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Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis

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REASONABLENESS WITH TEETH: THE FUTURE OF FOURTH AMENDMENT REASONABLENESS ANALYSIS

*Cynthia Lee**

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INTRODUCTION

Reasonableness standards permeate the law. From the reasonable man standard used to measure negligent behavior in tort law¹ to the requirement in criminal law that a person claiming self-defense must have reasonably believed that the force used was necessary to prevent an imminent unlawful attack,² the

* Charles Kennedy Poe Research Professor of Law, The George Washington University Law School. A special thanks to Tom Clancy for inviting me to write and present this paper at the National Judicial College’s Annual Fourth Amendment Symposium in Oxford, Mississippi in March 2011. I appreciate thoughtful comments on this paper by Eric Miller, Fabio Arcila, Jonathan Witmer-Rich, Josephine Ross, and David Gray when I presented it at Law and Society in San Francisco, California in June 2011. I thank Erin Mick for excellent research assistance. Parts of this Article have been adopted from Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403 (2010).

¹ RESTATEMENT (SECOND) OF TORTS § 283 (1965).

² See, e.g., CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 131 (2003); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996).

law demands more from us than simply our honest, good faith efforts. Across disciplines, the law requires that we act reasonably.

Just as reasonableness standards permeate the law in general, reasonableness standards permeate the law regarding the Fourth Amendment. The Supreme Court's definition of a "search" within the meaning of the Fourth Amendment turns on whether the defendant's expectation of privacy was *reasonable*.³ The Court's definition of a "seizure" of the person turns on whether a *reasonable* person in the defendant's shoes would have felt free to leave or terminate the encounter with the police officer.⁴ Probable cause to search is defined as *reasonable* grounds to believe that evidence of a crime will be found in the place to be searched.⁵ Officers can conduct a *Terry* stop upon *reasonable* suspicion of criminal activity and can do a *Terry* frisk of the person if they have *reasonable* suspicion that the suspect is armed and dangerous.⁶ And, increasingly, the validity of a search turns on whether the reviewing court believes the search was reasonable.⁷

Because reasonableness plays such an important role in Fourth Amendment search jurisprudence, this Article assesses the past, the present, and the future of reasonableness analysis. Part I focuses on the past. For much of the twentieth century, the Court embraced what is called the warrant preference view of the Fourth Amendment under which the validity of a search turned on whether the police sought prior judicial authorization in the

³ Katz v. United States, 389 U.S. 347 (1967).

⁴ See Florida v. Bostick, 501 U.S. 429 (1991); United States v. Mendenhall, 446 U.S. 544 (1980).

⁵ Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("The substance of all the definitions of probable cause is a reasonable ground for belief of guilt . . ." (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949))); see also Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649 (2009) [hereinafter Kinports, *Diminishing Probable Cause*] (opining that by using phrases like "reasonable belief" and "reason to believe," the Court risks conflating for probable cause and reasonable suspicion standards).

⁶ Terry v. Ohio, 392 U.S. 1 (1968). As Lewis Katz notes, the *Terry* Court never used the term "reasonable suspicion." Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 486 (2004). The reasonable suspicion standard was articulated in Justice Harlan's concurring opinion in *Sibron v. New York*, 392 U.S. 40, 71 (1968) (Harlan, J., concurring).

⁷ United States v. Knights, 534 U.S. 112 (2001).

form of a warrant based on probable cause issued by a magistrate judge. In case after case, the Court would announce 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.”⁸ Under the warrant preference model of reasonableness, a search was considered reasonable if the government obtained a search warrant prior to the search or an exception to the warrant requirement applied.

Part II focuses on the present. Even though it still treats as reasonable both searches conducted pursuant to a warrant and searches that fall within a well-established exception to the warrant requirement, the modern Court has increasingly abandoned the warrant preference view. Instead of interpreting the Fourth Amendment as expressing a preference for warrants, the modern Court reads the text of the Fourth Amendment as simply requiring reasonableness.⁹ Under this textualist reading of the Fourth Amendment, commonly called the reasonableness view, a search or seizure is valid as long as it is reasonable.¹⁰ The Court, however, has provided lower courts with little guidance as to what makes a search or seizure reasonable, suggesting only that whether a search is reasonable requires a balancing of the government’s interests against the individual’s interests.¹¹ Reasonableness as balancing gives lower courts overly broad discretion to decide whether a search or seizure is reasonable.

In a number of fairly recent cases, the modern Court has slightly revised the way it assesses the reasonableness of a search. In an effort to provide more guidance to lower courts, it has adopted what some have called an originalist approach.¹² Under this approach, a reviewing court must first ask whether the

⁸ *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Katz*, 389 U.S. at 357.

⁹ *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (“The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.”).

¹⁰ See *infra* Part II.

¹¹ *Knights*, 534 U.S. at 118-19 (“The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by [balancing].”).

¹² David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1760 (2000).

challenged governmental action was unlawful under the common law at the time of the Constitution's framing.¹³ If so, then it will be considered unreasonable.¹⁴ If it is unclear whether the challenged governmental action was unlawful at the time of the framing, the reviewing court goes back to a balancing test, balancing the government's interests against the individual's interests.¹⁵

Part III critiques the Court's current focus on reasonableness as the touchstone of Fourth Amendment analysis. It starts with what might be called the traditional critique of reasonableness. Under this critique, the current reasonableness inquiry is problematic because it provides insufficient guidance to lower courts and results in rulings that tend to be overly deferential to the government. Part III also provides the left critique of reasonableness. Under this critique, open-ended reasonableness balancing is problematic because it enables subconscious biases to influence the decision-making process both on the ground and in the courtroom. Implicit bias may lead police officers to see young men of color on the street as more suspicious than others, which may lead them to stop and search those individuals more frequently than others. Implicit bias may also lead courts to exercise their discretion to decide whether a search is reasonable in ways that favor law enforcement and disfavor blacks and Latinos who make up the bulk of individuals arrested, tried, and convicted of crimes in the United States.

Part IV looks to the future. The Court today stands at a crossroads. It can completely replace the warrant preference model with the reasonableness model of the Fourth Amendment, as it has already done in a few cases, it can return to a robust embrace of the warrant preference view, or it can recognize the virtues of the warrant preference and the reasonableness models and improve upon both. I support continued adherence to the warrant preference view, but recognize that the Court is unlikely to return to a robust embrace of warrants. In light of this reality, I argue that the Court should continue its current path of

¹³ *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999).

¹⁴ *Id.* at 299-300.

¹⁵ *Id.*

recognizing both models. Instead of extremely deferential pro-government reasonableness balancing, however, courts should engage in a more stringent form of reasonableness review, review that I call “reasonableness with teeth.”¹⁶

I. FOURTH AMENDMENT REASONABLENESS: THE PAST

The Fourth Amendment 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.¹⁷

Criminal procedure scholars and the Justices of the Supreme Court have debated the meaning of these words for years. The debate has centered on whether to interpret the Fourth Amendment as one interconnected text or as two separate clauses. As Justice Clarence Thomas explained in his dissent in *Groh v. Ramirez*, “The precise relationship between the Amendment’s Warrant Clause and Unreasonableness Clause is unclear. . . . [T]he Court has vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard.”¹⁸

For much of the twentieth century, the Supreme Court embraced the warrant preference view of the Fourth Amendment, under which the validity of a search turned on the presence or

¹⁶ I am not the first to suggest a more rigorous form of Fourth Amendment reasonableness review, see Clancy, *The Fourth Amendment’s Concept of Reasonableness*, *infra* note 28, and Colb, *The Qualitative Dimensions of Fourth Amendment “Reasonableness,”* *infra* note 66, and I am not the first to borrow from the concept of rational basis with bite in the equal protection arena. Christopher Slobogin has suggested that “Fourth Amendment analysis should mimic equal protection rationality review ‘with bite,’ if not strict scrutiny.” CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 42 (2007) [hereinafter SLOBOGIN, *PRIVACY AT RISK*]. Slobogin proposes a two-tiered framework involving a proportionality principle and an exigency principle, which I discuss later in this paper. See *infra* text accompanying notes 171-82.

¹⁷ U.S. CONST. amend. IV.

¹⁸ *Groh v. Ramirez*, 540 U.S. 551, 571-72 (Thomas, J., dissenting).

absence of a search warrant.¹⁹ Under the warrant preference view of the Fourth Amendment, if the officer obtains advance judicial authorization for a search in the form of a search warrant or if a search falls within one of the exceptions to the warrant requirement, the search will be presumed reasonable. Adherents of the warrant preference view emphasize the importance of having a neutral, detached judicial officer, rather than a police officer, make the probable cause determination.²⁰

In response to the argument that the text of the Fourth Amendment does not require warrants or probable cause, proponents of the warrant preference view read the two clauses in the Fourth Amendment as interconnected and related. As Morgan Cloud explains, the warrant preference view employs a conjunctive theory that links the two clauses in the Fourth Amendment together such that a search is considered reasonable if it was conducted pursuant to a warrant or an exception to the warrant requirement applied.²¹

Proponents of the warrant preference view also look to history to support their interpretation of the Fourth Amendment. They point out that the framers were primarily interested in protecting citizens against “arbitrary deprivations of privacy, property, and liberty.”²² Accordingly, when they drafted the Fourth Amendment, the framers sought to constrain executive discretion by subjecting search and seizure decisions to judicial

¹⁹ Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 559 (1999) (“For most of [the twentieth] century, the Supreme Court has endorsed what is now called the ‘warrant-preference’ construction of Fourth Amendment reasonableness, in which the use of a valid warrant . . . is the salient factor in assessing the reasonableness of a search or seizure.”); James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1124 (1992) (“For most of the twentieth century, the Court has proclaimed its faith in the principle of neutral, judicial screening of executive decisions to search.”).

²⁰ *Id.* at 1164 (“Neutral judicial determinations seem far preferable to those made by interested law enforcement agents.”); *see also* United States v. Chadwick, 433 U.S. 1, 9 (1977).

²¹ Morgan Cloud, *Searching through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1721-22 (1996) (reviewing William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Service)).

²² Tomkovicz, *supra* note 19, at 1134.

control.²³ While the framers may have focused primarily on the evils of general warrants and writs of assistance, they would have been equally concerned with warrantless searches had such searches been more common at that time because such searches would have resulted in similar harms.²⁴

Proponents of the warrant preference view argue that a warrant requirement with well-delineated exceptions provides more clarity than a general requirement that searches and seizures not be unreasonable.²⁵ Police officers can more easily predict whether their actions will be considered constitutional under the warrant preference view than under an interpretation of the Fourth Amendment that just tells them they need to act “reasonably.”²⁶ This is because if they procure a warrant, there is little question that the subsequent search will be deemed valid.

II. FOURTH AMENDMENT REASONABLENESS: THE PRESENT

In contrast to the warrant preference view is what I call the separate clauses view, or what most call the reasonableness view, of the Fourth Amendment. Supporters of this view focus on the word “and” in the middle of the Fourth Amendment.²⁷ They argue that the text of the Fourth Amendment is clearly divided into two separate and completely independent clauses—one stating that searches and seizures must not be unreasonable; the other specifying the requirements for a valid warrant.²⁸ Supporters of

²³ *Id.*

²⁴ *Id.* at 1135.

²⁵ *Id.* at 1155.

²⁶ *Id.*

²⁷ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994); Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1280-88 (2010) [hereinafter Arcila, *The Death of Suspicion*]; Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 8 (2007) [hereinafter Arcila, *In the Trenches*].

