . or other publck Officer inhabiting near unto the Place, and in the Day-time to enter . . . any House . . . or other Place, and in Case of Resistance to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed, and to put and secure the same in his Majesty's Store-house . . . .

Quoted in SMITH, supra note 29, at 43, 535-36.

61. LASSON, supra note 7, at 54.
62. SMITH, supra note 29, at 29.
63. Id. at 461.
64. Landynski maintains that writs of assistance usually have been considered as general search warrants but notes that at least one historian, D. M. Dickerson, disputed that characterization because the power to search inhered in the officers by virtue of their commission, and the writs were merely judicial orders empowering the customs officials to summon the sheriff or constable to keep the peace for the duration of the search. LANDYNSKI, supra note 5, at 32 n.53. But cf. SMITH, supra note 29, at 37-39, 461, 520-21 (citing cases and a 1768 opinion of the English Attorney General and recognizing that a writ of assistance was not a search warrant but merely the vehicle by which statutory power to search was exercised). Landynski concludes:

Whether or not the writs actually granted the search power, their importance—and the opposition aroused by their use—stemmed from the fact that the summoning of the peace officers to prevent frustration of the search made the general search an effective instrument of enforcement. Those opposed to the writs definitely regarded them as synonymous with the power to search itself.
manent search warrants placed in the hands of custom officials: they might be used with unlimited discretion and were valid for the duration of the life of the sovereign.\textsuperscript{65} The man who did the seizing, known as the informer, would initiate the proceedings to condemn the goods.\textsuperscript{66} The successful informer would receive a portion of the goods condemned.\textsuperscript{67} The informer was thus the "beneficiary of a mode of law enforcement that was commonly resorted to" at a time when no regular police organizations existed.\textsuperscript{68}

C. Reaction Against Suspicionless Searches and Seizures

In contrast to the lack of any measurable complaint regarding warrantless actions and common-law search warrants, the reaction against the suspicionless search and seizure practices pursuant to writs of assistance and general warrants produced several well-known cases\textsuperscript{69} in the years preceding the American Revolution.\textsuperscript{70} In America, the issuance of writs of assis-

\textsuperscript{65} LANDYNSKI, supra note 5, at 32 n.53; see also Berger v. New York, 388 U.S. 41, 58 (1967) (equating the customs writs of assistance to general warrants).

66. LANDYNSKI, supra note 5, at 31 (footnote omitted); see also LASSON, supra note 7, at 53-54. The writs expired six months after the death of the sovereign. Id. at 57.

67. SMITH, supra note 29, at 13. If the case were defended and went against the informer, he would be liable for damages at common law. Id. at 13, 310 (citing Leglise v. Champante, 93 Eng. Rep. 871 (K.B. 1728)). The common-law position was modified in England by a statute in 1746; the statute provided that, if the court certified that probable cause for the seizure existed, the action for damages in effect would be barred. A similar limitation was introduced into the American colonies in 1764. Id. at 13 n.9. In addition, in 1719, by act of Parliament, customs officials in England were protected from suit if their seizures were made upon credible information. Id. at 512-13. As a result of the 1719 legislation, English customs enforcement officials, unlike those in America, while still operating under general writs of assistance, adopted the practice of searching only where they had credible information concerning a specific place. Id. at 513-14.

68. Id. at 13.

69. There are numerous examples of the colonials seeking to protect themselves from other suspicionless invasions of their homes. See, e.g., id. at 111-14 (outlining reaction to proposed excise taxes on wines and spirits, which included concerns that the authorities would search houses without consent).

70. Several other sources of authority also condemned the general warrant. For ex-
tance for customs searches and seizures produced widespread resistance, including a famous court case in 1761 questioning for the first time in America general powers to search.\footnote{71} In England, a short time later, a series of cases confronted various aspects of the powers to search and seize, resulting in the condemnation of general warrants.\footnote{72} Also, at the time of the American Revolution, many of the states adopted legal protections against general warrants.\footnote{73} Together, these developments had a profound influence upon the drafters of the Fourth Amendment.

1. The Writs of Assistance in America

In 1696, Parliament passed legislation that arguably permitted the use of suspicionless writs of assistance to enforce customs in the colonies.\footnote{74} Smuggling was a widespread practice

ample, Chief Justice Hale stated that the general warrant to apprehend all persons suspected of committing a crime was void and was no defense to a suit for false imprisonment. 1 HALE, \textit{supra} note 12, at 580; 2 id., \textit{supra} note 12, Vol. I at 580; Vol. II at 112; LASSON, \textit{supra} note 7, at 35. Hale maintained:

The party asking for the warrant should be examined under oath touching the whole matter, whether a crime had actually been committed and the reasons for his suspicion. The warrant should specify by name or description the particular person or persons to be arrested and must not be left in general terms or in blanks to be filled in afterwards. Upon the reasoning of the first rule, Hale held that warrants to search any suspected place for stolen goods were invalid (although he admitted that there were precedents of such general warrants) and should be restricted to search in a particular place suspected, after a showing, upon oath, of the suspicion and the "probable cause" thereof, to the satisfaction of the magistrate.

\textit{Id.} at 35-36 (footnotes omitted).

Also, in 1680, Chief Justice Scroggs was impeached in England and one of the articles of impeachment was based on his issuance of "general warrants for attaching the persons and seizing the goods of his majesty's subjects, not named or described particularly, in the said warrants . . . ." \textit{Id.} at 38 (citation omitted); see also 1 Cuddihy, \textit{supra} note 40, at 73-76 (discussing events surrounding Scroggs' impeachment and maintaining that the real reason for impeachment was a power struggle between Parliament and the King).

71. \textit{See infra} notes 79-95 and accompanying text.
72. \textit{See infra} notes 106-20 and accompanying text.
73. \textit{See infra} notes 121-28 and accompanying text.
74. SMITH, \textit{supra} note 29, at 117-18. It was recognized in England in 1766 that the
in the American colonies, and after 1760, writs of assistance became the principal means of combating the practice.\textsuperscript{75} Massachusetts bore the brunt of the customs writ use,\textsuperscript{76} with the Superior Court of Massachusetts granting writs based on the 1696 Act beginning in the 1750s.\textsuperscript{77} Attempts to obtain the writs in other colonies were generally unsuccessful.\textsuperscript{78}

In Massachusetts, in 1761, new writs of assistance had been requested after the previously-issued ones expired upon the death of the king the preceding year.\textsuperscript{79} A group of Boston merchants opposed the proposed writs, retaining James Otis to

writs were without legal authority. Parliament thereafter passed the Townshend Act, providing a legal basis for the writs. \textit{Id.} at 438-55.

\textsuperscript{75} LANDYNSKI, supra note 5, at 30. \textit{See generally} LASSON, supra note 7, at 51-78. “Documents variously called writs or warrants of assistance were known in colonial America long before the controversies, first in Massachusetts and later almost everywhere else, in the middle eighteenth century.” SMITH, supra note 29, at 95 (footnote omitted).

\textsuperscript{76} LANDYNSKI, supra note 5, at 31. There were two reasons for this. First, [t]he characteristic institution of customs law enforcement, seizure of offending ships and cargos, was viable only if the customs officer could be confident of following it up with the necessary court process of condemnation; unless the spoils of a seizure were condemned as forfeited[, the customs official] not only forwent his one-third share (in the profits that did not materialize), but also stood vulnerable to an action for damages. Condemnation by a common law court was usually out of the question (at any rate in a contested case), because it depended upon the verdict of jurors who were likely to favor the custom house’s adversary. In a vice-admiralty court, on the other hand, condemnation was decided by the judge alone.

SMITH, supra note 29, at 96. In Massachusetts, in the 1750s, the vice-admiralty court assumed jurisdiction over customs condemnation actions. \textit{Id.} at 96, 115. Thus, customs officials could be confident that their seizures would result in condemnation. Indeed, in 1763, Thomas Hutchinson wrote that Massachusetts had seizures every day. \textit{Id.} at 500-01. In other colonies, the common-law courts had jurisdiction over the customs condemnation proceedings, and enforcement proceedings were ineffective. \textit{See} \textit{id.} at 96.

Second, only in Massachusetts was the colonial court willing to issue general writs of assistance. \textit{Id.} at 106-07, 115; \textit{see also} QUINCY, supra note 13, at 435-40 (In a letter dated June 4, 1765, Chief Justice Hutchinson stated that all of the customs officers in Massachusetts had been furnished with writs of assistance.). In the other colonies, customs officials could not obtain a general writ of assistance nor be confident that any seizures made would be condemned.

\textsuperscript{77} \textit{See generally} QUINCY, supra note 13, at 401-11.

\textsuperscript{78} \textit{See} \textit{id.} at 500-11; LASSON, supra note 7, at 73-76.

\textsuperscript{79} TAYLOR, supra note 7, at 36.

represent their cause. The key issue at the first hearing on the proposed writs, and the question upon which the case ultimately turned, was whether the Superior Court should continue to grant the writs in general and open-ended form or whether it should limit the writs to a single occasion based on particularized information under oath. Jeremiah Gridley, the attorney general of the Massachusetts Bay Colony, defended the general writs of assistance as necessary to enforce the customs laws. The writs, Gridley argued, were justified by

the necessity of the Case and the benefit of the Revenue . . . . [T]he Revenue [was] the sole support of Fleets & Armies, abroad, & Ministers at home[,] without which the Nation could neither be preserved from the Invasions of her foes, nor the Tumults of her own Subjects. Is not this I say infinitely more important, than the imprisonment of Thieves, or even Murderers? yet in these Cases 'tis agreed Houses may be broke open.

Gridley conceded that the “common privileges of Englishmen” were taken away, but asserted that those benefits were also taken away in criminal cases.

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80. QUINCY, supra note 13, at 531-32. Chief Justice Hutchinson, in his account of the case, later wrote that the writs were objected to because they did not specify the place to be searched, and were not supported by information upon oath, says: “The Court was convinced that a writ, or warrant, to be issued only in cases where special information was given upon oath, would rarely, if ever, be applied for, as no informer would expose himself to the rage of the people.”

Id. at 414 n.2 (quoting 3 HUTCHINSON’S HISTORY OF MASSACHUSETTS 94).

81. SMITH, supra note 29, at 282-83.

82. See generally QUINCY, supra note 13, at 476-82. This necessity argument has often been invoked in justifying searches. See, e.g., Entick v. Carrington, 19 Howell’s St. Tr. 1029, 1063-64 (1765) (Attorneys for Lord Halifax argued that the power of the executive to issue search warrants for papers in seditious libel cases was essential to the government); cf. Wasserstrom, supra note 10, at 317 (“The ‘general searches’ which the framers sought to outlaw when they enacted the fourth amendment may well have been ‘cost-justified,’ and were defended on precisely this basis.”).

83. SMITH, supra note 29, at 281.

84. Id. Gridley added the right was also taken away in cases of “fine.” Gridley used the term to refer to the right of entry by authorities for distress for unpaid taxes. Id. at 281-83. Although Gridley analogized the situation to criminal cases, in such
James Otis, representing the merchants, attacked the writs as ""against the fundamental principles of law.""\textsuperscript{85} Otis contrasted the customs writ ""unfavorably with the common-law warrant for stolen goods, pointing out that it was both unlimited geographically and perpetual temporally, so that there was no return of the warrant before the issuing magistrate.""\textsuperscript{86} Otis maintained:

Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and everything in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.... Again, these writs are NOT RETURNED. Writs in their nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in law live forever, no one can be called to account. Thus reason and the constitution are both against this writ.\textsuperscript{87}

Otis conceded that the ""privilege of the house"" was subject to peremptory violation when there was a crime to be dealt with, [but] he stressed how grave and urgent the situation must be before the exception applied: the crime must be 'fla-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{85} Taylor, supra note 7, at 36-37 (quoting 2 Legal Papers of John Adams 125 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)). See generally, Smith, supra note 29, at 331-79 (extensive analysis of Otis' argument).
\item \textsuperscript{86} Taylor, supra note 7, at 37; see also Payton v. New York, 445 U.S. 573, 608-09 (1980) (White, J., dissenting) (recounting Otis' reliance on common law to support view that general writ was void).
\item \textsuperscript{87} Taylor, supra note 7, at 37 (quoting 2 Legal Papers of John Adams, supra note 85, at 142-44).
\end{enumerate}
\end{footnotesize}
grant,’ the necessity ‘great’ and ‘public.’” Further, Otis emphasized that the common-law search warrant for stolen goods had to be special and that a particular house must be suspected.\textsuperscript{89}

Although Otis lost his case, he gained a place in history.\textsuperscript{90} In that case, “the American tradition of constitutional hostility to general powers of search first found articulate expression.”\textsuperscript{91} In the audience was John Adams, who later recounted that Otis’ oration was so moving that then and there the American Revolution was borne.\textsuperscript{92} Although this was an overstatement,\textsuperscript{93} the use of the writs of assistance for customs searches and seizures “caused profound resentment” in the colonies,\textsuperscript{94} and their use is considered to be “the first in the chain of events which led directly and irresistibly to revolution and independence.”\textsuperscript{95}

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88. Smith, \textit{supra} note 29, at 341.
89. \textit{Id.}
90. Otis’ arguments in the writs of assistance case have often been cited by the Supreme Court. \textit{See}, e.g., Frank v. Maryland, 359 U.S. 360, 364 (1959); Boyd v. United States, 116 U.S. 616, 625 (1886) (The debate over the issuance of the writs of assistance in Massachusetts in 1761 “was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.”); \textit{see also} Taylor, \textit{supra} note 7, at 38 (“The writs of assistance were anathema in the colonies, and Otis’ argument against them was well known among the founding fathers.”).
93. \textit{See Smith, supra} note 29, at 377 (documenting the litigation and recognizing that Adams’ account was probably embellished); \textit{cf.} 2 \textit{Legal Papers of John Adams, supra} note 85, at 116-17. While Otis’ argument, delivered before a small audience, did not of itself have the inspirational effects attributed to it, Otis’ ideas stimulated resistance in the larger struggle against unreasonable searches and seizures.
94. Landynski, \textit{supra} note 5, at 31; \textit{see also} Harris v. United States, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (The abuses surrounding searches and seizures “more than any one single factor gave rise to American independence.”); Leagre, \textit{supra} note 9, at 397 (Based on the history of abuses, the “chief concern in the colonists’ minds was probably with the issuance of general warrants.”).
95. Lasson, \textit{supra} note 7, at 51 (citation omitted); \textit{see also} Berger v. New York, 388 U.S. 41, 58 (1967) (Use of general warrants “was a motivating factor behind the Declaration of Independence.”); Stanford v. Texas, 379 U.S. 476, 482 (1965) (“[The]
After the Superior Court ruled in favor of the proponents of the writs, the Massachusetts Assembly passed a bill requiring that writs of assistance be issued only when the customs officer possessed credible information from a specified informant that one of the acts of trade was being violated by a specified person at a specific place. The bill was vetoed by the governor, despite the governor’s recognition that the bill was very popular and that the veto would cause a clamor. Public reaction in Massachusetts and in other colonies against the writs was widespread and included rescuing seized ships, issuing town meeting promulgations, pamphleteering, publishing accounts of Otis’ arguments in the writs of assistance case, and providing other propaganda decrying the oppressive nature of the writs. In 1767, Parliament passed the Townshend

Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance . . . .”); United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (The revulsion was so “deeply felt by the Colonies as to be one of the potent causes of the Revolution.”).

96. SMITH, supra note 29, at 567-68; see also QUINCY, supra note 13, at 495-96 (providing text of the bill).


98. See, e.g., QUINCY, supra note 13, at 436-38; 2 LEGAL PAPERS OF JOHN ADAMS, supra note 85, at 179-80.

99. For example, at a meeting of the inhabitants of Boston on November 2, 1772, a committee was appointed “to state the Rights of the Colonists.” QUINCY, supra note 13, at 466. The committee report, published by order of the town, attacked the writs of assistance as giving “absolute and arbitrary” power to customs officials to search anywhere they pleased. Id. at 467. The report concluded:

Thus our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks and Chests broke open, ravaged and plundered, by Wretches, whom no prudent Man would venture to employ even as Menial Servants; whenever they are pleased to say they suspect there are in the House, Wares, [etc.] for which the Duties have not been paid. Flagrant instances of the wanton exercise of this Power, have frequently happened in this and other seaport Towns . . . . These Officers may under the color of Law and the cloak of a general warrant, break through the sacred Rights of the Domicil, ransack Mens [sic] Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders.

QUINCY, supra note 13, at 467 (quoting Report of Committee at 15-17); see also Warden v. Hayden, 387 U.S. 294, 315 (1967) (Douglas, J., dissenting); Grano, supra note 13, at 619 & n.93.

100. See generally SMITH, supra note 29, at 466-501, 562-66; QUINCY, supra note 13.
Act to clarify existing statutory authority to issue the writs in all of the colonies.\(^\text{101}\) That Act, which authorized general writs of assistance,\(^\text{102}\) was ineffective because most courts in the American colonies, with the one notable exception being Massachusetts, continued to refuse to issue the writs.\(^\text{103}\) Some colonial courts avoided the requirement that the writs be general and open-ended, issuing instead special writs.\(^\text{104}\) This interpretation was directly contrary to the purpose of the statute, and two different attorneys general of England issued opinions reminding the American courts that the writs authorized by the legislation were to be general.\(^\text{105}\) Those opinions had little effect.

2. English Cases

In England, shortly before the American Revolution, the abuses associated with searches pursuant to general warrants resulted in a series of cases stemming from publications objectionable to the crown.\(^\text{106}\) In 1762, a series of pamphlets, called the North Briton, began to be published anonymously. The author, John Wilkes, used the pamphlets to deride govern-

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13, at 436-38, 444-49, 458-59, 463, 488-94; 1 Cuddihy, \textit{supra} note 40, at 316-57; \textit{2 id.} at 389-441. As an example of contemporary reaction, Chief Justice Thomas Hutchinson, who had presided over the case where Otis presented his famous oration, lost his home to fire during the Stamp Act riots of 1765. The then governor of Massachusetts Bay Colony attributed the attack to Hutchinson's role in granting writs of assistance to customs officials. \textit{QUINCY, supra} note 13, at 416 n.2, 434 n.20; \textit{LASSON, supra} note 7, at 68; \textit{TAYLOR, supra} note 7, at 38.

101. \textit{SMITH, supra} note 29, at 438-55 (The Townshend Act was motivated by the recognition that there was no legal basis to issue writs of assistance in the colonies.).

102. \textit{Id.} at 453-54, 460.

103. \textit{See generally 2 Cuddihy, supra} note 40, at 388-89, 442-82; \textit{QUINCY, supra} note 13, at 500-11.

104. \textit{QUINCY, supra} note 13, at 510-11, 534-35; \textit{SMITH, supra} note 29, at 2, 460, 469-70.


ment ministers and criticize governmental policies. After an especially bitter attack, the government decided to apprehend and prosecute the responsible party for seditious libel.

A warrant was issued by Lord Halifax, the secretary of state, to four messengers, ordering them "to make strict and diligent search for the authors, printers, and publishers of a seditious and reasonable paper, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers." 107

This warrant was general as to the persons to be arrested, the places to be searched, and the papers to be seized. It resulted in the arrest of forty-nine persons in three days. Eventually, the messengers located the printers and learned Wilkes' identity. Wilkes and all of his private papers were then seized. 108

The printers and Wilkes brought separate suits against the messengers for false imprisonment. 109 The Wilkes case was well-known in America and has been considered a fundamental driving force behind the adoption of the Fourth Amend-

107. LASSON, supra note 7, at 43 (citation omitted). England had long licensed books and restricted printing. See LANDYNSKI, supra note 5, at 21-24 (tracing history of licensing of publications). The Stationers' Company, a private guild, had the power to search, seize, and arrest those violating restrictions on printing. TAYLOR, supra note 7, at 25; LANDYNSKI, supra note 5, at 21. The agents of the Stationers' Company carried a written authority much like a warrant, allowing the agents to search anywhere they pleased. TAYLOR, supra note 7, at 25; LANDYNSKI, supra note 5, at 21-22. This regulation accompanied "the oppressive law of Elizabethan and Stuart times against sedition." TAYLOR, supra note 7, at 25.

[T]he Star Chamber and Court of High Commission intensified their efforts to stamp out seditious libel, warrant[ing] their "messengers" to search for incriminating documents grew ever more general and oppressive. These tribunals were abolished under Cromwell, but soon after the Restoration Parliament enacted the Licensing Act for regulation of the press, which conferred on crown officers equally broad search authority. The Act expired in 1695, but despite the lack of statutory authority the Secretaries of State, as crown officers, continued to issue general warrants of search in seditious libel cases.

Id.

108. LASSON, supra note 7, at 43-44.
In that case, Chief Justice Pratt criticized the warrants for failing to specify the offenders' names in the warrant and for giving the messengers the discretionary power to search wherever their suspicions chanced to fall. Pratt maintained that if the power to issue such warrants existed, "it certainly [might] affect the person and property of every man in this kingdom, and [was] totally subversive of the liberty of the subject."

Another contemporary English case, *Entick v. Carrington*, has been repeatedly cited by the United States

10. See, e.g., Stanford v. Texas, 379 U.S. 476, 484 (1965) (describing the *Wilkes* opinion as "a wellspring of the rights now protected by the Fourth Amendment"); Boyd v. United States, 116 U.S. 616, 626-27 (1886) (maintaining that it can be "confidently asserted" that the *Wilkes* case and its results "were in the minds of those who framed the Fourth Amendment"). Partially as a consequence of the *Wilkes* case, the House of Commons condemned the use of general warrants. Stanford v. Texas, 379 U.S. at 484; 2 THOMAS E. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 252 (1864). General arrest warrants and writs of assistance, however, were not abolished. See Lobelson, supra note 7, at 1437.

11. *Wilkes*, 98 Eng. Rep. at 498; see also *Huckle*, 95 Eng. Rep. at 769 (In a suit brought by a printer seized under the warrant, which did not name anyone, the Lord Chief Justice, in upholding a damage award for the printer, stated: "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject."); *Leach*, 19 Howell's St. Tr. at 1026-27 (upholding a damage award for seizure of a printer under general warrant that neither named nor described person to be seized.).

In affirming the judgment against the messengers in *Leach*, the court did so on the narrow ground that the warrant called for the seizure of the author, printer, or publisher; Leach was none of these. *Id.* at 1028. Counsel for Leach had argued that the warrant was illegal because it failed to name or describe the printer, publisher, or author of the publication. *Id.* at 1023. Counsel maintained:

If "author, printer, and publisher," without naming any particular person, be sufficient in such a warrant as this is; it would be equally so, to issue a warrant generally, "to take up the robber or murderer of such a one." This is no description of the person; but only of the offence: it is making the officer to be judge of the matter, in the place of the person who issues the warrant. Such a power would be extremely mischievous, and might be productive of great oppression.

*Id.* at 1023-24. The Chief Justice, Lord Mansfield, agreed that the warrant was too general because it failed to name or describe anyone. *Id.* at 1026-27. The three other judges also viewed the warrant as illegal and void.


13. 2 Wilks K.B. 275; 19 Howell's St. Tr. 1029 (1765).
Supreme Court as a "'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law.'"\textsuperscript{114} The \textit{Entick} case stemmed from a warrant issued by the secretary of state to arrest Entick and to seize his books and papers, based on the charge that he was "the author, or the one concerned in writing of several weekly very seditious papers . . . ."\textsuperscript{115} Entick was arrested, and all of his papers were seized from his home.\textsuperscript{116} After his release, he sued the messengers in trespass. The jury returned a verdict for Entick, and the case was heard by Pratt, who by then was called Lord Camden.\textsuperscript{117}

During the course of his opinion, Camden condemned the scope of the warrant, which authorized seizure of all of Entick's papers, libelous or not.\textsuperscript{118} Camden declared that, if such a warrant were legal, then "the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even suspect, a person to be the author, printer, or publisher of a seditious libel."\textsuperscript{119} In contrast to the warrant before the court, Camden pointed out the judicial safeguards attending the issuance of common-law warrants for stolen goods:

\begin{quote}
Observe too the caution with which the law proceeds [for stolen goods warrants.]—There must be a full charge upon oath of a theft committed.—The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant to shew [sic] them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if
\end{quote}

\textsuperscript{115.} 2 Wilks K.B. at 278.
\textsuperscript{116.} \textit{Id.} at 275-76.
\textsuperscript{117.} \textit{Taylor}, supra note 7, at 32.
\textsuperscript{118.} 19 Howell's St. Tr. at 1066.
\textsuperscript{119.} \textit{Id.} at 1063.
the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him.

On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select: no person to prove in the owner’s behalf the officer’s misbehaviour.\textsuperscript{120}

3. State Constitutions

Many of the colonial governments at the time of the American Revolution adopted legal protections against unreasonable searches and seizures.\textsuperscript{121} Those protections, embodied in the constitutions of the various states after declaring their independence,\textsuperscript{122} addressed abuses associated with warrants.\textsuperscript{123} Most, if not all, were not drafted to address searches or seizures occurring without a warrant.\textsuperscript{124} However,

\begin{itemize}
\item \textsuperscript{120} \textit{Id.} at 1067.
\item \textsuperscript{121} \textit{See generally} 2 Cuddihy, \textit{supra} note 40, at 484-536. Even the Continental Congress succumbed to the lure of the general warrant. On August 28, 1777, Congress, in response to information that a large British army had landed at the head of the Chesapeake Bay, “recommended to the Supreme Executive Council of Pennsylvania the arrest of certain persons, most of them Quakers, who had shown a disposition inimical to the American cause, ‘together with all such papers in their possession as may be of a political nature.’” \textsc{Lasson, supra} note 7, at 76.
\item \textsuperscript{122} Some statutory limitations were also adopted. For example, New Jersey passed a statute in 1782 to prevent illegal trade with the enemy. \textsc{Quincy, supra} note 13, at 508-09 n.11. The act provided for the issuance of search and seizure warrants “as in the case of stolen Goods” by judges upon application made if “due and satisfactory Cause of Suspicion shewn [sic],” and made upon written oath or affirmation, that goods are concealed in a house or other building. \textit{Id.} (quoting Statute of June 24, 1782, c. 317).
\item \textsuperscript{123} \textit{See Taylor, supra} note 7, at 38 (“[W]arrants and writs were in the forefront of the colonial mind when the libertarian provisions of the early constitutions were drafted.”); Gidea & Weiler, \textit{supra} note 7, at 1404 n.29 (1989). \textit{See generally} \textsc{Lasson, supra} note 7, at 79-82 (detailing the provisions of the eight states addressing search and seizure in their constitutions prior to the adoption of the Fourth Amendment).
\item \textsuperscript{124} \textit{See Taylor, supra} note 7, at 41-42. There were a few provisions that at least obliquely addressed more than warranted actions. On September 28, 1776, Pennsylvania adopted its statement of rights. \textsc{Lasson, supra} note 7, at 80-81. Section 10 provided:
\end{itemize}
a common theme of the provisions was the requirement that the search or seizure be based on particularized suspicion.\textsuperscript{125} For example, the Pennsylvania statement of rights required warrants to be issued only upon a "sufficient foundation" and prohibited general warrants to search places or to seize "any person or persons, his or their property."\textsuperscript{126} Article Fourteen of the Massachusetts Declaration of Rights of 1780, which served as the model for the Fourth Amendment,\textsuperscript{127} provided

That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search in suspected places, or to seize any person or persons, his or their property, are contrary to that right, and ought not to be granted.

*Quoted in id.* at 81 n.11. The first clause of this provision, while stating the broader principle of freedom from searches and seizures, served only as a premise for condemning general warrants, which were the only abuses prevented. *Id.* at 81 n.10; *see also* SOURCES OF OUR LIBERTIES 366 (R. Perry & J. Cooper eds., 1960) (indicating that provision of Vermont Constitution of 1777 is identical to Pennsylvania provision).

Article 14 of the Massachusetts Declaration of Rights of 1780 provided:

Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

*Quoted in LASSON, supra note 7,* at 82 n.15. New Hampshire duplicated the Massachusetts provision in its Bill of Rights of 1784. *Id.* at 82.

125. Six states constitutionally "restricted searches and seizures to specific persons, places and subjects," and two other states achieved the same objective through judicial and statutory precedents. 2 Cuddihy, *supra* note 40, at 535.

126. *See supra* note 124 (reproducing the text of Pennsylvania's provision).

127. *See LANDYNISKI, supra* note 5, at 38-39. Because the Fourth Amendment was based on the Massachusetts model, "[t]his is clear proof that Congress meant to give wide, and not limited, scope to [the] protection against police intrusion." Harris v. United States, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting). Further, since the Amendment is based on that model, examination of the construction the Massachusetts court "placed upon the progenitor of the Fourth Amendment" is appropriate in interpreting the latter. *Id.* at 161. The Massachusetts provision was later interpreted to "not prohibit all searches and seizures of a man's person, his papers, and possessions; but such only as are 'unreasonable,' and the foundation of which is 'not previously sup-
that all warrants were contrary to each person’s “right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions" if "the cause or foundation of them" was not supported by oath or affirmation, and if the warrant was "not accompanied with a special designation of the person or objects of search, arrest or seizure."  

