OVERVIEW OF REASONABLENESS STANDARDS

Professor Thomas K. Clancy

OBJECTIVES:

After this session, you will be able to:
1. Identify the five main tests for reasonableness employed by the Supreme Court; and
2. Describe how the balancing test applies in criminal cases.

REQUIRED READING:

Thomas K. Clancy, *Fourth Amendment Satisfaction: Reasonableness Models* (May 2012) [NCJRL Outline]........................................................................................................1
FOURTH AMENDMENT SATISFACTION
REASONABLENESS MODELS ©

Thomas K. Clancy

Fourth Amendment Satisfaction:
"Reasonableness" Models

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THIS SESSION ASSUMES THAT THE AMENDMENT APPLIES:

Two dimensions to Fourth Amendment Satisfaction:

1. Reasonableness Clause

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2. Warrant Clause

The Warrant Clause sets forth the requirements for a warrant to issue. Those requirements are discussed in another session.

______________________________________________________________________________
“REASONABLENESS” HAS TWO DIMENSIONS: it measures –

1. permissibility of the INITIAL DECISION to search and seize

2. permissible SCOPE of the intrusion

See, e.g., 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.’”).
WHAT IS “REASONABLE?”

NYC begins random searches on subways
7/05

“We live in a world where, sadly, these types of security measures are needed.”

NY Mayor Michael Bloomberg
CURRENT SUPREME COURT PRECEDENT UTILIZES FIVE MAIN “MODELS” TO MEASURE REASONABLENESS:

- WARRANT PREFERENCE MODEL
- INDIVIDUALIZED SUSPICION MODEL
- TOTALITY OF THE CIRCUMSTANCES TEST
- BALANCING TEST
- HYBRID MODEL GIVING DISPOSITIVE WEIGHT TO THE COMMON LAW

These are broad frameworks by which the Court typically approaches the problem of measuring reasonableness. Some cases contain a mix of one or more models\(^1\) and there are also several situations that do not easily fit within any of those models, such as consent. The models are offered here to facilitate understanding of the Court’s cases and give some framework to address similar situations. Unfortunately, because the Court has done little to establish a meaningful hierarchy among the models, the Court in any situation may choose whichever model it sees fit to apply.

\(^1\) E.g., Samson v. California, 547 U.S. 843 (2006) (observing that reasonableness involved examining the totality of the circumstances and then articulating the balancing test as the measure).
MODEL #1: WARRANT PREFERENCE MODEL

REASONABLENESS IS DEFINED BY THE WARRANT CLAUSE: A SEARCH OR SEIZURE IS NOT “UNREASONABLE,” AND THEREFORE NOT FORBIDDEN, WHEN IT IS CARRIED OUT WITH A WARRANT ISSUED PURSUANT TO THE CRITERIA SET OUT IN THE WARRANT CLAUSE.²

² E.g., 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 requirements of the first and second clauses are equivalent and 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 reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained.”).
some observations

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<th>#1</th>
<th>Warrant Preference</th>
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<td>• preference stated in various ways</td>
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<td>• justification for the model ??</td>
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"Our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'


EXCEPTIONS: 22 by Scalia's count


90 - 99 %

VARIATIONS ON THE FORMULATION OF THE PREFERENCE:

[reflecting the strength or lack of strength that view has had on the at any given time]

- all searches and seizures are per se unreasonable, subject to enumerated exceptions, in the absence of a warrant

- warrants are required when “practicable” to obtain

- warrants are “preferred”

- searches are “presumptively unreasonable” without a warrant

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3 See, e.g., Minnesota v. Dickerson, 508 U.S. 366, 372 (1993); California v. Acevedo, 500 U.S. 565 (1991). Given that formulation of the preference, the Court has often stated that the government bears a heavy burden of justifying exceptions to the specifications of the Warrant Clause, that is, that the warrant exception must be based on necessity. See, e.g., Chambers v. Maroney, 399 U.S. 42, 61-62 (1970) (Harlan, J., concurring and dissenting).

4 Carroll v. United States 267 U.S. 132, 156 (1925).


JUSTIFICATION FOR MODEL:

• assures citizen intrusion is justified
• pre-intrusion authorization by neutral magistrate
• warrant limits intrusion to predetermined locations, objects, persons
• insulates police from liability

MODERN STATUS:


  “our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.’”