²⁸ Amar, *supra* note 27, at 762 (noting that “[t]he Amendment contains two discrete commands—first, all searches and seizures must be reasonable; second, warrants authorizing various searches and seizures must be limited (by probable cause, particular description, and so on)"); see also Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 724-25 (2007) (explaining that supporters of the reasonableness view of the Fourth Amendment “argue that the plain text reveals no grammatical or logical relationship between the Warrant Clause and the

the reasonableness view argue that the original intent of the Framers “was to outlaw certain kinds of warrants [general warrants], not to enact a preference for warrants.”²⁹

Under the reasonableness view, a search comports with the Fourth Amendment as long as it is reasonable.³⁰ The validity or reasonableness of the search does not turn on whether the government obtained a search warrant prior to the search.³¹ Searches and seizures conducted without a warrant are valid as long as they are reasonable.³² The probable cause requirement applies only when police seek a warrant.³³ Reasonableness review consists of balancing the governmental interests against the individual’s interests.³⁴

The legislative history does not provide robust support for the separate clauses view of the Fourth Amendment. As Tom Clancy

Reasonableness Clause”); Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 999 [hereinafter Clancy, *The Fourth Amendment’s Concept of Reasonableness*] (explaining that under the reasonableness view, “the Fourth Amendment’s two clauses are distinct: the first clause requires only that searches and seizures be ‘reasonable’; the second clause addresses only those searches and seizures conducted under warrants . . .”); Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1061 (2011) (reviewing William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Service)) (explaining that under the reasonableness view, the first clause “declares a freedom from unreasonable searches and seizures” while the second clause “specifies the form and content of search and arrest warrants”).

²⁹ Tomkovicz, *supra* note 19, at 1130-31.

³⁰ Amar, *supra* note 27, at 759.

³¹ *Id.*; see also Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 72 (“The natural reading of the [Fourth] amendment is that unreasonable searches and seizures are forbidden (clause 1), and specifically (clause 2) that a search (or arrest) warrant is invalid unless it complies with the specific requirements (probable cause, etc.) spelled out in the second clause.”).

³² TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 43 (1969).

³³ Amar, *supra* note 27, at 782 (“The ‘probable cause’ standard applies only to ‘warrants,’ not all ‘searches’ and ‘seizures.’”); Arcila, *The Death of Suspicion*, *supra* note 27, at 1294 (“Only the Warrant Clause contains any textual support for a suspicion requirement . . .”).

³⁴ Daniel S. Lohse, *Returning to Reasonableness: The Argument Against Expanding Investigatory Searches and Seizures to Completed Misdemeanors*, 2010 U. ILL. L. REV. 1629, 1646; Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1467 & 1469; Scott E. Sundby, “Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1796-97 (1994).

observes, the initial draft of the Fourth Amendment, prepared by James Madison, 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, *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.³⁵

In other words, it appears that the Framers were primarily concerned with preventing warrants issued without probable cause. They viewed as unreasonable searches and seizures conducted pursuant to such warrants. The initial draft of the Fourth Amendment clearly linked the two clauses together such that the prohibition against unreasonable searches and seizures was violated when a warrant was issued without probable cause and without particularity of description.

According to Clancy, the initial draft of the Fourth Amendment was referred to the Committee of Eleven, which consisted of one congressman from each state represented in Congress.³⁶ The Committee revised the draft as follows: “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.”³⁷

The amended draft, like the original draft, linked the two clauses such that the rights protected by the Fourth Amendment would be violated if a warrant was issued without probable cause or particularity of description. Clancy notes that one Egert Benson

³⁵ Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 515 (1995) (citing 1 ANNALS OF CONG. 452 (1789)) (emphasis added).

³⁶ *Id.* at 516.

³⁷ *Id.* (emphasis added). The Committee of Eleven’s draft did not include any reference to “unreasonable searches and seizures.” *Id.* Clancy notes that this omission was inadvertent and the phrase was later re-inserted into the draft that became the Fourth Amendment as we know it today. *Id.*

of New York objected to the phrase “by warrants issuing” and wanted to replace these words with “and no warrant shall issue” because he felt the draft language was not forceful enough to convey the Framers’ strong disapproval of general warrants.³⁸ Benson’s proposal was defeated by a “considerable majority” of the House, but Benson, as chair of the committee that reported amendments out to the Senate, inserted this clause into the final draft.³⁹ Somehow this change went unnoticed and the Fourth Amendment, as amended by Benson, was formally enacted.⁴⁰ Benson’s original intent may have been to bolster the idea that searches pursuant to general warrants, i.e., warrants issued without probable cause or not particularly describing the place to be searched or the person or things to be seized, were unreasonable, but proponents of the reasonableness view have interpreted the phrase “and no warrants shall issue” as divorcing the prohibition against unreasonable searches and seizures from the requirements of a valid warrant.

The reasonableness view of the Fourth Amendment was promoted by Akhil Amar in his 1994 *Harvard Law Review* article, *Fourth Amendment First Principles*.⁴¹ In this article, Amar argued the text of the Fourth Amendment does not require warrants or even probable cause.⁴² According to Amar, all the Fourth Amendment requires is that searches and seizures be reasonable, or at least not unreasonable.⁴³ While the reasonableness approach was reflected in a few pre-1994 Supreme Court opinions,⁴⁴ Amar’s

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 516-17.

⁴¹ Amar, *supra* note 27.

⁴² *Id.* at 761.

⁴³ *Id.* at 801.

⁴⁴ Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment “Search and Seizure” Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 937 (2010) (noting that “in the 1925 ruling in *Carroll v. United States*, [the Supreme Court] adopted the view that the Fourth Amendment did not condemn all warrantless searches, but only those that the justices did not find to be ‘reasonable’ in the circumstances”). Some scholars point to two cases in the 1960s—*Camara v. Municipal Court* and *Terry v. Ohio*—as marking the beginning of the Court’s turn away from the warrant preference view and its embrace of reasonableness balancing. See, e.g., Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 385 (1988) (“[T]his Article

work hastened its prominence. Over the past several decades, the Court has increasingly embraced the reasonableness view of the Fourth Amendment. In case after case, the Court has announced that “the touchstone of the Fourth Amendment is reasonableness.”⁴⁵ Since 2000, only a few decisions have explicitly embraced the warrant preference view, the most recent of which was *Arizona v. Gant*, authored by former Supreme Court Justice John Paul Stevens.⁴⁶ With Justice Stevens’s departure from the Court in 2010, the number of decisions strongly embracing the warrant preference view is likely to diminish even further.

Another model of reasonableness that has started to emerge primarily in the opinions of Justice Scalia and Justice Thomas is what David Sklansky calls the Court’s “new Fourth Amendment originalism.”⁴⁷ This approach, which can be considered a subset of the reasonableness view, appears to limit the discretion of reviewing courts by requiring them to look to common law precedent. As Justice Scalia explains, the Court must construe Fourth Amendment reasonableness in terms of what was considered an unreasonable search when the Fourth Amendment

traces the Court’s fourth amendment analysis from the warrant clause’s dominance through the eventual entronement by *Camara* and *Terry* of the reasonableness balancing test.”); Reinert, *supra* note 34, at 1468-69 (opining that *Camara* and *Terry* “signaled the beginning of the end of the Warrant Clause’s centrality to Fourth Amendment inquiries”).

⁴⁵ See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (“[T]he ultimate touchstone of the Fourth Amendment is ‘reasonableness’”); *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (“The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by [balancing].”); *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (“[The Fourth Amendment’s] ‘central requirement’ is one of reasonableness.”); *Soldal v. Cook County*, 506 U.S. 56, 71 (1992) (“[R]easonableness is still the ultimate standard under the Fourth Amendment.”); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (“The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.”).

⁴⁶ *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (“Consistent with our precedent, 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.” (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))).

⁴⁷ See Sklansky, *supra* note 12, at 1760.

was adopted in 1791.⁴⁸ Under this focus-on-the-common-law-history approach, the reviewing court is supposed to first ask whether the challenged conduct was regarded as an unlawful search or seizure under the common law at the time when the Fourth Amendment was adopted.⁴⁹ If the governmental activity in question would have been unlawful at the time of the framing, it will be deemed unreasonable and in violation of the Fourth Amendment.⁵⁰ If it is unclear whether the challenged conduct was regarded as an unlawful search or seizure under the common law, then the reviewing court must go back to assessing the reasonableness of the search by balancing the intrusion on privacy against the promotion of legitimate governmental interests.⁵¹

Many believe the focus-on-the-common-law-history approach allows the Justices to reach the results they favor without appearing to be engaging in ideological favoritism.⁵² In Thomas Davies's view, the common-law approach provides easy cover for the Justices to say that searches they want to approve are reasonable and searches they want to disapprove are unreasonable while appearing to reach these conclusions in a fair and neutral way.⁵³ Davies doubts "whether even clear history can

⁴⁸ *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999) ("In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."); *see also* *United States v. Jones*, 132 S. Ct. 945, 950 (2012) ("At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'").

⁴⁹ *Minnesota v. Dickerson*, 508 U.S. 366, 379-80 (1993) (Scalia, J., concurring).

⁵⁰ *Id.*

⁵¹ *Houghton*, 526 U.S. at 299-300.

⁵² *See, e.g.*, Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" Is Only a Modern, Destructive, Judicial Myth*, 43 *TEX. TECH L. REV.* 51, 55-56 (2010) [hereinafter Davies, *Can You Handle the Truth?*] (opining that when the Justices of the Supreme Court have looked to framing era common-law doctrine to assess the reasonableness of a search or an arrest, "they have frequently misstated the historical doctrine in ways that fit the desired result"); *see also* Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 *MISS. L.J.* 279, 287 (2004) (noting that "Judge Richard Posner has been particularly critical of this 'originalist' approach, suggesting that it is a sham, with a 'judge . . . do[ing] the wildest things, all the while presenting himself as the passive agent of the sainted Founders—don't argue with me, argue with Them'").

⁵³ Davies, *Can You Handle the Truth?*, *supra* note 52, at 53 ("Notwithstanding recent originalist rhetoric, the actual course of search-and-seizure decisions reveals

provide much positive guidance for shaping specific responses to modern search and seizure issues.”⁵⁴ This is because “[a]pplying the original meaning of the language of the Fourth Amendment in a completely changed social and institutional context would subvert the *purpose* the Framers had in mind when they adopted the text.”⁵⁵ Likewise, Donald Dripps notes that “too much has changed to enable modern judges to seek specific guidance from eighteenth-century common law practices.”⁵⁶ Morgan Cloud has observed that the common-law approach is partial in two ways: (1) it is incomplete, “reviewing only a small fraction of the relevant historical data;”⁵⁷ and (2) it is “partisan, selectively deploying fragments of the historical record to support their arguments about the Amendment’s meaning.”⁵⁸ David Sklansky suggests two additional problems with the common-law approach to reasonableness. First, because early common-law authority is widely indeterminate, the approach allows the Court to pick and choose which precedent it wishes to follow.⁵⁹ Second, since the framers were not necessarily concerned with issues regarding

that the justices of the Supreme Court have made arrest and search decisions on the basis of the majority’s ideological predilections and then have sometimes advanced or concocted historical claims to justify their decisions.”).

⁵⁴ Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 736 (1999).

⁵⁵ *Id.* at 740-41.

⁵⁶ Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 409 (2004).

⁵⁷ Cloud, *supra* note 21, at 1707-08.

⁵⁸ *Id.* at 1708.