D. Drafting of the Fourth Amendment

Against the background of ill use of the warrant process to engage in suspicionless searches and seizures and the revulsion against that abuse, the Fourth Amendment was promulgated. The Amendment embodies the common-law standards for the issuance of warrants for stolen goods and reflects the framers’ high regard for the common law. The drafting process supports the view that only abuses associated with warranted actions were contemplated by the framers. The initial

reported by oath or affirmation.” Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 336 (1841) (emphasis added); see also Wasserstrom, supra note 5, at 1394 (The history of the Fourth Amendment suggests that the “and” joining the two clauses should be read to mean “therefore.”).

128. See TAYLOR, supra note 7, at 42.

129. The omission of a Bill of Rights was a main criticism of the Constitution during the debates over its approval by the States. See generally LASSON, supra note 7, at 83-100. Typical anti-Federalist attacks included the claim that general search warrants would be permitted. See, e.g., id. at 88 n.36, 93-94. One pamphlet that gained widespread circulation, “Letters of a Federal Farmer,” by Richard Henry Lee, complained that several essential rights were omitted, including “freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men’s papers, property and persons.” Id. at 88 n.37 (quoting Richard Henry Lee) (citation omitted).

130. See, e.g., Payton v. New York, 445 U.S. 573, 609-10 (1980) (White, J., dissenting) (discussing the importance of the common law to the framers); Gerstein v. Pugh, 420 U.S. 103, 116 n.17 (1975) (The common law warrant for recovery of stolen goods furnished the model for a ‘reasonable’ search under the Fourth Amendment.").

131. See Ker v. California, 374 U.S. 23, 51 (1963) (Brennan, J., dissenting) (The framers of the Fourth Amendment intended to carry forward protections already afforded in English law and to eliminate searches under general warrants and writs of assistance.); Henry v. United States, 361 U.S. 98, 100-01 (1959) (explaining that colonial revulsion against the general warrant and writs of assistance is reflected in the Fourth Amendment); TAYLOR, supra note 7, at 43 (drafting process of the Fourth Amendment.
draft, prepared by James Madison\textsuperscript{132} and sent to the House of Representatives, provided:

The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, \textit{shall not be violated by warrants} issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.\textsuperscript{133}

Although this proposal recognized the individual right to be protected against \textit{all} unreasonable searches and seizures, its prohibitions against general searches and seizures were "directed against improper warrants only."\textsuperscript{134}

\textsuperscript{132}Within days of Washington’s inauguration, Madison was advocating in Congress for a Bill of Rights. \textit{Lasson, supra} note 7, at 98-99. As an example of the necessity for the Bill of Rights, Madison referred to the power of the federal government to collect revenues. He maintained:

\textit{[t]he means for enforcing the collection are within the discretion of the Legislature; may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.}

\textit{Id.} at 99 (footnote omitted).

\textsuperscript{133}Annals of Cong., 1st Cong., 1st Sess., at 452 (emphasis added), \textit{quoted in \textit{Lasson, supra}} note 7, at 100 n.77.

\textsuperscript{134} \textit{Lasson, supra} note 7, at 100 (footnote omitted); \textit{accord} Payton v. New York, 445 U.S. at 583-84. Lasson asserted that this draft of the Amendment was a one-barreled affair, directed apparently only at the essentials of a valid warrant. The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequentially to the issuance of warrants without probable cause, etc.

\textit{Lasson, supra} note 7, at 103; \textit{see also} United States v. Rabinowitz, 339 U.S. 56, 81 (1950) (Frankfurter, J., dissenting) (The Fourth Amendment was framed with general warrants especially in mind.); Harris v. United States, 331 U.S. 145, 191 (1947) (Murphy, J., dissenting) (The Fourth Amendment was "designed in part, indeed perhaps primarily, to outlaw such general warrants."); Davis v. United States, 328 U.S. 25 Memph. L. Rev. 483 (1995)
The congressional history concerning the evolution of the language of the Amendment is sparse. The draft was referred to the Committee of Eleven, which was made up of one member from each state represented in Congress. That committee reported a draft to the full House in the following form:

The rights of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.

After this version was reported to the House, "the phrase 'unreasonable searches and seizures,' inadvertently omitted in the committee's draft, was inserted." The phrase "by warrants issuing" was objected to by Egert Benson of New York, who believed that "[t]his declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore [sought] to alter it [to] read 'and no warrant shall issue.'" The historical records do not indicate the basis of Benson's objection. The proposed revision was defeated by a "considerable majority." Several days later, Benson, acting as chairman of the committee appointed to arrange and report amendments, reported the clause as he had proposed it, notwithstanding its rejection by the House. Benson's version was ac-

582, 604-05 (1946) (Frankfurter, J., dissenting) (Based on the living experiences and their knowledge of the abuses attending searches and seizures, Madison and the other framers of the Amendment meant to prohibit as unreasonable all searches and seizures without a warrant.); TAYLOR, supra note 7, at 42 (Madison's draft only prohibited general warrants.); Gildea & Weiler, supra note 7, at 1411-12 (1989) (James Madison reluctantly supported an amendment but sought only to ban general warrants.).

135. LASSON, supra note 7, at 100.
136. Id. at 101 (emphasis added).
137. LANDYNISKI, supra note 5, at 41. "The word 'secured' was [also] altered to read 'secure . . . .'" Id.
139. LASSON, supra note 7, at 101, 102 n.84 (citing Annals of Cong., 1st Cong., 1st Sess., at 783).
140. Id. at 101-02; LANDYNISKI, supra note 5, at 41-42. It is unknown whether the change was due to Benson's oversight, his unilateral action, or an unreported acceptance of Benson's phrasing by the House. LASSON, supra note 7, at 102 n.84.
cepted by the Senate, later formally enacted by both Houses of Congress, and ratified by the states.\textsuperscript{141}

\textbf{E. The Debate over Meaning}

1. The Relationship of the Clauses

There is little disagreement that a central theme of the Amendment was its prohibition against searches and seizures made pursuant to a general warrant.\textsuperscript{142} The second clause of the Amendment serves this purpose "in two ways: first, by prescribing the requirement of probable cause, necessarily peculiar to each case; and second, by making requisite the description of the particular place to be searched, the persons to be apprehended, and the objects to be seized."\textsuperscript{143} However, based on the historical record and the wording of the Amendment itself, there is considerable difference of opinion as to the scope of the regulation of searches and seizures and the relationship of

\textsuperscript{141} LASSON, \textit{supra} note 7, at 103.
\textsuperscript{142} See, e.g., Olmstead v. United States, 277 U.S. 438, 463 (1928); Lloyd W. Weinreb, \textit{Generalities of the Fourth Amendment}, 42 U. Chi. L. Rev. 47, 50 (1974). At least one commentator argued that, had the Amendment passed in the form approved by the House and not contained Benson's changes, then "[t]he insertion of the protection 'against unreasonable searches and seizures' [would not have been intended] to impose additional standards but [would have been mere] preface to the prohibition of general warrants." However, the commentator maintained, "it seems clear that the amendment as finally adopted and ratified contemplated something more than a mere prohibition of general warrants. By its division into two clauses the amendment was given broader scope; the protection against unreasonable searches and seizures was thus intended to have independent substantive content." Leagre, \textit{supra} note 9, at 397-98; \textit{see also} Payton v. New York, 445 U.S. 573, 585 (1980) (The addition of the reasonableness clause made it "perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant."); LASSON, \textit{supra} note 7, at 103. Leagre recognized that the sparse House records are the only source for the discussion of the modifications to the Amendment. Leagre, \textit{supra} note 9, at 398. Further, he conceded that "the prohibition of general warrants was the sole concern of the 'considerable' majority of the members of the House." \textit{Id.} at 397. Thus, his position is based solely on a divining of Congressman Benson's intent, whose modifications were rejected by a considerable majority presumably concerned solely with general warrants. \textit{See id.} at 398 n.52.
\textsuperscript{143} LASSON, \textit{supra} note 7, at 120.
the two clauses.

The views fall into two principal groups. One view maintains:

The first clause—"[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated"—recognized as already existing a right to freedom from arbitrary governmental invasion of privacy and did not seek to create or confer such a right. It was evidently meant to re-emphasize (and, in some undefined way, strengthen) the requirements for a valid warrant set forth in the second clause. The second clause, in turn, defines and interprets the first, telling us the kind of search that is not "unreasonable," and therefore not forbidden, namely, the one carried out under the safeguards there specified.

144. See generally Tomkovicz, supra note 5, at 1116-36 (discussing the two views). In California v. Acevedo, 500 U.S. 565 (1991), Justice Scalia advocated another view. He proposed that "the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded." Id. at 583 (Scalia, J., concurring in judgment). He added:
I have no difficulty with the proposition that that includes the requirement of a warrant, where the common law required a warrant; and it may even be that changes in the surrounding legal rules (for example, elimination of the common-law rule that reasonable, good-faith belief was no defense to absolute liability to trespass), may make a warrant indispensable to reasonableness where it once was not. But the supposed "general rule" that a warrant is always required does not appear to have any basis in the common law, and confuses rather than facilitates any attempt to develop rules of reasonableness in light of changed legal circumstances . . . .
Id. at 583-84 (citations omitted); see also People v. Chiagles, 142 N.E. 583 (N.Y. 1923) (Justice Cardozo stated that protection against unreasonable searches and seizures is immunity "in the light of common-law traditions." ); cf. Oliver v. United States, 466 U.S. 170, 183-84 (1984) (While "[t]he common law may guide consideration of what areas are protected by the Fourth Amendment," common law rights are not co-incident with the Fourth Amendment.).

145. LANDYNSKI, supra note 5, at 43; see also Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring) ("But it is by now axiomatic that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause.' "); Wong Sun v. United States, 371 U.S. 471, 479 (1963) (The Court indicated that the requirements of the first and second clauses are equivalent and stated that it should be at least as difficult for a police officer to act without a warrant as it is for him to obtain a warrant in the first instance: "[w]hether or not the requirements of
Following this view,

fourth amendment reasonableness turns on the presence of a validly issued warrant, except in certain specified or exceptional situations where it would not be feasible to require the police to obtain a warrant before they act. Even where a warrant is not required, fourth amendment reasonableness turns on the presence of the essential precondition for a valid warrant, probable cause.\textsuperscript{146}

\begin{footnotesize}
\textsuperscript{146} Wasserstrom, supra note 10, at 282 (footnotes omitted); accord United States v. United States District Court, 407 U.S. 297, 315 (1972); Chimel v. California, 395 U.S. 752, 761-66 (1969); cf. Payton v. New York, 445 U.S. 573, 616 (1980) (White, J., dissenting) (maintaining that, while warrant should not be required to make in-home arrest, officer must still have probable cause to believe that arrestee has committed crime and is in the house).
\end{footnotesize}
A main disciple of this view was Felix Frankfurter. 147 Referring to the Fourth Amendment, he has stated:

These words are not just a literary composition. They are not to be read as they might be ready [sic] by a man who knows English but has no knowledge of the history that gave rise to the words . . . . One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable." Words must be read with the gloss of the experience of those who framed them. Because the experience of the framers of the Bill of Rights was so vivid, they assumed that it would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary. When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity. Even a warrant cannot authorize it except when it is issued "upon probable cause * * * and particularly describing the place to be searched, and the persons or things to be seized." 148

147. See United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) ("A search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity."); Harris v. United States, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting) ("With minor and severely confined exceptions, . . . every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant."); Davis v. United States, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting) (The warrant clause of the Fourth Amendment was "the key to what the framers had in mind by prohibiting 'unreasonable' searches and seizures," because all seizures without judicial authority were deemed 'unreasonable."); see also LANDYNISKI, supra note 5, at 111; cf. Wasserstrom, supra note 5, at 1394-96 (Based on the vast differences in today's world from one in which the framers lived, the commentator rejects reliance on language, structure, and history of the Amendment as guides to interpreting it).

148. United States v. Rabinowitz, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dis-
Telford Taylor has attacked this view as standing the Amendment on its head. In discussing the second view, Taylor asserts that the Amendment was designed primarily as a limitation on the issuance of warrants and that the framers took for granted the existence of warrantless searches because experience had given them no cause to be concerned about them. He opines that neither the legislative history of the Amendment nor any other history "sheds much light on the purpose of the first clause. Quite possibly it was to cover shortcomings in warrants other than those specified in the second clause; quite possibly it was to cover other unforeseeable contingencies." Taylor maintains that the Amendment was designed to authorize warrants and was not a safeguard against oppressive searches. Therefore, in Taylor's view, the Amendment was not designed to make most searches covered by warrants.

According to this view, the two clauses are distinct. The first clause substantively requires only that searches and seizures be "reasonable." The second clause addresses only...
those searches and seizures conducted under warrants, saying nothing about when a warrant is necessary or about what factors are to be examined to determine reasonableness: \textsuperscript{154} “[B]y its express language, the fourth amendment does not require warrants; rather, it merely specifies the conditions that warrants must satisfy to be valid.” \textsuperscript{155} Adherents to this view assert that the relevant test is not whether it was reasonable to have obtained a warrant, but “whether the search itself was reasonable,” with that question turning on “the total atmosphere” of a particular case. \textsuperscript{156} “The failure to obtain a warrant is, at most, one factor in the evaluation of general reasonableness.” \textsuperscript{157}

Chief Justice Rehnquist shares this view. Rehnquist has argued that “nothing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants. The terms of the Amendment simply mandate that the people be secure from unreasonable searches and seizures, and that any warrants which may issue shall only issue upon probable cause.” \textsuperscript{158} He has rejected the “judicially created”\textsuperscript{159} preference for warrants, arguing, as Taylor has, that, in emphasizing the warrant requirement over the reasonableness of the search, the Court has stood the Fourth Amendment on its head.\textsuperscript{160}


\textsuperscript{155} Grano, supra note 13, at 604.


\textsuperscript{157} Wasserstrom, supra note 10, at 281.


\textsuperscript{159} Id.

\textsuperscript{160} Id. (quoting Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Harlan, J., concurring) (quoting TAYLOR, supra note 7, at 23-24)); see also Payton v. New York, 445 U.S. 573, 621 (Rehnquist, J., dissenting) (The Court has misread the Fourth Amendment in connection with searches by elevating the warrant requirement over the necessity for probable cause.). Compare Texas v. Brown, 460 U.S. 730, 735 (1983) (plurality opinion by Rehnquist, J.) (recognizing that the Court’s cases “hold that pro-
The Supreme Court's collective opinion about the relationship of the clauses has, from decade to decade, vacillated between the two competing views of the relationship of the clauses.\textsuperscript{161} One commentator aptly summarized the Supreme Court's interpretation of the relationship of the two clauses when he wrote: "The courts have said little of lasting significance about the relationship between the two clauses."\textsuperscript{162}

At times, the Court has stated that all searches and seizures are per se unreasonable, subject to enumerated exceptions, in the absence of a warrant.\textsuperscript{163} Moreover, the Court has explicitly recognized that the concepts of the Warrant Clause are applicable to warrantless searches and seizures:

[T]he notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context . . . . And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that

\textsuperscript{161} See Weinreb, supra note 142, at 48.

\textsuperscript{162} Id.

The Court has stressed: "[t]his demand for specificity . . . upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." Thus, for example, in determining whether an officer acted reasonably in stopping a person on the street, "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which [the police officer] is entitled to draw from the facts in light of his experience."

At other times, the Court has rejected a "categorical warrant requirement" and has looked to "reasonableness alone" to measure the validity of the government's activities. This latter view, which may now command a majority of adherents on the Court, has severed the two clauses completely, judging reasonableness, not in terms of the substantive requirements of the Warrant Clause, but based on what the majority believes is reasonable under the circumstances.

An example of the view exposing the independence of the two clauses is United States v. Rabinowitz, wherein the Supreme Court permitted reasonableness to be determined without reference to the Warrant Clause. In that case, the Court, in upholding the warrantless search of a one-room office as an incident to a valid arrest, stated:

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165. *Id.* at 21 n.18 (citations omitted).
166. *Id.* at 27.
167. See, e.g., *Acevedo*, 500 U.S. at 582 (Scalia, J., concurring) (cataloging the cases as "lurch[ing] back and forth" between the two views); Texas v. Brown, 460 U.S. 730, 745-46 (1983) (Powell, J., concurring) (recognizing the inconsistency of Court's emphasis on Warrant Clause).
172. The scope of a warrantless search incident to an arrest was later modified to
What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are "unreasonable" searches and, regrettably, in our discipline we have no ready litmus paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.\textsuperscript{173}

The Court, in other cases, has also opined that the specifications of the Warrant Clause are not the \textit{sine qua non} of reasonableness. Instead, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable . . . ."\textsuperscript{174} The test of reasonableness "is not capable of precise definition or mechanical application."\textsuperscript{175} Rather, in defining the contours of the right to be free from unreasonable searches and seizures, "the specific content and incidents of this right must be shaped by the context in which it is asserted."\textsuperscript{176} Following this view, the Court in more recent cases has explained that, while "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion."\textsuperscript{177} Pursuant to that view, whether particularized suspicion is a necessary component of reasonableness depends upon the balance of competing individual and governmental interests; it is not mandated in all

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\item include only the "wingspan" of the arrestee. \textit{See} Chimel v. California, 395 U.S. 752 (1969).
\item 173. 339 U.S. at 63. The Court stated: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case." \textit{Id.} at 65-66.
\item 174. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); \textit{see} United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985); United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983); \textit{see also} Carroll v. United States, 267 U.S. 132, 147 (1925) (The Amendment "does not denounce all searches and seizures, but only such as are unreasonable.").
\item 176. Wyman v. James, 400 U.S. 309, 318 (1971) (quoting Terry v. Ohio, 392 U.S. 1, 9 (1968)); \textit{see also} \textit{T.L.O.}, 469 U.S. at 337 ("[W]hat is reasonable depends on the context within which a search takes place.").
\item 177. United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976) (footnote omitted); \textit{see also} \textit{T.L.O.}, 469 U.S. at 324 n.8.
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cases.

2. Individualized Suspicion as an Inherent Quality of "Reasonableness"

The debate over the relationship of the two clauses may never be resolved for all time by a majority of the Court at any given time. Each of the two views discussed above has significant shortcomings. The view asserting the primacy of the Warrant Clause is based on the premise that there is a preference for a warrant contained in the Amendment. Yet, the language of the Amendment does not create a preference for a warrant; it is silent on the question because it was drafted at a time when it was assumed that a warrant would be used. The second view completely divorces the Reasonableness Clause from the Warrant Clause, ignoring the historical relationship of the clauses, and sets the Reasonableness Clause adrift without any guide to measure reasonableness.

If the debate concerning the relationship of the two clauses were resolved in favor of the view that the Warrant Clause serves to define reasonableness, then it follows that the principle of individualized suspicion contained in the probable cause and particularity requirements of the Warrant Clause would be mandated for all searches and seizures. If the debate were resolved in favor of the independence of the two clauses, however, the conclusion would not necessarily follow that an undefined, atmospheric balancing test for reasonableness would result. Instead, giving substance to the principles of historical analysis and original intent, reference to what the framers meant by the term "reasonableness" should be employed in determining what that term means. Relevant considerations in ascertaining the framers' concept of reasonableness are the search and seizure practices and the legal environment of the time, the contemporary litigation and public opinion decrying the lack of individualized suspicion as a fundamental defect in general warrants, and the historical relationship of the two clauses.

Starting with the universally accepted premise that "the
fourth amendment was the product of particular events that closely preceded the Constitution and the Bill of Rights,"\textsuperscript{178} examination of the search and seizure practices predating the drafting of the Fourth Amendment yields several conclusions. The framers were operating in an environment in which, with limited exceptions,\textsuperscript{179} there was no right to search or seize without a warrant. The exceptions to use of a warrant, notably felony cases pursuant to hue and cry or hot pursuit, required individualized suspicion of criminal activity to justify the search or seizure. The historical abuses associated with search and seizure practices involved broad grants of official authority pursuant to a general warrant.\textsuperscript{180} General warrants were the perceived evil.

The drafting process of the Fourth Amendment reinforces the conclusion that suspicionless searches and seizures pursuant to general warrants were the initial and primary evils sought to be prevented. The lack of concern with warrantless actions is reflected in the earlier drafts of the Amendment and in the state predecessors, all of which primarily addressed general warrants. The Amendment does not mandate a warrant; the framers presupposed that one would be used. Thus, in the face

\textsuperscript{178} TAYLOR, supra note 7, at 19.

\textsuperscript{179} One commentator, writing about the permissibility of searches incident to arrest, has stated:

[I]t is plain as plain can be that these litigations involved searches under the authority of warrants, and that none of the parties was at all concerned about warrantless searches incident to arrest. The stream of practice for the latter flowed from an independent source, wholly unbroken by the rocks of controversy or litigation.

Herein there is nothing surprising, for arrest searches involved none of the abuses against which Otis and Camden railed. The only victims of such searches were those who, as probable felons, were the objects of hue and cry, hot pursuit, or an arrest warrant . . . .

There is no evidence that suggests that the framers of the search provisions of the federal and early state constitutions had in mind warrantless searches incident to arrest. If there was any "original understanding" on this point, it was that such searches were quite normal and, in the language of the fourth amendment, "reasonable."

TAYLOR, supra note 7, at 39.

\textsuperscript{180} Id. at 27. In England between 1700 and 1763, 108 warrants were issued; all but two of these were general warrants. See Lobelson, supra note 7, at 1436.
of the legal background that a warrant was presumed to be generally necessary, the Amendment says nothing about whether there is a preference for one. It follows that, to the extent that the debate over the relationship of the clauses focuses on whether a warrant is preferred, the debate is misplaced.

The core complaint of the colonists was not that the searches and seizures were warranted, warrantless, or unauthorized actions; it was the general, suspicionless nature of the searches and seizures. The customs writs of assistance in America and the Wilkes and Entick cases in England all involved suspicionless searches and seizures pursuant to general warrants. As they sought to regulate searches and seizures, the framers held certain principles to be fundamental, of which particularized suspicion was in the first rank. The common-law warrant for stolen goods was viewed as the embodiment of the requirements of a reasonable search or seizure. Therefore, the framers incorporated the "stringent requirements" applicable to common-law warrants for stolen goods into the Amendment. The framers were addressing the only situation that they knew or were concerned about—general war-

181. See Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 398-99 (1974) (When the Fourth Amendment was adopted, searches and seizures at issue involved the rummaging of English messengers and colonial customs officials: "It is illusory to suppose that we can know what they thought of anything else. Nothing else was then in controversy."); Tomkovicz, supra note 5, at 1134 (Framers objected to general warrants and writs of assistance because they were arbitrary invasions: the officers were authorized to search on bare suspicion and had unlimited discretion to choose whom, where, and what to search and seize.).

182. See Wasserstrom, supra note 10, at 303-04 (The language and history of the Warrant Clause "tells us that searches and seizures of the sort the colonists rebelled against were unreasonable because they were made pursuant to executive authority that was not adequately constrained with respect to basis by requirement of probable cause, or with respect to scope by a requirement of particularity.").

183. See generally Taylor, supra note 7, at 39-41.

184. Id. at 41.

185. See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (The "driving force" behind the adoption of the Fourth Amendment was "widespread hostility among the former Colonists to issuance of writs of assistance" and general search warrants permitting the search of private houses); Brower v. County of Inyo, 489 U.S. 593, 596 (1989) ("The writs of assistance [were] the principal grievance against which the Fourth Amendment was directed . . .") (citation omitted); Harris v. United States, 331
rants—and sought to eliminate them by imposing explicit safeguards. It follows that the framers, in the second clause of the Fourth Amendment, were specifying what the characteristics of a reasonable search and seizure were, including the requirement of particularly describing the persons and things to be seized and the places to be searched and the requirement that the intrusion be justified by probable cause. By so prescribing the requirements of a search pursuant to a warrant, the framers were seeking to ensure that freedom from suspicionless intrusions was guaranteed. Thus, for the former colonists, particularized suspicion of wrongdoing was an irreducible minimum for a search or seizure.

Having defined a reasonable search and seizure as meeting enumerated requirements, it is but a small deduction to conclude that the framers intended that those specifications also should attach to warrantless searches and seizures as those

U.S. 145, 196 (1947) (Jackson, J., dissenting) (by controlling the search warrant, framers believed they were controlling all searches); TAYLOR, supra note 7, at 41 ("[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern."); Wasserstrom, supra note 5, at 1393 ("[T]he Framers did not build the warrant clause into the Constitution to prevent warrantless searches. Rather, they sought to prohibit the newly formed federal government from using general warrants, a device they believed jeopardized the liberty of every citizen."); see also Leagle, supra note 9, at 397 ("The importance of this history prior to the drafting of the Fourth Amendment lies in its indication that the chief concern in the colonists' minds was probably with the issuance of general warrants.").

186. See United States v. Watson, 423 U.S. 411, 429 (1976) (Powell, J., concurring) (There was no historical evidence that framers "were at all concerned about warrantless arrests by local constables and other peace officers.").

187. See Wasserstrom, supra note 10, at 304. Probable cause was the framers' solution to the problem they did face — warranted searches — and that solution clearly should carry over to warrantless searches and seizures as well, for if "probable cause" describes the quantum of evidence which the framers required to support the issuance of a warrant, this must be because they thought that unless it was supported by that quantum of evidence, a search or seizure was unjustified, and should not take place. There is simply no persuasive argument that a warrantless search or seizure on less than probable cause is reasonable, if a warranted search or seizure without probable cause is not.

Id. (footnote omitted).
practices developed in response to law enforcement needs.\textsuperscript{188}

It defies common sense and the historical context to believe that the colonials would think that actions of a similar character would be reasonable in the absence of individualized suspicion if no warrant were used but would not satisfy the probable cause or particularity requirements if a warrant were employed. One cannot then conclude that, to counteract the abuses of the general warrant, the drafters of the Fourth Amendment eliminated the need for warrants. Instead, the framers were attempting to ensure that abuses were eliminated, not warrants.

In conclusion, given the historical background, characterized by suspicionless searches and seizures pursuant to general warrants, the litigation and outcry concerning those abuses, the antecedent colonial constitutional efforts to prevent general warrants, the importance attached to the necessity of establishing individualized suspicion to issue a common-law search warrant, and the drafting process of the Amendment itself, it takes little deductive reasoning to conclude that a chief goal of the framers was to prevent the historical abuses associated with suspicionless searches and seizures predating the Amendment.\textsuperscript{189} The framers believed individualized suspicion to be an inherent component of the concept of reasonableness. They intended not only to prohibit the specific evils of which they were aware, but also, based on the general terms they used, to give the Constitution enduring value beyond their own lifetimes.\textsuperscript{190} To be consistent with those values,\textsuperscript{191} the Amend-

\textsuperscript{188} Cf. United States v. Chadwick, 433 U.S. 1, 9 (1977) ("What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth."); Amsterdam, supra note 181, at 411 ("[W]arrantless searches exhibiting the same characteristics as general warrants and writs must be deemed unreasonable if there is no principled basis for distinguishing them from general warrants and writs.").


\textsuperscript{190} See John H. Elly, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1-2 (1980) ("The Constitution proceeds by briefly indicating certain fundamental
ment should be interpreted to require that, generally, for searches and seizures to be reasonable, they must be based on individualized suspicion.

III. THE SUPREME COURT'S CONSIDERATION OF INDIVIDUALIZED SUSPICION

A. Introduction

Interpretation of the Fourth Amendment is not "frozen" by the law enforcement practices that existed at the time of its passage. The Constitution is a living document, and, therefore, while historical analysis is important, it is not dispositive of whether a particular search or seizure is reasonable. Traditionally, a search or seizure required probable cause to believe that its object evidenced a crime, and an arrest required probable cause to believe that the person arrested was engaged in criminal activity. Several events by the middle of the

principles whose specific implications for each age must be determined in contemporary context . . . . That the complete inference will not be there—because the situation is not likely to have been foreseen—is generally common ground.”); Grano, supra note 13, at 620 (“The underlying grievances are certainly relevant to the interpretative task, but constitutional provisions cannot be properly viewed simply as shorthand statements for the specific grievances that gave rise to them.”); Tomkovicz, supra note 5, at 1137 (“Constitutional analysts generally agree that the document was meant to be more than a mere catalogue of forbidden actions.” The framers intended that the “underlying values” be honored.).

191. See Zurcher v. Stanford Daily, 436 U.S. 547, 559 (1978) (The Court rejected the claim that more than an ordinary search warrant should be required to search a newsroom because the “Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance.”); Harris v. United States, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting) (asserting that, even if the framers “may have overvalued privacy,” it was not up to him to substitute his judgment); Tomkovicz, supra note 5, at 1138 (“If the Framers chose certain principles, it is not for us to set their choices aside in favor of our preferences.”); see also Olmstead v. United States, 277 U.S. 438, 465 (1928) (The Fourth Amendment is to be construed in light of what was deemed an unreasonable search or seizure when it was adopted.); Carroll v. United States, 267 U.S. 132, 149 (1925) (same).