• 90-99% of all searches and seizures fit within an “exception”
MODEL#2: CASE-BY-CASE MODEL

“THERE IS NO FORMULA FOR THE DETERMINATION OF REASONABLENESS. EACH CASE IS TO BE DECIDED ON ITS OWN FACTS AND CIRCUMSTANCES.”

Go-Bart Importing v. United States, 282 U.S. 344 (1931)

**JUSTIFICATION FOR:**

**two clauses are independent:** the first clause 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

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#2. Totality of the Circumstances

“Reasonableness”: no intrinsic criteria to measure

“total atmosphere” -- no factors

case-by-case analysis

if search otherwise R., don’t need warrant

(ex) knock and announce - how long do you have to wait?
COMPETITION BETWEEN THE CASE-BY-CASE AND WARRANT PREFERENCE MODELS

EXAMPLE: Search incident to arrest

when case-by-case analysis applied, scope of search invariably broad


- upheld warrantless search of ENTIRE one-room office as incident to valid arrest
- REASONING:
  - “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.”
  - “relevant test;” not whether a warrant was procured but “whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.”
when warrant preference model applied - search of limited scope, influenced heavily by the Warrant Clause requirement of particularity

RESOLUTION OF THE CONTEST FOR SEARCHES INCIDENT ARREST:

Chimel v. California, 395 U.S. 752 (1969), rejected both the result in Rabinowitz and methodology, LIMITING SCOPE TO “GRASP” AREA:

It is argued in the present case that it is “reasonable” to search a man’s house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively “reasonable” to search a man’s house when he is arrested on his front lawn–or just down the street–than it is when he happens to be in the house at the time of arrest.
MODERN STATUS OF CASE-BY-CASE ANALYSIS

- **Methodology still used:**
  - test of reasonableness “is not capable of precise definition or mechanical application”\(^7\)
  - must examine the totality of the circumstances of the case\(^8\) to assess the reasonableness of a search or a seizure.

- **Example:** How long do the police have to wait after knocking and announcing their presence when executing a warrant? It’s a case-by-case analysis!


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\(^7\) Bell v. Wolfish, 441 U.S. 520, 559 (1979).

MODEL#3: INDIVIDUALIZED SUSPICION

REASONABLENESS REQUIRES INDIVIDUALIZED SUSPICION, THAT IS, PROBABLE CAUSE FOR ARRESTS AND SEARCHES, ARTICULABLE SUSPICION FOR STOPS AND FRISKs.

**Effect Of:**

- limits discretion by employing objective criteria outside government’s control to measure propriety of intrusion
- mandates specific justification for each intrusion
- focus of inquiry is upon circumstances presented by 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

**Example:** *Davis v. Mississippi*, 394 U.S. 721 (1969)

- Police investigating a rape could not permissibly seize two dozen young African-American men and take them to police headquarters for questioning and fingerprinting simply because victim described her assailant as a Negro youth
- Procedure condemned 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.”

**TWO DIMENSIONAL USE OF INDIVIDUALIZED SUSPICION**

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<th>#3 Individualized Suspicion</th>
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<td><strong>two dimensions</strong></td>
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<td>limits:</td>
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<td>1. when initial intrusion justified</td>
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<td>2. scope of intrusion performed</td>
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- limits circumstances under which government may *initiate* actions

- limits scope search or seizure by ensuring that intrusion *performed* is reasonably related to circumstances that justified initial interference

**EXAMPLE:** if police are looking for an elephant, they do not have any objective basis to believe that it would be found in a dresser drawer and opening that drawer would be outside the scope of a permissible search.⁹

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⁹ *E.g.* United States v. Ross, 456 U.S. 798, 824 (1982) (the scope of a search “is defined by the object of the search and the places in which there is probable cause to believe that it may be found”); Davis v. United States, 328 U.S. 582, 592 (1946) (warrantless search of service station for gasoline ration coupons is limited in scope by the “nature of the coupons”)
**HISTORICAL BASIS:**