⁵⁹ Sklansky, *supra* note 12, at 1794. The Court itself acknowledged this problem in the *Atwater* case. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). In that case, a police officer arrested a woman named Gail Atwater for driving without a seatbelt, a fine only offense. Atwater was taken into custody and held in a jail cell until she was brought before a magistrate and released on bond. Ultimately, she was ordered to pay a \$50 fine. Atwater brought a civil rights suit, alleging that the warrantless arrest for a fine only seatbelt violation constituted an unreasonable seizure under the Fourth Amendment. Atwater argued that police at early common law lacked the authority to make a warrantless arrest for a minor offense other than an offense involving breach of the peace. The Court rejected Atwater’s argument and upheld the warrantless arrest. Justice Souter, writing for the Court, examined early common law and framing era authorities on police power to execute warrantless arrests and concluded that “the common law commentators (as well as the sparsely reported cases) reached divergent conclusions” on this issue. *Id.* at 328.

race, class, and gender, a focus on what was considered lawful at early common law might lead a reviewing court to overlook equality concerns.⁶⁰

Ironically, even though today's Court does not accord the warrant preference view the premier status it once held, the Court still applies it in the bulk of its cases. If a search takes place with a valid search warrant, its constitutionality is presumed. If the government engages in a warrantless search and that search satisfies the requirements of a well-delineated exception to the warrant requirement, it too will be presumed reasonable. For example, in its recent 2011 decision in *Kentucky v. King*,⁶¹ the Court paid credence to both views of the Fourth Amendment. Writing for the Court, Justice Alito started by expressing adherence to the reasonableness view of the Fourth Amendment, noting, "The text of the Amendment thus expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity."⁶² In the very next paragraph, Justice Alito paid credence to the warrant preference view, noting, "It is a basic principle of Fourth Amendment law, . . . that searches and seizures inside a home without a warrant are presumptively unreasonable."⁶³ Justice Alito even acknowledged that the warrant requirement is subject to certain exceptions, including the exigent circumstances exception that was at issue in the case.⁶⁴

The Court today stands at a crossroads. It can return to a robust embrace of warrants, it can completely abandon the presumption of reasonableness that currently accompanies searches that take place with a search warrant and searches that fall within an exception to the warrant requirement, and instead require reasonableness balancing in all cases in which a search is challenged, or it can continue to recognize the merits of both the

⁶⁰ Sklansky, *supra* note 12, at 1772-73.

⁶¹ 131 S. Ct. 1849, 1856 (2011).

⁶² *Id.*

⁶³ *Id.* (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)) (internal quotation marks omitted).

⁶⁴ *Id.*

warrant preference and reasonableness views. Given its current composition, the Court is unlikely to return to a robust embrace of the warrant preference view. Abandoning years of carefully developed Fourth Amendment doctrines, however, would be a mistake. The Court should recognize the strength of both models and improve upon their weaknesses. In the next Section, I outline why the Court should not completely replace the warrant preference model with the reasonableness model. In Part IV, I suggest that Fourth Amendment reasonableness review should be more rigorous and less deferential to the government than it is at present. In short, I propose that courts engage in reasonableness review *with teeth*.

III. PROBLEMS WITH THE COURT'S CURRENT FOCUS ON REASONABLENESS

A. *The Traditional Critique of Reasonableness*

The modern Court's movement away from warrants and its embrace of reasonableness as the central meaning of the Fourth Amendment is problematic for several reasons. First, reasonableness review as currently applied in the Fourth Amendment context is highly deferential, resulting in decisions that usually uphold the challenged governmental action.⁶⁵ As Tom Clancy has noted, when the Court engages in reasonableness balancing, instead of being evenhanded, it balances with its thumb on the scale in favor of the government.⁶⁶ Fourth

⁶⁵ See, e.g., *Illinois v. Lidster*, 540 U.S. 419 (2004); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *Nat'l Treasury Emp. Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989); *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

⁶⁶ Clancy, *The Fourth Amendment's Concept of Reasonableness*, *supra* note 28, at 1011; see also Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642, 1687 (1998) [hereinafter Colb, *The Qualitative Dimensions of Fourth Amendment "Reasonableness"*] (noting that in cases where the Court engages in reasonableness balancing, it applies a "relaxed and deferential approach"); *Montoya De Hernandez*, 473 U.S. at 558 (Brennan, J., dissenting) (criticizing Fourth Amendment reasonableness balancing as a process "in

Amendment reasonableness review is so deferential to the government that some scholars have compared Fourth Amendment reasonableness review to rational basis review in the equal protection context.⁶⁷ Tracey Maclin, for example, notes that if the reviewing court “can identify any plausible goal or reason that promotes law enforcement interests,” the challenged police conduct will often be considered reasonable and not in violation of the Fourth Amendment.⁶⁸

While it may make sense to defer to the government when the court is reviewing social and economic legislation that does not impact a suspect class or fundamental right, which is what courts usually do when applying rational basis review, reasonableness review in the Fourth Amendment context should not be deferential to the government. Fear of arbitrary searches and a desire to check the discretion of searching governmental officials prompted the Framers to include the Fourth Amendment in the Bill of Rights in the first place.⁶⁹ The judiciary should be careful to defend its role of checking the executive when a fundamental right is at issue, especially when the bulk of individuals negatively impacted are poor persons of color.⁷⁰

which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales”).

⁶⁷ Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 199 (1993) [hereinafter Maclin, *The Central Meaning of the Fourth Amendment*] (“Fourth Amendment questions are resolved using a test that approximates the rational basis standard, which is the test used to decide equal protection and due process challenges to social and economic legislation.”); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) (“The Supreme Court’s generalized ‘reasonableness’ standard resembles . . . rational-basis constitutional review . . .”).

⁶⁸ Maclin, *The Central Meaning of the Fourth Amendment*, *supra* note 67, at 200.

⁶⁹ *Id.* at 201 (opining that “the central meaning of the Fourth Amendment is distrust of police power and discretion”).

⁷⁰ I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 65 (2009) (“The collateral consequences of *Terry* and its progeny is that they permit the disproportionate targeting of minorities in cars, on buses, on planes, on foot, even in shopping malls.”); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 977, 1030 (2002) (explaining why police are more likely to stop black people than white people when there is a choice between stopping one or the other); M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding “Zero-Tolerance” Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 387-88 (2011) (noting that in New York City, police focus their attention on “poor communities of color” and that “[o]f the approximately 580,000 people stopped and

A second problem with the Court's embrace of reasonableness is that the Court has failed to define reasonableness for Fourth Amendment review purposes, except to say that a search may be considered unreasonable if it was unlawful at the time of the framing.⁷¹ As a general matter, reasonableness review means the reviewing court must balance the government's interests against the individual's interests with little guidance from above.⁷² Because the reviewing court is free to consider any circumstance it feels is relevant and disregard any circumstance it feels is irrelevant, the exercise of its unguided discretion can lead to inconsistent results. Many legal scholars have complained that since there are no standards to guide the court's discretion, searches and seizures are reasonable under the reasonableness view if the reviewing court thinks they are reasonable.⁷³

The lack of guidance in Fourth Amendment reasonableness review is particularly striking given that on numerous occasions the Court has spoken of the importance of having bright line rules

searched in New York City in 2009, nearly 90% were black or Latino, yet they were less likely to have committed an offense than white people"); Jeffery Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 458, 477 (2000) (noting "individuals of color are more likely than white Americans to be stopped, questioned, searched, and arrested" and referencing a New York City OAG Report showing "that stops were disproportionately concentrated in the city's poorest neighborhoods, neighborhoods with high concentrations of racial minorities"); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 *IND. L.J.* 659, 681 (1994) (noting that poor law-abiding African Americans and Hispanics living in high crime areas are subject to search and seizure much more often than are whites); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 *GEO. L.J.* 1005, 1047 (2010) ("Police regularly stop and search Blacks and Latina/os in larger numbers than their percentage of the general population . . . [and] these minority groups represented the overwhelming majority of searches (77.2%).").

⁷¹ See *supra* text accompanying notes 47-51.

⁷² See *supra* text accompanying notes 34, 51.

⁷³ Davies, *Can You Handle the Truth?*, *supra* note 52, at 55 ("The beauty of 'Fourth Amendment reasonableness'—at least from the justices' points of view—is that it can carry whatever content the justices choose to give it."); Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 *HASTINGS CONST. L.Q.* 295, 299-300, 327 (1992) (arguing the reasonableness standard results in ad-hoc and unprincipled decision making); Carol S. Steiker, *Second Thoughts About First Principles*, 107 *HARV. L. REV.* 820, 855 (1994) (arguing that the "freewheeling 'reasonableness' standard . . . suffers from the concerns about official arbitrariness").

in the Fourth Amendment context to guide police officers who often need to make quick, on the spot decisions in the field.⁷⁴ When it comes to providing guidance to lower courts struggling to determine the validity of a search, however, the Court has eschewed bright-line rules in favor of a vague and amorphous reasonableness standard.

B. *The Critique of Reasonableness From the Left*

Beyond the traditional critique of reasonableness, both feminist theory and critical race theory offer additional insights. First, in purporting to be neutral and objective, a reasonableness standard can mask the fact that what the law considers reasonable is often just what those in positions of authority consider to be reasonable. As Dana Raigrodski notes, “reasonableness and common sense have always been assigned a race (white), a gender (male), and a class (wealthy).”⁷⁵

Gender, religion, race, class, and sexual orientation, to name just a few markers of identity, can influence not only the way one experiences life, but also the way one perceives the world. Judges ascribing to a colorblind model of jurisprudence might not fully appreciate the ways in which race and ethnicity may influence assessments of suspicion and criminality. An example of this can be seen in Anthony Thompson’s critique of the *Terry v. Ohio* decision.⁷⁶ In *Terry*, the Court held that an officer’s decision to stop and frisk three men was not in violation of the Fourth Amendment, even though the officer lacked probable cause to believe they were involved in criminal activity.⁷⁷ The *Terry* Court established a new lower level of justification, later called reasonable suspicion, for brief investigatory seizures of the

⁷⁴ *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973). For critiques of the Court’s embrace of bright line rules, see Dripps, *The Fourth Amendment and the Fallacy of Composition*, *supra* note 56; Albert W. Alschuler, *Bright-Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984).

⁷⁵ Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 187 (2008).

⁷⁶ Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

⁷⁷ *Terry v. Ohio*, 392 U.S. 1 (1968).

person.⁷⁸ Chief Justice Warren, writing the majority opinion in *Terry*, recounted the facts of the case in entirely race-neutral terms, never revealing that Terry and one of his companions were black, and that Terry's other companion and Detective McFadden were white.⁷⁹ Thompson suggests that only when one considers race does Detective McFadden's assertion—that he couldn't say what precisely drew his attention to the defendants and that he just didn't like them—make sense.⁸⁰

Terry v. Ohio is not the only opinion in which the Court describes the facts of the case in entirely race-neutral terms. In countless Supreme Court cases, the race of the defendant is never mentioned, as if irrelevant.⁸¹ This is in keeping with what Neil Gotanda identifies as our nation's commitment to a color-blind ideology.⁸² Yet, as Tracey Maclin, Lenese Herbert, Devon Carbado, Andrew Taslitz, and others have noted, race is a relevant consideration when trying to determine the reasonableness of a search or seizure.⁸³ For example, the test for a seizure is whether

⁷⁸ *Id.*

⁷⁹ Thompson, *supra* note 76, at 964.

⁸⁰ *Id.* at 966.

⁸¹ See *United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991); *Tennessee v. Garner*, 471 U.S. 1 (1985); see also Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 339-40 (1998) ("The majority opinion [in *Garner*] did not even acknowledge that Edward Garner, who was shot in the back of the head by a Memphis officer . . . was a skinny, unarmed black teenager."); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 157 (noting that Christopher Drayton and Clifton Brown, the defendants in *United States v. Drayton*, were two young African American men); Carbado, *supra* note 70, at 977 ("Nowhere in Justice O'Connor's opinion does she entertain the possibility that Bostick may have been targeted because he is black. In fact, Justice O'Connor does not even mention Bostick's race.").

⁸² Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

⁸³ Lenese C. Herbert, *Bete Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149 (2003) (critiquing the Court's colorblind Fourth Amendment jurisprudence in *Terry v. Ohio*, *Whren v. United States*, and *Illinois v. Wardlow*); Carbado, *supra* note 70, at 977-88 (critiquing Justice O'Connor's colorblind perspective reflected in *Florida v. Bostick*); Maclin, *Race and the Fourth Amendment*, *supra* note 81, at 370-75 (arguing that since the Court allows a consideration of race when it benefits law enforcement, the Court should allow minority defendants to provide evidence of racial targeting as part of the reasonableness inquiry, which is a totality of the circumstances inquiry); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to Internment*, 70 FORDHAM L. REV. 2257, 2283 (2002) (arguing that in order to have a more "respect-based Fourth Amendment Jurisprudence" the

the reasonable person in the defendant's shoes would have felt free to leave or terminate the encounter.⁸⁴ A young black male who has grown up in South Central Los Angeles knows that if he is stopped by a police officer, he should do whatever the officer says and not talk back unless he wants to kiss the ground. This young man may not feel free to leave or terminate the encounter with the officer, but if the reviewing court believes the average (white) person would have felt free to leave, then the encounter will not be considered a seizure and the young black male will not be able to complain that his Fourth Amendment rights have been violated.