194. See Henry v. United States, 361 U.S. 98, 100 (1959) (“The requirement of
twentieth century combined to undermine that paradigm: the Fourth Amendment was incorporated into the Fourteenth Amendment, thereby making it applicable to the states, 195 which is to say that it applied for the first time to the everyday law enforcement activities of state and local governments; the number and variety of official intrusions into individuals’ lives increased exponentially as a result of the increasing complexities of society; 196 and the Fourth Amendment was found applicable to situations less intrusive than a full search or an arrest. 197

As a reaction to the inelasticity of the historical paradigm when applied to the numerous and diverse actions by governmental authorities, the Supreme Court made two fundamental modifications. In 1967, in a case involving a health inspection of a building, the Court created a concept of probable cause divorced from individualized suspicion. 198 The next year, the Court bisected the concept of individualized suspicion, requiring the traditional probable cause showing for full searches and for circumstances approximating a custodial arrest. However, for lesser intrusions involving stops and frisks, a balancing test was adopted, and a lesser quantity of individualized suspicion, articulable suspicion, served to justify those encroachments. 199

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197. See Dunaway, 442 U.S. at 207-10 (discussing the fact that, prior to 1968, the Court analyzed the Fourth Amendment’s guarantee in terms of arrest, probable cause to arrest, and warrants based on probable cause but in Terry v. Ohio, 392 U.S. 1 (1968), the Court recognized that the Amendment also applied to stops predicated upon reasonable suspicion).
198. Camara v. Municipal Court, 387 U.S. 523 (1967); see also infra notes 279-283 and accompanying text.
199. See Terry v. Ohio, 392 U.S. 1 (1968); see also infra notes 219-222 and accompanying text.
More recently, the Court has abandoned any pretense of believing that individualized suspicion remains the preferred model for any searches and seizures to be reasonable. The list of permissible suspicionless invasions continues to grow, and the level of intrusiveness of those suspicionless governmental actions has continually intensified.\footnote{200}

This Part examines the Supreme Court decisions discussing the need for individualized suspicion. Section B outlines the traditional approach mandating individualized suspicion,\footnote{201} the development of the balancing test,\footnote{202} and the creation of a non-individualized concept of probable cause.\footnote{203} Section C details the lengthy list of circumstances where individualized suspicion is no longer required.\footnote{204}

\textbf{B. The Traditional Approach, the Balancing Test, and Non-Individualized Probable Cause}

1. The Traditional Approach: Requiring Individualized Suspicion

\textit{a. Warrantless Situations}

Although not all encounters are seizures,\footnote{205} once that threshold has been passed, the police must justify the resulting interference with liberty. Individualized suspicion of illegal activity is normally required as one element of that justification.\footnote{206} Depending on the onerousness of the seizure, the

\begin{itemize}
quantity of individualized suspicion must increase. Prior to 1968, the only seizure of a person recognized as implicating the Fourth Amendment was an arrest. A person cannot be arrested, or subjected to the functional equivalent of arrest, absent probable cause to believe that that person is engaged in criminal activity. The Court has repeatedly explained that probable cause to justify an arrest "means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." This principle has been extensively litigated and remains firmly entrenched.

an arrest for violating that statute. See Brown v. Texas, 443 U.S. 47, 53 (1979) (A statute requiring individuals to identify themselves to a police officer violated Fourth Amendment rights as applied because police did not have reasonable suspicion that the petitioner had committed or was committing a criminal act.); cf. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (holding vagrancy statute unconstitutional on vagueness grounds); Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939) (A statute criminalizing the status of "gang member" where no acts or omissions of gangs were defined violated the Due Process Clause of the Fourteenth Amendment.); William O. Douglas, Vagrancy and Arrest on Suspicion, 70 YALE L.J. 1, 5-13 (1960) (documenting pre-Papachristou practice of using vagrancy laws to arrest individuals to hold them for investigation of other crimes).


208. See, e.g., Payton v. New York, 445 U.S. 573, 602-03 (1980) (requiring warrant issued upon probable cause for arrest in home); id. at 616 (White, J., dissenting) (maintaining that although warrant for arrest in home should not be required, officer must have reasonable grounds to believe arrestee has committed crime and is in house at the time of entry); United States v. Watson, 423 U.S. 411, 417 (1976) (recognizing legality of warrantless arrest in public place based on probable cause); Adams v. Williams, 407 U.S. 143, 148-49 (1972) (requirement of probable cause to arrest developed when officer determined that person had a gun and thus corroborated informant's tip that person unlawfully possessed weapon and drugs); Beck v. Ohio, 379 U.S. 89, 96-97 (1964) (finding arrest illegal when record failed to disclose basis for believing that person was engaged in criminal activity).


210. Seizures of things requires a similar showing. See, e.g., Kremen v. United
Similarly, to justify a search, it often has been stated that the officer must have probable cause to believe that the person, place, or thing to be searched has evidence of a crime.\textsuperscript{211} For example, in \textit{Carroll v. United States},\textsuperscript{212} the Court, in considering under what circumstances a search of automobiles for illegal liquor was permissible, stated: "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search."\textsuperscript{213} Rather, the Court stated, to justify such a search, the official must have individualized suspicion amounting to probable cause to believe that the vehicle is carrying contraband.\textsuperscript{214}

The probable cause requirement has been recognized as having "central importance" to the protection the individual is afforded by the Fourth Amendment:\textsuperscript{215}

"The requirement of probable cause has roots that are deep in our history." Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even

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\textsuperscript{212} 267 U.S. 132 (1925).

\textsuperscript{213} \textit{Id.} at 153-54.

\textsuperscript{214} \textit{Id.; see also} Brinegar v. United States, 338 U.S. 160, 177 (1949); \textit{cf.} Delaware v. Prouse, 440 U.S. 648, 664 (1979) (holding suspicionless stops of vehicles to check drivers' licenses and vehicle registrations illegal).

'strong reason to suspect' was not adequate to support a warrant for arrest.” The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the "reasonableness" requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule.\textsuperscript{216}

Thus, for example, police investigating a rape cannot seize young African-American men and take them to police headquarters for questioning and fingerprinting simply because the victim described her assailant as a Negro youth.\textsuperscript{217} That type of investigatory procedure has been condemned as violating the Fourth Amendment because such "seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry . . . ."\textsuperscript{218}

In 1968, the Court in \textit{Terry v. Ohio}\textsuperscript{219} recognized that the Fourth Amendment also applied to intrusions that did not constitute an arrest or a full search. The Court held that the Amendment applied to stops—brief detentions of suspicious persons to investigate those suspicions—and to frisks—patdowns of the outer clothing of the person to determine if the person is armed.\textsuperscript{220} A lesser standard of individualized suspicion has been employed to justify those impositions. For stops, it usually must be shown that the police have articulable suspicion that the person is engaged in criminal activity.\textsuperscript{221} A frisk, which is designed to protect an officer’s safety during an encounter with an individual, is justified by

\textsuperscript{216} Id. (citations omitted).
\textsuperscript{218} Id. at 726.
\textsuperscript{219} 392 U.S. 1 (1968).
\textsuperscript{220} Id. at 30.
\textsuperscript{221} See, e.g., United States v. Sokolow, 490 U.S. 1 (1989); see also Pennsylvania v. Mimms, 434 U.S. 106, 121-22 (1977) (Stevens, J., dissenting) (stating rule that "individualized inquiry" is usually necessary for each police intrusion).
specific and articulable facts which, taken together with rational
inferences from those facts, lead a reasonable person to believe
that the person is armed and dangerous. 222

Importantly, for both stops and frisks, although the quantity
of information necessary to justify either action is less than
that necessary to support an arrest or a full search, the Court
continues to require individualized suspicion. 223 The Court has
explained:

Courts have used a variety of terms to capture the elusive
concept of what cause is sufficient to authorize police to
stop a person. Terms like "articulable reasons" and "found-
ed suspicion" are not self-defining; they fall short of pro-
viding clear guidance dispositive of the myriad factual sit-
uations that arise. But the essence of all that has been
written is that the totality of the circumstances—the whole
picture—must be taken into account. Based upon that
whole picture the detaining officers must have a particular-
ized and objective basis for suspecting the particular person
stopped of criminal activity.

The idea that an assessment of the whole picture must
yield a particularized suspicion contains two elements, each
of which must be present before a stop is permissible.
First, the assessment must be based upon all of the cir-
cumstances.

* * * *

The second element contained in the idea that an
assessment of the whole picture must yield a particularized
suspicion is the concept that the process ... must raise a
suspicion that the particular individual being stopped is
engaged in wrongdoing .... "[T]his demand for speci-
ficity is the central teaching of this Court's Fourth Amend-
ment jurisprudence." 224

222. Terry, 392 U.S. at 21.
223. These principles also apply to the temporary detention of personal property.
See United States v. Place, 462 U.S. 696, 702-06 (1983) (temporary detention of lugg-
age based on articulable suspicion that it contains drugs permissible).
phasis added).
Thus, absent articulable suspicion that the person accosted is engaged in criminal activity, it has been said that even the most fleeting detention of a person violates the Fourth Amendment,\textsuperscript{225} as does the most cursory of frisks.\textsuperscript{226} For example, police officers cannot stop a person who looks suspicious without pointing to any facts supporting that conclusion merely because the person is in a neighborhood frequented by drug users.\textsuperscript{227} In such instances, in the absence of any articulable basis for suspecting the person of misconduct, the balance between the public interest in preventing crime and the individual's "right to personal security and privacy tilts in favor of freedom from police interference."\textsuperscript{228}

The centrality of the role played by individualized suspicion as a prerequisite for an intrusion may find its strongest expression in cases discussing association as a basis for a search or seizure. It is not an infrequent situation where the person whom the police have probable cause to arrest is found in the company of another person who is unknown to the police or whom the police do not have prior cause to arrest.\textsuperscript{229}

\textsuperscript{225} See, e.g., United States v. Sokolow, 490 U.S. 1 (1989) (finding stop of person at airport justified by articulable suspicion that person was drug courier); United States v. Hensley, 469 U.S. 221, 227-36 (1985) (holding stop justified based upon "wanted" flyer issued upon reasonable suspicion that person stopped had committed crime); Florida v. Rodriguez, 469 U.S. 1, 6-7 (1984) (assuming that seizure occurred but was justified based upon articulable suspicion that person was a drug courier); Florida v. Royer, 460 U.S. 491, 498-99 (1983) (stating rule); \textit{Cortez}, 449 U.S. at 419-22 (finding stop of vehicle was based upon reasonable suspicion that it contained illegal aliens); Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam) (finding no articulable suspicion that person accosted at airport was a drug courier); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (holding that, within border, government interest in preventing illegal entry of aliens permits stop of vehicle when reasonable suspicion exists that vehicle contains aliens).

\textsuperscript{226} See, e.g., Adams v. Williams, 407 U.S. 143, 145-48 (1972) (informant's tip provided articulable suspicion to believe that person was armed and dangerous, justifying a limited protective search for weapons); Sibron v. New York, 392 U.S. 40, 64 (1968) (police officer may pat down suspicious individual where reasonable suspicion exists that individual is armed and dangerous); \textit{Terry}, 392 U.S. at 23-30 (same).


\textsuperscript{228} \textit{Id}.

\textsuperscript{229} 2 \textsc{Lafave}, supra note 1, § 3.6(c), at 49.
The "leading case"\textsuperscript{230} in this area is \textit{United States v. Di Re},\textsuperscript{231} which involved the prosecution of Di Re for knowingly possessing counterfeit gasoline ration coupons. After being told by an informant that he would be purchasing the coupons from Buttita at a specified location, the police followed Buttita's car to the appointed place.\textsuperscript{232} Officers approached the car and found the informant in the back seat holding two counterfeit gasoline coupons in his hand.\textsuperscript{233} The informant told the police that he had obtained the coupons from Buttita, who was the driver of the car.\textsuperscript{234} Di Re, who was seated in the front passenger's seat, was also arrested and searched, resulting in the recovery of counterfeit coupons from Di Re.\textsuperscript{235} The informant was not called as a witness, and the prosecution presented no evidence that Di Re knew of the illegal transaction.\textsuperscript{236}

Reversing Di Re's conviction, the Court held that there was no probable cause to search him.\textsuperscript{237} It stressed that Buttita's giving the ration coupons to the informant would not by itself suggest illegality and that the transaction took place on a public street in daytime.\textsuperscript{238} The Court also believed that Di Re's search was not justified as incident to the right to search the automobile:

The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reason-

\textsuperscript{230} 2 Id.
\textsuperscript{231} 332 U.S. 581 (1948).
\textsuperscript{232} Id. at 583.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} Id. at 593.
\textsuperscript{237} Id.
\textsuperscript{238} Id.
ing with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?  

The Court concluded: “We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.”

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239. *Id.* at 587.

240. *Id.; see also 2 LAFAVE, supra note 1, § 3.6(c), at 50-51.

In light of *Di Re*, it seems clear beyond question that the mere fact of present association with a person whom the police have grounds to arrest for conduct on some past occasion does not constitute probable cause for the arrest of the associate as well. Likewise, by the same analysis, it may be said that present ‘association’ with a vehicle, in the sense of being a passenger in it, is not alone a basis for arrest merely because it is known that the car was used in the commission of some crime on a past occasion.

2 LAFAVE, *supra* note 1, § 3.6(c), at 50-51. Although association with a known criminal is insufficient by itself to justify a seizure, *see* Sibron v. New York, 392 U.S. 40, 62 (1968) (speaking with known drug addicts), it may serve as a factor in assessing whether individual suspicion is present. *See id.* at 68 (Douglas, J., concurring) (“Consorting with criminals may in a particular factual setting be a basis for believing that a criminal project is underway.”). Justice Harlan has stated:

[A]ssociation with known criminals may . . . be a factor contributing to [suspicion but] does not, entirely by itself, create suspicion adequate to support a stop. There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended.

*Id.* at 73 (Harlan, J., concurring in result).

In *Ker v. California*, 374 U.S. 23 (1963), wherein the Supreme Court addressed the propriety of the arrest of a wife of a suspected drug dealer when she was present in the couple’s apartment at the time of the husband’s arrest, the Court found individualized suspicion based on deducing what the wife must have known. At the time the police entered the apartment, they had probable cause to arrest George Ker for possession of marijuana but had no reason to suspect Ker’s wife. *Id.* at 35-36. As the officers entered the apartment, the wife, Diane Ker, emerged from the kitchen. In the kitchen was a small scale atop the sink, upon which lay a “brick-shaped” package of marijuana in plain view. *Id.* at 28, 36. The officers also recovered marijuana from a kitchen cupboard and from a bedroom dresser. *Id.* at 29. Based on those circumstances, the Court held that the arrest of Diane Ker was proper, reasoning:
A similarly strong statement of the role of individualized suspicion in assessing the reasonableness of an intrusion was made in *Ybarra v. Illinois.* In that case, the Supreme Court considered the constitutionality of the search of a tavern patron when the premises were being inspected pursuant to a search warrant. Upon entering the tavern, the officers announced their purpose and advised those present that they were going to conduct a cursory search for weapons. An officer frisked each of the nine to thirteen customers present in the tavern. In the first patdown of Ybarra, the officer felt what he described as "a cigarette pack with objects in it." He did not remove the pack; instead, he proceeded to frisk the other customers. He thereafter returned to Ybarra and retrieved the pack from Ybarra’s pants pocket. Six tin foil packets of heroin were found in the pack. Both when the warrant was issued and when it was executed, "the agents knew nothing in particular about Ybarra, except that he was present, along with several other customers, in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale."

The Court held that the search was illegal, reasoning:

[A] person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person

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Even assuming that her presence in a small room with the contraband in a prominent position on the kitchen sink would not alone establish a reasonable ground for the officers’ belief that she was in joint possession with her husband, that fact was accompanied by the officers’ information that Ker had been using his apartment as a base of operations for his narcotics activities.

*Id.* at 36-37.

242. *Id.* at 88.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 88-89.
247. *Id.* at 91.
must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.248

The Court also stated that there was no reasonable basis to pat down Ybarra, ruling that there must be a particularized belief that the person frisked is “armed and presently dangerous.”249 Because the initial pat down was illegal, the officer’s discovery of the objects in the pack could not be used as a basis for the more extensive search.250

b. Particularity Requirement for Warrants

A somewhat different analysis of the role of individualized suspicion must be employed for searches and seizures pursuant to warrants. This is because the Warrant Clause explicitly requires that the warrant must “particularly describ[e] the place to be searched and the persons or things to be seized.”251 Referring to the Warrant Clause’s requirement of a particular description, the Court has stated:

These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever “be [s]ecure in their persons, houses, papers, and effects” from intrusion and seizure by officers acting under the unbridled authority of a general warrant.252

The problem posed by the general warrant “is not that of intrusion per se, but of a general, exploratory rummaging in a

248. Id. (citation omitted).
249. Id. at 92-93.
250. Id. at 93 n.5.
251. U.S. CONST. amend. IV; see, e.g., Steele v. United States, 267 U.S. 498 (1925); West v. Cabell, 153 U.S. 78, 85-88 (1894) (arrest warrant must name person or describe person with particularity.).
person's belongings . . . . [The Fourth Amendment addresses this problem] by requiring a "particular description" of the things to be seized. 253 If a warrant does not specify with particularity the persons, 254 places, 255 or things 256 to be searched or seized, it is invalid. 257 Thus, the particularity requirement of the Warrant Clause performs two functions: it requires a particular description, which is to say that the police must describe to the magistrate specific areas or persons to be searched or seized; and it limits the intrusion to those particularly described persons, places, or things. 258

The particularity requirement relates to the requirement of individualized suspicion because the police can only search or seize the persons or objects specified in the warrant; 259 however, the two are not co-extensive. For example, the Court has authorized warrants without suspicion to search particular places. 260 In such cases, the authorities have not been required to specify why they suspect that the object of their search or seizure will be present. 261 The particularity requirement must


254. See 2 LAFAYE, supra note 1, § 4.5(e), at 227-33, § 4.9, at 290-92.

255. See 2 id. § 4.6, at 233-36.


257. See Massachusetts v. Sheppard, 468 U.S. 981, 988 n.5 (1984) ("The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.").

258. See United States v. Leon, 468 U.S. 897, 964-65 (1984) (Stevens, J., concurring in part and dissenting in part) (A warrant must "contain a description sufficient to enable the officers who execute it to ascertain with reasonable effort where they are to search and what they are to seize. The test is whether the executing officers' discretion has been limited in a way that forbids a general search.").

259. Plain view seizures are an exception to this rule. See Horton v. California, 496 U.S. 128 (1990).


261. Id. at 534.
be combined with the Warrant Clause’s probable cause requirement to ensure that individualized suspicion is present when a warrant is utilized.\textsuperscript{262} Probable cause explains why a person, place, or thing is the object of the search or seizure;\textsuperscript{263} the particularity requirement seeks to ensure that that suspicion is directed at specified persons, places, or things.\textsuperscript{264}

2. The Development of the Balancing Test and the First Departures from Individualized Suspicion

The traditional rule required that a search or seizure be supported by probable cause. When the Court recognized that the Fourth Amendment applied to circumstances involving infringements short of an arrest or a full search, the Court adopted a balancing test to determine whether those lesser intrusions are reasonable: “The permissibility of a particular law enforcement practice is judged by ‘balancing its intrusion on the individual’s Fourth Amendment interests against its promotion

\textsuperscript{262} See, e.g., Franks v. Delaware, 438 U.S. 154, 165 (1978) (“[W]arrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter.”); Nathanson v. United States, 290 U.S. 41, 46-47 (1933) (invalidating search pursuant to warrant for specified place where there were no facts supporting assertions of belief set forth in application for warrant).

\textsuperscript{263} See Berger v. New York, 388 U.S. 41, 58-59 (1967) (The purpose of the probable cause requirement, which is “to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed,” is wholly aborted by a statute permitting the electronic recording of conversations without requiring a belief that “any particular offense has been or is being committed.”).

\textsuperscript{264} The Court has recently undermined the particularity mandate of the warrant clause by creating a good faith exception to the exclusionary rule, which means that exclusion of presumptively illegally obtained evidence is no longer mandated as a Fourth Amendment matter if the officer had “reasonable grounds for believing that the warrant was properly issued.”

Because this is so, whether the description in the warrant \textit{in fact} was constitutionally adequate is no longer determinative on the suppression issue.

2 LAFAVE, supra note 1, § 4.5, at 207 (citing United States v. Leon, 468 U.S. 897, 923 (1984)). Now, suppression of evidence is only required because of a particularity defect if the warrant is “so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.” Leon, 468 U.S. at 923.
of legitimate governmental interests." At one time, it appeared that a precondition for the balancing test was the existence of the lesser intrusion. More recently, the Court has stated that a departure from the traditional probable cause standard is justified "where the public interest" is sufficient. The balancing test is now applied to a wide variety of intrusions, and the probable cause test is increasingly rejected as the proper model.

The balancing test became prominent in the wake of *Terry v. Ohio* and *Camara v. Municipal Court*. In *Terry*, the Court applied that test to validate the frisk of a person suspected of being armed and dangerous. Under the facts of the case, the Court was not called on to determine whether any level of individualized suspicion was necessary; instead, the Court reduced the necessary level of suspicion from probable cause to reasonable suspicion to permit stops and frisks.

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266. See, e.g., Dunaway v. New York, 442 U.S. 200, 213-14 (1979) (retaining the traditional probable cause test for intrusions exceeding a stop and rejecting a "multifactor balancing test" to measure reasonableness of police conduct as undermining the protections intended by the framers).


268. See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); cf. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 456-57 (1990) (Brennan, J., dissenting) (noting that the majority had engaged in a balancing test without first determining that the seizure was substantially less intrusive than an arrest). But see Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 44-50 (1988) (discussing balancing test and maintaining that the Court had confined its use to "new" or peripheral Fourth Amendment problems).

269. 392 U.S. 1 (1968).

270. 387 U.S. 523 (1967). See generally Sundby, supra note 6, at 391-414 (discussing impact of *Camara* and *Terry* upon Fourth Amendment analysis).

271. See supra notes 221-22 and accompanying text.
which were considered to be much less intrusive investigative techniques than were arrests and searches.\textsuperscript{272} The Terry Court iterated that the reasonableness of an intrusion is determined by inquiry into the facts of each case but maintained that individualized suspicion was a central component of reasonableness: "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."\textsuperscript{273} The Court added: "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."\textsuperscript{274}

This strong statement of the role of individualized suspicion, even when utilizing the balancing test, has been substantially eroded by other developments. In contrast to Terry, where individualized suspicion was considered a central component of reasonableness, subsequent cases have posited that, "although 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion."\textsuperscript{275} The standard of reasonableness now has no intrinsic components and depends solely upon the context in which the search or seizure takes place.\textsuperscript{276} One specialized application of the balancing test is triggered when the government has established that its interests present a "special need" beyond the normal needs of law enforcement.\textsuperscript{277} Once a spe-

\textsuperscript{272} Terry, 392 U.S. at 20, 27-30.

\textsuperscript{273} Id. at 21; see also Michigan v. Summers, 452 U.S. 692, 697-702 (1981).

\textsuperscript{274} Terry, 392 U.S. at 21 n.18 (citations omitted).


\textsuperscript{276} See, e.g., O'Connor v. Ortega, 480 U.S. 709, 719 (1987); T.L.O., 469 U.S. at 337.

\textsuperscript{277} Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987); see T.L.O., 469 U.S. at 340.
cial need is established, departures from individualized justification have been uniformly approved. 278

The first departure from individualized suspicion was approved of in Camara v. Municipal Court, 279 decided one year before Terry. In Camara, which did not rely on the special needs test, the Supreme Court validated the issuance of search warrants to inspect residences for health, fire, and housing code violations on an area-wide basis, rejecting any requirement of showing any individualized basis for believing that possible violations existed at a particular building. The Camara Court, although acknowledging that the intrusion upon Fourth Amendment rights by the inspections was "significant," 280 emphasized the governmental interest, contrasting it with the governmental interest in criminal investigations:

[I]n a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and

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(278) See, e.g., Skinner, 489 U.S. at 619; Von Raab, 489 U.S. at 665.
(280) Id. at 534-35.
enforce such minimum standards even upon existing structures.\textsuperscript{281}

The Court further found that "the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures."\textsuperscript{282} Accordingly, the Court created a non-individualized concept of probable cause. Probable cause to issue a warrant to inspect does not depend upon specific knowledge of the condition of the building; instead, it exists if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular welling.\textsuperscript{283}

\textit{Camara} was the fountainhead of many of the factors relied on by the Court to justify departures from individualized suspicion in later cases. Those considerations include the noncriminal purpose of the governmental intrusion at issue, the neutral criteria standard for guiding the executing official's actions, the historical acceptance of the activities, the necessity for the suspicionless nature of the actions, the preventive aspects of the governmental activities, and the intrusiveness of the invasion. As will be seen in Section C, which details the Supreme Court opinions addressing a host of activities that federal, state, and local authorities have sought to carry out without individualized justification, a combination of these and other criteria has often

\textsuperscript{281} \textit{Id.} at 535.

\textsuperscript{282} \textit{Id.} at 535-36.

\textsuperscript{283} \textit{Id.} at 538; \textit{see also} Almeida-Sanchez v. United States, 413 U.S. 266, 275-85 (1973) (Powell, J., concurring) (advocating probable cause standard without individualized suspicion for searches of vehicles for illegal aliens near border); cf. Sundby, \textit{supra} note 6, at 394 (viewing \textit{Camara} as reversing the traditional rules of probable cause and reasonableness: before \textit{Camara}, probable cause defined reasonableness; after \textit{Camara}, reasonableness defined probable cause).
been seen as sufficient to permit the suspicionless incursions. The validity of reliance on these factors to dispense with individualized justification is examined in Part III.

C. Case Law Examining Specific Exceptions to Individualized Suspicion

The principle that individualized suspicion is a prerequisite to a search or seizure has been eroded substantially. A large number of permissible suspicionless intrusions have been sanctioned. 284 These suspicionless intrusions, which are examined in this Section, fall into several categories. One category involves those searches and seizures that are adjuncts to valid primary intrusions. 285 Such intrusions include searches incident to arrest, searches of prison inmates and detainees, orders designed to protect police officers during stops, detentions of persons during the execution of search warrants, entries onto property to arrest persons, entries onto property to combat and investigate fires, and inventory searches of possessions validly in police custody. Border searches constitute a second, discrete category. 286 A third includes administrative inspections. 287 This broad category encompasses safety inspections of buildings and workplaces, searches of highly regulated businesses, and administrative searches of persons and their possessions. Administrative searches of persons and their possessions have extended to home visits related to the receipt of government benefits, work-related searches of governmental workplaces, and intrusions into the body for drug testing. An open question is whether searches of students by school officials need individualized suspicion. Vehicular use, 288 the final category, has also been the subject of numerous types of

284. The exceptions to individualized suspicion are not co-incident to the exceptions to the warrant requirement. See California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (discussing exceptions to warrant).
285. See infra notes 289-326 and accompanying text.
286. See infra notes 327-350 and accompanying text.
287. See infra notes 351-459 and accompanying text.
288. See infra notes 460-490 and accompanying text.
suspicionless activities. Although non-random license-and-vehicle-registration stops are not allowed, sobriety checkpoints are permitted, and dicta indicates that other types of roadblocks are also valid.

1. Searches and Seizures as Adjuncts of Valid Primary Intrusions

One extensive category of intrusions recognized as permissible regardless of individualized suspicion is composed of those searches and seizures that are adjuncts to valid primary intrusions. The secondary intrusion is considered reasonable to effectuate the purpose of the primary intrusion and does not require any additional individualized suspicion. The subsidiary intrusion "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."289 Without the primary intrusion, which usually precedes or is contemporaneous with the secondary intrusion, the adjunctive intrusion would not be permissible. Often, the overriding concern supporting the permissibility of such intrusions has been the protection of the safety of the law enforcement officer.