- complaints of the colonists against suspicionless searches and seizures
- historical requirement of probable cause to arrest or to search\(^\text{10}\)
- language of the Warrant Clause, which requires probable cause to search or seize pursuant to a warrant

**ONLY TWO LEVELS OF INDIVIDUALIZED SUSPICION\(^\text{11}\)**

- #1: frisks and stops -- reasonable suspicion needed
- #2: searches and arrests -- probable cause required

\(^{10}\) Dunaway v. New York, 442 U.S. 200, 213 (1979). Accord Henry v. United States, 361 U.S. 98, 100 (1959) (“The requirement of probable cause has roots that are deep in our history.”). The centrality of the role played by individualized suspicion as a prerequisite for an intrusion may find its strongest expression in cases rejecting mere association as a basis for a search or seizure. See United States v. Di Re, 332 U.S. 581, 587 (1948) (“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.”); Ybarra v. Illinois, 444 U.S. 85, 93 n.5 (1979) (requirement of probable cause particularized to each person “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”).

\(^{11}\) E.g., United States v. Montoya De Hernandez, 473 U.S. 531, 541 (1985) (rejecting third standard in addition to reasonable suspicion and probable cause because “subtle verbal gradations may obscure rather than elucidate the meaning” of reasonableness).
MODEL#4: THE BALANCING TEST

“UNFORTUNATELY, THERE CAN BE NO READY TEST FOR DETERMINING REASONABLENESS OTHER THAN BY BALANCING THE NEED TO SEARCH AGAINST THE INVASION WHICH THE SEARCH ENTAILS.”

Camara v. Municipal Court, 387 U.S. 523 (1967)

Main Factors:  
12 BALANCE GOVERNMENTAL VERSUS INDIVIDUAL INTERESTS  

- **individual’s interests**
  - examine “generality of the cases” – decisions do not turn on specific individual interests in the case before the Court
  - do not cumulate the interests of all persons who have been searched or seized. instead, on the individual’s side of the scale, the interests of one

12 In the wake of Camara, the balancing test appeared to have four distinct factors: the individual’s interests; the government’s interests; the necessity for the intrusion; and the procedures utilized by the authorities in executing the search or seizure. The importance of the latter two factors has significantly eroded; the element of necessity has been completely repudiated and the analysis of the procedures utilized in effectuating the search or seizure has often taken on–at best–a secondary role in the balancing test. See generally Thomas K. Clancy, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION chapter 11 (2008).


15 See Atwater v. City of Lago Vista, 532 U.S. 318, 346-47 (2001) (although conceding that if the Court balanced the competing interests based on the facts of the case, petitioner might win, asserting that “a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review”).
person stand alone

for searches, focus on the person’s privacy expectations: apply the hierarchy of privacy interests discussed in session on “What The Fourth Amendment Protects” to this analysis

- **governmental interests** are aggregated—it is not the interest involved in the specific case before the Court; instead, it is the totality of the harm to be combated that is placed on the government’s side of the scale\(^\text{16}\)

- **Court’s thumb** presses heavily on government’s side of the scale\(^\text{17}\) -- the Court has candidly acknowledged that the “practical realities” of the balancing test “militate in favor of the needs of law enforcement, and against a personal-privacy interest that is ordinarily weak”\(^\text{18}\)

- **No History here** -- balancing is non-historical in the nature of its analysis -- factors used are contemporary interests\(^\text{19}\)

\(^{16}\) For example, in *Sitz*, which addressed the permissibility of checkpoints set up to address the pervasive problem of drunk driving, the government’s interests were listed as the 25,000 deaths each year from drunk drivers, the nearly one million injuries, and the more than five billion dollars in property damage. *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990).

\(^{17}\) *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”).


\(^{19}\) *See, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (in applying the balancing test to searches of school children, stating: “Maintaining 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 schools have become major social problems.”).
BALANCING DIFFERS FROM THE CASE-BY-CASE APPROACH

- identifies specific interests to be balanced
- “done on a categorical basis—not in an ad hoc, case-by-case fashion”20

BROAD APPLICATION OF THE BALANCING TEST

used to justify lots of intrusions ——

- searches of prison inmates and detainees and their cells21
- orders designed to protect police officers during stops22
- detentions of persons during the execution of search warrants23
- entries onto property to combat and investigate fires24
- inventory searches of possessions validly in police custody25


22 See CLANCY, § 6.4.2.8.

23 See id. § 6.6.

24 See id. § 10.7.

25 See id. § 10.8.
• administrative inspections, including private residences, commercial buildings, ground and surface mines, and Occupational Safety and Health Administration inspections of places of employment for safety and regulatory violations.