It may be less easy for some to see the relevance of race and ethnicity to reasonableness in the search context, but the racial profiling literature suggests the importance of race in this context as well.⁸⁵ While police officers may not consciously discriminate against black and brown suspects, implicit bias may color their perceptions of who looks and acts suspiciously, and thus who to stop, question, and search.⁸⁶ Moreover, because police tend to focus their crime-fighting efforts in poor, high crime neighborhoods, which tend to be populated by poor minority and immigrant communities, poor black and brown individuals are more likely than other individuals to find themselves being stopped and searched.⁸⁷

subjective racial motives of the searching officer must be taken into account when determining whether the police action was reasonable).

⁸⁴ *United States v. Mendenhall*, 446 U.S. 544, 559-60 (1980).

⁸⁵ DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271; see also Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003) (discussing the post 9/11 arguments in support of ethnic profiling).

⁸⁶ L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2039 (2011) ("[E]ven when officers are not intentionally engaged in conscious racist profiling, implicit biases can lead to a lower threshold for finding identical behavior suspicious when engaged in by blacks than by whites.").

⁸⁷ See Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime In High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL'Y 135, 137 (2002).

Numerous studies demonstrate that individuals tend to perceive blacks, particularly young black males, as threatening or aggressive. In one early study, subjects observed a purportedly live (actually bogus) dialogue between two men discussing whether an electrical engineer should stick with his present job at a modest but adequate salary or take a new job offering considerably more pay but no long-term security.⁸⁸ The argument quickly heats up and results in one of the men shoving the other.⁸⁹ At this point, subjects were asked to characterize the behavior of the man who shoved the other man.⁹⁰ Sixty-nine percent of the subjects saw the shove as violent when both men were black.⁹¹ In contrast, when both men were white, only thirteen percent of the subjects found that the same behavior was violent.⁹² When the man shoving was black and the man being shoved was white, seventy-five percent saw the shove as aggressive.⁹³ When the man doing the shoving was white and the man being shoved was black, only seventeen percent saw the shove as aggressive.⁹⁴

The available research also shows a tendency to equate blackness with criminality.⁹⁵ A 2002 study tested subjects on their ability to accurately assess danger from individuals holding various objects.⁹⁶ Researchers developed a simplistic videogame that presented a series of background and target images.⁹⁷ Ten African American and ten white young men were recruited on

⁸⁸ Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 593 (1976) (testing 104 white undergraduates at the University of California at Irvine).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 595.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010) (finding that subjects held implicit associations between blacks and the status of being guilty).

⁹⁶ Joshua Correll et al., *The Police Officers Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002).

⁹⁷ *Id.* at 1315.

college campuses to pose as targets.⁹⁸ Each target appeared in the game four times—twice with a gun and twice without a gun, with a different object and in a different pose each time.⁹⁹ To play the game, subjects needed to decide as quickly as possible whether the target was holding a gun or not.¹⁰⁰ If the target was holding a gun, the subject was supposed to shoot him by pushing a button labeled *shoot* on the right side of a button box.¹⁰¹ If the target was holding some object other than a gun, the subject was told to press a button labeled *don't shoot* on the left side of the button box.¹⁰² A correct hit, i.e., correctly shooting a target with a gun, earned ten points; and a correct rejection, i.e., refraining from shooting a target with an object other than a gun, earned five points.¹⁰³ A false alarm, i.e., shooting a target holding an object other than a gun, resulted in a penalty of minus twenty points; a miss, i.e., not shooting a target holding a gun, resulted in a penalty of forty points.¹⁰⁴ This was to replicate the “payoff matrix” experienced by police officers on the street “where shooting an innocent suspect is a terrible mistake (as in the case of Amadou Diallo), but where the stronger motivation is presumably to avoid misidentifying an armed and hostile target, which could result in the officer’s death.”¹⁰⁵

Researchers found that subjects fired at an armed target more quickly if he was black than if he was white.¹⁰⁶ Subjects were also quicker to refrain from shooting armed white targets than armed black targets.¹⁰⁷ The study thus showed not only that innocent blacks are more likely than innocent whites to be shot, it also showed that individuals are in a more vulnerable position when dealing with armed white individuals than when dealing with armed black individuals because they are slower to recognize

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1315-16.

¹⁰² *Id.* at 1316.

¹⁰³ *Id.* at 1317.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

that white targets are armed. Shooter bias was evident not only in white subjects, but also in African American subjects.¹⁰⁸

Much of the research on implicit bias suggests that when individuals have to make quick, split-second decisions, implicit bias may limit their ability to control for racial bias caused by stereotypes and prejudice.¹⁰⁹ The research also suggests that making race salient can help egalitarian-minded individuals to suppress what would otherwise be automatic stereotype-congruent responses and to act in a more egalitarian manner.¹¹⁰ This research suggests the possibility that judges, who have more time to deliberate than police officers on the street, might be less prone to the ill-effects of implicit bias. The available research, however, shows that judges, just like other individuals, are influenced by implicit race bias.¹¹¹ It also suggests that judges can and do compensate for their own implicit racial bias, at least when race is made salient and the judges are attempting to render racially neutral decisions.¹¹²

In a 2009 study, Jeff Rachlinski, Sherri Lynn Johnson, Andrew Wistrich, and Chris Guthrie studied the effects of implicit bias on 133 trial judges who were given three hypothetical cases,

¹⁰⁸ *Id.* at 1324, 1327.

¹⁰⁹ B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 287, 288 (2006) (when participants had to make a snap judgment as to whether an object was a gun or a harmless object, they falsely saw a gun more often when primed with a black face than when primed with a white face).

¹¹⁰ William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806, 811 (2004) (finding that “unwanted prejudicial responses are most likely to occur under conditions of distraction or cognitive overload, when reflective cognitive processes that might modulate an automatically activated evaluation are otherwise engaged”); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 12, 14 (1989) (finding that when racial stereotypes about blacks were made salient, low-prejudice individuals seemed to consciously mediate their thoughts about blacks and align their thoughts with their egalitarian beliefs, but when race was not made salient, they responded in stereotype-congruent ways). For a fuller description of these and other studies, see Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 536-49 (2008).

¹¹¹ See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (finding that judges hold implicit racial biases that can influence their judgment).

¹¹² *Id.*

one involving a juvenile shoplifter, a second involving a juvenile robber, and a third involving a battery.¹¹³ Suspecting “that the judges might respond differently depending upon whether . . . the race of the defendant [was] salient,” the researchers did not explicitly identify the race of the defendant in the first two scenarios, but used a subliminal priming mechanism to do so indirectly, while explicitly identifying the defendant as either Caucasian or African American in the third hypothetical.¹¹⁴

Rachlinski found that in the first two experiments where the race of the defendant was not identified explicitly, judges who exhibited a white preference on the Implicit Association Test (IAT) gave harsher sentences to defendants if they had been primed with black associated words rather than neutral words.¹¹⁵ In other words, judges who had implicit bias in favor of whites were more likely to be harsher in their sentencing of black defendants than in their sentencing of similarly situated white defendants. Judges in the third experiment, where the race of the defendant was identified explicitly, did not judge the white and black defendants differently.¹¹⁶ Most of the judges in the third experiment reported that they suspected racial bias was being studied, even though the only cue they received was the explicit mention of the defendant’s race.¹¹⁷ This study suggests the usefulness of making race salient—perhaps by defense attorneys calling attention to the possibility of implicit racial bias affecting perceptions of dangerousness, criminality, and threat—when the case involves a black defendant.

The problematic nature of open-ended reasonableness standards has led some feminist scholars to argue in favor of more subjective standards over purportedly neutral objective ones. In the self-defense context, for example, some feminist scholars have argued that battered women who kill their abusers in non-confrontational situations should not be held to the usual reasonable person standard but should be compared to the

¹¹³ *Id.* at 1211.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1214-16.

¹¹⁶ *Id.* at 1219.

¹¹⁷ *Id.* at 1223-24.

average battered woman.¹¹⁸ In the Fourth Amendment context, Dana Raigrodski urges the Court to abandon reasonableness standards altogether.¹¹⁹

While I agree with the concerns raised by Raigrodski and others, I do not see the Court jettisoning reasonableness as the cornerstone of its Fourth Amendment jurisprudence anytime soon. Moreover, even if it wanted to, it would be difficult for the Court to abandon reasonableness as a requirement for a valid search or seizure. The text of the Fourth Amendment includes an explicit command that searches and seizures not be unreasonable. Rather than abandoning reasonableness, the Court should require more rigorous scrutiny of government claims of Fourth Amendment reasonableness. It should also provide more guidance to lower courts as to when a search ought to be deemed reasonable or unreasonable. Such guidance can minimize problems of inconsistency and arbitrariness. It can also lead to fairer results as possibilities for subconscious bias to influence the decision-making process would be restricted.

IV. THE FUTURE: A HYBRID APPROACH

In other work, I have suggested that the Court should embrace a more rigorous standard of reasonableness review—a standard I call “reasonableness with teeth.”¹²⁰ Looking outside the criminal procedure arena, I borrow from a small slice of the Court’s equal protection jurisprudence and draw lessons from three cases in which the Supreme Court utilized rational basis review to strike down the challenged legislation as unconstitutional. In this Part, I first examine the Supreme Court’s

¹¹⁸ See CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* (2000) (arguing that a reasonable woman standard should be adopted in certain legal contexts); Kit Kinports, *Defending Battered Women’s Self-Defense Claims*, 67 OR. L. REV. 393, 415 (1988) (arguing that since courts in self-defense cases consider at least some of the defendant’s attributes and circumstances, they should likewise permit an instruction directing the jury to measure the defendant’s actions against those of the reasonable battered woman).

¹¹⁹ Raigrodski, *supra* note 75, at 214-15.

¹²⁰ Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us about the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403 (2010) [hereinafter Lee, *Package Bombs, Footlockers, and Laptops*].

“rational basis with bite” jurisprudence. Next, I examine possible arguments against importing rational basis with bite into the Fourth Amendment context. I focus my attention here on Richard Worf’s use of political process theory to defend judicial deference to the legislature in cases involving suspicionless searches.¹²¹ Finally, I discuss a few ways the Court might implement a more rigorous form of reasonableness review.

Under the Court’s equal protection jurisprudence, if a law burdens a fundamental right or targets a suspect class, such as race, alienage, or national origin, the reviewing court must apply strict scrutiny review, striking down the legislation unless it is narrowly tailored to serve a compelling governmental interest.¹²² If the legislation discriminates on the basis of gender, the Court will apply heightened or intermediate scrutiny, striking down the legislation if it fails to substantially further an important governmental purpose.¹²³ If a law does not target a suspect or quasi-suspect class, the Court will uphold the legislation as long as the classification “bears a rational relation to some legitimate end.”¹²⁴

In most cases, the level of scrutiny employed predetermines whether the legislation will be struck down as constitutionally infirm or upheld. If strict scrutiny or intermediate scrutiny applies, the legislation will almost always be struck down. As Gerald Gunther put it, strict scrutiny is “‘strict’ in theory, [but] fatal in fact.”¹²⁵ On the other hand, if rational basis review is the applicable standard, the legislation will almost always be upheld.¹²⁶ The Court applying rational basis review is supposed to

¹²¹ Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93 (2007) [hereinafter Worf, *The Case for Rational Basis Review*].

¹²² *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

¹²³ *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that intermediate scrutiny has been applied to discriminatory classifications based on illegitimacy); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (gender classifications subjected to intermediate scrutiny).

¹²⁴ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

¹²⁵ Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *HARV. L. REV.* 1, 8 (1972).