There are several types of lawful adjunctive intrusions directed at persons. The oldest permits a search incident to a valid arrest, which is based on a common-law rule predating the Constitution.290 In upholding such searches, the Court has stated that, because "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment[,] . . . a search incident to the arrest requires no additional justification."291 In addition, the Court has stated: "It is the fact of the lawful arrest which establishes the authori-


290. United States v. Robinson, 414 U.S. 218, 233 n.3 (1973) (citing TAYLOR, supra note 7, at 44-45); see also People v. Chiagles, 142 N.E. 583, 583-84 (N.Y. 1923) (tracing origins of search incident to arrest).

ty to search, and . . . in the case of a lawful custodial arrest a full search of the person is . . . a ‘reasonable’ search under that Amendment.”292 Searches incident to arrest are viewed as necessary to protect the safety of the officer by disarming the suspect, to prevent frustration of the arrest, and to prevent concealment or destruction of evidence.293

Prison inmates and pretrial detainees are subject to search as an incident of their confinement.294 The right to search is grounded on the principle that, as a detainee, the person “simply does not possess the full range of freedoms of an unincarcerated individual.”295 Such searches promote the essential governmental goals of maintaining institutional security and preserving order and discipline.296 The scope of the permissible search includes suspicionless body cavity searches after contact visits with persons from outside the institution.297

293. Id. at 234-35; Chimel v. California, 395 U.S. 752, 762-63 (1969). Although the scope of the area searched has fluctuated over the years, see Robinson, 414 U.S. at 225-26, since 1969, the Court has limited the area to include only those areas within the arrestee’s immediate control at the time of the arrest. See Chimel, 395 U.S. 752; see also Maryland v. Buie, 494 U.S. 325 (1990) (Incident to a custodial in-house arrest, officers can look into closets and other spaces immediately adjoining place of arrest from which an attack could be immediately launched.); New York v. Belton, 453 U.S. 454, 460 (1981) (Incident to arrest of automobile occupant, police may search the entire passenger compartment of car.); Vale v. Louisiana, 399 U.S. 30, 33-34 (1970) (officers cannot use arrestee as a “walking search warrant” by moving him into house and from room to room to conduct a warrantless search of the house); cf. Mincey v. Arizona, 437 U.S. 385, 391-92 (1978) (court rejected exception to warrant requirement for extensive search of entire residence after entering house to arrest accused on basis that, while person arrested has lessened expectation of privacy in his person, he did not have lessened expectation of privacy in entire house); id. at 406-07 (Rehnquist, J., concurring in part and dissenting in part) (prior intrusion occasioned by shooting and police officers’ response “may legitimize a search under some exigencies that in tamer circumstances might not permit a search”).
295. Bell, 441 U.S. at 546.
296. Id.
297. Id. at 558-60. In permitting such searches, the Bell majority stated that the practice of searching body cavities “instinctively gives us the most pause.” Id. at 558. Nonetheless, because a detention facility was “a unique place fraught with serious
As an incident to a valid stop of an automobile, the police can demand to see the driver's license and the vehicle's registration and inspect the vehicle's identification number.\textsuperscript{298} The police officer may also order the driver out of the car, even when the officer has no reason to suspect the driver of foul play.\textsuperscript{299} This rule is based upon the proposition that there has already been a valid detention, and the only question is whether the driver during the stop will be "sitting in the driver's seat of his car or standing alongside it."\textsuperscript{300} The incremental intrusion\textsuperscript{301} of the order to exit the vehicle has been described as "de minimis"\textsuperscript{302} because the driver is being asked "to expose to view very little more of his person than is already exposed."\textsuperscript{303} Such orders serve to protect the officer:\textsuperscript{304} "Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be victim of an assault."\textsuperscript{305} Accordingly, the Court con-

\textsuperscript{299} Pennsylvania v. Mimi\textit{s}, 434 U.S. 106, 111 (1977) (per curiam). As an indication of the limited nature of adjunctively valid intrusions, the Court in Michigan v. Long, 463 U.S. 1032 (1983), held that, during the stop of an automobile, the police can make a protective search of the passenger compartment of the car "limited to those areas in which a weapon may be placed or hidden," only if the police have reasonable suspicion that the driver is armed and dangerous. \textit{Id.} at 1049. This protective search is not a permissible incident of every stop but must be justified in each case by individualized reasonable suspicion, although to make a workable rule, the entire passenger compartment of the automobile is considered within the area into which the person might reach to grab a weapon. \textit{Id.} at 1048-49.
\textsuperscript{300} Mimi\textit{s}, 434 U.S. at 111.
\textsuperscript{301} \textit{Id.}
\textsuperscript{302} \textit{Id.}
\textsuperscript{303} \textit{Id.}
\textsuperscript{304} \textit{Id.} at 110.
\textsuperscript{305} \textit{Id.} (footnote omitted). The Mimi\textit{s} Court also recognized that officers may be subjected to accidental injury from passing traffic in some situations and that "the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both." \textit{Id.} at 111.
cluded that “[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concern for the officer’s safety.”

Another permissible suspicionless “incremental intrusion on personal liberty” is the detention of all occupants of a home while the residence is searched pursuant to a search warrant. The Court has reasoned that, in such circumstances, a judicial officer has made the “critical determination” that the “police have probable cause to believe that someone in the home is committing a crime” and, therefore, they “should be given a special authorization to thrust themselves into the privacy of a home. The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.” The detention is justified, al-

306. Id. (footnote omitted). Justice Stevens, in a dissenting opinion, stated that, as a general rule, individualized suspicion was necessary for each intrusion on liberty. Id. at 116, 121 (Stevens, J., dissenting). Stevens believed that eliminating any requirement that the officer must explain his reasons for ordering a suspect out of a car signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits. Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin—may escape it entirely.

Id. at 122.


308. Id. at 703-04. The Summers Court distinguished Ybarra v. Illinois, 444 U.S. 85 (1979), which prohibited the patdown of tavern patrons during the execution of a search warrant for narcotics at the tavern, on the grounds that, in Ybarra, a search of the person on the premises occurred, yet there was no reason to believe that Ybarra had any “special connection” to the premises, and there was “no other basis for suspecting that he was armed or in possession of contraband.” 452 U.S. at 696 n.4.

Chief Justice Burger, joined by Justices Blackmun and Rehnquist, dissented in Ybarra. Burger would have held that officers executing “a search warrant for narcotics in a place of known narcotics activity may protect themselves by conducting” a patdown. 444 U.S. at 97 (Burger, C.J., dissenting). Rehnquist, although conceding that a person does not forfeit the protection of the Fourth Amendment merely due to his presence during the execution of a search warrant, specifically rejected a requirement of individualized suspicion that a particular person is armed and dangerous as a precondition of a frisk. Id. at 104 (Rehnquist, J., dissenting). He believed that “it was quite reasonable to assume that any one or more of the persons at the bar could have been involved in drug trafficking.” Id. at 106. That assumption, combined with the
though a "significant restraint"\textsuperscript{309} on liberty, because of the "legitimate law enforcement interest in preventing flight [if] incriminating evidence is found [and in] minimizing the risk of harm to the officers."\textsuperscript{310} The execution of a search warrant "is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence."\textsuperscript{311} By giving the police "unquestioned command of the situation,"\textsuperscript{312} that risk of harm to the police and the occupants is minimized.\textsuperscript{313} Moreover, the Court has reasoned, the presence of the occupants may facilitate the orderly completion of the search.\textsuperscript{314}

In addition to these adjunctive searches and seizures directed at persons, the Court has upheld several impositions directed at property as incidents of valid primary intrusions. An arrest warrant "implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."\textsuperscript{315} Prison inmates and pretrial detainees are subject to suspicionless searches of their rooms as an incident of their confinement.\textsuperscript{316}

\begin{quote}
recognition that firearms are tools of the narcotics trade, justified a frisk of all patrons.\textit{Id.} Rehnquist asserted that individualized suspicion "may be important in the case of an on-the-street stop, where the officer must articulate some reason for singling the person out of the general population," but that at least two reasons made it less significant during the execution of a search warrant, which

had thrust the police into a confrontation with a small, but potentially dangerous, group of people. First, in place of the requirement of "individualized suspicion" as a guard against arbitrary exercise of authority, we have here the determination of a neutral and detached magistrate that a search warrant was necessary . . . .

In addition, the task performed by the officers executing a search warrant is inherently more perilous than is a momentary encounter on the street.\textit{Id.} at 107.
\end{quote}

\textsuperscript{309} \textit{Summers}, 452 U.S. at 701.
\textsuperscript{310} \textit{Id.} at 702.
\textsuperscript{311} \textit{Id.} (footnote omitted).
\textsuperscript{312} \textit{Id.} at 703.
\textsuperscript{313} \textit{Id.} at 702-03.
\textsuperscript{314} \textit{Id.} at 703.
\textsuperscript{316} \textit{Bell v. Wolfish}, 441 U.S. 520, 555-57 (1979); \textit{see also id.} at 576 (Marshall, J., dissenting) (routine searches of rooms "may be an unavoidable incident of incarceration"). In justifying such searches, the \textit{Bell} majority suggested that "a person confined
A burning building "creates an exigency that justifies a warrantless entry by [firefighters] to fight the blaze." As an incident of that intrusion, firefighters and investigators may remain on the premises, not only until the fire has been extinguished and no danger of rekindling remains, but also to investigate the cause of the fire. This is permissible "because determining the cause and origin of a fire serves a compelling public interest." "Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction."

Police officers may conduct inventory searches of automobiles and personal effects lawfully in police custody. The search must be pursuant to a routine administrative policy and not part of an investigation. For example, the personal be-

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318. Clifford, 464 U.S. at 293; Tyler, 436 U.S. at 510. However, where reasonable expectations of privacy remain regarding the property, once the cause of the fire has been located, the justification for the intrusion dissipates and any further investigation requires additional justification. See Clifford, 464 U.S. at 292, 293-95 (imposing a warrant requirement and, for criminal investigations, probable cause).

319. Clifford, 464 U.S. at 293 (plurality opinion).

320. Tyler, 436 U.S. at 510; see also 3 LAFAVE, supra note 1, § 10.4(b), at 695-97 (discussing need for prompt fire investigation).

321. Colorado v. Bertine, 479 U.S. 367, 376 (1987) (police may search canister inside pouch contained in backpack inside locked vehicle either at roadside or at impoundment lot); Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (police may search arrestee's bag and containers therein, rather than sealing the bag for storage pending owner's release); South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (inventory search of vehicle may include all containers in vehicle if search conducted according to department policy); see also O'Connor v. Ortega, 480 U.S. 709, 724 (1987) (plurality opinion) (concept of probable cause has little meaning when applied to routine inventory of employee's office by public employer to secure government property). See generally John F. Wagner, Jr., Annotation, Supreme Court's Views as to Constitutionality of Inventory Searches, 109 L. Ed. 2d 776 (1992).

322. Florida v. Wells, 495 U.S. 1, 4 (1990); Lafayette, 462 U.S. at 648; cf.
longings of someone who has been custodially arrested may be searched at the police station.\textsuperscript{323} In such circumstances, an "inventory search is not an independent legal concept but rather an incidental administrative step following arrest and preceding incarceration."\textsuperscript{324} An arrest is only one of numerous ways in which personal property may be lawfully in police custody. The property also may come into police control as a result of an automobile accident or other community caretaking functions of the police.\textsuperscript{325} The function of an inventory search is to protect the owner's property, to protect the police against false claims for stolen or lost property, and to protect the police and others from potential danger.\textsuperscript{326}

\begin{footnotesize}
\begin{itemize}
  \item Michigan v. Thomas, 458 U.S. 259, 261-62 (1982) (when officer found contraband during inventory search, search of remainder of vehicle permissible based on probable cause to believe it contained additional contraband).
  \item La\f{}ayette, 462 U.S. at 648; United States v. Edwards, 415 U.S. 800, 804-05 (1974).
  \item La\f{}ayette, 462 U.S. at 644.
  \item See, e.g., Opperman, 428 U.S. at 368-69.
  \item La\f{}ayette, 462 U.S. at 646-47; Opperman, 428 U.S. at 369 ("The practice has been viewed as essential to respond to incidents of theft or vandalism.").
\end{itemize}
\end{footnotesize}
2. Border Searches

Travelers and goods crossing the international border seeking entry into the United States may be searched without any suspicion of illegal activity. This power is grounded solely on national sovereignty; that is, the federal government has both the right and obligation to protect the nation’s borders from legally excludable persons and things. Thus, "the

327. This power to search and seize without suspicion also extends to the functional equivalent of the border.

For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.

Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973) (footnote omitted). Border searches without suspicion may, under certain circumstances, also extend to searches in the United States’ interior of those who have recently crossed the border, based on surveillance starting at the border. See generally 3 LAFAVE, supra note 1, § 10.5(f), at 741-48. Congress has also given the Coast Guard and customs officials broad authority to stop and seize on water. See, e.g., United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (individualized suspicion not required for Coast Guard or Customs Service to board vessel and to examine owner’s documents). See generally 3 LAFAVE, supra note 1, § 10.5(k), at 776-88.


329. See United States v. Montoya De Hernandez, 473 U.S. 531, 538-39 (1985) (emphasizing sovereignty interests at the border); id. at 563-64 (Brennan, J., dissenting) (same); Torres v. Puerto Rico, 442 U.S. 465, 472-73 (1979) (“The authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity.”); United States v. Ramsey, 431 U.S. 606, 616 (1977) (sovereign’s right of self-protection); Almeida-Sanchez, 413 U.S. at 291 (White, J., dissenting) (“Jurisdiction over its own territory . . . is an incident of every independent nation.”); Carroll, 267 U.S. at 154 (speaking of the power of “national self protection”).

LaFave, in his treatise, considers border searches “a variety” of administrative searches. 3 LAFAVE, supra note 1, § 10.5(f), at 747. He therefore applies the three-part test utilized in Camara v. Municipal Court, 387 U.S. 523 (1967), to justify such searches. 3 id. § 10.5(a), at 716-17. This view, although buttressed by more recent Supreme Court cases citing Camara, fails to recognize the sui generis nature of border searches, which are justified solely by the unique circumstances necessary to enforce national
Fourth Amendment's balance of reasonableness is qualitatively different at the international border," and sovereignty alone is the measure of reasonableness. However, for detentions beyond the scope of routine customs searches and inspections, the individual liberty interest protected by the Fourth Amendment is not outweighed by mere assertions of sovereignty, and in the balance of interests, individualized suspicion of illegal activity becomes necessary.  

Attempts to protect national sovereignty have also moved away from the immediate vicinity of the border and into areas appurtenant to it. Several investigative techniques have been utilized by immigration authorities. Roving patrols by immigration authorities have been held to need articulable suspicion of criminal activity before stopping vehicles that are not known to have crossed the border, even though they are traveling near it. To search such vehicles, probable cause is required. Similarly, at fixed checkpoints away from the bor-

sovereignty. See Ramsey, 431 U.S. at 616 (holding searches at border are "reasonable simply by virtue of the fact that they occur at the border"). Only when attempts to enforce national sovereignty move away from the border or become unduly intrusive does a balancing of interests become applicable.  

330. Montoya De Hernandez, 473 U.S. at 538; see also Ramsey, 431 U.S. at 616.  

331. See, e.g., Montoya De Hernandez, 473 U.S. at 541 (a 16-hour detention of person reasonably suspected of "balloon swallowing," which is a method of smuggling cocaine into the country, was justified.). The Court expressed no view on the propriety of non-routine border searches. Id. at 541 n.4. See generally 3 LAFAVE, supra note 1, § 10.5 (b)-(e), at 718-41; cf. United States v. Ramsey, 431 U.S. 606 (1977) (upholding statute allowing search of incoming letters sent in the mail when reasonable suspicion to suspect customs laws violated; opinion, however, broadly implying that reasonable suspicion not necessary).  

332. Compare Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 221-24 (1984) (Powell, J., concurring) (asserting that suspicionless factory sweeps for illegal aliens was reasonable) with id. at 232-33 (Brennan, J., concurring in part and dissenting in part) (arguing that suspicionless seizure of factory workers who were illegal aliens violated Fourth Amendment's requirement of particularized suspicion).  

333. See 3 LAFAVE, supra note 1, § 10.5(g), at 748-51 (discussing searches of persons and things away from border but suspected of having crossed border).  

334. United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (roving border patrols may stop vehicles only where articulable suspicion of criminal behavior is present).  

der, probable cause is needed to justify a search. 336 However, in United States v. Martinez-Fuerte, 337 the Court upheld suspicionless stops of vehicles at permanent checkpoints located away from the border to locate illegal aliens. 338

Balancing the competing individual and governmental interests, the Martinez-Fuerte majority viewed the checkpoints as "necessary" because the flow of illegal immigrants could not be controlled effectively at the international border. 339 Individualized suspicion was considered "impractical" due to the heavy volume of traffic, and therefore, the authorities could not engage in a "particularized study of a given car." 340 Consequently, the Court opined, a requirement of individualized suspicion would eliminate any deterrent to well-disguised smuggling operations. 341 On the other hand, the Court viewed the intrusion upon protected Fourth Amendment interests as "routine" and minimal. 342 Individuals were deemed to have a diminished reasonable expectation of privacy in motor vehicles, 343 and there was only a visual inspection of the vehicle's passengers and a brief question or two. 344

The Court also looked at the procedures employed to justify the checkpoints. Checkpoints were considered less intrusive than stops by roving patrols because all vehicles were stopped, visible signs of authority were present, and the locations of the checkpoints were known. 345 Moreover, the officers at the checkpoint had limited discretion because superiors chose its location and the officers could stop only those vehicles passing through the checkpoint. 346 Given that limited discretion, the Court believed that less possibility of harassment of individuals

338. Id. at 566-67.
339. Id. at 556.
340. Id. at 557.
341. Id.
342. Id. at 561.
343. Id.
344. Id. at 557-58.
345. Id.
346. Id. at 559.
existed.347 However, the Martinez-Fuerte Court also approved of the diversion of a selected number of vehicles to secondary checkpoints for inquiry into the occupants' citizenship and residency status based upon discretionary decisions, not supported by articulable suspicion, made by an immigration officer at the initial checkpoint.348 The Court viewed the secondary referrals as advancing "Fourth Amendment interests by minimizing the intrusion on the general motoring public."349 It believed that the secondary checkpoints were permissible due to their public nature, the routine nature of the referrals, and the limited inquiry into residence status.350

3. Administrative Inspections

a. Safety Inspections of Buildings and Workplaces

One broad exception to particularized suspicion was approved of in Camara v. Municipal Court,351 wherein the Supreme Court validated the issuance of search warrants to inspect residences for health, fire, and housing code violations on an area-wide basis and did not require a showing of possible violations allegedly existing at a particular building. In doing so, the Court created a non-particularized352 concept of prob-

347. Id.
348. Id. at 546-47.
349. Id. at 560. Justice Brennan, in dissent, criticized this view:
The Court's view that "selective referrals—rather than questioning the occupants of every car—tend to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public," stands the Fourth Amendment on its head. The starting point of this view is the unannounced assumption that intrusions are generally permissible; hence, any minimization of intrusions serves Fourth Amendment interests. Under the Fourth Amendment, however, the status quo is nonintrusion, for as a general matter, it is unreasonable to subject the average citizen or his property to search or seizure. Thus, minimization of intrusion only lessens the aggravation to Fourth Amendment interests; it certainly does not further those interests.

Id. at 572-73 n.2 (Brennan, J., dissenting) (citation omitted).

350. Id. at 560.
352. Id. at 530.
able cause. Probable cause to issue a warrant to inspect does not depend upon specific knowledge of the condition of the building; it would exist, according to the Camara Court,

if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. 353

In Camara, the Supreme Court did not depart from the traditional probable cause standard “merely because the practice at issue was called an inspection rather than a search or merely because it was deemed to be within the police power of municipalities to deal with housing conditions.” 354 Instead, the Court balanced the need to search against the invasion that the search entailed. The Court identified the government’s goal at stake as securing city-wide compliance with minimal physical standards for private property. 355 This goal furthered the governmental interest of preventing the development of conditions hazardous to public health and safety: fires and epidemics could ravage large urban areas, and unsightly conditions adversely affected economic values of neighboring structures. 356 The Court added that the public interest demanded that such dangerous conditions be prevented or abated but that “the only effective way to seek universal compliance with the minimum standards required by municipal codes [was] through routine periodic inspections of all structures.” 357 Although the Camara

353. Id. at 538.
354. 3 LAFAVE, supra note 1, § 10.2(d), at 648.
355. Camara, 387 U.S. at 535.
357. Camara, 387 U.S. at 535-37; see also id. at 537 (“[I]t [was] doubtful that any
Court recognized that the intrusion upon Fourth Amendment rights was not peripheral because the inspections were neither personal in nature nor aimed at the discovery of evidence of a crime, the Court believed that the inspections involved a relatively limited invasion of privacy. It also observed that such programs had "a long history of judicial and public acceptance." Thus, the Court's analysis "involved not only a determination that the inspection in question was less intrusive than the typical search but also that 'acceptable results' in code enforcement could not be accomplished if it were necessary to establish in advance the probability that a particular violation was present in a particular building."

The reach of Camara, which involved a private residence, has been extended by the Supreme Court to commercial buildings, to ground and surface mines, and to inspections by the Occupational Safety and Health Administration for safety and regulatory violations. These latter inspections extend to "any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer" and allows OSHA to inspect "any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee."

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358. Id. at 534-35.
359. Id. at 537; see 3 LAFAVE, supra note 1, § 10.1(b), at 503-08 (criticizing these factors).
360. 387 U.S. at 537.
361. 3 LAFAVE, supra note 1, § 10.2(d), at 648. LaFave maintains, based on Camara, that a showing of "acceptable results" for business inspections is likewise required to permit a "watered-down probable cause standard." Id.
362. 387 U.S. at 525.
366. Id. at 309 n.1 (quoting 29 U.S.C. § 657(a) (1988)); see also 3 LAFAVE, supra note 1, § 10.2, at 629-30 (listing the types of industries subject to scrutiny by various
b. Closely Regulated Industries

Warrantless searches, in the absence of particularized suspicion, also have been permitted in the "relatively unique circumstances" of those industries subject to close governmental supervision and inspection.\(^{367}\) Industries deemed to be closely governmental authorities). As a substitute for probable cause that a specific business has violated a safety regulation, the Court stated:

A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.\(^{367}\)


367. *Marshall*, 436 U.S. at 313. The closely regulated industries concept is an exception to the warrant requirement and to the individualized suspicion requirement: if the Court determines that the industry is highly regulated, thus justifying an exception to the warrant requirement, individualized suspicion is also not required. The fact that the business establishment sought to be inspected is in a closely regulated industry is a sufficient condition for dispensing with individualized suspicion. See New York v. Burger, 482 U.S. 691, 702 (1987) (An owner or operator of commercial premises in a closely regulated industry has a reduced expectation of privacy, so that both the "warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness, . . . have lessened application."). LaFave states that, even for closely regulated businesses where a warrant is not required, there may still exist a necessity for a *Camara*-type showing of probable cause. 3 LAFAVE, supra note 1, § 10.2(d), at 649-52 (1987), 194-96 (Supp. 1994). He bases his position on the general rule that, "under the Fourth Amendment[,] circumstances excusing resort to the warrant process do not likewise excuse the necessity of probable cause." 3 id. at 649 (footnote omitted). He correctly notes that the closely regulated industry cases do not explicitly address the issue. 3 id. at 650 (1987), 135-36 (Supp. 1994). This is so, however, because those cases build upon the already established *Camara* rule dispensing with individualized suspicion, assume the correctness of that rule, and address whether the warrant process must be utilized. The *Camara*-type probable cause showing, even if necessary, does not entail a demonstration that the particular business inspected has or may have any regulatory violations, which is to say that no individualized suspicion is needed. Cf. *Burger*, 482 U.S. at 694 n.2 (acknowledging that there was no showing at trial level why police decided to inspect Burger's business); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621-31 (1989) (analyzing separately whether warrant and individualized suspicion are required for employee drug testing in highly regulated industry). LaFave properly concludes:

The risk of arbitrary action is a legitimate cause for concern whether or not the persons being investigated are engaged in a regulated business. If "a particular dealer is singled out for more intensive attention than is the
regulated have included liquor businesses, gun dealers, and automobile junkyards. The purpose of inspections of highly regulated industries is not coincident with the health and safety rationale that supplies the need to inspect premises for dangerous conditions. Instead, it is the stock of the highly regulated industry that has often been the object of the search: liquor, guns, and auto parts.

The Court has employed several rationales in allowing suspicionless and warrantless intrusions of highly regulated industries, although none of the articulated bases is entirely satisfactory. In the first of the cases, the Court found it unnecessary to justify its decision beyond citing the long history of regulating the liquor industry. This singular reliance on historical regulation had the obvious limitation of not justifying inspections of new industries or industries where the level of regulation increased. Accordingly, two years later, in sanctioning the statutorily authorized, warrantless search of the locked

3 LAFAVE, supra note 1, § 10.2(d), at 652 (footnote omitted) (quoting Peter S. Greenberg, The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See, 61 CAL. L. REV. 1011, 1025-26 (1973)).

368. In Donovan v. Dewey, 452 U.S. 594 (1981), the Court held that the coal mining industry was closely regulated, permitting warrantless safety inspections of all ground and surface coal mines. Given that the safety inspection rationale discussed in the preceding section justified the suspicionless nature of the search, no additional justification based on the closely regulated nature of the industry was needed for the lack of individualized suspicion. Therefore, for present purposes, Dewey fits more appropriately under a safety inspection rationale and is not included here in the closely regulated industry category for the purposes of dispensing with individualized suspicion.

369. See Burger, 482 U.S. at 699 (in closely regulated industries, owner has attenuated expectation of privacy over the stock); Marshall, 436 U.S. at 313 (same).

370. See 3 LAFAVE, supra note 1, § 10.2(g), at 664 (recognizing that the fact that the decisions concerning business inspections cannot be "comfortably reconciled" has left Fourth Amendment doctrine in the area "in a rather uncertain state" and urging the Court to re-examine the "entire analytical structure of existing law in this area").

storeroom of a licensed gun dealer, the Court emphasized the need to inspect.\textsuperscript{372} Several years later, although the Court again rejected any requirement that the industry need be subject to a long history of regulation to justify warrantless searches,\textsuperscript{373} it made the history of regulation a consideration lending support to upholding the constitutionality of a statute permitting warrantless and suspicionless searches.\textsuperscript{374}

The implied consent rationale has also been utilized: "[W]hen an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation."\textsuperscript{375} Apparently, this theory now has been rejected.\textsuperscript{376} The Court, in other decisions, has rested its result

\textsuperscript{372} United States v. Biswell, 406 U.S. 311, 314-16 (1972). The Court stated: [C]lose scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders . . . . Large interests are at stake, and inspection is a crucial part of the regulatory scheme, since it assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms.\textit{Id.} at 315-16 (citation omitted).


[If the length of regulation were the only criteria, absurd results would occur . . . . [N]ew or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems, could never be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation.\textit{Id.}


\textsuperscript{375} Marshall v. Barlow’s, Inc., 436 U.S. 307, 313 (1978); see also Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973) ("The businessman in a regulated industry in effect consents to the restrictions placed upon him."); Biswell, 406 U.S. at 316 (Inspections under the statute "pose only limited threats to the dealer’s justifiable expectations of privacy" because, "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."). But see 3 LAFAVE, supra note 1, § 10.2(c), at 638-42 (criticizing the implied consent theory).

\textsuperscript{376} The dissent in one case argued that

[T]he validity of the regulations depends not upon the consent of those regulated but on the existence of a federal statute embodying a congressional determination that the public interest in the health of the Nation's
on the pervasiveness and regularity of the industry’s regulation, reasoning that such regulation reduces any expectation of privacy and affords sufficient notice and regularity, obviating the need for a warrant or particularized suspicion.377

More recently, in New York v. Burger,378 the Court significantly modified the rationale of the regulated industries doctrine and extended it to permit inspections for the primary purpose of uncovering criminal activity pursuant to a regulatory scheme designed primarily to deter criminal activity.379 In Burger, a state statute required that automobile junkyards obtain licenses and maintain a record of motor vehicles and major vehicle parts.380 The law authorized the police to inspect the record and the junkyard without a warrant or suspicion and provided for criminal penalties for non-compliance.381 After the police searched Burger’s junkyard and discovered stolen vehicles and parts, Burger was arrested for possession of stolen property and for one count of unregistered operation as a vehi-

work force or the limitation of illegal firearms traffic outweighs the businessman’s interest in preventing a government inspector from viewing those areas of his premises which related to the subject matter of the regulation. Marshall, 436 U.S. at 338 (Stevens, J., dissenting). A majority of the Court later adopted a rationale much like that advocated by the just-quoted dissent: the property owner’s awareness of the inspection scheme bears upon the reasonableness of the scheme rather than demonstrating that the owner has impliedly consented. Accordingly, the Court upheld a scheme without regard to whether it pre-dated the owner’s entry into the business. See Donovan, 452 U.S. at 607 (Stevens, J., concurring); 3 LAFAVE, supra note 1, § 10(c), at 641.

377. See Donovan, 452 U.S. at 603, 606 (In upholding the warrantless inspections, without individualized suspicion, of underground and surface mines, the Court emphasized that the federal statute regulating mine safety was “specifically tailored” to assure “the certainty and regularity” of the inspection program and that “the regulation of mines . . . is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he ‘will be subject to effective inspection.’”); Marshall, 436 U.S. at 313 (In rejecting a claim that the search fit within the closely regulated industries exception, the Court stated that warrantless searches of such industries rested upon a history of government oversight so that no reasonable expectation of privacy for a proprietor over the stock of such an enterprise could exist.); Biswell, 406 U.S. at 316.

379. Id. at 693.
380. Id. at 694.
381. Id. at 694 n.1.
The Role of Individualized Suspicion

The Supreme Court held that the warrantless, suspicionless search fell within the exception to the warrant requirement for administrative inspections of closely regulated industries. Such industries, the Court determined, were those businesses that were so pervasively regulated that the proprietor had a reduced expectation of privacy. Viewing that exception as a variety of the "special needs" test, the Court set forth a three-part inquiry to justify inspections of closely regulated industries: (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be 'necessary to further [the] regulatory scheme'"; and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." The Court interpreted the third criteria as mandating that the "regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers."