• highly regulated businesses

• work-related searches of employee areas of governmental workplaces

• searches of public school students

• searches of parolees

• searches of probationers’ homes


29 Marshall v. Barlow’s, Inc., 436 U.S. 307, 320-21 (1978). 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 allow 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.” Id. at 309 n.1 (quoting 29 U.S.C. § 657(a) (1988)).

30 E.g., 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.”). The Court has employed several rationales in allowing suspicionless and warrantless intrusions of highly regulated industries but seems to have now settled on a balancing test to measure their reasonableness. See generally CLANCY, § 4.4.2.2.


• drug testing of various categories of people\textsuperscript{35}

• Most vehicular checkpoints,\textsuperscript{36} including license-and-vehicle-registration stops\textsuperscript{37} and sobriety\textsuperscript{38} and immigration checkpoints\textsuperscript{39}

• airport screenings of passengers and their effects—and many other types of entranceway intrusions\textsuperscript{40}

• **SPECIAL NEEDS**

  - Court sometimes asserts that departures from the warrant and individualized suspicion models are justified where the intrusion serves a “special need” that


\textsuperscript{36} \textit{See} Illinois v. Lidster, 540 U.S. 419 (2004) (upholding roadblock to seek information about recent crime in area); Delaware v. Prouse, 440 U.S. 648, 663-64 & n.26 (1979) (states not precluded from developing methods for spot checks of licenses and registrations “that [did] not involve the unconstrained exercise of discretion” and asserting that its opinion 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’’); 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.). \textit{But see} Indianapolis v. Edmond, 531 U.S. 32 (2000) (striking down roadblock to interdict drug trafficking).


\textsuperscript{38} \textit{See} Michigan Department of State Police v. Sitz, 496 U.S. 444, 445 (1990) (balancing “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” in upholding the intrusion).

\textsuperscript{39} \textit{See} CLANCY, \S 10.2.

\textsuperscript{40} \textit{See} CLANCY, \S 10.5.
is “divorced from the State’s general interest in law enforcement.”

However, such a need is not a precondition to balancing; it is just one of the ways by which the Court finds balancing to be the appropriate measure of reasonableness.

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42 See Samson v. California, 547 U.S. 843, __ nn.3-4, 126 S. Ct. 2193, 2201-02 nn.3-4 (2006) (applying balancing test and declining to determine whether there was a “special need” to search parolees because “general Fourth Amendment principles render[ed] such an examination unnecessary” and observing that “special needs” analysis was not a necessary precondition of valid suspicionless searches).
**IMPACT OF REDUCED EXPECTATIONS OF PRIVACY ON REASONABLENESS ANALYSIS**: depart from traditional models

**Reduced Expectations of Privacy**

- automobiles (eliminates warrant requirement)
- commercial property (especially in highly regulated industries: gun dealer, coal mine, liquor business, auto junkyard)
- some employees at work: (ex) train operators, customs
- children at school
- international border
- probationers
- parolees (maybe none)

**expectation of privacy analysis**

**Reasonable expectations**: two prongs –
- 1) actual EP
- 2) society recognizes EP as legitimate

**reduced expectations**:
- apply govt friendly reasonableness analysis

**no REP**:
- amendment does not apply as to a Search

**HIERARCHY** of privacy analysis example: **vehicles**

- Reasonable expectations
- reduced expectations → driver/owners
  - reasonableness model changes: no warrant for probable cause based searches
- no REP → car thief (Rakas)
  - passengers (Rakas -- as to glove box, under search)
MODEL#5: COMMON LAW PLUS BALANCING


- **step #1:** was the action “regarded as an unlawful search or seizure under the common law when the Amendment was framed” --- if it yields an answer, the common law at the time the Amendment was framed, which was in 1791, is *dispositive*