¹²⁶ Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 *CALIF. L. REV.* 297, 304 (1997).

defer to the legislature because it is presumed that even improvident or unwise social or economic legislation will eventually be corrected through the democratic process.¹²⁷

In three rare cases, which Cass Sunstein calls the “*Moreno-Cleburne-Romer* Trilogy,”¹²⁸ the Court utilized rational basis review but struck down the legislation in question. What the three cases had in common was that the legislation in question in each case affected a politically unpopular group. The legislation in *Moreno* was aimed at preventing poor, unrelated persons living under one roof from being eligible for food stamps.¹²⁹ The ordinance in *Cleburne* made it more difficult for a group home for the mentally disabled to qualify for a zoning permit,¹³⁰ and the legislation in *Romer* prohibited any governmental action designed to protect gays and lesbians from discrimination.¹³¹

Instead of rubber-stamping the legislation in question as it usually does when it applies rational basis review, the Court struck down the challenged enactments in each of these cases on equal protection grounds.¹³² The Court went out of its way to note that a desire to harm a politically unpopular group (hippies in *Moreno*, mentally disabled persons in *Cleburne*, and gays and lesbians in *Romer*) is not a legitimate governmental interest. Commentators have called the less-deferential-than-usual rational basis review that was exercised in these cases “rational basis review with a bite.”¹³³

Borrowing from the Court’s “rational basis with bite” jurisprudence, I suggest that courts deciding the validity of a search should conduct a more rigorous inquiry into the overall reasonableness of the search. In other words, the reviewing court should apply reasonableness review *with teeth*. The reviewing court should resist the urge to defer to the government whenever a criminal defendant challenges a search as unconstitutional. It should stop balancing with its thumb on the scale in favor of the

¹²⁷ *City of Cleburne*, 473 U.S. at 440.

¹²⁸ Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 59, 61 (1996).

¹²⁹ *USDA v. Moreno*, 413 U.S. 528, 530, 534-35 (1973).

¹³⁰ *City of Cleburne*, 473 U.S. at 436-37.

¹³¹ *Romer v. Evans*, 517 U.S. 620, 624 (1996).

¹³² See Sunstein, *supra* note 128, at 59-63.

¹³³ See, e.g., Bhagwat, *supra* note 126, at 327; Gunther, *supra* note 125, at 18-19.

government. It should start rigorously questioning whether the challenged governmental action ought to be upheld. It should scrutinize whether the government had good reason for engaging in the challenged action and whether there were good reasons for the government acting without advance judicial authorization.

In proposing “reasonableness with teeth,” I do not suggest that the Court simply import what it has done in the equal protection context into the Fourth Amendment context. One problem with borrowing from the Court’s “rational basis with bite” jurisprudence is that the Court has provided little guidance regarding when “rational basis with bite” is appropriate and virtually no guidance with respect to what “rational basis with bite” means besides heightened judicial scrutiny of the challenged governmental action.¹³⁴ Another problem is that the Court applies deferential rational basis review in most equal protection cases and applies non-deferential “rational basis with bite” in only a small minority of cases.¹³⁵

Reasonableness with teeth in the Fourth Amendment context need not replicate these problems. First, factors relevant to whether a search should be deemed reasonable can and should be spelled out in advance—reducing vagueness and lack of guidance concerns. Second, it is unnecessary to limit reasonableness with teeth to cases in which a politically unpopular group has been disadvantaged.¹³⁶ Non-deferential reasonableness review should

¹³⁴ See Lee, *Package Bombs, Footlockers, and Laptops*, *supra* note 120, at 1492.

¹³⁵ See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999).

¹³⁶ Arguably, every criminal case in which a search is challenged involves a politically unpopular group, the group of persons identified as criminal defendants. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993) [hereinafter Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice*] (arguing that legislatures undervalue the rights of criminal defendants); Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 116-17 (2007) (arguing that the unpopularity of criminal defendants “make[] them the quintessential discrete and insular minority”); Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 594 (2005) (arguing that criminal defendants are an unpopular group); David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1290 (2002) (noting that criminal defendants as a group are “peculiarly powerless to protect themselves through the normal processes of majoritarian democracy”); William J. Stuntz, *Substance*,

apply in all cases where the validity of a search is at issue, not simply those cases implicating a politically unpopular group. Since the Fourth Amendment requires that all searches and seizures be reasonable, not just those directed at politically unpopular groups, reasonableness is already required for all searches and seizures. The only question is what form reasonableness review ought to take. Nothing in the Fourth Amendment requires that reasonableness review be deferential to the government.¹³⁷ Indeed, given the concerns that motivated the Framers to include the Fourth Amendment in the Bill of Rights (the desire to constrain arbitrary and exploratory governmental searches and seizures), a non-deferential standard of review is more appropriate than a deferential, pro-government standard of review.¹³⁸

I do not suggest that the Court completely abandon all of the doctrines it has carefully established over the years. While I feel several Fourth Amendment doctrines are in desperate need of reform, such as the consent doctrine and the administrative search doctrine, the basic idea behind the warrant preference view

Process and the Civil-Criminal Line, 7 J. CONTEMP. LEGAL ISSUES 1, 20-21 (1996) (arguing that criminal suspects as a group find it hard or impossible to protect themselves through the political process). Moreover, the vast majority of criminal defendants are poor and/or black or Latino. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 257 (2009) (noting strong empirical evidence that "black Americans are disproportionately arrested, convicted, and incarcerated on drug charges"); Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 62 (2011) ("[There is] sufficient data to establish that low-income people constitute a disproportionate percentage of criminal defendants."); Cecelia Klingele et al., *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 962 (2010) ("Although African Americans comprise less than thirteen percent of the U.S. population, thirty-eight percent of our country's two million prison inmates are black."); Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 734-35 & n.47, 737 (2011) (explaining that "race and class disparities intersect to concentrate the burdens of incarceration among the most socially disadvantaged groups of individuals" with the result that "poor and minority individuals (who . . . constitute the vast majority of criminal defendants)"); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1970-71 (2008) ("African Americans constitute 13% of the general population, but nearly half of a record-high prison population.").

¹³⁷ See Lee, *Package Bombs, Footlockers, and Laptops*, *supra* note 120, at 1492.

¹³⁸ See Maclin, *The Central Meaning of the Fourth Amendment*, *supra* note 67 (arguing that the central meaning of the Fourth Amendment is distrust of police power and discretion).

—that searches that take place with a search warrant and warrantless searches that fall within an exception to the warrant requirement ought to be presumed reasonable—is sound. Indeed, I believe the wisest course of action is to continue to adhere to the warrant preference view and strengthen the warrant process. Because the Court has clearly indicated this is not the path it intends to pursue, I offer reasonableness with teeth as an improvement on current reasonableness balancing. Instead of simply balancing the government’s interests against the individual’s interests, a process that in today’s post-9/11 world is likely to almost always result in a conclusion that the government’s interests outweigh the individual’s interests, courts should engage in non-deferential review of the reasonableness of the search or seizure in question.

My focus here is less on *how* non-deferential reasonableness review ought to be implemented than on *why* non-deferential reasonableness review ought to be embraced in light of increasingly popular proposals to shift Fourth Amendment decision making from the province of the judiciary to the province of the legislature. For example, Richard Worf has argued that judges should generally defer to legislative judgments regarding the reasonableness of suspicionless group searches because legislatures are better able than courts to serve democratic interests.¹³⁹ Worf relies on political process theory, the idea that when a constitutional provision is ambiguous, “the majoritarian decision[s] of the legislature should . . . be preferred [over] the decisions of unelected and unaccountable judges.”¹⁴⁰

Worf starts by claiming that in the Fourth Amendment arena, “[t]he Court essentially applies strict scrutiny in every case” because it balances *de novo* and does not defer to legislative judgments.¹⁴¹ It is difficult to see how Worf can conclude that the Court is applying strict scrutiny when it engages in reasonableness balancing. In most cases, once the Court finds a special need above and beyond the normal need for law

¹³⁹ Worf, *The Case for Rational Basis Review*, *supra* note 121.

¹⁴⁰ *Id.* at 100-01.

¹⁴¹ *Id.* at 105.

enforcement, it concludes that the government's interests outweigh the individual's interests.¹⁴²

Perhaps the problem is in the way Worf conceives of reasonableness. Worf equates reasonableness in the Fourth Amendment context with cost-effectiveness.¹⁴³ He writes, "Reasonableness must, in some sense, mean only cost-effectiveness."¹⁴⁴ I take issue with the proposition that if something is cost-effective, then it must be reasonable. Take, for example, a corporation that manufactures widgets with a defective part. Even if research suggests that a user of this widget stands a one percent chance of being maimed or disfigured, the corporation's board of directors might decide to continue manufacturing the widget after weighing the costs and benefits because it thinks the risk of the defect being discovered is small. Additionally, the board may conclude that even if someone is injured and sues, the cost to settle such a lawsuit will likely be less than the profit the corporation stands to gain from manufacturing the widget without disclosure. Cost-effective? Perhaps. Reasonable? No. Reasonableness in other contexts, such as the self-defense doctrine, is recognized as including a normative component.¹⁴⁵ Reasonableness in the search and seizure context ought to include a normative component as well.

Building on this idea that reasonableness in the Fourth Amendment context means cost-effective, Worf provides five reasons why he thinks legislatures would be better able than courts to decide questions regarding the reasonableness of a suspicionless group search regime. First, he argues that "legislatures have a developed capacity to register the costs and benefits of a practice."¹⁴⁶ Second, legislatures "have better access

¹⁴² *Illinois v. Lidster*, 540 U.S. 419 (2004); *Bd. of Educ. v. Earl*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *Nat'l Treasury Emp. Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *New York v. Burger*, 482 U.S. 691 (1987); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

¹⁴³ Worf, *supra* note 121, at 117.

¹⁴⁴ *Id.*

¹⁴⁵ See LEE, MURDER AND THE REASONABLE MAN, *supra* note 2.

¹⁴⁶ Worf, *supra* note 121, at 120.

to the relevant facts.”¹⁴⁷ Courts only have the facts of the particular case before them. Legislatures, in contrast, can “seek out facts instead of relying simply on those that interested parties put before them.”¹⁴⁸ Third, Worf thinks legislatures have more legitimacy than courts because ordinary people can be involved in setting policies that affect them.¹⁴⁹ Fourth, Worf argues that “legislatures can [better] accommodate local variations in reasonableness.”¹⁵⁰ The Supreme Court, in contrast, sets standards of reasonableness that apply nationwide. Fifth, Worf argues that legislatures are better able than courts to adapt to changed circumstances because courts are bound by rules of stare decisis.¹⁵¹

Worf’s arguments are similar to arguments made by my colleague, Orin Kerr, who suggests that legislatures, not courts, ought to be entrusted with protecting citizen privacy interests vis-a-vis new technologies.¹⁵² Kerr provides three reasons why he believes courts should defer to legislatures when it comes to questions regarding the privacy implications of evolving technologies. First, because courts are resolving disputes arising from past events, Fourth Amendment rules tend to lag behind parallel statutory rules and current technologies.¹⁵³ Given the way our criminal justice system works, it can take a long time before an issue is resolved by the Supreme Court.¹⁵⁴ The Court generally does not step in until after the circuit courts of appeals have addressed an issue, and usually only to resolve a circuit split. Second, Kerr notes that “[j]udicial rulemaking is limited by strong stare decisis norms that limit the ability of judicial rules to change quickly.”¹⁵⁵ Legislatures, in contrast, can respond more quickly to

¹⁴⁷ *Id.* at 124.

¹⁴⁸ *Id.* at 125.

¹⁴⁹ *Id.* at 126-27.

¹⁵⁰ *Id.* at 127.

¹⁵¹ *Id.* at 128-29.

¹⁵² Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004).

¹⁵³ *Id.* at 868 (“[L]egislatures typically create generally applicable rules ex ante, while courts tend to create rules ex post in a case-by-case fashion”).

¹⁵⁴ *Id.* at 868-69.