After making the preliminary determination that vehicle dismantling was a closely regulated industry, the Burger Court believed that all three criteria were satisfied. The state had a substantial interest in regulating the vehicle dismantling industry because motor vehicle theft had increased, the theft

382. Id. at 695-96.
383. See id. at 694 n.2 (stating that it was unclear why Burger's business was selected for inspection).
384. Id. at 700-01.
385. Id. at 702.
386. Id. at 702-03 (citations omitted).
387. Id. at 703. To perform the first function of a warrant, the Court stated that "the statute must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.'" Id. (citation omitted). In limiting the discretion of the officers, the statute must be "'carefully limited in time, place, and scope.'" Id. (citation omitted).
388. Id. at 707-08.
problem was associated with the vehicle dismantling industry,\(^ {389}\) and vehicle dismantlers provided the major market for stolen vehicles and vehicle parts.\(^ {390}\) The Court also found that stolen parts and vehicles passed quickly through automobile junkyards and, therefore, frequent and unannounced inspections were necessary to detect them.\(^ {391}\) Finally, the statute served as an adequate substitute for a warrant because it informed those in the business that regular inspections would be made, it set forth the scope of the inspection and those authorized to inspect, and it placed appropriate restraints upon the discretion of the inspecting officers.\(^ {392}\)

c. Administrative Searches of Persons and Their Possessions

i. Intrusions into Property Interests Related to Receipt of Government Benefits

To ensure compliance with welfare rules, welfare caseworkers have been permitted to enter the homes of recipients without any suspicion that a recipient was not complying with the rules.\(^ {393}\) Interpreting a statute that conditioned the receipt of aid to families with dependent children upon beneficiaries allowing caseworkers to enter their home, the Court in Wyman v. James held that such a home visit was not a search.\(^ {394}\) Alternatively, the Court determined that, even if the visit were construed to be a search, the statute mandating it was reasonable within the meaning of the Fourth Amendment.\(^ {395}\)

The Court supported its conclusion by balancing several factors: the public interest in assuring that the "paramount" needs of the dependent child were met; the permissibility of

\(^{389}\) Id. at 708.

\(^{390}\) Id. at 708-09.

\(^{391}\) Id. at 710.

\(^{392}\) Id. at 711.

\(^{393}\) Wyman v. James, 400 U.S. 309 (1971).

\(^{394}\) Id. at 317. The Court reasoned: "If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search." Id. at 317-18.

\(^{395}\) Id. at 318.
the state utilizing “gentle means, of limited extent and of practical and considerate application, of achieving that assurance”; the recipient’s interest in receiving the funds and his or her obligation to use the funds properly; the routine nature of the visit, which was at the heart of the welfare goal of providing personal rehabilitation; the fact that the visit was preceded by advance notice of a specified date during normal working hours for the visit; the fact that forcible entry was forbidden, thus minimizing the homeowner’s burden from the intrusion; the home visit provided information that could not be obtained through an interview anywhere else; and the visit was by a caseworker and was not a criminal investigation.\textsuperscript{396}

ii. Searches of Governmental Workplaces

Government employers’ searches and seizures of employees’ private property at the workplace are subject to the constraints of the Fourth Amendment.\textsuperscript{397} A plurality of the Court in \textit{O’Connor v. Ortega} found a special need, making the probable cause requirement for workplace searches and seizures “unsuitable,”\textsuperscript{398} and adopted a balancing test, weighing the “invasion of the employees’ legitimate expectations of privacy against the government’s need for supervision, control, and the efficient operation of the workplace.”\textsuperscript{399} Because of the multitude of reasons to search or seize\textsuperscript{400} and the “great variety”

\textsuperscript{396} Id. at 318-24.
\textsuperscript{397} O’Connor v. Ortega, 480 U.S. 709, 715 (1987) (plurality opinion). A workplace includes “those areas and items that are related to work and are generally within the employer’s control.” Id.
\textsuperscript{398} Id. at 720.
\textsuperscript{399} Id. at 719-20.
\textsuperscript{400} The Court stated:

[Employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct. Employers and supervisors are focused primarily on the need to complete the government agency’s work in a prompt and efficient manner. An employer may have need for correspondence, or a file or report available only in an employee’s office while the employee is away from the office. Or . . . employers may need to safeguard or identify state property or records in an office in connection with a pending investigation into
of work environments in the public sector, the plurality believed that the question whether an employee has a reasonable expectation of privacy in the workplace must be addressed on a case-by-case basis.\textsuperscript{401}

\textit{O'Connor} examined the standard of reasonableness for two types of intrusions: noninvestigatory work-related intrusions and investigatory searches for evidence of suspected work-related misfeasance.\textsuperscript{402} As to noninvestigatory work-related intrusions, given that the governmental interest is in the efficient and proper operation of the workplace,\textsuperscript{403} the plurality believed that the work of public agencies "would suffer if employers were required to have probable cause before they entered an employee's desk for the purpose of finding a file or piece of office correspondence."\textsuperscript{404} Indeed, the plurality opined, "the concept of probable cause, rooted as it is in the criminal investigatory context," had little meaning for such searches.\textsuperscript{405} Accordingly, the plurality believed that wide latitude must be given to such searches.\textsuperscript{406}

A similar conclusion was reached regarding investigatory searches for work-related misconduct.\textsuperscript{407} The plurality reasoned that the consequences of misconduct or incompetence to the agency and the public interest could be severe.\textsuperscript{408} It contrasted the public employer with law enforcement officials, recognizing that the employer's overriding interest was in the effective and efficient operation of its agency.\textsuperscript{409} Therefore, it concluded, a probable cause requirement would "impose intolerable burdens on public employers."\textsuperscript{410} The delay in correcting

\underline{Id.} at 721-22.
\textsuperscript{401} \textit{Id.} at 718.
\textsuperscript{402} \textit{Id.} at 723.
\textsuperscript{403} \textit{Id.}
\textsuperscript{404} \textit{Id.}
\textsuperscript{405} \textit{Id.}
\textsuperscript{406} \textit{Id.}
\textsuperscript{407} \textit{Id.} at 724.
\textsuperscript{408} \textit{Id.}
\textsuperscript{409} \textit{Id.}
\textsuperscript{410} \textit{Id.}
employee misconduct caused by the need to meet that standard would cause "irreparable damage to the agency's work."\textsuperscript{411}

As to both types of intrusions, the plurality stated that they "should be judged by the standard of reasonableness under all the circumstances" for both the inception and the scope of the intrusion.\textsuperscript{412} For the search to be reasonable at its inception, ordinarily there must be "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file."\textsuperscript{413} However, the plurality expressly declined to decide whether individualized suspicion was a necessary element of misconduct-related searches because the employer in the case before it had such suspicion of the employee.\textsuperscript{414} The plurality believed that a search would be reasonable in scope when the "measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]."\textsuperscript{415}

iii. Searches of Students

The Supreme Court, departing from the probable cause standard,\textsuperscript{416} has permitted searches of students\textsuperscript{417} by school authorities while at school based upon "the reasonableness, under all the circumstances, of the search."\textsuperscript{418} The Court expressly declined to decide whether individualized suspicion was an essential element of searches conducted by school authorities.

\textsuperscript{411} Id.
\textsuperscript{412} Id. at 725-26.
\textsuperscript{413} Id. at 726.
\textsuperscript{414} Id.
\textsuperscript{415} Id. (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).
\textsuperscript{416} T.L.O., 469 U.S. at 340.
\textsuperscript{417} The Court did not address whether a schoolchild had a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies or what standards were applicable for searches of those areas by school officials and by other public authorities acting at the request of school officials. Id. at 337 n.5.
\textsuperscript{418} Id. at 341.
because the search in the case before it was based upon individualized suspicion that the student had broken school rules. 419 According to the majority, however, a search of a student ordinarily would be justified “when there are reasonable grounds for suspecting that the . . . student has violated or is violating either the law or the rules of the school.” 420

This result stemmed from the majority’s balancing of the student’s legitimate expectations of privacy and the “government’s need for effective methods to deal with breaches of public order.” 421 The Court recognized that schoolchildren “may find it necessary to carry with them a variety of legitimate, noncontraband items” but counterpoised the interests of teachers and administrators in maintaining discipline in the classroom and on school grounds. 422 The Court opined that, although maintaining order had never been easy, in recent years, school disorder often had taken “particularly ugly

419. Id. at 342 n.8.
420. Id. at 341-42 (footnote omitted); cf. In re William G., 709 P.2d 1287, 1294-97 (Cal. 1985) (en banc) (adopting reasonable suspicion standard for searches of students and noting that a majority of courts in other jurisdictions had adopted a standard of suspicion less than probable cause); 3 LAFAVE, supra note 1, § 10.11(b), at 175-77 (discussing lower court decisions concerning suspicionless searches of students and their lockers).
421. T.L.O., 469 U.S. at 337. The majority did not premise the balancing test upon a finding of a special need, which concurring Justice Blackmun viewed as a “crucial step” omitted from the Court’s analysis. See id. at 351-53 (Blackmun, J., concurring). Subsequent cases, however, have viewed T.L.O. as an example of “special needs” analysis. See, e.g., Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602 (1989); O’Connor v. Ortega, 480 U.S. 709, 720 (1987) (plurality opinion). But see id. at 741-42 (Blackmun, J., dissenting) (criticizing plurality’s analysis as repeating T.L.O.’s error of failing to address special needs analysis). Blackmun, in T.L.O., stated that the “elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers.” 469 U.S. at 352. He maintained that the framers balanced reasonableness in favor of a judicial warrant premised upon probable cause. Id. at 351. To depart from those standards, “exceptional circumstances” presenting a special need are necessary before “a court is entitled to substitute its balancing of interests for that of the Framers.” Id.; cf. id. at 357-62 (Brennan, J., concurring in part and dissenting in part) (criticizing the majority’s use of a balancing test as unsupported in precedent and in public policy and viewing the “unguided” balancing test as a “conceptual free-for-all” that “portends a dangerous weakening of the Fourth Amendment to protect the privacy and security of our citizens”).
422. T.L.O., 469 U.S. at 339.
forms," with drug use and violent crimes becoming major problems.423 Even in schools that had been spared severe discipline problems, the Court reasoned, the preservation of order and a proper educational environment required close supervision of schoolchildren and the enforcement of rules against conduct that would be permissible if undertaken by an adult.424

iv. Intrusions into Bodily Integrity

The Court has upheld the suspicionless drug testing of various employees as valid administrative searches.425 In Skinner v. Railway Labor Executives' Ass'n,426 the Court upheld two sets of federal regulations, one mandating suspicionless blood and urine testing for the presence of alcohol and illegal drugs of employees involved in certain train accidents and the other requiring suspicionless breath and urine testing of employees who violate certain safety rules.427 Applying a balanc-

423. Id.
424. Id.
427. Id. at 633. LaFave views Skinner as representing "a standard somewhere between individualized reasonable suspicion and purely random inspections . . . ." 3 LAFAVE, supra note 1, § 10.2, at 237 (Supp. 1994). This is because the testing occurred only after a triggering event, that is, an accident or rules violation, and stemmed from a compelling need. 3 id. Thus, according to LaFave, the result in Skinner is not "particularly troublesome." 3 id. This view is misplaced. Skinner does not provide any more of a standard somewhere between individualized suspicion and a purely random search than does searching all persons who happen to be in the area surrounding an open-air drug market after the police have received a tip that someone in the area was holding a large quantity of illegal drugs. In both instances, while an event has occurred, that is, illegal drug possession or a train accident, the authorities have no idea who is responsible for the event. To say that the police seize and search only those in the immediate area of the drug market or test only those employees who happen to be on the train does not remove the suspicionless nature of those intrusions. Those actions cannot be applauded by saying that the intrusions were minimized because, for example, not all employees were tested. In other words, to say that fewer than all persons who could be tested or searched were not actually subjected to the intrusion does not justify the intrusion. See United States v. Martinez-Fuerte, 428 U.S. 543, 572 n.2
ing test to measure reasonableness, the Court found the probable cause requirement "impracticable" because of the special need to protect the safety of railroads.

The *Skinner* Court characterized the individual interests implicated by the testing as infringing on privacy concerns and concluded that the drug tests, involving blood, urine, and breath examinations, posed only limited threats to the employees' justifiable expectations of privacy. Blood tests, it reasoned, were commonplace, involved virtually no risk, trauma, or pain, and were not an unduly extensive imposition on a person's bodily integrity. Breath tests were viewed as less intrusive than blood tests because they did not have to be conducted in a hospital and occasioned minimal embarrassment and inconvenience. Urine tests, like breath tests, did not involve a bodily intrusion. Although urine tests required persons to "perform an excretory function traditionally shielded by great privacy," the Court opined that the regulations reduced the degree of intrusiveness by requiring the collection of the sample in a medical environment and by not requiring visual observation of urination. More importantly, the majority reasoned, railway employees had a diminished expectation of privacy by reason of their participation in an industry that was pervasively regulated to ensure safety.

Turning to the government's interests, the Court stated that the tests were not prescribed to assist in the prosecution of employees but rather to prevent accidents and casualties in railroad operations resulting from impairment by alcohol or drugs by deterring substance abuse. The Court viewed the interest

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429. *Id.* at 628.
430. *Id.* at 625.
431. *Id.*
432. *Id.* at 626.
433. *Id.*
434. *Id.* at 627.
435. *Id.* at 620-21, 628. Because there was no prohibition against turning over the results to prosecutors, the majority left open the question whether the routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme
in testing without individualized suspicion as compelling.\textsuperscript{436} The railway industry had a documented history of accidents resulting from substance abuse, and on-the-job intoxication continued to be a significant problem;\textsuperscript{437} the affected employees discharged duties fraught with such risks of injury to others that even a momentary lapse of attention could have disastrous consequences; and the employees could cause great human loss before any signs of impairment became noticeable.\textsuperscript{438} The testing procedures also provided railroads with “invaluable information about the causes of major accidents,” allowing them to take appropriate safety measures.\textsuperscript{439} The ability to obtain information about drug and alcohol use, according to the Court, would be seriously impaired by requiring individualized suspicion because the scene at serious train accidents was frequently chaotic, making it “impracticable” for investigators to determine which crew members contributed to the accident and whether a particular employee was impaired.\textsuperscript{440} The Court recognized that the events following safety-rules violations were less chaotic but opined that objective indicia of impairment remained absent. It also stated that “any attempt to gather evidence relating to the possible impairment of particular employees would likely result in the loss or deterioration of the evidence furnished by the tests.”\textsuperscript{441}

In a case decided the same day, \textit{National Treasury Employees Union v. Von Raab},\textsuperscript{442} the Court validated the suspicionless urinalysis testing of United States Customs Service employees seeking transfer or promotions to positions engaged directly in drug interdiction and of those who were required to carry firearms. The majority determined that the

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\textsuperscript{436} Id. at 628.

\textsuperscript{437} Id. at 606-07.

\textsuperscript{438} Id. at 628 (citations omitted).

\textsuperscript{439} Id. at 630.

\textsuperscript{440} Id. at 631.

\textsuperscript{441} Id.

\textsuperscript{442} 489 U.S. 656 (1989).
government's need to conduct suspicionless searches outweighed the privacy interests of the employees.\textsuperscript{443} The Court opined that the Customs Service was on the front line of defense against the serious problem of drug smuggling and that employees might be tempted by bribes and by their access to contraband.\textsuperscript{444} The government had a "compelling interest" in ensuring that the employees were "physically fit" and had "unimpeachable integrity and judgment."\textsuperscript{445} That interest, according to the Court, was at least as important as the government's interest pertaining to border searches: "This national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics."\textsuperscript{446} As to testing employees who carried firearms, the Court maintained that the "public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force."\textsuperscript{447}

The Court found that Customs Service employees had a diminished expectation of privacy: employees engaged in drug interdiction, unlike most private citizens or other government employees, should expect the government to inquire into

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\item \textsuperscript{443} \textit{Id.} at 668. Because the program also covered employees required to handle classified material, the Court remanded the case for further proceedings to clarify the scope of that category of employees. \textit{Id.} at 678.
\item \textsuperscript{444} \textit{Id.} at 668.
\item \textsuperscript{445} \textit{Id.} at 670.
\item \textsuperscript{446} \textit{Id.}
\item \textsuperscript{447} \textit{Id.}
\item \textsuperscript{448} \textit{Id.} at 672 n.2. The Court opined that "certain forms of public employment may diminish privacy expectations even with respect to . . . personal searches." \textit{Id.} at 671. The majority illustrated its point by referring to employees of the United States Mint, who should expect to be subject to certain routine personal searches when they leave the workplace every day. Similarly, those who join the military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions.
\item \textit{Id.} at 671.
\end{itemize}
\end{footnotesize}
their fitness and honesty, and employees who carried weapons should expect inquiry into their fitness because their duties required judgment and dexterity. The Court therefore concluded that, although "reasonable tests designed to elicit this information doubtless infringe some privacy expectations," those expectations were outweighed by the "Government's compelling interests in safety and in the integrity of our borders." The Court also observed that the testing procedures significantly minimized intrusiveness by testing only employees tentatively accepted for promotion, by allowing employees to provide urine specimens in a stall, and by restricting the urinalysis to the detection of specified drugs. Unlike in Skinner, there was no showing in Von Raab that the testing was in response to any historical or current substance abuse by employees or of any actual adverse consequences from such use. The testing program was designed to deter drug use among those eligible for promotion to sensitive positions within the Customs Service and to prevent the promotion of drug users to those positions. Given those goals, which the Court characterized as special needs, the Court dismissed the probable cause standard as "peculiarly related to criminal investigations." It opined that the

standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person. Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any

449. Id. at 672.
450. Id. (footnote omitted).
451. Id. at 672 n.2.
452. Id. at 667 (quoting Colorado v. Bertine, 479 U.S. 367, 371 (1987)). Test results could not be used in a criminal prosecution of the employee without the employee's consent. Id.
measure of individualized suspicion.\textsuperscript{453}

Turning to the facts of \textit{Von Raab}, the Court believed that the deterrent aspects of the program outweighed any showing of a lack of concrete results. Although conceding that there was no documented problem of drug use in the Customs Service and that it was unlikely that the testing would detect much drug use by employees, the Court maintained that the Customs Service was not immune to the pervasive problem of drug use in the workplace.\textsuperscript{454} It stated that, where, as in \textit{Von Raab}, the possible harm against which the government seeks to guard is substantial, the need to prevent its occurrence furnishes “ample justification” for reasonable searches designed to further that goal.\textsuperscript{455} The majority illustrated this principle by reference to the practice of searching all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage:

When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.\textsuperscript{456}

The Court, while acknowledging that the air piracy precautions were in response to an observable national and international hijacking crisis, asserted that the validity of the searches was not impugned for a particular airport or airline absent a demonstration of danger at that airport or airline.\textsuperscript{457} It opined: “It is suf-

\textsuperscript{453} \textit{Id.} at 668 (citations omitted).

\textsuperscript{454} \textit{Id.} at 674. The Court analogized the fact that only a few employees were guilty of wrongdoing to homeowners, who are required to submit to suspicionless housing code inspections, and to motorists, who are stopped at checkpoints for illegal immigrants. \textit{Id.}

\textsuperscript{455} \textit{Id.} at 675.

\textsuperscript{456} \textit{Id.} at 675 n.3 (citations omitted).

\textsuperscript{457} \textit{Id.} at 676 n.3.
ficient that the Government have the compelling interest in preventing an otherwise pervasive societal problem from spreading to a particular context.”458 The Von Raab Court also stated that the validity of the screening program did not depend upon whether significant numbers of offenders were discovered. Citing statistics that, in the fifteen years that the airport screening program was in effect, more than 9.5 billion persons and 10 billion pieces of luggage had been examined, but only 42,000 firearms detected, the Court stated that, when deterrence was the goal, a low incidence of the conduct sought to be prevented was a “hallmark of success.”459

4. Vehicle Use Regulations

a. Driver’s License and Vehicle Registration Stops

Random, suspicionless stops of vehicles to check for the driver’s license and the vehicle’s registration have been held to violate the Fourth Amendment.460 Applying a balancing test to assess the reasonableness of the challenged governmental activity,461 the Supreme Court opined that the “kind of standardless and unconstrained discretion” involved in random stops was “the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.”462

The Court believed “that the States have a vital interest in

458. Id. at 675 n.3.
459. Id. at 676 n.3.
461. Id. at 654. Prouse was decided in 1979, when the Court still asserted that implementation of the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against “an objective standard,” whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon “some quantum of individualized suspicion,” other safeguards are generally relied upon to assure that the individual’s reasonable expectation of privacy is not “subject to the discretion of the official in the field . . . .”

Id. at 654-56 (footnotes omitted).
462. Id. at 661.
ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed.\footnote{463} On the other side of the scale were several intrusions upon individual interests: drivers would be subject to “a possibly unsettling show of authority” when directed to pull over to the side of the road, the stop would interfere with freedom of movement, and the stop “[might] create substantial anxiety.”\footnote{464} In weighing the competing interests, the Court decided that a system of suspicionless spot checks at the discretion of the officer in the field did not sufficiently further the state interests to justify the intrusions, particularly given the productivity of the device and the availability of alternative mechanisms.\footnote{465}

The Court, however, added that states were not precluded from developing methods for spot checks that involved less intrusion or “that [did] not involve the unconstrained exercise of discretion.”\footnote{466} One possible alternative, the Court opined, was “roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community.”\footnote{467} The Court concluded that a road-
block which allowed the motorist to observe that other vehicles were being stopped and to see visible signs of the officers' authority was much less likely to produce fright or annoyance. The Court also explained that its ruling was not intended to "cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others."  

b. Sobriety Checkpoints

In Michigan Department of State Police v. Sitz, the Supreme Court upheld the seizures of persons operating motor vehicles at sobriety checkpoints in the absence of individualized showing of suspicion. The Court described the checkpoints:

Under the guidelines [established by the Michigan State Police], checkpoints would be set up at selected sites along state roads. All vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication. In cases where a checkpoint officer detected signs of intoxication, the motorist would be directed to a location out of the traffic flow where an officer would check the motorist's driver's license and car registration and, if warranted, conduct further sobriety tests. Should the field tests and the officer's observations suggest that the driver was intoxicated, an arrest would be made. All other drivers would be permitted to resume their jour-

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stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use. United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 n.14 (1976); see also United States v. Brignoni-Ponce, 422 U.S. 873, 888 (1975) (Rehnquist, J., concurring) ("[A]gricultural inspections and highway roadblocks to apprehend known fugitives" are permissible.). See generally Galberth v. United States, 590 A.2d 990, 1000-01 (D.C. 1991) (recognizing that lower courts have generally upheld roadblocks to check licenses and registration). But cf. Prouse, 440 U.S. at 665-67 (Rehnquist, J., dissenting) (criticizing the majority opinion for forbidding suspicionless stops of individual motorists but permitting stops if directed at all motorists).

468. Prouse, 440 U.S. at 657.
469. Id. at 663 n.26.
During the one-hour-and-fifteen-minute duration of the check-
point at issue in Sitz, "126 vehicles passed through the check-
point."\textsuperscript{472} "Two drivers were detained for field sobriety test-
ing," resulting in the arrest of one motorist for driving under
the influence of alcohol.\textsuperscript{473}

The Supreme Court addressed only the initial stop of mo-
torists at the checkpoint.\textsuperscript{474} It recognized that the stop was a
seizure within the meaning of the Fourth Amendment\textsuperscript{475} but
rejected the contention that individualized suspicion was nec-
essary to justify the stop. Utilizing the balancing test, the Court
weighed "the State's interest in preventing drunken driving, the
extent to which [the checkpoints] can reasonably be said to
advance that interest, and the degree of intrusion upon
[stopped] motorists."\textsuperscript{476}

The majority posited that "[n]o one can seriously dispute
the magnitude of the drunken driving problem or the States' in-
terest in eradicating it."\textsuperscript{477} It cited statistics showing that the
annual death toll from drunken drivers exceeded 25,000, along
with "'nearly one million personal injuries and more than five
billion dollars in property damage.'"\textsuperscript{478} Against this great
weight, the Court opined, "the weight bearing on the other
scale—the measure of the intrusion on motorists stopped briefly
at sobriety checkpoints—is slight."\textsuperscript{479} Analogizing the situation
to a brief stop at a highway checkpoint for detecting illegal
aliens, the majority perceived "virtually no difference between

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\begin{itemize}
  \item 471. \textit{Id.} at 447.
  \item 472. \textit{Id.} at 448.
  \item 473. \textit{Id.}
  \item 474. The majority stated that the "[d]etention of particular motorists for more exten-
  sive field sobriety testing may require satisfaction of an individualized suspicion stan-
  dard." \textit{Id.} at 451 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976)).
  \item 475. \textit{Id.} at 450.
  \item 476. \textit{Id.} at 455.
  \item 477. \textit{Id.} at 451.
  \item 478. \textit{Id.} (quoting 4 \textsc{LAFave}, supra note 1, § 10.8(d), at 71); \textit{see also id.} at 455-56
  (Blackmun, J., concurring) (citing the tragedy of the immense slaughter on the high-
ways).
  \item 479. \textit{Id.} at 451.
\end{itemize}
the levels of intrusion on law-abiding motorists” in the two stops.\textsuperscript{480} The two types of checkpoints, the Court believed, would seem identical to the average motorist “save for the nature of the questions the checkpoint officers might ask.”\textsuperscript{481} It found that the “‘objective’ intrusion, measured by the duration of the seizure and the intensity of the investigation, [was] minimal.”\textsuperscript{482} Addressing the “‘subjective’ intrusion on motorists,”\textsuperscript{483} the Court viewed the fright of travelers as appreciably less at checkpoints as compared to roving patrols because the driver could observe other vehicles being stopped, could observe visible signs of the officers’ authority, and would be much less likely to be frightened or annoyed by the intrusion.\textsuperscript{484} The Court therefore found the intrusion at a sobriety checkpoint to be indistinguishable from the previously approved intrusion at an immigration checkpoint.\textsuperscript{485}

Turning to an examination of the effectiveness of the checkpoint program, the Court stated that it was up to “politically accountable officials” and not the courts to choose “among reasonable alternative law enforcement techniques.”\textsuperscript{486} In placing the responsibility on public officials to choose between such alternatives, the Court indicated that such choices had limits: there must be some empirical evidence, however slight, to justify the activity.\textsuperscript{487} Thus, according to the majority, the vice of random motor vehicle stops to check for drivers’ licenses was the complete lack of data supporting the stops as an effective means of promoting highway safety.\textsuperscript{488} The Court also viewed random stops as standardless and giving

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\textsuperscript{480.} \textit{Id.}  
\textsuperscript{481.} \textit{Id. at} 452.  
\textsuperscript{482.} \textit{Id.}  
\textsuperscript{483.} \textit{Id.} The Court rejected the idea that fear and surprise should be measured by a motorist who had been drinking; rather, the fear and surprise engendered in a law-abiding motorist by the nature of the stop was the proper measure. \textit{Id.}  
\textsuperscript{484.} \textit{Id. at} 453 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976) (quoting United States v. Ortiz, 422 U.S. 891, 895 (1975))).  
\textsuperscript{485.} \textit{Id.}  
\textsuperscript{486.} \textit{Id.}  
\textsuperscript{487.} \textit{Id. at} 454.  
\textsuperscript{488.} \textit{Id.}  

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\textsuperscript{25} Memphis L. Rev. 483 (1995)
too much discretion to the officer in the field. In contrast, the Court viewed Sitz, which netted 1.6% of the drivers passing through the checkpoint, as involving “neither a complete absence of empirical data nor a challenge to random highway stops.”

IV. THE USE OF A BALANCING TEST TO DECIDE WHETHER TO PERMIT A SUSPICIONLESS INTRUSION

As the preceding part of this Article demonstrates, the Court has addressed a wide variety of suspicionless intrusions by governmental authorities into individual interests protected by the Fourth Amendment. The rationales utilized by the Court in permitting suspicionless intrusions have varied, with some justifications gaining and then losing favor over time. Remarkably absent from the Court’s analysis, however, has been any significant recognition of the historical importance of individualized suspicion or the role it should play in assessing the reasonableness of an intrusion. Instead, the Court has employed a balancing test, which consists of four factors, and has decided, based on those factors, whether individualized suspicion should be mandated in each situation.

This Part examines the four principal grounds utilized by the Court to support its decisions, which are: the individual’s interests, the government’s interests, the necessity for the intru-

489. Id.
490. Id. at 454-55. The Court then cited data demonstrating that such sobriety checkpoints resulted in arrests of about one percent of the motorists stopped. Id. at 455.
491. Cf. Schulhofer, supra note 425, at 107 (noting that the Supreme Court had upheld nearly all administrative searches it had considered since 1980, that this “appearance of basic consistency—in the result—is misleading,” and that a closer look indicated that the Court was “fundamentally in disarray”).
492. Indeed, the question whether individualized suspicion should be required has often played a secondary role to the question whether a warrant should be required and has at times not even been discussed once the Court has decided that no warrant is necessary. The question whether a warrant is necessary, however, has little to do with whether individualized suspicion should be required as a condition of the validity of an intrusion. The lack of attention to this issue reflects the Court’s misplaced focus on whether the Fourth Amendment should be interpreted to prefer a warrant.
sion, and the procedures utilized by the authorities in executing the search or seizure. It describes how the Court has often misidentified the legitimate component parts of each of these factors and shows that, over time, any principle animating any of the factors has dissipated. The factors in the balancing test have become mere shells, manipulated to justify unguided conclusions as to what the majority in any given case concludes is reasonable. Contrary to the Court's current view, each of the principal grounds have identifiable legitimate components. This Part, therefore, discusses the Court's view of each of the factors, identifies the legitimate components of each of these grounds, and discusses how each of these factors should be employed. The ultimate purpose of the inquiry is to demonstrate that a balancing test without substantive content fails as a useful test in determining reasonableness.