- **step #2:** if step #1 “yields no answer,” apply the balancing test
OTHER CURRENT CASES ON ROLE OF HISTORY:

In *Atwater v. City of Lago Vista*, 532 U.S. 318, 346 n.14 (2001), which was a case where the majority believed that probable cause historically justified all arrests, in responding to Justice O’Connor’s dissent that sought to modify that standard, the majority opined:

History . . . is not just “one of the tools” relevant to a Fourth Amendment inquiry[.] Justice O’Connor herself has observed that courts must be “reluctant . . . to conclude that the Fourth Amendment proscribes a practice that was accepted at the time of adoption of the Bill of Rights and has continued to receive the support of many state legislatures,” *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (dissenting opinion), as the practice of making warrantless misdemeanor arrests surely was and has. Because here the dissent “claim[s] that [a] practic[e] accepted when the Fourth Amendment was adopted [is] now constitutionally impermissible,” the dissent bears the “heavy burden” of justifying a departure from the historical understanding.
THE COURT’S ATTEMPTS TO HARMONIZE THE MODELS

*nothing lasts forever:*

- numerous attempts to harmonize cases by announcing the primacy–or demise–of a particular model
- inconsistent opinions on meaning of reasonableness are abundant and within same time period

**MOST RECENT EFFORT:** *Indianapolis v. Edmond, 531 U.S. 32 (2000)*

**How to choose between models?**

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<td>2. balancing limited to where “primary purpose” of s/s not to detect evidence of “ordinary criminal wrongdoing”</td>
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**What checkpoints are permissible?**

| Edmond: drugs? |
| Sitz: sobriety? |
| Lidster: informational (gather info on recent crime)? |

**TEST:** search or seizure is “ordinarily unreasonable in the absence of individualized suspicion of wrongdoing,” thereby placing that model at the pinnacle of the hierarchical structure of reasonableness

- balancing limited to situations where the “primary purpose” of search or seizure is not to detect evidence of “ordinary criminal wrongdoing”

**Edmond FACTS**

- highway checkpoint program explicitly designed to discover illegal narcotics

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43 *See also* Illinois v. Lidster, 540 U.S. 419 (2004) (finding primary purpose of roadblock was informational and not investigatory and therefore permissible).
hit rate: 1,161 vehicles stopped; 104 motorists arrested: 55 arrest arrests for drug-related crimes, 49 for offenses unrelated to drugs, with an overall “hit rate” of approximately 9 per cent

**EDMOND ON HOW TO MEASURE “PRIMARY PURPOSE”:**

- Previously approved checkpoint programs were “designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.”

- Rejected the view that those checkpoints similar to Indianapolis program because they had the same ultimate purpose of arresting those suspected of committing crimes: “If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose.” Because the *primary purpose* of the Indianapolis checkpoints was “to advance ‘the general interest in crime control,’” the Court declined “to suspend the usual requirement of individualized suspicion.”

- Although subjective intentions play no role in ordinary probable cause analysis, “programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion.” The Court emphasized that the purpose inquiry “is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene.”

- Lower courts can “sift[] abusive governmental conduct from that which is lawful” and that “a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar.”
MY VIEW:

- Nothing in Edmond would prevent Indianapolis from and conducting the same screening for drugs as an incident to permissible checkpoint distinction between a criminal law enforcement purpose and other purposes is illusory or at least unwise:

  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.”

- distinction is ironic in light of search and seizure practices that motivated the Framers: suspicionless intrusions approved of at the “programmatic level,” that is, writs of assistance and general warrants issued by executive officials to find illegally imported goods and authors and publications critical of the government

- Edmond’s framework -- just another of many attempts at creating a hierarchy that is ignored in subsequent opinions

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46 E.g., Samson v. California, 547 U.S. 843 (2006) (approving suspicionless stop and search of a person simply because the person was known to be on parole; the court explicitly disclaimed reliance on a special need, stating that “our holding under general Fourth Amendment principles renders such an examination unnecessary.” The Court stated that, because the “touchstone of the Fourth Amendment is reasonableness, not individualized suspicion,” and that, although it had “sanctioned suspicionless searches in limited circumstances, namely programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be ‘reasonable’ under the Fourth Amendment.”).