¹⁵⁵ *Id.* at 871.

changing facts.¹⁵⁶ Finally, Kerr notes that “[l]egislative rules tend to be the product of a wide range of inputs,” whereas judicial rules are the result of “written briefs and oral arguments by [only] two parties.”¹⁵⁷

Both Worf and Kerr argue that those affected by the searches they discuss (suspicionless group searches in Worf’s case and searches involving new technologies in Kerr’s case) can adequately protect themselves through the political process.¹⁵⁸ Worf claims that the typical searched or seized group—students subjected to drug testing, people who ride the subway, or drivers who drive on a particular highway—is medium-sized and therefore well positioned to achieve their aims through the political process.¹⁵⁹ He argues that such groups “have numerous members, so they have the economies of scale that individuals lack.”¹⁶⁰ He also claims they “are not so large that collective action and free rider problems are [avoided].”¹⁶¹ Realistically, however, how many people who ride the subway in New York City are going to take the time to try to band together to complain about random subway searches? How would drivers who use a particular route contact other similarly situated drivers so as to lodge a complaint about an objectionable checkpoint? And even if they were successful in organizing like-minded individuals in protesting a particular checkpoint, how likely is it that the legislature would actually listen to them and eliminate the checkpoint after the legislature has weighed the alternatives and made the decision to establish the checkpoint? Not likely.

Kerr makes a similar argument with respect to advances in technology.¹⁶² He notes that the main consumers of new technologies, like the computer and the Internet, are affluent white majorities.¹⁶³ Kerr argues that “[s]uch users generally will

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 875.

¹⁵⁸ Worf, *The Case for Rational Basis Review*, *supra* note 121; *see also* Kerr, *supra* note 151.

¹⁵⁹ Worf, *The Case for Rational Basis Review*, *supra* note 121, at 132.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Kerr, *supra* note 152, at 887.

¹⁶³ *Id.*

be able to represent their interests before Congress effectively, resulting in a healthy debate and relatively favorable [outcomes] for balanced legislative rules.”¹⁶⁴ While it may be true that affluent whites use computers and the Internet in greater numbers than poor minorities, to date, I have not seen affluent whites banding together to ask Congress to pass legislation curtailing the government’s practice of engaging in suspicionless searches of laptops at international airports.¹⁶⁵

The main reason courts should not defer to legislatures when it comes to Fourth Amendment questions rests on institutional competency and separation of powers grounds.¹⁶⁶ The judiciary should not defer to the legislature in matters involving the Fourth Amendment because the judiciary has the primary authority over matters involving constitutional interpretation.¹⁶⁷ This is particularly true in cases affecting the interests of a “discrete and insular minorit[y].”¹⁶⁸ In almost all Fourth Amendment cases, the affected individuals are criminal defendants, individuals who have been charged with a crime, who arguably constitute a “discrete and insular minorit[y].”¹⁶⁹ Because this particular group is an

¹⁶⁴ *Id.*

¹⁶⁵ Since July of 2008, the Department of Homeland Security has permitted federal agents at the border or its functional equivalent to search and seize laptops and other electronic devices without a warrant and without any individualized suspicion. Ellen Nakashima, *Expanded Powers to Search Travelers at Border Detailed*, WASH. POST, Sept. 23, 2008, at A2 (discussing U.S. CUSTOMS AND BORDER PROTECTION POLICY REGARDING BORDER SEARCH OF INFORMATION (July 16, 2008); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DIRECTIVE NO. 7-6.0, BORDER SEARCHES OF DOCUMENTS AND ELECTRONIC MEDIA (July 16, 2008)). In September 2010, the ACLU along with other organizations filed a lawsuit against the Department of Homeland Security, challenging the constitutionality of its laptop policy. Press Release, ACLU, *Abidor v. Napolitano: The ACLU Challenges Suspicionless Laptop Border Policy* (Mar. 30, 2011), available at <http://www.aclu.org/free-speech-technology-and-liberty/abidor-v-napolitano>.

¹⁶⁶ Fabio Aricla, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1256-57 (2004) (arguing that it is inappropriate to accord *Chevron* style deference to legislatures in the Fourth Amendment context because “neither the legislature nor the executive branch has the power to delegate any portion of the judiciary’s constitutional adjudicatory power”).

¹⁶⁷ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁶⁸ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

¹⁶⁹ *See supra* note 136 and accompanying text.

unpopular and disfavored group, it is unlikely to find redress in the majoritarian legislature.¹⁷⁰

What might reasonableness with teeth look like in practice? Reasonableness review with teeth could take any number of forms. Without choosing one form over another, I examine a few possibilities here.

First, the current model of open-ended reasonableness balancing could be replaced with Christopher Slobogin's two part proportionality and exigency framework.¹⁷¹ Slobogin suggests that all searches should first satisfy a proportionality principle.¹⁷² Proportionality, as explained by Slobogin, means the justification for the search must be roughly proportionate to its intrusiveness.¹⁷³ If the search in question is extremely intrusive, then the government needs a stronger justification to engage in

¹⁷⁰ Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice*, *supra* note 136.

¹⁷¹ Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107 (2010) [hereinafter Slobogin, *Government Dragnets*]; Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053 (1998) [hereinafter Slobogin, *Let's Not Bury Terry*]; Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991) [hereinafter Slobogin, *The World Without a Fourth Amendment*]; SLOBOGIN, PRIVACY AT RISK, *supra* note 16, ch. 2.

¹⁷² SLOBOGIN, PRIVACY AT RISK, *supra* note 16, at 21-22; Slobogin, *Government Dragnets*, *supra* note 171, at 138; Slobogin, *Let's Not Bury Terry*, *supra* note 171, at 1054. Other scholars have suggested that the Court adopt a proportionality principle in its Fourth Amendment jurisprudence, but unlike Slobogin, have argued that the amount of justification required should vary depending on the seriousness of the offense as opposed to the intrusiveness of the government action. *See, e.g.*, Jeffrey Bellin, *Crime Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1 (2011) (arguing that Fourth Amendment reasonableness review should include consideration of the seriousness of the crime being investigated such that as the crime increases in severity, the government response can increase in intrusiveness and still be considered reasonable); Colb, *supra* note 66, at 1673-77 (arguing that a more stringent showing of probable cause should be required when the offense being investigated is minor).

¹⁷³ SLOBOGIN, PRIVACY AT RISK, *supra* note 16, at 21 ("[The reconceptualization of the Fourth Amendment's] key component can be stated very simply: a search or seizure is reasonable if the strength of its justification is roughly proportionate to the level of intrusion associated with the police action. I call this concept the proportionality principle."); Slobogin, *Government Dragnets*, *supra* note 171, at 138; Slobogin, *Let's Not Bury Terry*, *supra* note 171, at 1054; Slobogin, *The World Without a Fourth Amendment*, *supra* note 171, at 4.

that search.¹⁷⁴ Slobogin suggests the use of hit rates to measure the strength of the government's justification.¹⁷⁵ Second, under Slobogin's proposed framework, unless there are exigent circumstances, the government must obtain ex ante authorization for the search.¹⁷⁶ Slobogin explains that such advance authorization does not always have to take the form of a warrant based on probable cause issued by a judicial magistrate.¹⁷⁷

Slobogin's proposed framework makes a lot of sense. Unlike the current reasonableness balancing test, which allows the reviewing court to pick and choose which factors it considers relevant, Slobogin's proportionality principle tells the reviewing court it must focus on intrusiveness and hit rates.¹⁷⁸ Unlike the current model of reasonableness balancing, which encourages the reviewing court to place its thumb on the scale in favor of the government in assessing the government's interests against the individual's interests, Slobogin's proportionality principle looks at hit rates or likelihood of success, not the importance of the

¹⁷⁴ SLOBOGIN, PRIVACY AT RISK, *supra* note 16, at 38 (explaining, for example, that extremely invasive actions such as "bodily surgery, perusal of private diaries, and prolonged undercover operations . . . should take place only if there is clear and convincing proof that the evidence thereby sought is crucial to the state's case); Slobogin, *Government Dragnets*, *supra* note 171, at 139; Slobogin, *Let's Not Bury Terry*, *supra* note 171, at 1082-84 (explaining a four-tiered approach where the level of intrusiveness dictates the justification required ranging from clear and convincing evidence to probable cause to reasonable suspicion to a relevance standard); Slobogin, *The World Without a Fourth Amendment*, *supra* note 171, at 68 ("[F]or example, the government would generally have to show a higher degree of confidence that a search will be successful when evidence is thought to be in a private home than when it is believed to be in a warehouse or in the 'open fields.'").

¹⁷⁵ SLOBOGIN, PRIVACY AT RISK, *supra* note 16, at 41-42; Slobogin, *Government Dragnets*, *supra* note 171, at 139; Slobogin, *Let's Not Bury Terry*, *supra* note 171, at 1088.

¹⁷⁶ SLOBOGIN, PRIVACY AT RISK, *supra* note 16, at 44 ("[W]hen there is no exigency, ex ante review of the search by some independent official should be preferred—a tenet this book will call the *exigency principle*."); Slobogin, *Government Dragnets*, *supra* note 171, at 141; Slobogin, *The World Without a Fourth Amendment*, *supra* note 171, at 75 (explaining that the exigency principle entails that "whenever some level of justification is required, authorization by a neutral third party should be obtained in all nonexigent situations").

¹⁷⁷ Slobogin, *Government Dragnets*, *supra* note 171, at 141.

¹⁷⁸ *Id.* at 139 ("Under proportionality reasoning, the more intrusive a dragnet program is, the higher its hit rate must be.").

asserted governmental interest.¹⁷⁹ Slobogin's proportionality principle also requires the reviewing court to consider the intrusiveness of the government action on the individual or individuals who are subjected to the search.¹⁸⁰ The only problem with Slobogin's proposal is that he would exempt most of the suspicionless group searches, searches he calls "government dragnets," from his proposed framework.¹⁸¹ In many government dragnet cases, Slobogin would follow Richard Worf's deference to the legislature approach.¹⁸² The reviewing court would be encouraged to simply rubber stamp the government's search regime as long as a legislative body was responsible for creating and implementing it.

A second way to achieve less deferential reasonableness review is by embracing a multidimensional balancing approach, such as the one proposed by Alexander Reinert.¹⁸³ Under Reinert's proposal, courts reviewing the reasonableness of a search should recognize that the "public interest" is multifaceted and includes collective values that are actually in harmony with individual liberties. Reinert identifies two categories of collective interests ignored by the Supreme Court's current jurisprudence: participatory pluralism and efficient administration of the criminal justice system. Reinert explains that when an individual is subjected to a Fourth Amendment intrusion, he may be less likely to participate in civic activities in the future out of fear that he may expose himself to more such intrusions.¹⁸⁴ This is particularly true if the individual feels he was singled out because of his membership in a particular racial or ethnic group.¹⁸⁵ Reinert points to the post-9/11 intrusions on Arab, Muslim, and South Asian communities as an example of how Fourth Amendment intrusions can negatively affect civic participation.¹⁸⁶ He notes that "in the wake of widely held reports of law

¹⁷⁹ *Id.* at 140.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 109-10.

¹⁸² *Id.*

¹⁸³ Reinert, *supra* note 34.

¹⁸⁴ *Id.* at 1487-89.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1488.

enforcement tracking and prosecuting donations to particular Islamic charities in this country, civic participation of Muslim communities steeply declined.”¹⁸⁷

Reinert identifies a second collective interest that is impinged upon by Fourth Amendment intrusions: the efficient administration of criminal justice.¹⁸⁸ Reinert notes that as the Court has relaxed the justification required for certain kinds of Fourth Amendment intrusions, the likelihood that innocent individuals will be intruded upon increases.¹⁸⁹ For example, the Court’s move in *Terry v. Ohio* from requiring probable cause for all seizures of the person to permitting police officers to briefly seize individuals based on reasonable suspicion of criminal activity has resulted in more innocent people being stopped.¹⁹⁰ This creates the potential for hostility against law enforcement and bogs down the criminal justice system.