493. It has been argued that, although the balancing test utilized by the Court typically pits individual against governmental interests, the characterization is arbitrary because "[i]nterests may be conceived of in both public and private terms." T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 981 (1987). For example, the argument runs, posing a conflict between the government and a prisoner for the purpose of searching the prisoner's cell by identifying the prisoner's interest as being that of privacy and the government's as being in jail security overlooks that "[s]ociety has a general interest in preventing unwarranted governmental intrusions" and that "prisoners and guards have an individualized interest in being free from assaults and in having a governmental authority protect them." Id. Therefore, "there is little sense in seeing the balance in terms of individual versus governmental interests." Id.

Contrary to that view, the recognition of a dichotomy of individual and governmental interests is neither arbitrary in theory nor unworkable in practice. Admittedly, an interest may be conceived of in both public or private terms, but such a characterization must take the interest to a level of generality that has little meaning in a given case. In the instance of the search of a prisoner's cell, while the prisoner certainly has an interest in his personal safety from other prisoners, that interest is not primarily or directly implicated by the government activity. The prisoner's primary interest is in preventing the government's intrusion into his privacy. On the other hand, the government's primary interest in such a case is not recognizing the principle of guarding society against unwarranted intrusions; it is to ensure a secure prison environment. Thus, on the concrete level posed by the facts of a particular case, by examining the primary or more immediate interests of the government and private party, the distinction between the two interests is real and identifiable.
A. The Individual's Interests

In assessing the individual's interests when weighing whether individualized suspicion should be required for a given governmental intrusion, the Supreme Court has focused almost exclusively on the person's privacy expectations. To support its inquiry, the Court has created a hierarchy of privacy interests: reasonable expectations of privacy "that society is 'prepared to recognize as legitimate'" have, at least in theory, the greatest protection; diminished expectations of privacy are more easily invaded, and subjective expectations of privacy that society is not prepared to recognize as legitimate have no protection.

For example, in *Skinner v. Railway Labor Executives' Ass'n*, after finding that railway employees had a diminished expectation of privacy due to participating in an industry pervasively regulated to ensure safety, the Court concluded that drug tests posed "only limited threats to [the employees'] justifiable expectations of privacy." Similarly, in *National Treasury Employees Union v. Von Raab*, the Court opined that "certain forms of public employment may diminish privacy expectations even with respect to such personal searches." It found that Customs Service employees engaged in drug interdiction should expect the government to inquire into their fitness and honesty and that employees who carried weapons


495. Id. at 342 n.8 ("Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal"); accord *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624-25 (1989).


499. Id. at 628.


501. Id. at 671.
should expect inquiry into their fitness.\textsuperscript{502} The Court therefore determined that, although "reasonable tests designed to elicit this information doubtless infringe some privacy expectations, \ldots [those] expectations [were] outweigh[ed] by the Government’s compelling interests in safety and in the integrity of our borders."\textsuperscript{503} In other decisions, the Court has reasoned that the pervasiveness and regularity of the industry’s regulation reduced any expectation of privacy, thereby affording sufficient notice and regularity, obviating the need for particularized suspicion.\textsuperscript{504}

The Court’s expectation of privacy analysis has several flaws. One criticism involves the Court’s assertion that only lesser expectations of privacy usually are permissibly invaded. This claim is belied by the preceding Part’s summary of the case law, which has permitted suspicionless invasions across the entire spectrum of expectations of privacy. Indeed, the most private aspects of life are now subject to suspicionless intrusions. One must open his home and business to inspectors, and those employed in certain professions must give blood and urine samples.

These invasions can only be characterized as minimal because citizens’ sensitivity to their rights have been dulled by the ever-increasing intrusions by the government into all aspects of daily life. Thus, for example, the fact that the Court characterized as limited the privacy interests involved in \textit{Skinner}, which permitted invasions of the body for blood tests and required supervised urination, defied a long history of shielding

\textsuperscript{502} \textit{Id.} at 672.

\textsuperscript{503} \textit{Id.} (footnote omitted).

\textsuperscript{504} See Donovan v. Dewey, 452 U.S. 594, 603 (1981) (upholding the warrantless inspections, without individualized suspicion, of underground and surface mines and emphasizing that the federal statute regulating mine safety was "specifically tailored" to assure "the certainty and regularity" of the inspection program and that "the regulation of mines \ldots is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he \textquote{will be subject to effective inspection}"); Marshall v. Barlow’s, Inc., 436 U.S. 307, 313 (1978) (rejecting claim that the search fit within the closely regulated industries exception but stating that warrantless searches of such industries rested upon a "history of government oversight [so that no reasonable expectation of privacy \ldots could exist for a proprietor over the stock of such an enterprise"]).
a person’s body and excretory functions from intrusion. If such privacy interests are so easily diminished by the employment one chooses, it would seem that all individual privacy interests are readily reducible to minimal levels. The “peculiar logic” of the diminished expectation of privacy rationale, therefore, is that it permits the scope of Fourth Amendment protections to diminish as governmental regulation increases. Yet “the mandates of the Fourth Amendment demand heightened, not lowered, respect, as the intrusive regulatory authority of government expands.” To rely exclusively or primarily on a privacy analysis in the face of society’s ever-increasing demands serves to eviscerate the legitimacy of individual interests as a counterbalance to government interests.

Another problem with the Court’s belief that a lesser ex-

505. See, e.g., Schmerber v. California, 384 U.S. 757, 767-72 (1966) (ruling that blood tests are only permitted when probable cause established); Storms v. Couglin, 600 F. Supp. 1214, 1224 (S.D.N.Y. 1984) (stating that a urinalysis involves a basic offense to “human dignity”).

506. Donovan, 452 U.S. at 612 (Stewart, J., dissenting); see also id. at 608 (Rehnquist, J., concurring) (maintaining that the pervasiveness of the regulation could not justify the result but noting that “I have no doubt that had Congress enacted a criminal statute similar to that involved here—authorizing, for example, unannounced warrantless searches of property reasonably thought to house unlawful drug activity—the warrantless search would be struck down under our existing Fourth Amendment line of decisions”); 3 LAFAVE, supra note 1, § 10.2(c), at 640 (“Notice . . . does not establish either implied consent or an unprotected expectation of privacy, but is a factor bearing upon the reasonableness of the inspection program.”); Peter S. Greenberg, The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See, 61 CAL. L. REV. 1011, 1025-26 (1973).

The difficulty with the Court’s analysis is the implication that government intention and action, if sufficiently well publicized, colors a citizen’s constitutionally cognizable privacy expectations. Were a municipality to inform its citizens that henceforth houses would be searched for narcotics without warrants, the practice would be no more proper than before the promulgation of the government’s intention. The same result presumably would apply if the government limited its practice to new residents, who were informed of the government’s plans before moving into the area . . . . The procedures . . . are proper, then, only if they adequately meet the demands of the various interests covered by the fourth amendment, not because the citizen subjected to them knows what to expect.

Id. at 1026.

507. Donovan, 452 U.S. at 612 (Stewart, J., dissenting).
pectation of privacy serves to point to the permissibility of suspicionless intrusions is that the Court, once it determines that the affected individual or industry has a diminished expectation of privacy, makes no attempt to ascertain if there is any correlation between the privacy interest diminished and the search or seizure utilized. In *Skinner*, for example, although railway employees worked in an industry fraught with danger to the public and which had a history of employee substance abuse, it did not necessarily follow that the employees had any less of an expectation of privacy in their persons. As Justice Marshall observed, the decisions in the regulatory area until *Skinner*

involved searches of employer *property*, with respect to which “[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a *proprietor* over the *stock* of such an enterprise.” Never have we intimated that regulatory searches reduce employees’ rights of privacy in their *persons* . . . . [I]ndividuals do not lose Fourth Amendment rights at the workplace gate, any more than they relinquish these rights at the schoolhouse door, or the hotel room threshold. These rights mean little indeed if, having passed through these portals, an individual may remain subject to a suspicionless search of his person justified solely on the grounds that the Government already is permitted to conduct a search of the inanimate contents of the surrounding area.\(^{508}\)

The Court has also incorrectly identified the perspective from which to measure privacy interests. In assessing the intrusiveness of a given governmental activity, the Court has at times examined the objective and subjective impacts of the intrusion upon the individual’s privacy interests:

The degree of objective intrusiveness of a particular search or seizure depends upon its nature, duration, and scope.

\(^{508}\) *Skinner*, 489 U.S. at 648-49 (citations omitted); *cf.* *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (stating that a person on the street has as much right to personal security as a homeowner).
The degree of subjective intrusiveness turns upon a hypothetical individual’s perception of and reaction to a particular search or seizure. The Court inquires whether a person undergoing the search or seizure would be likely to experience “concern,” “fright,” “surprise,” “embarrassment,” “anxiety,” or “awe.”

Illustrative is Sitz, where the Court examined the objective and subjective aspects of the intrusion on motorists stopped briefly at sobriety checkpoints and concluded that the intrusion was slight. It found that the objective intrusion, measured by the duration of the seizure and the intensity of the investigation, was minimal. The Court viewed the subjective intrusion on motorists as appreciably less at checkpoints, as compared to roving patrols, because the occupant could see other vehicles being stopped and visible signs of the officers’ authority, making it much less likely that the motorist would be frightenened or annoyed by the intrusion.

This idea that, the more systematic and open the intrusion, the more acceptable it is, has become a common theme in the case law. Justice Rehnquist accurately criticized the view as resting on the assumption that “motorists, apparently like sheep, are much less likely to be ‘frightened’ or ‘annoyed’ when stopped en masse . . . . The Court thus elevates the adage ‘misery loves company’ to a novel role in Fourth Amendment jurisprudence.”

More importantly, by examining the subjective intrusion, the Court becomes an amateur psychiatrist, seek-

509. Strossen, supra note 169, at 1183 (footnotes omitted).
511. Id. at 451.
512. Id. at 452.
513. Id. at 452-53.
514. See, e.g., Delaware v. Prouse, 440 U.S. 648, 663-64 (1979) (Blackmun, J., concurring) (Roadblocks where every driver or every tenth driver was stopped to check licenses and registrations would be subjectively less intrusive than random stops.); United States v. Martinez-Fuerte, 428 U.S. 543, 558-59 (1976) (checkpoint stops subjectively less intrusive than roving patrol stops); United States v. Ortiz, 422 U.S. 891, 894-95 (1975) (The circumstances of a checkpoint stop, at which motorists can observe other vehicles being stopped, are “far less intrusive” than those attending a roving patrol stop.).
515. Prouse, 440 U.S. at 539 (Rehnquist, J., dissenting).
The Role of Individualized Suspicion

...to divine the subjective impressions of accosted persons. This mode of analysis is unpersuasive, serving only to bootstrap policy results that the majority seeks to enshrine. The Court has repudiated recourse to subjective intent in other contexts of Fourth Amendment analysis as irrelevant and unworkable.\(^{516}\) Certainly, different people react differently to the same situations, and to base the permissibility of a search or seizure upon some notion of what the majority of individuals may feel as a result of the intrusion is footless.\(^{517}\)

The sole measure of when a person’s interest has been invaded and the severity of that invasion should be the objective aspects of the encounter. The objective intrusion for seizures includes such considerations as the restraint on the individual’s freedom of movement,\(^{518}\) any questioning, any visual inspection,\(^{519}\) any examination of the contents of possessions, and the other circumstances surrounding the encounter. For example, roadblocks “often involve numerous officers, vehicles with blinking lights, and spectators.”\(^{520}\) These objective characteristics must then be placed in context by assigning values to them. One commentator has argued that roadblocks and similar “displays of police power ‘are the hallmark of authoritarian regimes’ in other countries.”\(^{521}\) Thus one might conclude, based upon the manner in which a roadblock was conducted and societal values, that roadblocks are “a dragnet-

\(^{516}\) See cases cited infra note 538.

\(^{517}\) Cf. Strossen, supra note 169, at 1197 (“[S]ome individuals might well be more upset by massive intrusions than by individualized ones.”). For example, one objective criterion utilized by the Court to measure the subjective intrusiveness of the search or seizure is whether the action has been preceded by advance notice, which, in the Court’s view, serves to minimize the element of surprise. Id. “However, it seems likely that some individuals will experience more anxiety the longer they must anticipate undergoing a search or seizure.” Id.

\(^{518}\) Cf. United States v. Place, 462 U.S. 696, 709 (1983) (“The length of the detention of [the airline passenger’s] luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause.”).


\(^{520}\) Strossen, supra note 169, at 1197 n.116 (citation omitted).

\(^{521}\) Id.; see also Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 460 (1990) (Stevens, J., dissenting).
like procedure offensive to the sensibilities of free citizens."522 Those objective criteria, combined with a recognition of the values enshrined in the Fourth Amendment, should be the guide to measure the impingement of the individual interests occasioned by a search or seizure.

The most important flaw in the Court’s reliance on privacy analysis to assess the reasonableness of a suspicionless search or seizure is that the inquiry is much too narrow. The interests of individuals cannot be reduced to a privacy analysis; the Fourth Amendment protects interests of persons that are unrelated to privacy. This was made abundantly clear recently by a unanimous Supreme Court: “The Amendment protects the people from unreasonable searches and seizures of ‘their persons, houses, papers, and effects.’”523 Thus, the Court added, “our cases unmistakably hold that the Amendment protects property as well as privacy.”524 It further opined that “the Fourth Amendment can neither be translated into a provision dealing with constitutionally protected areas nor into a general constitutional right to privacy. The Amendment . . . protects individual privacy against certain kinds of governmental intrusion, ‘but its protections go further, and often have nothing to do with privacy at all.’”525 What is protected and “[w]hat matters is the intrusion on the people’s security from governmental interference.”526

Because persons have substantive security interests protected by the Amendment unrelated to privacy concerns, one fun-
damental flaw in the Court’s application of the balancing test to suspicionless governmental intrusions is its reduction of individual interests to privacy concerns. This is not to say that privacy analysis has no role in assessing the individual’s interests. Privacy, a distinct personal interest, remains an important consideration. When a legitimate expectation of privacy is present, along with a protected security interest or some other interest protected by the Amendment, then the combination of those interests must be considered in assessing the legitimacy of a suspicionless intrusion.

B. Government Interests

The Court has analyzed numerous governmental interests and has assigned varying weights to them. Those interests have included the following: whether the intrusion is designed to enforce a criminal law, whether a “special need” beyond the normal needs of law enforcement is present, and whether the government seeks to deter or prevent occurrences. Each of these governmental interests will be discussed, with the goal of clarifying how legitimate governmental interests should be viewed as factors in assessing the validity of suspicionless governmental intrusions.

In justifying departures from individualized suspicion, the Court has often relied on the fact that the governmental intrusion was not made to enforce a criminal law but was for some other purpose.\footnote{See, e.g., Wyman v. James, 400 U.S. 309, 318-24 (1971) (home visit was by a welfare caseworker and was not a criminal investigation). See generally Sundby, supra note 6, at 408-11.} For example, the Court has frequently distinguished between searches for evidence of a crime and regulatory inspections in permitting suspicionless intrusions.\footnote{See, e.g., Donovan v. Dewey, 452 U.S. 594, 598 n.6 (1987); Marshall v. Barlow’s, Inc., 436 U.S. 307, 320-21 (1978); id. at 326 (Stevens, J., dissenting); Camara v. Municipal Court, 387 U.S. 523, 537 (1967).} In Von Raab, rejecting any requirement of individualized suspicion for drug testing of specified Customs Service officials, the Court stated that the probable cause standard “is peculiarly related to
criminal investigations” and that “[the probable cause standard] may be unhelpful in analyzing the reasonableness of routine administrative functions.”

Indeed, by way of distinguishing the governmental interest involved from criminal law enforcement, the Court in Von Raab emphasized that the results of the drug testing “could not be used in a criminal prosecution of the employee without the employee’s consent.”

In New York v. Burger, which involved the suspicionless search of an automobile junkyard pursuant to a statute regulating vehicle dismantlers, the distinction between the government purpose of enforcing its criminal laws and a valid, non-criminal law goal as a factor in assessing the validity of the suspicionless intrusion was at least blurred. In that case, the Court recognized that a state may enforce its criminal law goals through the regulatory process. Indeed, the regulatory

529. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 667-68 (1989) (citations omitted); see also O’Connor v. Ortega, 480 U.S. 709, 723 (1987) (plurality opinion) (As to noninvestigatory, work-related intrusions of government workplaces, given the governmental interest in “the efficient and proper operation of the workplace,” the work of public agencies “would suffer if employers were required to have probable cause before they entered an employee’s desk for the purpose of finding a file or piece of office correspondence. Indeed, it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context,” meaning for such searches.).

530. Von Raab, 489 U.S. at 666; cf. Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 620-21 (1989) (alcohol and drug tests not prescribed to assist “in the prosecution of employees, but rather ‘to prevent accidents and casualties in railroad operations’”; however, because no prohibition against turning over results to prosecutors, Court left open question whether routine use in criminal prosecutions of evidence obtained pursuant to administrative scheme “would give rise to an inference of pretext, or otherwise impugn the administrative nature” of program).


[A] State can address a major social problem both by way of administrative scheme and through penal sanctions. Administrative statutes and penal laws may have the same ultimate purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem. An administrative statute establishes how a particular business in a “closely regulated” industry should be operated, setting forth rules to guide an operator’s conduct of the business and allowing government officials to ensure that those rules are followed. Such a regulatory approach contrasts with that of the penal laws, a major emphasis of which is the punishment of individuals for specific acts
scheme in Burger was designed to facilitate the enforcement of traditional criminal law goals, that is, deter the trafficking in stolen goods.\textsuperscript{532} Police officers conducted the inspection and arrested Burger for criminal offenses after they discovered that he possessed stolen auto parts.\textsuperscript{533} The Court believed that "[t]he discovery of evidence of [criminal acts during] an otherwise proper administrative inspection [did] not render [the] search illegal or the administrative scheme suspect."\textsuperscript{534}

Any restriction in the use of suspicionless intrusions in the criminal context remaining after Burger was eliminated in Sitz, where roadblocks were used to enforce the criminal law prohibition against drunk driving.\textsuperscript{535} The program was designed with the express purpose of identifying, arresting, and prosecuting those who were driving while intoxicated. Although sobriety roadblocks arguably achieve a broad societal good, deterring drunk driving and thereby reducing alcohol-related traffic accidents, perhaps every criminal law has as an underlying purpose the deterrence or promotion of a particular form of conduct. Thus, the Sitz program was no different in need or purpose than any other criminal law goal.

Although the Court prior to Burger and Sitz often viewed the non-criminal purpose of the intrusion as important in assessing the permissibility of the suspicionless actions, that analysis was faulty: the governmental purpose is important in assessing the legitimacy and strength of the governmental interest; it is not a relevant consideration in distinguishing between

of behavior.

\textit{Id.}

532. \textit{Id.} at 693, 713-14 (recognizing that "ultimate purpose" of regulatory scheme was "the deterrence of criminal behavior").

533. \textit{Id.} at 694-95.

534. \textit{Burger}, 482 U.S. at 716. Dissenting in \textit{Burger}, Justice Brennan maintained that the statute's "fundamental defect" was its authorization of searches for the sole purpose of uncovering evidence of criminal acts. \textit{Id.} at 724 (Brennan, J., dissenting). An administrative search, he maintained, could not be used to search for criminal violations. \textit{Id.} The majority's approach, he cautioned, was "dangerous" because the legislature could "abrogate constitutional protections simply by saying that the purpose of an administrative search scheme is to prevent a certain type of crime." \textit{Id.} at 728.

535. \textit{See supra} notes 470-90, 510-13 and accompanying text.
like intrusions. The intent of the intruder does not distinguish one intrusion from another. As the Court has recently stated:

In our view, the reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question of whether the Amendment applies. What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all. As we have observed on more than one occasion, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."\(^{536}\)

Just as the intent of the intruder has no utility in determining whether the Fourth Amendment is applicable, it should have no role in determining whether the Amendment is satisfied. Intrusions may be performed to determine whether a building meets fire safety codes, whether a motorist is intoxicated, whether automobile parts are stolen, or whether a child's welfare is being maintained. These are all legitimate governmental interests. The fact that the intruder may be there for a relatively benign purpose carries no weight in assessing the legitimacy or strength of the governmental interest in performing the intrusion without individualized suspicion.\(^{537}\) Indeed, in other aspects of Fourth Amendment analysis, the Court has rejected any reliance on the subjective intent of the governmental agent in assessing the propriety of the agent's actions.\(^{538}\)

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537. See, e.g., Wyman v. James, 400 U.S. 309, 340-41 (1971) (Marshall, J., dissenting) ("[T]here is neither logic in, nor precedent for, the view that the ambit of the Fourth Amendment depends not on the character of the governmental intrusion but on the size of the club that the State wields against a resisting citizen.").

538. See, e.g., Brower v. County of Inyo, 489 U.S. 593, 598 (1989) (applying an objective standard to measure police officer's intent to seize suspect); Michigan v. Chesternut, 486 U.S. 567, 575 n.7 (1988) (stating that subjective intent of officer was
Moreover, as Burger illustrated, the line between a criminal law enforcement purpose and other purposes is often far from clear,\footnote{See also Camara v. Municipal Court, 387 U.S. 523, 531 (1967) (recognizing that most regulatory laws are enforced by criminal process); Schulhofer, supra note 425, at 89, 114-16 (rejecting distinction between regulatory enforcement and criminal law enforcement as "chimerical and irrelevant"); Sundby, supra note 6, at 411 ("[T]he penal-regulatory distinction misses [the] point that whatever the inspection's purpose, [it] still invades the individual's privacy.").} which is to say that reliance on such a distinction is illusory.

The Supreme Court has also not required individualized suspicion when a "special need" of the government is present.\footnote{See, e.g., Skinner v. Railway Executives' Ass'n, 489 U.S. 602, 619 (1989) (collecting cases).} The term "special need," however, is misleading. The Court is not referring to any "need" in the sense of necessity; rather, it speaks of a special interest. Also, although the initial cases adopting the concept involved governmental regulatory interests unrelated to criminal penalties,\footnote{See, e.g., Griffin v. Wisconsin, 483 U.S. 868, 878 (1987) (regarding the need to preserve "the deterrent effect of the supervisory arrangement" of probation); O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (regarding "the efficient and proper operation of the workplace"); New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (regarding "the substantial need of teachers and administrators for freedom to maintain order in the schools").} the Court has now excised from the definition of a special need the requirement that the interest must be unrelated to criminal law enforcement. What is considered a special need has evolved to include some very mundane criminal law enforcement concerns. For example, in Burger, which permitted the suspicionless searches of vehicle dismantlers, the state presented only the interest in investigating those trafficking in stolen auto parts.
Burger fits with difficulty into any theory proposing a narrow range of permissible governmental special needs that justify enhanced status under the Fourth Amendment. The sweep of the result in Burger is broad. The search of junkyards to ensure that stolen auto parts do not enter the stream of commerce presents no more of a special need than that presented by countless other businesses that deal in essentially fungible goods. Indeed, the Burger Court stated that an "automobile junkyard is closely akin to the secondhand shop or the general junkyard."542 The opinion thus invites regulation—and suspicionless searches—of a host of industries and shops, from Goodwill, used book stores, antique stores, pawn shops, and recycling industries and centers to flea markets. Moreover, the rationale of the opinion cannot be easily limited to secondhand merchandise. Burger rested in large part on the ease of discovery of stolen vehicle parts before they enter the stream of commerce. The interests present in Burger, deterrence and prevention of crime, were not special needs. The legislature, in enacting the statute regulating the vehicle dismantlers, was merely attempting to protect society from harm that might befall it from thieves. On the other hand, if the interests in Burger are special needs, then that concept threatens to envelop Fourth Amendment analysis, making the special needs test the rule, rather than the exception.543 If prevention of automobile theft is a special need, then murder, rape, and most other offenses similarly qualify.

The Court's special need analysis is formless, and the conclusion that a special need is present is more a facade for policy results than an analytical framework supporting reasoned

543. A special need is also not a necessary condition for dispensing with individualized suspicion. Illustrative is the Court's decision in Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990), which involved roadblocks designed to capture drunk drivers. In that case, the Court did not rely on the special needs test to justify dispensing with individualized suspicion. The interest involved in Sitz demonstrates that some very ordinary law enforcement interests have been used to justify dispensing with individualized suspicion. See 496 U.S. at 449-50 (applying the balancing test in the absence of a special need).
decision making.\textsuperscript{544} The question should be: to effectuate a valid governmental interest, should individualized suspicion be abandoned as a condition of the search or seizure? Labelling an interest as special simply does not advance resolution of that question. Nor does characterizing the governmental purpose as being for a relatively benign purpose unrelated to a criminal investigation. However, although there should be no distinction as to the types of governmental interests that justify suspicionless intrusions, the \textit{strength} of the governmental interest is an important consideration. Patently, as the governmental interest becomes more important, it carries more weight. Where should the line be drawn: a legitimate governmental interest,\textsuperscript{545} a substantial governmental interest,\textsuperscript{546} or a compelling governmental interest?\textsuperscript{547}

The answer to this question depends to a large extent upon the strength of the countervailing factors in a balancing test and in the role that individualized suspicion should play in Fourth Amendment analysis. However, some general statements

\textsuperscript{544} In \textit{Skinner v. Railway Labor Executives' Ass'n}, 489 U.S. 602 (1989), according to dissenting Justice Marshall, since the Court began recognizing the special needs exception, "the clarity of Fourth Amendment doctrine has been badly distorted." \textit{Id.} at 639 (Marshall, J., dissenting). "Tellingly," he argued, "each time the Court has found that 'special needs' counseled ignoring the literal requirements of the Fourth Amendment for such full-scale searches in favor of a formless and unguided 'reasonableness' balancing inquiry, it has concluded that the search in question satisfied that test." \textit{Id.} He maintained that the balancing test served only to justify policy results that the majority reached in each case; accordingly, he rejected it as "unprincipled and dangerous," \textit{id.} at 641, and subject to "shameless manipulability." \textit{Id.} at 647. Marshall maintained that the Court must remain faithful to the Warrant Clause requirements of a warrant and probable cause. Those principles, he opined, were "time-honored and textually based" and were "principles the Framers of the Bill of Rights designed to ensure that the Government has a strong and individualized justification when it seeks to invade an individual's privacy." \textit{Id.} at 655. To do otherwise, the Amendment’s reasonableness command, Marshall believed, "lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term." \textit{Id.} at 637.

\textsuperscript{545} \textit{See}, e.g., \textit{Torres v. Puerto Rico}, 442 U.S. 465, 471 (1979) ("[T]he grounds for a search must satisfy objective standards which ensure that the invasion of personal privacy is justified by legitimate governmental interests.").

\textsuperscript{546} \textit{See} National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989); \textit{Burger}, 482 U.S. at 702-03.

\textsuperscript{547} \textit{See} \textit{Skinner}, 489 U.S. at 628.
can be made. A peripheral or unimportant governmental interest would not count for much in any weighing process.\textsuperscript{548} Such minor, secondary interests may never be enough to overcome individual interests protected by the Fourth Amendment, even when the intrusions are fleeting. If this were not so, the Fourth Amendment, which is designed to protect persons from the government, would have only illusory protections. On the other hand, the Fourth Amendment does not create a total shield against governmental intrusions.\textsuperscript{549} Therefore, substantial or compelling intrusions may be sufficient in certain circumstances to justify a suspicionless intrusion. As a general rule, even without considering whether individualized suspicion has any role in the balancing test, the government must have at least a substantial interest to carry enough weight to initiate the balancing process.\textsuperscript{550} On the other hand, a compelling interest may point to the reasonableness of the most intrusive of searches and seizures. However, the governmental interest, regardless of how strong it is, does not alone justify suspicionless searches and seizures.

How does one determine what is a substantial or compelling governmental interest? This is difficult to do in the abstract because of the wide diversity of governmental interests. "Compelling," however, connotes an interest so strong that the government is obliged to pursue the interest to ensure the survival of its authority. A substantial governmental interest is not as strong, but is such that pursuit of the interest strongly or materially benefits the government.

When the governmental goal is to deter, individualized suspicion’s role becomes problematic because, in such situations, the goal is to prevent the circumstances from developing. If the government must wait until it can demonstrate that the circumstances are present, then its goal has been frustrated. In such cases, the strength of the governmental interest in deter-

\textsuperscript{549} See, e.g., Wyman v. James, 400 U.S. 309 (1971).
ring the activity is the proper focus to identify the governmental interests involved. The government’s interest in deterrence cannot be divorced from the principle of necessity; where deterrence is the goal, there must be a showing that the potential source of the danger cannot be identified in advance. If the source could be identified, then there would be no need to intrude beyond the identified source. This is to say that the element of necessity is present in such cases and that the governmental interest in deterrence does not control whether individualized suspicion is dispensed with or not. Therefore, more will be said about the propriety of the government’s interest in deterrence in the next Section.