I agree with Reinert that courts engaging in reasonableness balancing should be open to considering collective harms of the kind he identifies. The problem with his proposal is that it does not adequately respond to two of the problems associated with the current reasonableness balancing test—lack of guidance and overly broad discretion. It simply adds more things for the reviewing court to consider in the overall reasonableness balancing mix.

A third way reasonableness with teeth review might be implemented is through a framework of presumptions. Under such a framework, courts would assess the reasonableness of a search using a hybrid warrant preference-reasonableness approach. As it does under the warrant preference model, the reviewing court would start by asking whether the government agent was acting pursuant to a warrant or an exception to the warrant requirement other than special needs. If so, the court would presume the search was reasonable. If, however, the government agent did not procure a warrant, the reviewing court would need to assess the validity of the search by engaging in a

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1491.

¹⁸⁹ *Id.* at 1492-93.

¹⁹⁰ *Id.* at 1493-94.

more rigorous form of reasonableness review than is employed today. In other words, the reviewing court would engage in reasonableness review with teeth.

Instead of balancing the government's interests against the individual's interests or looking to framing era common law, the reviewing court would primarily consider three factors. It could consider a fourth factor only if the facts clearly suggested its presence. If the warrantless search did not fall within an established exception to the warrant requirement, the reviewing court would consider these factors to see if any one factor or combination of factors led to a presumption of unreasonableness. If, on the other hand, the warrantless search satisfied the requirements of an established exception to the warrant requirement, then the reviewing court would only be able to override the initial presumption of reasonableness of that search if the court found at least two factors leading to a presumption of unreasonableness.

Under my proposed framework, the reviewing court would first consider the nature and scope of the intrusion. It would ask whether the search was highly intrusive or involved an intrusion into a repository for highly personal or private material or information. If so, the court would apply a presumption of unreasonableness. This first consideration recognizes that privacy is one of the core values protected by the Fourth Amendment.¹⁹¹

One might question the wisdom of asking the reviewing court to consider whether the search involved an intrusion on privacy when presumably the court has already decided that the government intruded upon a reasonable expectation of privacy and therefore conducted a search. The court, however, would not be revisiting the reasonable expectation of privacy test. This first inquiry does not ask whether the government intruded upon a

¹⁹¹ *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (“The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusions by the State.”); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (“The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.”).

reasonable expectation of privacy. Instead, it focuses on the nature and scope of the intrusion, using privacy as a metric. The mere fact that the government has intruded upon a reasonable expectation of privacy merely tells us that the Fourth Amendment is implicated. It does not tell us whether the government violated the Fourth Amendment. The Court has recognized that there are varying degrees of intrusiveness.¹⁹² While I disagree with the Court's assumption that individuals have lessened expectations of privacy in their cars, the fact remains that the Court and many individuals consider the search of a home more intrusive than the search of an automobile in part because the home is a place where very private things are kept and where very private things are said and done.¹⁹³ A strip search involving the viewing of private parts is considered more intrusive than a frisk of the outer clothing.¹⁹⁴ Similarly, many would consider the search of a personal computer more intrusive than the search of a cigarette package.¹⁹⁵

¹⁹² *Atwater v. City of Lago Vista*, 532 U.S. 318, 363 (2001) (noting that while both traffic stops and full custodial arrests "are seizures that fall within the ambit of the Fourth Amendment, the latter entails a much greater intrusion on an individual's liberty and privacy interests").

¹⁹³ *See, e.g., Kyllo v. United States*, 533 U.S. 27, 31 (2001) (noting that "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" stands at the very core of the Fourth Amendment (internal citations omitted)); *California v. Acevedo*, 500 U.S. 565, 569 (1991) (noting the distinction made at early common law between the search of a dwelling house and the search of a moving vehicle).

¹⁹⁴ *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2641-43 (2009) (distinguishing between the suspicion needed to search a backpack and outer clothes and the suspicion needed to conduct a strip search).

¹⁹⁵ I am not completely comfortable with suggesting that the nature and scope of the intrusion should matter. In previous cases, the Court has refused to draw a distinction between "worthy" and "unworthy" containers, explaining:

For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.

United States v. Ross, 456 U.S. 798, 822 (1982). In prior work, I have supported the Court's refusal to draw a distinction between worthy and unworthy containers. *See Lee, Package Bombs, Footlockers, and Laptops, supra* note 120.

Second, the court would ask whether the search was supported by probable cause.¹⁹⁶ If the officer lacked probable cause, the court would apply a presumption of unreasonableness. Many Fourth Amendment scholars wisely argue that probable cause must be a part of any Fourth Amendment reasonableness analysis. Scott Sundby, for example, has stated, “[P]robable cause must be at the center of the Fourth Amendment universe.”¹⁹⁷ Similarly, George C. Thomas has argued that except in cases involving searches incident to arrest, police should only be allowed to search for evidence when they have probable cause to believe

¹⁹⁶ Much has been written on the subject of probable cause. *See, e.g.*, Bruce A. Antkowiak, *Saving Probable Cause*, 40 SUFFOLK U. L. REV. 569 (2007) (noting how the War on Terror has resulted in the erosion and neglect of probable cause); Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical versus Concrete Harms*, 73 LAW & CONTEMP. PROBS. 69 (2010) (assessing whether there is a legal or moral difference between arresting two people, each based on 50/50 odds of guilt, on the one hand, and arresting two people, one of whom is definitely innocent and the other of whom is definitely guilty, when the officer cannot tell which is innocent and which is guilty); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951 (2003) (arguing for a sliding scale of probable cause that takes into account the gravity of the investigated offense and the intrusiveness of the proposed search as part of the reasonableness framework); Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913 (2009) (arguing that the magistrate should consider the track record of both the individual police officer as well as the officer’s unit for establishing probable cause in the past when deciding whether to issue a warrant); Wesley MacNeil Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377 (2011) (explaining that probable cause in the framing era was merely a pleading requirement, not the evidentiary threshold that it represents today); Andrew E. Taslitz, *What is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*, 73 LAW & CONTEMP. PROBS. 145, 145 (2010) (defining probable cause as “having four components: one quantitative (How certain must the police be?), one qualitative (How strong must the supporting data sources be?), one temporal (When must police and courts make their judgments?), and one moral (Do the police have ‘individualized suspicion?’)"); Arcila, *In the Trenches*, *supra* note 27 (arguing that probable cause during the framing era did not play a central role in Fourth Amendment jurisprudence); Colb, *The Qualitative Dimensions of Fourth Amendment “Reasonableness,” supra* note 66, at 1673-77 (arguing that if the offense of investigation is a minor offense, a more stringent showing of probable cause should be required and that in cases involving serious governmental intrusions, probable cause alone should not be sufficient to justify a search); Kinports, *Diminishing Probable Cause*, *supra* note 5 (arguing that by using phrases such as “reasonable belief” and “reason to believe” when analyzing probable cause, the Supreme Court is risking indirectly combining the higher standard of probable cause with the lower standard of reasonable suspicion).

¹⁹⁷ Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133, 1138 (1998).

the search will produce evidence of a crime.¹⁹⁸ Thomas notes that requiring probable cause to make a search avoids the harm of suspicionless searches and the risk that government officials will abuse their power.¹⁹⁹

Probable cause alone, however, should not automatically lead to a finding that the search was reasonable. Under current doctrine, probable cause is all that is needed to search a car.²⁰⁰ Even if the police have time to get a warrant, they are not required to do so under the automobile exception.²⁰¹ Arguably, it is not reasonable to search a car that is not readily mobile without obtaining prior judicial authorization.²⁰² Under current law, probable cause to believe that a person has committed an offense, even a fine-only offense like a seatbelt violation, is sufficient for an officer to effectuate a custodial arrest of the individual, which in turn gives the officer the ability to search the individual and any containers on the individual.²⁰³ The officer who arrested Gail Atwater had probable cause to believe she had violated the law requiring the wearing of a seatbelt, yet many would dispute the Supreme Court's conclusion that her arrest was reasonable.²⁰⁴

Third, the reviewing court would ask whether it was impracticable for the police officer to get a warrant prior to

¹⁹⁸ George C. Thomas III, *Time Travel, Hovercraft, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1459 & 1478 (2005); see also Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 627 (1995) (arguing that individualized suspicion should be a component of Fourth Amendment reasonableness analysis because 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").

¹⁹⁹ Thomas, *supra* note 198, at 1479.

²⁰⁰ *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (holding that probable cause alone satisfies the automobile exception to the Fourth Amendment).

²⁰¹ *Id.* at 466-67.

²⁰² The U.S. Supreme Court, however, has ruled that a car search based solely on probable cause is reasonable even if the car is not mobile. *Maryland v. Dyson*, 527 U.S. 465 (1999) (reversing a state court decision that held that in order for the automobile exception to apply, there had to be not only probable cause to believe that evidence of a crime was in the automobile, but a separate finding of exigency).

²⁰³ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

²⁰⁴ Wayne A. Logan, *Reasonableness as a Rule: A Paean to Justice O'Connor's Dissent in Atwater v. City of Lago Vista*, 79 MISS. L.J. 115 (2009).

searching. Here, the court would want to consider the danger to the officer or the public and risk to the investigation if the officer had stopped to get a warrant. If stopping to get a warrant would have posed little or no danger to the officer, the public, or the investigation, then the court should apply a presumption of unreasonableness.

As an additional consideration, the reviewing court could ask whether the officer acted in good faith or bad faith. Evidence that the officer was acting in bad faith could also result in a presumption of unreasonableness. Bad faith can be reflected in various ways.²⁰⁵ If, for example, there is evidence that the officer was using the fact that an individual committed a traffic violation as the justification for a stop when the real reason the officer wanted to stop the individual was because the officer had a mere hunch that the individual was involved in illegal activity, this would be an indication that the officer acted in bad faith. Likewise, any evidence that the officer was motivated by a desire to harass would suggest bad faith. If the officer claimed he entered a home in order to render emergency aid to an injured person within, but there is evidence that the officer was more concerned with whether the occupants of the house were engaged in criminal activity than whether anyone was in need of emergency aid, this would also be an indication of bad faith. If there is any indication that the officer was motivated by race, gender, class, or sexual orientation bias, this would suggest bad faith and result in a presumption of unreasonableness.

Consideration of the subjective intent of the officer, however, runs contrary to current law. The Supreme Court, on many occasions, has said that the good faith or bad faith of the officer is irrelevant to the constitutionality of the police action.²⁰⁶ The

²⁰⁵ John Burkoff defines bad faith in the search context as occurring “when the police officer who is searching acts entirely and deliberately for reasons that do not constitute a proper legal justification for the search.” John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 101 (1982) (arguing that even if objective reasons exist to support a search, if the officer’s sole reason for engaging in the search was an improper reason, the officer’s bad faith should render the search unconstitutional).

²⁰⁶ *Kentucky v. King*, 131 U.S. 1849, 1859 (2011) (opining that considering whether the police in bad faith intentionally created an exigent circumstance to get around the warrant requirement “is fundamentally inconsistent with our Fourth Amendment jurisprudence” which rejects a subjective approach and asks only whether the action

Court's position on subjective intent is a bit hypocritical. Under current doctrine, the government's purpose in establishing a suspicionless search regime is considered a relevant factor in determining whether there was a special need above and beyond the normal need for law enforcement,²⁰⁷ but the individual police officer's purpose in stopping or searching an individual is considered irrelevant.²⁰⁸ In other words, the government's "good" purpose is relevant when it can help the government, but the government's "bad" purpose is irrelevant when considering it might help the defendant.²⁰⁹

Defenders of the Court's position might argue it is difficult to prove intent and therefore it is best to stick with objective factors when trying to assess questions of reasonableness. While it may be difficult to discern the subjective intent of the government actor, this does not stop us from requiring proof of intent in other areas of the law. For example, the concept of *mens rea* is a long-established tradition in substantive criminal law where proof of intent is the general rule and liability without intent is the exception.²¹⁰ Moreover, it makes sense to consider the bad faith of government actors when the question is the overall reasonableness of a search. How can a search be considered reasonable if the officer's reason for engaging in the search was to

was objectively justified); *Brigham City v. Stewart*, 547 U.S. 398, 404 (2006) (rejecting argument that reviewing court assessing reasonableness of entry into a home under the emergency aid doctrine ought to consider whether the officers were truly motivated primarily by a desire to save lives and property); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

²⁰⁷ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (noting that what distinguishes permissible checkpoints from impermissible checkpoints is their primary purpose).

²⁰⁸ *Id.*

²⁰⁹ A distinction might be drawn between programmatic purposes, which is what the Court is assessing in special needs cases, and an individual officer's purpose in engaging in a particular search. In other contexts, however, the Court displays similar bias. For example, the Court requires a defendant challenging his conviction on the ground that the government failed to preserve exculpatory evidence to prove that the police acted in bad faith. *Arizona v. Youngblood*, 488 U.S. 51 (1988). It does not require the government to prove the police acted in good faith.

²¹⁰ *Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.").

harass? How can a search be considered reasonable if the officer's real reason for suspecting the defendant of criminal activity was the defendant's race?

My framework of presumptions approach marries the warrant preference and reasonableness models of the Fourth Amendment, recognizing that both approaches carry considerable advantages. In requiring prior judicial authorization for a search unless an exception to the warrant requirement applies, the warrant preference model reflects the importance of having a neutral third party assess the lawfulness of governmental action that intrudes upon reasonable expectations of privacy. The reasonableness model, on the other hand, reflects the importance of giving both law enforcement officials and judicial officers broad discretion to decide when a warrantless search is appropriate. My hybrid model recognizes the importance of prior judicial authorization for a search in two ways. First, it allows the reviewing court to presume that searches that take place with a search warrant are reasonable. Second, it ensures that a court reviews the validity of the search at some stage of the process—either pre-search if a warrant is obtained or post-search since all warrantless searches would be subject to reasonableness with teeth review. My hybrid model also recognizes the importance of giving reviewing courts broad discretion. This is why my proposal uses a framework of rebuttable presumptions rather than rigid rules.²¹¹

My approach differs from the Court's current approach to reasonableness in several respects. First, the current approach to reasonableness is largely a balancing test that weighs the

²¹¹ Presumptions are a staple of the Supreme Court's jurisprudence and an important source of guidance to lower courts on a variety of issues. For example, the Court has held that lower courts deciding claims of ineffective assistance of counsel under the Sixth Amendment should presume the competence of the trial attorney. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .”). It has directed lower courts deciding whether to dismiss an indictment on the ground of selective prosecution to apply a presumption that the prosecutor has not violated equal protection. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (“In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present ‘clear evidence to the contrary.’”).

government's interests against the individual's interest.²¹² The current approach de-emphasizes the importance of warrants and focuses instead on whether, as a general matter, the challenged governmental action ought to be considered reasonable²¹³ or whether it was unlawful at common law.²¹⁴ My hybrid model of reasonableness, in contrast, recognizes the importance of having a neutral third party assess the appropriateness of the search ex ante. Not only does my hybrid model start by asking whether there was a warrant, it incorporates one of the key components of the warrant process, probable cause, into its inquiry and forces the reviewing court to consider whether the officers could have gotten a warrant.

Second, aside from instructing lower courts to look to the common law at the time the Fourth Amendment was adopted, the current approach provides little guidance to lower courts as to what factors they ought to consider when assessing the reasonableness of the search. Under the current approach, if the challenged action was not unlawful at the time of the framing, the reviewing court is supposed to balance the governmental interests against the individual's interests.²¹⁵ Balancing, however, is problematic in today's world because it is likely to lead to a finding of reasonableness whenever the government claims a national security interest or an interest in protecting the public. Popular today is the notion that individuals ought to be willing to sacrifice some inconvenience and imposition on their privacy interests in the service of the larger collective good, an idea expressed by Joseph Grano more than twenty-five years ago.²¹⁶

By specifying which factors ought to be considered relevant, my proposed approach provides lower courts with some guidance as to when they should deem a search unreasonable without

²¹² See *supra* note 34.

²¹³ See *supra* notes 27-46.

²¹⁴ See *supra* note 47-51.

²¹⁵ See *supra* note 51.

²¹⁶ Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 497 (1984) (suggesting the need for a community model under which individuals "who share[] the benefits of community living may legitimately be expected to make reasonable sacrifices on behalf of the community's efforts to solve and control crime").

telling them how they must rule. The presumptions I propose are rebuttable, and the ultimate decision is left with the reviewing court. Moreover, my proposal forces courts to be more transparent about why they think a given search is or is not reasonable.

My proposed framework also recognizes that criminal defendants are a politically powerless group in need of enhanced judicial protection.²¹⁷ Just as the Court recognized in footnote four of the *Carolene Products* case that the federal judiciary is uniquely positioned to protect the rights of “discrete and insular minorities,”²¹⁸ the current Court should recognize that criminal defendants as a group are unlikely to have their interests protected by the popularly elected legislature or executive.

One might object to my proposal on the ground that it does not resolve problems of ambiguity and overly broad discretion inherent in the current approach but merely pushes back the reasonableness determination to a later time. While I agree that my proposal does not provide a magic bullet formula for determining whether and when a search is reasonable, it provides better assistance to lower courts than the current model by narrowing the list of relevant factors they should consider. The proposed framework not only identifies these factors, it also specifies how these factors should be viewed through a series of presumptions.

Let’s think about how my proposed framework would work in practice. Let’s say police officer Peter has had several run-ins with an individual named Adam and wants to harass Adam because Adam called him a pig during their last encounter. Peter calls his precinct and asks the clerk to check if there are any outstanding arrest warrants for Adam’s arrest. When he receives a negative response, Peter calls the neighboring precinct’s clerk and asks the same question despite departmental regulations instructing line officers not to call clerks in other precincts without prior authorization from one’s supervisor.²¹⁹ This time, the clerk tells

²¹⁷ See *supra* note 136 and accompanying text.

²¹⁸ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

²¹⁹ This hypothetical is loosely based on the facts in *Herring v. United States*, 555 U.S. 135 (2009). Unlike in *Herring*, the clerk in my hypothetical accurately tells Officer Peter that there is an outstanding warrant for Adam’s arrest based on his failure to

him there is an outstanding warrant for Adam's arrest based on his failure to pay three recent parking tickets. Armed with this information, Peter may arrest Adam in public.²²⁰ Once Peter arrests Adam and takes him into custody, Peter may conduct a full search of Adam's person.²²¹ If Peter finds a smart phone in Adam's jacket pocket, Peter not only may seize the smart phone, he may also search its contents, looking at Adam's text messages, e-mails, Facebook entries, photographs, and even bank account information.

Under current law, the warrantless search of Adam's smart phone found on Adam's person would likely be deemed lawful under the search incident to arrest doctrine as long as the arrest was lawful and custodial and the search took place substantially contemporaneously with the arrest.²²² Since there was an outstanding warrant for Adam's arrest, the arrest would be considered lawful. The search was substantially contemporaneous with the arrest, and the smart phone was found on Adam's person. Even if Adam password protected his smart phone, this would not necessarily prevent the officer from hacking into the smart phone or forcing him to reveal the password.²²³ An alternate justification supporting the warrantless search of a smart phone found on an

pay three parking tickets. In *Herring*, the clerk erroneously reported to the officer that there was an outstanding arrest warrant. *Id.* at 137-38.

²²⁰ *United States v. Watson*, 423 U.S. 411 (1976).

²²¹ *United States v. Robinson*, 414 U.S. 218 (1973) (authorizing full search of the person, including containers found on the person, incident to a lawful, custodial arrest).

²²² *See United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007) (allowing warrantless viewing of text messages on cell phones seized incident to arrest); *United States v. Wurie*, 612 F. Supp. 2d 104, 109 (D. Mass. 2009) (noting "trend heavily in favor of finding that the search incident to arrest" doctrine applies to cell phones). *But see State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009) (rejecting application of the search incident to arrest doctrine to cell phones). Over the past few years, the vast majority of courts that have assessed the constitutionality of police searching of cell phones incident to arrest, have approved of the practice. Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1129 (2011). The Supreme Court has not yet ruled on whether an exception to the search incident to arrest doctrine ought to be recognized for warrantless searches of cell phones found on or near a person who has been arrested and taken into custody. Joshua A. Engel, *Doctrinal Collapse: Smart Phones Cause Courts to Reconsider Fourth Amendment Searches of Electronic Devices*, 41 U. MEM. L. REV. 233, 237 (2010).

²²³ Gershowitz, *supra* note 222.

arrestee's person is the exigent circumstances exception.²²⁴ Police may worry that if they wait to search the smart phone, a confederate might remotely wipe the phone of its contents.

Under my proposed framework, the reviewing court would start by asking whether the search took place with a warrant or fell within an established exception to the warrant requirement. Here, even though Peter acted without a search warrant, the search falls within the search incident to arrest exception. Accordingly, the search enjoys a presumption of reasonableness that can be overcome only if the reviewing court finds at least two factors pointing to a presumption of unreasonableness in its review for overall reasonableness. In this review, the court would first consider three factors: (1) the nature and scope of the intrusion, (2) whether the officer had probable cause to believe evidence of a crime would be found in the smart phone, and (3) whether it was impracticable for the officer to get a warrant. If there is clear evidence of bad faith, the reviewing court could also consider the officer's bad faith.

The reviewing court could first find that the search of a smart phone is extremely intrusive given the vast amounts of personal information a smart phone is capable of storing. Second, in this case, it does not appear that the officer had any specific and articulable facts leading him to believe that the smart phone he searched contained any incriminating evidence. Adam was arrested because he had three outstanding parking tickets. It was not likely that Adam's smart phone would yield any further evidence supporting the offense of arrest. Third, it was not impracticable for Peter to have gotten a search warrant to search the smart phone. Once Peter had possession of the smart phone and took Adam in custody, it was unlikely that Adam would be able to destroy any evidence on the smart phone, unless he had access to a computer or could call an accomplice and tell the accomplice to wipe the smart phone. Additionally, Peter's purpose in arresting and searching Adam was to harass Adam for calling him a pig, suggesting bad faith. All of these factors would point to

²²⁴ As one court noted, "evidence may be lost due to the dynamic nature of the information stored on and deleted from cell phones or pagers." *United States v. Mercado-Nava*, 486 F. Supp. 2d 1271, 1278 (D. Kan. 2007).

a presumption that the search was unreasonable, overriding the initial presumption of reasonableness, and allowing the court to find the search unconstitutional.

One problem with my framework of presumptions approach is that it does not work so well in the case of administrative searches. This is because in most administrative search cases, there is no individualized suspicion or probable cause, suggesting a presumption of unreasonableness, but it is also impracticable to obtain a search warrant in advance, suggesting a presumption of reasonableness. These two factors cancel each other out, leaving the court to consider the nature and scope of the intrusion. The problem here is that just considering the nature and scope of the intrusion without also considering the government's interests may lead to balancing with the thumb on the scale in favor of the individual rather than fair balancing. Moreover, evidence of bad faith will only be present in a limited number of cases. More attention needs to be paid to the question of how to implement less deferential review of administrative searches, but I will leave that question to another day.

CONCLUSION

The Supreme Court has moved away from reading the Fourth Amendment as expressing a preference for warrants to understanding it as requiring only reasonableness, not warrants. The Court today stands at a crossroads. It can completely replace the warrant preference model with the reasonableness model of the Fourth Amendment, as it has already done in a few cases; it can return to a robust embrace of the warrant preference view; or it can recognize the virtues of the warrant preference and the reasonableness models and improve upon both. Because the Court is unlikely to return to a robust embrace of warrants, I argue that the Court should continue its current path of recognizing both models. Instead of extremely deferential pro-government reasonableness balancing, however, I argue that courts should engage in a more stringent form of Fourth Amendment reasonableness review. Courts assessing the reasonableness of a Fourth Amendment search should employ reasonableness review with teeth.