C. Necessity for the Intrusion

The government can have a strong—or even compelling—interest but still not need to intrude upon protected interests without individualized suspicion. In other words, a sufficiently important governmental interest is different from any need for a suspicionless intrusion.551 Some of the Court’s earlier opinions emphasized that need is an essential precondition to a suspicionless intrusion. The Court has, however, clouded the two distinctly different concepts of governmental interest and necessity and, in its most recent opinions, has rejected any requirement for showing any need to proceed without individualized suspicion.552 This Section outlines these developments. It also identifies the core components of the principle of necessity and asserts that those core components must be present to dispense with individualized suspicion.

Recourse to claims that the suspicionless nature of the governmental search or seizure is necessary to effectuate the governmental interest are as old as the debate concerning what is a reasonable search or seizure. Gridley, arguing the crown’s position in the writs of assistance case in 1761, asserted that the suspicionless customs searches were necessary to protect

551. See infra notes 554-68 and accompanying text.
552. See infra notes 569-87 and accompanying text.
the government revenue. Similar claims continue to the present day. In *Torres v. Puerto Rico*, the Commonwealth sought approval for suspicionless searches of the luggage of persons coming to the island from the United States due to a serious problem with the "influx of weapons and narcotics." While Puerto Rico's law enforcement interest was considered substantial by the Court, the Commonwealth's position boiled down to a contention that its law enforcement problems were so pressing that it should be granted an exemption from the usual requirements of the Fourth Amendment. The Court summarily rejected this argument, stating that "we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement."

The initial cases dispensing with individualized suspicion rested upon a powerful conception of necessity. For example, a search incident to arrest is premised on the historical recognition that, to protect the arresting officer and effectuate the

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553. See *supra* notes 82-84 and accompanying text.
555. Id. at 472.
556. Id. at 473-74.
557. Id. at 474.
558. The Court has often relied on the historical acceptance of the actions challenged to support its conclusion that the search or seizure without suspicion was reasonable. See, e.g., *United States v. Robinson*, 414 U.S. 218, 230-35 (1973); see also *supra* notes 367-92 and accompanying text (discussing historical acceptance as a factor supporting suspicionless intrusions in the cases concerned with highly regulated industries). Historical acceptance is not a substantive reason in its own right for departing from individualized suspicion and does not, ipso facto, demonstrate necessity. See, e.g., *Williams v. Illinois*, 399 U.S. 235, 240 (1970) (stating the "need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution"). Oliver Wendell Holmes stated:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). However, historical acceptance does serve to demonstrate that, over time, the actions currently challenged have been deemed reasonable and necessary. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991) (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) ("If a thing has been practised [sic] for two hundred years by com-
arrest, the suspect must be disarmed.\textsuperscript{559} In \textit{Camara v. Municipal Court},\textsuperscript{560} the Court viewed as reasonable area-wide health and safety code enforcement inspections designed to combat the dangers fires and epidemics pose to large urban areas because other canvassing techniques would not achieve acceptable results.\textsuperscript{561} The necessity involved in \textit{Camara} was patent: without virtually universal compliance with code requirements, health and safety programs would be ineffective, subjecting large portions of the public to a substantial risk of mass harm from unattended dangerous conditions, and "most housing code violations occur within private premises and cannot be detected from outside."\textsuperscript{562} Thus, if housing inspections required individualized suspicion, such inspections might not be possible at all.\textsuperscript{563}

Other cases have also employed a high standard of need. The receipt of government benefits for dependent children in \textit{Wyman v. James}\textsuperscript{564} was held to be permissibly tied to a home visit by governmental authorities because the home visit provided information that could not be obtained through an interview anywhere else.\textsuperscript{565} Such home visits have been compared with housing inspections in that acceptable results could not be ob-

\textsuperscript{560} 387 U.S. 523 (1967).
\textsuperscript{561} Id. at 537; see also 3 LAFAVE, supra note 1, § 10.2(d), at 648 (The \textit{Camara} Court's analysis included the determination "that 'acceptable results' in code enforcement could not be accomplished if it were necessary to establish in advance the probability that a particular violation was present in a particular building."); Schulhofer, supra note 425, at 91-92 (stating \textit{Camara} reflected the widely shared sense that alternative procedures to area-wide inspections were unworkable).
\textsuperscript{562} 3 LAFAVE, supra note 1, § 10.1(b), at 604-05.
\textsuperscript{563} Schulhofer, supra note 425, at 92.
\textsuperscript{564} 400 U.S. 309 (1971).
\textsuperscript{565} Id. at 318-24.
tained by using the traditional probable cause standard. 566
""Relations between parents and, in particular, preschool children have too little ready visibility to expect that children can be adequately protected by generally requiring a "probable cause" showing of imminent injury before state authorities can examine children or their parents against the parents' will." 567 Similarly, in fire investigations, the Court has viewed prompt investigation as necessary to prevent recurrence of the fire and to preserve evidence. 568 These cases reflect the essence of "necessity" as being essential and indispensable.

Any requirement for a strong showing of need as a precondition for a suspicionless search or seizure has been worn away by the more recent decisions. In New York v. Burger, 569 ostensibly utilizing a high standard of need, the Court in fact applied a minimal standard. Although the Court stated that one of the factors justifying the suspicionless inspections of automobile dismantlers was that they "were necessary to further [the] regulatory scheme," 570 the result in Burger was not justified by its rationale, unless the concept of necessity employed by the Court entails a lower burden than does the ordinary meaning of the word. Burger rested in large part on the premise that it is easier to discover stolen vehicle parts before they enter the stream of commerce. Ease of discovery is a far cry from a demonstration that the technique is essential or indispensable.

By the time Skinner v. Railway Labor Executives' Ass'n 571 was decided, the standard of need required to be

566. 3 LAFAVE, supra note 1, § 10.3(a), at 673.
567. Id. (quoting Robert A. Burt, Forcing Protection on Children and Their Parents: The Impact of Wyman v. James, 69 Mich. L. Rev. 1259, 1306 (1971)). Accordingly, it has been asserted, for routine visits not based on information that the child might be in danger, "it would suffice that a particular home visit was in accordance with an established schedule to make such visits at designated intervals, as is true in the housing inspection area." Id. at 673-74 (footnotes omitted).
568. Michigan v. Tyler, 436 U.S. 499, 510 (1978); see also 3 LAFAVE, supra note 1, § 10.4(b), at 695-97 (discussing need for prompt investigation of fires).
570. Id. at 702-03 (citations omitted).
shown was reduced to one of practicality.\textsuperscript{572} In that case, the Court permitted the substance abuse testing of all crew members of trains involved in an accident or in a rule violation. The Court reasoned that serious train accident scenes frequently were chaotic, making it “impractical” for investigators to determine which crew members contributed to the accident.\textsuperscript{573} Although the events following safety rules violations were less chaotic, the Court opined that objective indicia of possible impairment by particular employees remained absent and “any attempt to gather evidence relating to the possible impairment of particular employees likely would result in the loss or deterioration of the evidence furnished by the tests.”\textsuperscript{574}

The erosion of any requirement to show need as a consideration in deciding whether to permit a suspicionless search or seizure became complete with the two cases \textit{National Treasury Employees Union v. Von Raab}\textsuperscript{575} and \textit{Michigan Department of State Police v. Sitz.}\textsuperscript{576} In \textit{Von Raab}, there was no showing that the suspicionless urinalysis testing of certain Customs Service employees was needed to effectuate the governmental interest. Indeed, the Court conceded that there was no documented problem of drug use in the Customs Service and that it was unlikely that the testing would detect much drug use by employees.\textsuperscript{577} Instead, the Court contented itself with asserting

\textsuperscript{572} \textit{Id.} at 619 (citing Griffin v. Wisconsin, 483 U.S. 868 (1987)); New Jersey v. T.L.O., 469 U.S. 325, 351 (1985); see also \textit{National Treasury Employees Union v. Von Raab}, 489 U.S. 656, 665 (1989); \textit{cf.} United States v. Martinez-Fuerte, 428 U.S. 543, 556-57 (1976) (stating traffic-checking program in the interior of the United States was “necessary” because the crossing of illegal immigrants could not be controlled effectively at the international border and individualized suspicion “impractical” due to the large amount of traffic).

\textsuperscript{573} \textit{Skinner}, 489 U.S. at 631.

\textsuperscript{574} \textit{Id.}

\textsuperscript{575} 489 U.S. 656 (1989).

\textsuperscript{576} 496 U.S. 444 (1990).

\textsuperscript{577} \textit{Von Raab}, 489 U.S. at 673. This contrasts sharply with \textit{Skinner}, where there had been a long and well-documented history of substance abuse by railway employees. The \textit{Von Raab} Court analogized the fact that only a few employees were guilty of wrongdoing to the fact that homeowners are required to submit to suspicionless housing code inspections and motorists are stopped at checkpoints for illegal immigrants. \textit{Id.} at 674. In these situations, however, there were demonstrated, substantial problems
that the Customs Service was not immune to the pervasive problem of drug use in the workplace and that the deterrence aspect of the program outweighed any showing of lack of concrete results.\textsuperscript{578} The Court maintained that, where "the possible harm against which the Government seeks to guard is substantial," the government interest in preventing its occurrence alone furnishes "ample justification for reasonable searches" designed to further that goal.\textsuperscript{579}

The majority illustrated its position by reference to the practice of searching all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, which was in response to "an observable national and international hijacking crisis."\textsuperscript{580} The majority believed that "[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness," so long as the procedures utilized in executing the search were also reasonable.\textsuperscript{581} It posited: "It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to a particular context."\textsuperscript{582} Thus, the validity of the searches was not impugned for a particular airport or airline, even though there was no demonstrated danger at the airport or for the

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\textsuperscript{578} 489 U.S. at 674.
\textsuperscript{579} \textit{Id}. at 674-75.
\textsuperscript{580} \textit{Id}. at 675 n.3.
\textsuperscript{581} \textit{Id}. (citations omitted).
\textsuperscript{582} \textit{Id}. 

airline.\textsuperscript{583} Nor did the validity of the screening program depend upon whether significant numbers of offenders were discovered. The Court opined that, when deterrence was the goal, a low incidence of the conduct sought to be prevented was a "hallmark of success."\textsuperscript{584}

By asserting that the "danger alone meets the test of reasonableness,"\textsuperscript{585} the Court eliminated any requirement of demonstrating that the government's interest could only be effectuated by proceeding without particularized suspicion or that it was impractical to proceed without individualized suspicion. Similarly, in \textit{Sitz}, the majority rejected the idea that, as part of any balancing analysis, the comparative effectiveness of the checkpoint program for drunk drivers must be examined. The Court stated that it was up to politically accountable officials and not the courts to choose among reasonable alternative law enforcement techniques.\textsuperscript{586} By failing to inquire into whether an alternative technique would equally effectuate the government interest without dispensing with particularized suspicion, the Court eliminated any requirement of need as a precondition for suspicionless intrusions.\textsuperscript{587}

Whether one imposes a requirement of a need to intrude without individualized suspicion in assessing the permissibility of an intrusion depends to a large extent on how one views the role of individualized suspicion in Fourth Amendment reasonableness analysis. Clearly, if particularized suspicion is found to have a central role, then the strength of the government's need to proceed without it must be greater than if one believes that its role is not central and is, for example, a mere procedural safeguard for which other safeguards may be adequately substi-

\textsuperscript{583} \textit{Id.}
\textsuperscript{584} \textit{Id.} at 676 n.3.
\textsuperscript{585} \textit{Id.} at 675 n.3 (emphasis omitted).
\textsuperscript{586} The Court stated that there must be some empirical evidence, however slight, to justify the activity. It cited data demonstrating that such sobriety checkpoints resulted in arrests of about one percent of the motorists stopped. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 453-54 (1990).
\textsuperscript{587} See also Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 629 n.9 (1989) (rejecting inquiry into availability of alternatives).
tuted. A balancing test cannot identify individual suspicion’s proper role. Only after that role is determined can one then properly balance the competing interests. Thus, the essential flaw in the Court’s balancing analysis is its use of balancing to determine whether particularized suspicion is necessary without assigning a role to it or a weight to it prior to engaging in the balancing process.

The principle of necessity is neither as elastic nor as superfluous as the more recent opinions of the Supreme Court would seem to indicate. If individualized suspicion is an inherent quality of the Fourth Amendment’s concept of reasonableness, then a strong showing of need must be made to justify departures from it. Neither a mere assertion of need is enough nor are claims of convenience, practicality, or the “reasonableness” of the suspicionless activity.\footnote{588} A demonstration that the intrusion \textit{must} be performed without individualized suspicion to achieve the government’s purpose should be an indispensable requirement in every circumstance where the government seeks to search or seize without particularized suspicion.\footnote{589}

\footnote{588. See Torres v. Puerto Rico, 442 U.S. 465, 476 (1979) (Brennan, J., concurring); Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion) (The concept that constitutional provisions against arbitrary governmental actions are “inoperative when they become inconvenient or when expediency dictates otherwise . . . if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.”); see also United States v. Martinez-Fuerte, 428 U.S. 543, 575-76 (1976) (Brennan, J., dissenting).

There is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied. Dispensing with reasonable suspicion as a prerequisite to stopping and inspecting motorists because the inconvenience of such a requirement would make it impossible to identify a given car as a possible carrier of aliens is no more justifiable than dispensing with probable cause as prerequisite to the search of an individual because the inconvenience of such a requirement would make it impossible to identify a given person in a high-crime area as a possible carrier of concealed weapons.\textit{Martinez-Fuerte}, 428 U.S. at 575-76 (Brennan, J., dissenting).

\footnote{589. Cf. New Jersey v. T.L.O., 469 U.S. 325, 363 (1985) (Brennan, J., concurring in part and dissenting in part) (stating that, in assessing whether a departure from the probable cause standard is justified, “it is the costs of applying probable cause as opposed to applying some lesser standard that should be weighed on the government’s...}
Justice Scalia, dissenting in *Von Raab*, discussed his view of the role that need should play in assessing whether to dispense with individualized suspicion:

Until today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment. Today, in *Skinner*, we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court’s opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court’s opinion in the present case because neither the frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.590

Scalia, although conceding that “there are some absolutes in Fourth Amendment law,”591 believed that the answer to the question of whether a search is reasonable “depends largely upon the social necessity that prompts the search.”592 Scalia illustrated his point:

Thus, in upholding the administrative search of a student’s purse in a school, we began with the observation (documented by an agency report to Congress) that “[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the school have become major social problems.” When we approved fixed checkpoints near the Mexican border to stop and search cars for illegal aliens, we observed at the outset that “the Immigration and Naturalization Service now suggests

590. 489 U.S. at 680-81 (citations omitted).
591. Id. at 681.
592. Id.
there may be as many as 10 or 12 million aliens illegally in the country,” and that “[i]nterdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems.” And the substantive analysis of our opinion today in *Skinner* begins, “[t]he problems of alcohol use on American railroads is as old as the industry itself,” and goes on to cite statistics concerning that problem and the accidents it causes, including a 1979 study finding that “23% of the operating personnel were ‘problem drinkers.’” 593

Scalia saw real danger in allowing suspicionless searches in the absence of a demonstrated need. He saw no difference in the facts of *Von Raab* from the suspicionless stops of cars to check the drivers’ licenses in *Delaware v. Prouse*, 594 which added only marginally to highway safety while burdening a large number of motorists. 595 Scalia also cautioned that, by extending the drug tests to those who carry firearms, the Court exposed “vast numbers of public employees to this needless indignity.” 596 He reasoned: “Logically, of course, if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs, may endanger others—automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards.” 597

Scalia’s analysis is helpful but only partially correct. He largely failed to distinguish between the strength of the government interest involved and the need to dispense with individualized suspicion to effectuate that interest. He missed the mark when he indicated that a strong government interest—stemming from a demonstrated widespread problem—is sufficient. His analysis is closer to the mark where he opined that the reliance on generalizations such as the Court’s statement that “[t]here

593. *Id.* (citations omitted).
596. *Id.* at 685.
597. *Id.*
is little reason to believe that American workplaces are immune from [the] pervasive social problem of drug abuse" is intolerable absent a showing that "the workplace at issue could produce such catastrophic social harm that no risk whatever is tolerable—the secured areas of a nuclear power plant, for example."\(^{598}\) In this last example, he recognized that the government interest alone—the safety of nuclear power plants—must be combined with the additional consideration that, to effectuate that interest, absolute compliance must be maintained.

A more exact expression of the proper role of need is contained in Justice Brennan's dissenting opinion in *Sitz*, where he acknowledged that abandoning the requirement of articulable suspicion would be justified based upon a strong showing of need.\(^{599}\) Brennan asserted that a strong government interest was, by itself, not enough to justify dispensing with individualized suspicion. Thus, he believed, even the "immense social cost caused by drunken drivers" was insufficient, as would be a "consensus that a particular law enforcement technique serves a laudable purpose."\(^{600}\) In support of his view that a showing of necessity was required, Brennan cited immigration checkpoints, where it had been established that the flow of traffic tended to be "too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens."\(^{601}\) He contrasted this evidence to *Sitz*, where there had been no showing of "a similar difficulty in detecting individuals who are driving under the influence of alcohol, nor [was] it intuitively obvious that such a difficulty exists."\(^{602}\) Brennan opined:

That stopping every car *might* make it easier to prevent drunken driving ... is an insufficient justification for abandoning the requirement of individualized suspicion.

\(^{598}\) *Id.* at 684 (citation omitted).


\(^{600}\) *Id.* at 459.

\(^{601}\) *Id.* at 458 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976)).

\(^{602}\) *Id.*
“The needs of law enforcement stand in constant tension with the Constitution’s protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.” Without proof that the police cannot develop individualized suspicion that a person is driving while impaired by alcohol, I believe the constitutional balance must be struck in favor of protecting the public against even the “minimally intrusive” seizures involved in this case.\footnote{Id. at 458-59 (citation omitted).}

The concept of necessity has several facets, each of which may come to the forefront of consideration depending on the circumstances. One component is the absence of any effective alternatives.\footnote{Cf. O’Connor v. Ortega, 480 U.S. 709, 744-46 (1987) (Blackmun, J., dissenting) (opining that, before a warrant and probable cause standards are dispensed with, it must be established that “there is no alternative in the particular circumstances”); Illinois v. Lafayette, 462 U.S. 640, 647 (1983) (“The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative ‘less intrusive’ means.”).} The examination of alternatives serves to minimize needless invasions upon the freedom from suspicionless searches and seizures. If the government has an alternative means to achieve the end, there is no need to intrude. In assessing the availability of alternatives, the comparative onerousness of each alternative is a valid consideration. If the relative cost or effort of utilizing an alternative mechanism is out of proportion to utilizing a suspicionless intrusion, then the alternative method may be said to be unavailable. For example, while some alternative method of preventing fires from spreading might be imagined in lieu of housing inspections, such as posting fire wardens at every street corner, this alternative, even if adequate, would not be feasible given the costs involved.

A second aspect of necessity is productivity.\footnote{Productivity analysis presupposes a demonstrated problem. If no demonstrated problem is present, such as in \textit{Von Raab}, then one should not even reach the productivity question.} This is to say that there must be some showing of an empirical result,
that is, that the asserted purpose will be served.\textsuperscript{606} Productivity in many cases is bound up with the availability of alternative mechanisms: if both mechanisms achieve the same result, there is no demonstrated need to engage in the suspicionless invasion. This type of examination was utilized in \textit{Delaware v. Prouse},\textsuperscript{607} where the Court concluded that a system of suspicionless spot checks of drivers' licenses and vehicular registrations at the discretion of the officer in the field was not sufficiently productive of the state interests to justify the intrusion, particularly given the alternative mechanisms available:

The foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained. Furthermore, drivers without licenses are presumably the less safe drivers whose propensities may well exhibit themselves. Absent some empirical data to the contrary, it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers. If this were not so, licensing of drivers would hardly be an effective means of promoting roadway safety. It seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed. The contribution to highway safety made by discretionary

\textsuperscript{606} Productivity may be difficult to measure, particularly where the dominant goal is deterrence. The burden, however, should be on the government to demonstrate that its methods do deter behavior. This is so because the government must justify its intrusions. Thus, it is not enough to assert, as the Court did in \textit{Von Raab}, that the desire to prevent a potential danger alone suffices to justify a deterrence-style regime. Productivity, when the need is to deter, could be established by studies or tests showing the effectiveness of the program. It might also be measured by demonstrating that there was a crisis but that, after the program was implemented, instances of the behavior sought to be deterred were few. For example, the installation of metal detectors in airports in response to the hijacking of airplanes virtually eliminated that problem.

\textsuperscript{607} 440 U.S. 648 (1979).
stops selected from among drivers generally will therefore be marginal at best.608

Justice Stevens, dissenting in Michigan Department of State Police v. Sitz,609 criticized the Court’s abandonment of this approach. He maintained that suspicionless intrusions could only be justified by “the degree to which the seizure advance[d] the public interest,” as compared to techniques using particularized suspicion.610 According to Stevens, studies had demonstrated that sobriety checkpoints had little effect on accident and arrest rates.611 He believed that the Court’s analysis resembled

a business decision that measures profits by counting gross receipts and ignoring expenses. The evidence in this case indicates that sobriety checkpoints result in the arrest of a fraction of one percent of the drivers who are stopped, but there is absolutely no evidence that this figure represents an increase over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols. Thus, although the gross number of arrests is more than zero, there is a complete failure of proof on the question whether the wholesale seizures have produced any net advance in the public interest in arresting intoxicated drivers.612

A third aspect of necessity is the requirement of a high level of compliance to achieve an acceptable level of satisfaction of the governmental interest. In Camara, where the Court was concerned with the enforcement of building codes, it said

608. Id. at 659-60.
610. Id. at 457.
611. Id. at 460.
612. Id. at 469-70 (footnotes omitted). Justice Stevens noted that, in Martinez-Fuerte, not only was there a net increase in arrests at the border checkpoints, but the Court carefully explained that there was a net benefit to the law enforcement interests at stake. Id. at 471-72. Justice Stevens also asserted that common sense suggested that there was a vast difference in a roadblock at the border to detect illegal aliens and sobriety checkpoints. Drunk drivers can be detected by the noticeable effects of intoxication on driving; illegal aliens are impossible to detect absent the checkpoint. Id. at 472.
that "universal compliance" was necessary to effectuate the government's interest.\textsuperscript{613} The reasoning was essentially that, unless all buildings in an area are safe, then all of them are in danger of a fire starting at the unsafe structure and spreading to other structures. The Court's emphasis on the need for universal compliance, however, was overstated.\textsuperscript{614}

One might as cogently argue that there is a need for universal compliance with the criminal law and that the public interest demands that all dangerous offenders be convicted and punished. It is certainly not a novel observation that in the field of criminal law this argument has not prevailed, and that instead we are committed to a philosophy tolerating a certain level of undetected crime as preferable to an oppressive police state. If there is a greater public interest in total enforcement of housing codes than of the criminal law, the \textit{Camara} opinion does not explain why.\textsuperscript{615}

Furthermore, "[a] more fruitful line of analysis, compared to this overstated need for [total] enforcement, is to consider whether [utilizing individualized suspicion] would permit an acceptable level of enforcement."\textsuperscript{616} Two bases underlie what constitutes an acceptable level of enforcement and distinguishes criminal law enforcement from \textit{Camara}-type situations. First, many of the cases dispensing with individualized suspicion have found the prevention or detection of activities or conditions that could affect a large number of persons to be important: mass harm from epidemics or from fires sweeping across urban areas,\textsuperscript{617} nuclear power plants,\textsuperscript{618} intoxicated train operators,\textsuperscript{619} and explosive devices in air planes.\textsuperscript{620} These scenarios have in common the potential for a single source affecting large numbers of people at the same time. To combat mass

\textsuperscript{613} Camara v. Municipal Court, 387 U.S. 523, 535-36 (1967).
\textsuperscript{614} See 3 LAFAYE, supra note 1, § 10.1(b), at 604-05.
\textsuperscript{615} Id. at 604.
\textsuperscript{616} Id.
\textsuperscript{617} See, e.g., Camara v. Municipal Court, 387 U.S. 523 (1967).
problems at an early stage before they become mass disasters, the Court has permitted interference with personal interests in a diverse number of ways: housing and business inspections, intrusions into bodily integrity and privacy, and requiring persons to do such activities as walking through metal detectors as a condition of boarding an airplane.

This contrasts with criminal law enforcement, where individual crimes are committed and traditional police investigatory techniques are sufficient to achieve an acceptable level of enforcement. This is not to say that no substantial governmental interest in operating without individualized suspicion is ever at stake when the potential for mass harm is not present. Yet the course of history indicates that this is generally the case: traditionally, where isolated instances of dangerous or criminal activity occur that have no potential for mass harm, individualized suspicion has generally been required. 621 Thus, the police

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621. The numbers calculations of Sitz as to deaths, injuries, and property damage resulting from the pervasive problem of drunk driving, if examined in the aggregate, clearly demonstrate a compelling governmental interest: 25,000 deaths each year from drunk drivers, nearly one million injuries, and more than five billion dollars in property damage. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990); see also id. at 455-56 (Blackmun, J., concurring in the judgment) (citing the tragedy of the immense slaughter on the highways). But those numbers do not demonstrate a need to depart from individualized suspicion. This is because those numbers represent the total of thousands of accidents. Each accident results in a few deaths and injuries and some property damage. Thus, the crime of drunk driving does not create societal consequences any different than any other crime. Each murder is reprehensible; each armed robbery, sexual assault, or burglary causes similar adverse societal consequences. Yet each is caused by an individual or small group and affects a similar number of persons. The total number of murders in society are not aggregated to justify suspending the principle of individualized suspicion to investigate murders. Cf. Arizona v. Hicks, 480 U.S. 321 (1987) (rejecting argument that murder scenes should be exempt from the warrant requirement). Similarly, the drunk driving problem is also composed of individual cases that belie reliance on the total numbers. Cf. 3 LaFave, supra note 1, § 10.1(b), at 604. Furthermore,

[O]ne might as cogently argue that there is a need for universal compliance with the criminal law and that the public interest demands that all dangerous offenders be convicted and punished. It is certainly not a novel observation that in the field of criminal law this argument has not prevailed, and that instead we are committed to a philosophy tolerating a certain level of undetected crime as preferable to an oppressive police state.
cannot enter a house to look for the individual marijuana smoker because that person's activity poses no substantial danger to anyone outside his or her abode. If the marijuana smoker is a commercial airplane pilot or train operator, then the link to mass harm becomes more substantial. This does not mean that the police can enter the pilot's home, for reasonable procedures must still be utilized, but it does mean that the government has a strong interest in regulating the pilot's behavior.

The potential for mass harm is not sufficient in and of itself. A second basis is also common to the situations where the need for a high level of compliance is needed. This involves what is here characterized as a fourth facet of necessity, as applied to individualized suspicion—that is, the inability to identify the source of the problem utilizing particularized suspicion in advance of the harm occurring.\textsuperscript{622} In such circumstances, unless the government intervenes before individualized suspicion has arisen, the government interest will be frustrated. One example is fire inspections of buildings in urban areas. Absent an inspection, the dangerous conditions existing in such structures cannot be identified before the dangers have been realized. Another example would be a reliable report that a nuclear device has been placed in a neighborhood but that it is unknown exactly where the terrorists have placed it. The gravity of the harm in such a situation would be so great that a house-to-house search without suspicion falling on any one

\textit{Id.}

If the collective societal interest in performing the suspicionless intrusions is the proper measure of the government's interest, then the totality of all persons whose interests are invaded by the search or seizure at issue is the proper measure of the individual interest at stake. See State v. Tourtillo, 618 P.2d 423, 441-42 (Or. 1980) (Linde, J., dissenting), cert. denied, 451 U.S. 972 (1981); James B. Jacobs & Nadine Strossen, \textit{Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks}, 18 U.C. DAVIS L. REV. 595, 626 n.136 (1985).

\textsuperscript{622} Cf. Ellen M. Alderman, Note, \textit{Dragnet Drug Testing in Public Schools and the Fourth Amendment}, 86 COLUM. L. REV. 852, 872 (1986) ("[I]f the nature of the problem generates articulable suspicious behavior, thereby enabling public officials to identify the persons most probably engaged in the activity, it is not reasonable under the fourth amendment to subject an entire class of people to a search.").
house would be reasonable. This contrasts with a reliable report that a man possesses heroin at a specified location and, when the police arrive at that location, a crowd is present. In such circumstances, the potential for mass harm is absent, and the police would not be justified in searching each member of the crowd.

The various aspects of necessity—the absence of effective alternatives, the comparative productivity of operating without individualized suspicion, the need to achieve a high level of enforcement, and the inability to identify the source of the problem utilizing individualized suspicion—are interrelated and may substantially overlap in a particular situation. However, it is important to stress the various forms that necessity may take to ensure that its meaning is fully comprehended in each situation and to ensure that the principle of necessity remains an important check on using suspicionless intrusions.

D. Procedures Utilized in Planning and Executing the Search or Seizure

The individualized suspicion requirement limits not only the circumstances under which the government may initiate actions but also the scope and details of the search or seizure: "Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider ‘whether the . . . action was justified at its inception,’ second, one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’"623 When individualized suspicion is absent, the Court has often examined the procedures utilized in selecting the target of the search or seizure and in executing the search or seizure as one of the elements of the balancing test to determine whether the suspicionless nature of the intrusion is permissible. This Section demonstrates that any principle originally animating the Court’s analysis of the procedures

utilized has been extinguished by subsequent cases. Although the Court originally demanded tight reigns on discretion by officials executing a plan, which had to employ explicit, neutral limitations on discretion, a plan now need not provide much guidance, and the executing officials are permitted wide discretion. In addition to these criticisms, the Court’s use of the procedures attending the search or seizure to justify the suspicionless nature of the intrusion is fundamentally flawed for two reasons: it presupposes that the discretion of the executing officials is the evil the Amendment seeks to eliminate, and the procedures employed in carrying out an intrusion should not be used to justify suspicionless intrusions.

The amount of discretion left to officials in targeting an object of a search or seizure and in executing the search or seizure has often been an important consideration in assessing the permissibility of a suspicionless intrusion. In such circumstances, because individualized suspicion is not present to limit discretion, the Court has employed other tools to do so. The principal alternative means utilized is a plan “embodied explicit, neutral limitations” on discretion. For example, a suspicionless regulatory inspection program “must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.” Those functions arguably serve as a substitute for individualized suspicion because government agents can only look for


626. New York v. Burger, 482 U.S. 691, 702-03 (1987) (citations omitted). The Court stated that “the statute must be ‘sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.’” Id. at 703 (citation omitted). In limiting the discretion of the officers, the statute “must be ‘carefully limited in time, place, and scope.’” Id. (citation omitted).
legislatively or administratively determined objects or conditions.

The early cases enunciated and applied these rules. Thus, the presence of discretion proved fatal in *Delaware v. Prouse*,627 where the Court held that random, suspicionless stops of vehicles instituted by patrol officers to check the drivers’ licenses and the vehicles’ registrations violated the Fourth Amendment.628 The Court emphasized that the “kind of standardless and unconstrained discretion” involved in random stops was “the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.”629 In comparison, in *Camara v. Municipal Court*,630 the Court permitted suspicionless housing inspections in part because the inspections were carried out pursuant to legislatively or administratively determined standards and because the inspectors could only examine predetermined objects.

Both of the elements believed necessary in the earlier cases, a neutral, predetermined plan and limited discretion by the executing officials, have been substantially eliminated by later decisions. Little now remains of the original view that a neutral plan had to carefully limit the discretion of executing officials. More recent cases have permitted searches and seizures where the plan does not give much guidance. For example, in *New York v. Burger*,631 the statute permitting suspicionless inspections of automobile junkyards presented the “barest of administrative schemes.”632 It merely required a vehicle dismantler to “register and pay a fee, display the registration in various circumstances, maintain a police book, and allow inspections.”633 The statute did not create a predictable and guided governmental presence because it did “not inform the operator of a vehi-

628. Id.
629. Id. at 661.
632. Id. at 718 (Brennan, J., dissenting).
633. Id. at 720 (citations omitted).
cle-dismantling business that inspections [would] be made on a regular basis; in fact, there [was] no assurance that any inspections at all [would] occur."\textsuperscript{634} Nor did the statute provide an "upper [or] a lower limit on the number of searches that [were] conducted at any given operator’s establishment in any given time period."\textsuperscript{635} Moreover, "neither the statute, . . . nor any regulatory body, provide[d] limits or guidance on the selection of vehicle dismantlers for inspection."\textsuperscript{636}

Officials in the field have also been allowed an increasing amount of discretion. In \textit{United States v. Martinez-Fuerte},\textsuperscript{637} the Court permitted immigration authorities unlimited discretion to refer any motorist stopped at a primary checkpoint to a secondary checkpoint for further questioning.\textsuperscript{638} In \textit{Sitz}, which concerned the stopping of motorists at temporary sobriety checkpoints, the Court analogized the situation to the permanent highway checkpoints for detecting illegal aliens in \textit{Martinez-Fuerte} and perceived "virtually no difference" in the levels of intrusion on law-abiding motorists at the two stops.\textsuperscript{639} Contrary to the majority’s conclusions, there are vast differences between a routine stop at a permanent, fixed checkpoint and a surprise stop at a temporary sobriety checkpoint.\textsuperscript{640} As to permanent checkpoints, there is no room for discretion in either the timing or the location of the stop.\textsuperscript{641} In contrast, the police retain broad discretion in determining the timing and location of a sobriety roadblock.\textsuperscript{642}"There is also a significant difference between the kind of discretion that the officer exercises after the stop is made."\textsuperscript{643} In particular, "[a] check for a driver’s license, or for identification papers at an immigration checkpoint, is far more easily standardized than is

\textsuperscript{634} \textit{Id.} at 722.
\textsuperscript{635} \textit{Id.} at 722-23.
\textsuperscript{636} \textit{Id.} at 723.
\textsuperscript{637} 428 U.S. 543 (1976).
\textsuperscript{638} \textit{Id.} at 560.
\textsuperscript{640} \textit{Id.} at 462-63 (Stevens, J., dissenting).
\textsuperscript{641} \textit{Id.} at 463.
\textsuperscript{642} \textit{Id.} at 464.
\textsuperscript{643} \textit{Id.}
a search for evidence of intoxication." Thus, "[a] ruddy complexion, an unbuttoned shirt, bloodshot eyes or a speech impediment may suffice to prolong the detention" at a sobriety checkpoint.

In addition to gutting the concepts of a neutral plan and limitations on the discretion of the executing officials, the Court's utilization of procedural safeguards in the balancing test is foundationally faulty for two reasons: the analysis improperly focuses on limits on the discretion of the executing officials, and the procedures utilized in executing a search or seizure should not be used to excuse the lack of individualized discretion. The need for constraint on discretion has been said to derive from the Reasonableness Clause of the Fourth Amendment: "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials . . . in order to 'safeguard the privacy and security of individuals against arbitrary invasions.'" Because the Court has focused on the officials "in the field" as those whose discretion needs to be restrained, decisions made by higher officials or more systematic searches or seizures are more likely to be upheld. The problem with this view is that it distorts the perceived evil that the Fourth Amendment was designed to combat. Discretion of officers in the field was not the perceived

644. Id.
645. Id. at 465.
646. Delaware v. Prouse, 440 U.S. 648, 654 (1979). This view ignores the historical relationship between the two clauses of the Amendment and the particularity requirement of the Warrant Clause. See supra notes 142-91 and accompanying text (discussing the two competing views of the relationship of the Fourth Amendment’s two clauses).
647. Prouse, 440 U.S. at 653-54 (citations omitted).
648. See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985); Prouse, 440 U.S. at 655. The genesis of the belief that the field officials’ lack of discretion somehow makes lack of individualized suspicion acceptable can be found in Camara, wherein the Supreme Court, in validating the issuance of search warrants to inspect residences for health, fire, and housing code violations on an area-wide basis, stated that probable cause to issue a warrant to inspect existed “if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.” Camara v. Municipal Court, 387 U.S. 523, 538 (1967).
The Role of Individualized Suspicion

evil. Indeed, the writs of assistance for customs searches were issued by judges, and the searches and seizures in Wilkes v. Wood\textsuperscript{649} and Entick v. Carrington\textsuperscript{650} were pursuant to warrants issued by higher officials. Standardless discretion was a by-product of not having individualized suspicion. Particularized suspicion is the component of reasonableness that produces limits on discretion. The Court’s view clouds this by making limits on discretion the “good” that is to be achieved. However, for the framers, the “good”—the core value—\textit{was} individualized suspicion, which limited arbitrariness at all levels of government, not just at the lowest level of those executing the search or seizure.

To the extent that the Court’s opinions rely on the procedures utilized as part of the justification permitting suspicionless intrusions, that analysis is misplaced. The procedures utilized in executing a search or seizure should not be part of the weighing process to determine \textit{whether} a departure from the principle of particularized suspicion is justified. The procedures employed are to ensure that discretion is limited and the scope of the intrusion was no greater than needed to effectuate the government interest.\textsuperscript{651} This occurs \textit{after} it is decided that the government interests outweigh the individual interests and that a suspicionless intrusion is necessary to effectuate the government’s interests. Thus, in examining the procedures employed, the proper question is whether discretion has been limited to effectuate the governmental interest and to prevent unnecessary intrusion upon individual interests. The proper consideration is not, because discretion is limited, partic-

\begin{itemize}
\item \textsuperscript{649} 98 Eng. Rep. 489 (K.B. 1763).
\item \textsuperscript{650} 95 Eng. Rep. 807 (K.B. 1795).
\item \textsuperscript{651} See, e.g., National Treasury Employees Union v. Von Raab, 489 U.S. 656, 672 n.2 (1989) (testing procedures significantly minimized intrusiveness by testing only employees tentatively accepted for promotion, by allowing employees to provide urine specimens in a stall, and by restricting the urinalysis to the detection of specified drugs); Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 624-25 (1989) (discussing how procedures used in obtaining drug and alcohol samples limited the intrusion); United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1973) (opining that reasonableness of procedures followed at checkpoint stops minimized intrusion on interests of motorists).
\end{itemize}
ularized suspicion is unnecessary.\footnote{The lack of the ability to formulate and utilize objective criteria to limit discretion demonstrates that individualized suspicion remains necessary. See, e.g., Delaware v. Prouse, 440 U.S. 648, 662 (1979) (finding no standards to support random stops of vehicles to check drivers' licenses and registrations).}

V. THE ROLE OF INDIVIDUALIZED SUSPICION

A. Why Aren't These Intrusions Reasonable?

Already there are a host of situations beyond those currently sanctioned where the need for particularized suspicion in executing searches and seizures has been called into question. Justice Stevens, for example, seems prepared to expand significantly the everyday circumstances where suspicionless intrusions are permissible:

It is . . . common practice to require every prospective airline passenger, or every visitor to a public building, to pass through a metal detector that will reveal the presence of a firearm or an explosive. Permanent, nondiscretionary checkpoints could be used to control serious dangers at other publicly operated facilities. Because concealed weapons obviously represent one such substantial threat to public safety, I would suppose that all subway passengers could be required to pass through metal detectors, so long as the detectors were permanent and every passenger was subjected to the same search. Likewise, I would suppose that a State could condition access to its toll roads upon not only paying the toll but also taking a uniformly administered breathalyzer test.\footnote{Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 473-74 (1990) (Stevens, J., dissenting) (footnotes omitted); see, e.g., Legal Aid Soc'y v. Crosson, 784 F. Supp. 1127 (S.D.N.Y. 1992) (upholding use of metal detectors to search for weapons in possession of persons seeking to enter courthouse).}

If society has a compelling interest in regulating those who possess handguns, then a logical extension of Justice Stevens' analysis would permit, and technological innovations make possible, the police to set up checkpoints and detectors in neighborhoods,\footnote{See James Q. Wilson, Just Take Away Their Guns, N.Y. TIMES, Mar. 20, 1994,} on highways,\footnote{25 Memph. L. Rev. 483 (1995)} at stadiums,
schools,\textsuperscript{657} and at other public gatherings.\textsuperscript{658} There are many other situations where suspicionless seizures would be helpful: suspicionless sweeps of public housing for illegal occupants, weapons, and drugs;\textsuperscript{659} searches of students’ clothing, purses, and lockers to locate another student’s missing property;\textsuperscript{660} roadblocks to check for auto larceny;\textsuperscript{661} and blocking off an entire area and detaining everyone long enough to check for outstanding warrants.\textsuperscript{662}

Drug trafficking is an enormous problem. Suspicionless

\begin{footnotes}
\textsuperscript{657} See United States v. O’Mara, 963 F.2d 1288, 1291-92 (9th Cir. 1992) (after reports of illegal firearms discharges in Joshua Tree National Monument, it was permissible to set up roadblock on only exit road to stop and question all campers because “public interest in apprehending persons who randomly shoot dangerous weapons in a public campground is [] weighty”).


\textsuperscript{659} See, e.g., People v. Dukes, 580 N.Y.S.2d 850 (N.Y. Crim. Ct. 1992) (upholding metal detector in main lobby of high school to search for weapons).

\textsuperscript{660} Cf. Terry v. Ohio, 392 U.S. 1, 31-32 (1968) (Harlan, J., concurring) (asserting that the states have the power to permit police officers to forcibly frisk and disarm persons suspected of concealing weapons based upon articulable suspicion but that that power “might not warrant routine general weapons checks”).


\textsuperscript{662} Cf. People v. William G. (\textit{In re William G.}), 709 P.2d 1287, 1299-1300 (Cal. 1985) (Bird, C.J., concurring and dissenting) (recounting incident in high school where school officials searched lockers, purses, and bodies of 20 students in attempt to locate watch and ring of another student).

\textsuperscript{663} See People v. Cascarano, 587 N.Y.S.2d 529, 531-32 (N.Y. Crim. Ct. 1992) (A suspicionless checkpoint set up to determine if vehicles passing through it are stolen does not violate the Fourth Amendment.).

\textsuperscript{664} \textit{But cf.} Community for Creative Non-Violence v. Unknown Agents of United States Marshals Serv., 797 F. Supp. 7, 13-14 (D.D.C. 1992) (although Marshals validly entered homeless shelter pursuant to arrest warrant for suspect reasonably believed to be there, it was impermissible to detain and require 200 other persons in the shelter to identify themselves before they could leave or return to sleep in the hope of finding other fugitives); Brown v. State, 553 A.2d 1317 (Md. Ct. Spec. App. 1989) (ruling that it was impermissible to establish roadblock to stop for warrant check).
\end{footnotes}
seizures of travelers is a tempting possible solution. Stops at airports, train stations, and bus stations and roadblocks on highways could disrupt trafficking. The traveler could be momentarily detained while a trained dog sniffed the traveler and his or her luggage and other belongings. If a positive reaction resulted, then the police would have probable cause to search and arrest.\textsuperscript{663} In cities, large and small, there are neighborhoods that are characterized by a high incidence of drug trafficking. Brief stops of everyone in such zones to learn the person's identification and perform a dog sniff would be a fruitful investigative tool.\textsuperscript{664} By using such methods, major advances against the illegal drug trade might be achieved.\textsuperscript{665}

Other social ills are also susceptible to successful attack by such methods. Some urban areas become the focal point for certain types of crime.\textsuperscript{666} Street prostitution is often characterized by women congregating in a known area and soliciting customers. A city park might be the object of a wave of vandalism.\textsuperscript{667} An apartment complex may suffer a rash of automobile thefts.\textsuperscript{668} A sparsely populated area with vacant summer homes could be targeted for burglaries.\textsuperscript{669} Why not stop

\begin{itemize}
\item \textsuperscript{663} See, e.g., Florida v. Royer, 460 U.S. 491, 505-06 (1983) (plurality opinion) (ruling that positive indication by trained dog for presence of drugs in baggage justified arrest on probable cause).
\item \textsuperscript{664} Cf. Wirin v. Horrall, 193 P.2d 470 (Cal. Dist. Ct. App. 1948) (ruling that it was impermissible to blockade high-crime area of city and search all cars leaving area); Galberth v. United States, 590 A.2d 990, 997-1001 (D.C. 1991) (ruling roadblock for primary purpose of disrupting open-air drug market illegal).
\item \textsuperscript{665} Cf. Sibron v. New York, 392 U.S. 40, 73 (1968) (Harlan, J., concurring) (Association with known criminals "does not, entirely by itself, create suspicion adequate to support a stop. There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended."); Gibbs v. State, 306 A.2d 587 (Md. Ct. Spec. App. 1973) (ruling that it was improper to merely stop in an area that, most of the day, was characterized by street assaults, narcotics, and robberies).
\item \textsuperscript{666} See generally 3 LAFAVE, supra note 1, § 9.3(g), at 495-97.
\item \textsuperscript{667} See State v. Hillesheim, 291 N.W.2d 314 (Iowa 1980) (ruling that it was illegal to stop all vehicles entering park after dark to combat wave of vandalism because the plan was formulated by two patrol officers and not at the policy-making level).
\item \textsuperscript{668} See People v. Meit, 420 N.E.2d 1119 (Ill. App. Ct. 1981) (police staked out apartment complex and properly stopped all vehicles to determine if driver was or knew registered owner).
\item \textsuperscript{669} See People v. John B.B., 438 N.E.2d 864 (N.Y.), cert. denied, 459 U.S. 1010
\end{itemize}
and question everyone in the area?

These are but a few of the actions authorities could take. Other intrusions, more Orwellian in nature, are readily conceivable and are as obvious as the tactics of law enforcement authorities in other countries that do not have the benefit of the Fourth Amendment. To permit such actions would radically transform society and the belief that the Fourth Amendment somehow protects against such actions. Why aren’t these actions reasonable? If the Court’s totally subjective reasonableness analysis is applied, many of these suspicionless intrusions could be upheld. If these practices were allowed, more intrusive procedures would surely follow.

B. The Proper Balance

Acceptance of the Court’s basic premise that the Fourth Amendment’s concept of reasonableness entails a balancing test does not inevitably lead to the conclusion that the concept has no inherent meaning or that the balancing should be performed in an historical vacuum. There are two primary reasons why individualized suspicion should be considered a component of reasonableness: it recognizes the historical importance of individualized suspicion to the framers of the Constitution, and it provides needed guidance to courts and governmental officials, avoiding the slippery slope of an unprincipled reasonableness analysis.


670. Cf. Aleinkoff, supra note 493, at 945, 990-91 (comparing balancing analysis with other modes of constitutional adjudication and maintaining that constitutional law, contrary to the view of balancers, provides a set of peremptory norms that are basic to the American notion of limited powers, as well as a validating function, which serves as a forum for the affirmation of background principles and for ratification of changes in those principles); id. at 989-91 (criticizing the use of a balancing test to analyze the reasonableness of a Fourth Amendment intrusion).

671. Cf. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806 (1992) (pointing out that due process analysis has not been reduced to a formula but takes into account the historical balance and living traditions as they develop over time); Carroll v. United

Working on a clean slate or at another point in history, the conclusion one might reach about the importance of individualized suspicion might change. This would reflect, at least in part, the values and felt necessities of the time as to what was considered reasonable. Yet the concept of reasonableness cannot be so easily reduced to an examination of contemporary views if one accepts the view that historical analysis and the examination of the framers' intent are primary considerations in interpreting the Amendment. An aversion to suspicionless searches and seizures was a prime, if not the prime, motivation of the framers of the Fourth Amendment. Establishing that proposition was the major objective of the historical analysis contained in Part I of this Article. The framers believed that suspicionless searches and seizures were both unjustified and arbitrary. They were unjustified because "every citizen is entitled to security of his person and property unless and until an adequate justification for disturbing that security is shown."672 The "petty tyranny of unregulated rummagers," that is, the despotic and capricious exercise of the power to search and seize by executive officials, made suspicionless searches and seizures arbitrary.673 Accordingly, individualized suspicion was viewed as a substantive condition for all reasonable searches and seizures. Part I therefore concluded that, to the framers, individualized suspicion was an intrinsic component of the Fourth Amendment's concept of reasonableness.

Others, however, might dispute the historical record and conclude that the framers did not intend to define reasonableness to include the requirement of particularized suspicion. They might also contend that the framers' intent is not control-

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672. Amsterdam, supra note 181, at 411.
673. Id.
ling as to what constitutes a reasonable search or seizure. They might argue that, while individualized suspicion was important to the framers, times have changed and, given that the framers did not specifically enshrine individualized suspicion by defining a reasonable search or seizure to require it, modern interpreters can look to other criteria as a guide by which to measure reasonableness. To persons who hold such a view, Parts II and III are a rejoinder. Those parts, setting forth the decisions of the Supreme Court and their primary rationales, illuminate the need to impose such a requirement. Part II demonstrated that, after the Supreme Court departed from individualized suspicion as a condition for a reasonable search or seizure and undermined a principled basis for its decisions, the quantity and quality of the suspicionless intrusions relentlessly expanded. As indicated by Section A of this Part, the trend toward suspicionless invasions may continue to accelerate.

Part III demonstrated that there is now no principled analysis. There has been no significant recognition of the historical importance of individualized suspicion or the role it should play in assessing the reasonableness of an intrusion. Freedom from suspicionless searches and seizures has neither been considered a substantive interest of individuals nor a component of reasonableness. Instead, the Court examines other criteria and decides, based on those factors, whether individualized suspicion is needed, merely concluding that the search or seizure is therefore reasonable. By so proceeding, the Court fails to recognize the role individualized suspicion should play in assuring that citizens' interests are guarded by the Fourth Amendment. 674

In identifying the individual's interests, the governmental interests, the need to intrude, and the procedures utilized as the factors to be weighed in assessing reasonableness, the Court has ultimately skewed or rejected all objective criteria for each factor, which is to say that no substance now animates any of

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674. Cf. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 457 (Brennan, J., dissenting) ("Some level of individualized suspicion is a core component of the protection the Fourth Amendment provides against arbitrary government action.").
the factors.\textsuperscript{675} The Court has often undervalued individual interests and overvalued governmental interests.\textsuperscript{676} It has reduced individual interests to a privacy analysis and has elevated mundane governmental interests to "special needs." A showing of need to intrude without individualized suspicion, which at one time was viewed as embodying the dictionary definition of necessity and then later of practicality, seemingly has now been eliminated entirely as a consideration.\textsuperscript{677} Another factor, the procedures utilized, should not be a consideration in determining whether individualized suspicion should be eliminated. The procedures utilized serve to limit the scope of an otherwise valid intrusion to that which is necessary to effectuate the government's interests. The procedures utilized only become relevant after it is determined, based on other considerations, that a suspicionless intrusion is permissible. The balancing test has become a shameless game composed of meaningless labels.

A better framework is needed. Based on Part II, one should conclude that individualized suspicion is an intrinsic component of reasonableness. Based on Parts III and IV, one should conclude that there is a need for objective criteria to guide courts in assessing reasonableness.\textsuperscript{678} An objective


All of these 'balancing tests' amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive nihilism is merely a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences.

\textit{Id.}; cf. \textit{also} United States v. Montoya De Hernandez, 473 U.S. 531, 558 (1985) (Brennan, J., dissenting) (criticizing balancing as process "in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales").

\textsuperscript{676} See supra note 621.

\textsuperscript{677} Cf. United States v. Rabinowitz, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting) (observing how later decisions find root in earlier loose language: "These [earlier] decisions do not justify today's decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision."). \textit{United States v. Rabinowitz} was overruled in part by Chime\textsuperscript{e} v. California, 395 U.S. 752 (1969).

\textsuperscript{678} The need for a principled framework to measure reasonableness has sometimes been recognized in even the more recent decisions. \textit{See, e.g.}, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 637-38 (1989) (Marshall, J., dissenting); Michigan v.
guide ensures that the protections of the Fourth Amendment are not eviscerated by the expanding demands of society and by judges who fail to appreciate the unreasonableness of the intrusions under the circumstances. A bulwark against relentless expansion of governmental intrusion into all aspects of life is the recognition that individualized suspicion is a central component of reasonableness and an element of any principled balancing test. Freedom from suspicionless intrusions is an independent concept and a core substantive protection of the Amendment. This is not a radical proposal or a reinterpretation of the Fourth Amendment; it is a mere recognition of the values contained in the Amendment and the need for an objective guide to measure reasonableness. By so infusing the reasonableness command, individual liberty will remain preeminent. Group considerations and broad societal interests will not overwhelm individual interests.

Although the four broad areas identified by the Court, that is, the individual's interest, the government's interest, the need to intrude, and the procedures utilized, all have legitimate roles to play in assessing the reasonableness of an intrusion, the weighing process must also consider the role that individualized suspicion should play. Individualized suspicion is a normative factor that overrides any balance otherwise reached absent a


What the fourth amendment most clearly prohibits are practices like random entries into people's homes or random searches of people on the street for general governmental purposes: to acquire information, or to prevent danger to the public, or to look for evidence of wrongdoing, or simply to remind people that the government is the source of all their blessings.

Id.
showing of a compelling need to dispense with it. It is not a mere procedural device to safeguard other values protected by the Amendment, which may or may not be dispensed with based upon the weighing of other factors.

The balancing test should not be a mere weighing of the previously discussed factors along with individualized suspicion as a fifth factor. Reasonableness is not a simple balancing of factors. The scales are not balanced: they are tipped by individualized suspicion as a component of reasonableness against the government. The countervailing factors, principally the government’s interest and its need to dispense with particularized suspicion to effectuate that interest, do not have to outweigh merely the citizen’s interests; they must also tip the balance by outweighing the normative value of individualized suspicion. The procedures utilized are then examined to ensure that they are tailored to intrude no more than necessary to effectuate the government’s interest. Only then can one conclude that a given suspicionless search or seizure is reasonable.

VI. CONCLUSION

Individualized suspicion, whether it rises to the level of probable cause to arrest or search or mere articulable suspicion to stop or frisk, has served as a bedrock protection against unjustified and arbitrary police actions. The requirement of “some quantum of individualized suspicion”680 limits the government’s discretionary authority to search and seize. When an intrusion may be initiated and its scope are determined by the circumstances presented by the private party or target of the search or seizure and are not derived from circumstances within the control of the government. Premised on a proper governmental interest, the government may act if and only if the individual or object provides a reason for an intrusion.

One stark conclusion should be drawn from the history preceding the Amendment and the drafting process of the Amendment: particularly described persons, places, or things

based on individualized suspicion were considered inherent characteristics of reasonable searches and seizures by the framers. Individualized suspicion was considered an element of reasonableness. The framers did not mandate explicitly that searches be performed with a warrant because, based on everything they had experienced, it was assumed that searches and seizures would generally be performed pursuant to a warrant. That assumption was carried forward through time. Over time, however, society and its needs changed. The Fourth Amendment was made applicable to the States. Street encounters and preventive measures became more prevalent as population and crime increased dramatically. With the advent of modern transportation, mobility increased significantly, as did the need for swift and efficient action. Health, safety, and social regulations unrelated to criminal law enforcement became ubiquitous. The warrant has become a minor aspect of law enforcement. Still, until the last third of the twentieth century, the principle that individualized suspicion was a fundamental component of reasonableness remained a bedrock, probably unanimously held, view. The stream of history was deep and wide and kept alive the values held by the framers.

There is now, however, an expanding zone of intrusion by the government. Prior to Camara and Terry, the government was required to show probable cause to believe that the individual was violating the law before an intrusion was justified. In 1967, to meet the ever-increasing pressures and dangers of urban society, the Court in Camara approved of a non-particularized concept of probable cause for building inspections. The next year, to meet the pressing need for swift action to combat crime, the Court in Terry reduced the level of individualized suspicion necessary to permit flexible responses by the police. Taken together, these cases represented a retreat from the carefully guarded requirement of particularized probable cause. The Court next retreated from those positions, requiring no suspicion for a wide variety of government activity. It has also expanded the permissible magnitude of the intrusion.

The danger of desensitization to official affronts has been enhanced by the proliferation of intrusions on privacy by mod-
ern mass society. The trend in the Court has to some extent paralleled the societal diminution of respect for the worth of the individual. The Court has been influenced by societal trends and, in turn, has contributed to these trends by degrading the importance given to individualized suspicion. If the Supreme Court continues on the path it has chosen, the line of cases currently culminating with Burger, Von Raab, and Sitz is just the beginning. The number and intrusiveness of exemptions from the requirement of individualized suspicion will continue to grow.

There must be a return to the central importance given to individualized suspicion by the framers. A reasonableness inquiry is not an unprincipled balancing of competing interests. Rather, it is a weighted inquiry: one starts with a conception of what reasonableness is. It is, at least in part, a search or seizure based on individualized suspicion that the object of the intrusion has characteristics that justify the intrusion. This conclusion is reached by employing historical analysis; by relying on precedent, which, at least until recently, recognized the importance of individualized suspicion; by giving meaning to the purpose of the Fourth Amendment, which is to protect individuals; and by recognizing that, without accepting individualized suspicion as a component of reasonableness, there is no principled basis to require particularized suspicion in any given situation and the principle becomes honored only in its breach. Exceptions to the requirement of individualized suspicion should only be justified by a showing of necessity, which is to say that exceptions to that requirement should be few. Recognizing freedom from suspicionless intrusions as a principle of independent Fourth Amendment significance ensures that, when departures from that principle are made, they will be done with conscious regard for the consequences. By requiring justifications for such departures directly to address individualized suspicion as an important constituent part of reasonableness, the erosion of respect for individual interests and the use of relativistic reasonableness analysis would be checked.

Today’s majority of the Supreme Court apparently has
forgotten the basic guidance provided by the "leading case" interpreting the Amendment: "illegitimate and unconstitutional practices get their first footing... by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed." It has failed to attend to the basic task of understanding the Amendment. The Court must return to the fundamentals: history does provide guidance; the Fourth Amendment was designed to protect individual liberty; reasonableness does have meaning; and individualized suspicion is a core component of reasonableness.

683. See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting) (asserting that the greatest dangers to liberty from governmental intrusions stem from a lack of understanding of the Fourth Amendment); Weinreb, supra note 142, at 50 ("We have less common understanding of the fourth amendment now than there was a hundred years ago, not so much because we have perceived hitherto hidden problems as because we have sought results without attending to the task of understanding.").