

## Randomization and the Fourth Amendment

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*Randomized checkpoint searches are generally taken to be the exact antithesis of reasonableness under the Fourth Amendment. In the eyes of most jurists, checkpoint searches violate the central requirement of valid Fourth Amendment searches—namely, individualized suspicion. We disagree. In this Article, we contend that randomized searches should serve as the very lodestar of a reasonable search. The notion of “individualized” suspicion is misleading; most suspicion in the modern policing context is group based and not individual specific. Randomized searches by definition are accompanied by a certain level of suspicion. The constitutional issue, we maintain, should not turn on the question of suspicion-based versus suspicionless police searches, but on the level of suspicion that attaches to any search program and on the evenhandedness of the program. In essence, we argue for a new paradigm of randomized encounters that satisfy a base level of suspicion and that will provide the benefits of both privacy protection (by ensuring a minimum level of suspicion) and evenhandedness (by cabining police discretion), the very values we wish to protect through the Fourth Amendment.*

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## INTRODUCTION

In the eyes of most jurists, checkpoint searches symbolize the exact antitheses of Fourth Amendment reasonableness. No matter whether the checkpoints operate on a randomized or exhaustive basis, or whether they entail immediate searches or discretionary referrals to a secondary site, courts and commentators typically use the checkpoint to illustrate police searches that do not satisfy a central requirement of the Fourth Amendment—individualized suspicion. Justice Sandra Day O’Connor sums up the standard view: “For most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment.”<sup>1</sup> Naturally, there are exceptions in cases of exigent circumstances—an emergency road block designed to catch a fleeing felon is one notable example—but under ordinary circumstances, checkpoints are almost universally condemned for violating the central tenet of individualized suspicion that lies at the heart of Fourth Amendment jurisprudence.

The problem with this conventional account is that it conflates the *suspicionless* nature of the checkpoint search with the *randomized* aspect of the search. The two ingredients—lack of suspicion and randomization—are collapsed in the constitutional analysis, as if “random” necessarily means “suspicionless.” As a result, in the constitutional debates over random drug testing, border patrol checkpoints, and administrative inspections, the controversy inevitably turns on the costs to privacy of having *suspicionless* searches versus the benefits of evenhandedness that flow from *randomized* searches.

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<sup>1</sup> *Vernonia School District 47J v Acton*, 515 US 646, 667 (1995) (O’Connor dissenting). See also *Ybarra v Illinois*, 444 US 85, 91 (1979).

The conflation of the two inevitably reinforces a negative view of checkpoint searches.

We take a different view based on an important conceptual separation of the issue of suspicion from the question of randomization. We contend that the model of the randomized checkpoint should serve as the lodestar for reasonableness under the Fourth Amendment and that the concept of “individualized suspicion” should be abandoned. Randomization is crucial to promoting the value of evenhandedness, which is necessary to achieve the goal of controlling discretion, a goal that lies at the very heart of Fourth Amendment reasonableness. We also argue that randomized searches *by definition* are accompanied by a certain level of suspicion. The constitutional issue, we maintain, should not turn on the question of suspicion-based versus suspicionless police encounters with individuals, but first on the *level of suspicion* that attaches to any search program *and* second on the evenhandedness of the program. In essence, we argue for a new paradigm of randomized encounters that satisfies a base level of suspicion in order to capture the benefits of *both* privacy protection (by ensuring a minimum level of suspicion) *and* evenhandedness (by cabining police discretion).

We begin by noting that the concept of “individualized suspicion” is based on a faulty understanding of suspicion, and, as a result, Fourth Amendment jurisprudence has been constructed using an inaccurate model of suspicion. The model is inaccurate in at least two ways. First, the term “individualized suspicion” is misleading in that it implies that the process of suspicion-based judgments is *binary*: suspicion is either individualized and constitutional, or it is not. In reality, suspicion is a probabilistic concept. It is, in technical terms, a *continuous* variable, not a *categorical* one. Second, the term is misleading because it suggests that law enforcers come to judgments about individuals by evaluating unique individual traits. In reality, most individuals arouse suspicion because of the group-based-type behavior that they exhibit or the fact that they belong to readily identifiable groups—sex and age are two examples—rather than because of unique individual traits. Typically, individuals come to police attention because they are young, or are male, or are running away from the police, or have a bulge in their pocket.<sup>2</sup> To be sure, there are cases when suspicion attaches to an individual because of his or her unique identification. Arrest warrants executed for a fugitive of the law are the best example. But these cases obviously are rare in contrast to the more typical police–civilian encounter. Let us explain both of these points.

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<sup>2</sup> For a discussion of the factors that gave rise to suspicion in a study of New York City policing, see notes 20–25 and accompanying text.

First, the proper way to think about suspicion is with reference to a probability scale of 0 to 1, *not* as either individualized or not.<sup>3</sup> Consider a case in which a police officer sees a known batterer assaulting his wife. The level of suspicion regarding the batterer is high, at, or very close to, 1 on a probability scale. Similarly, when Roman Polanski is identified at the airport in Switzerland on the basis of his passport and matched—by full name, date of birth, and place of birth—to an outstanding arrest warrant, the level of suspicion is again high, at, or very close to, 1.<sup>4</sup> Now consider a case in which a police officer observes an African American man whose measured pacing, peering, and conferring make the police officer suspicious that he might be engaged in or preparing to commit a crime. The level of suspicion the officer has regarding this suspect is lower than in the first two cases we described.<sup>5</sup> Note, though, that a court utilizing a binary “individualized suspicion” standard would find individualized suspicion in *all of these* cases. In fact, the Supreme Court found individualized suspicion on the facts of the third case in *Terry v Ohio*.<sup>6</sup> Note, too, that the binary metric of “individualized suspicion” does not give courts a way to distinguish among these cases and does not compel courts to spell out how much suspicion is necessary to trigger a justifiable stop or arrest. As it is commonly employed, the “individualized suspicion” standard provides courts only the option of coding these very different encounters 0 or 1, without realistically giving any guidance as to the *quantum* of suspicion necessary to delineate the binary 1.<sup>7</sup>

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<sup>3</sup> We think this point is noncontroversial, but for a different view of suspicion that rejects the probabilistic concept we espouse here and instead adopts a virtue-oriented approach to epistemic rationality, see generally Eric J. Miller, *The Epistemology of Suspicion* (Yale Law School Working Paper, Apr 2011) (on file with authors).

<sup>4</sup> Naturally, someone else who resembles Polanski may have stolen his passport and be impersonating Polanski, so the level of suspicion is never really 1. But it is very close in that case.

<sup>5</sup> We refer here, obviously, to the facts recounted by Detective Martin McFadden to justify his stop and search of John W. Terry in the famous case of *Terry v Ohio*, 392 US 1, 5–8 (1968).

<sup>6</sup> 392 US 1, 30 (1968).

<sup>7</sup> To be sure, the courts could distinguish between more or less suspicion in these cases and could allow an arrest in the first two, but only a stop-interrogate-and-frisk in the third. The courts might intervene to weigh the amount of intrusion of the search or seizure against the amount of evidence of suspicion. But in all these cases, police intervention and coercion is constitutionally permitted *because* the constitutional standard of “individualized suspicion”—though indeterminate, undefined, and unquantified—has been met. By contrast, if a court were to utilize a probabilistic spectrum standard in these cases, see Part I.B, the court would have to clearly identify the quantum of suspicion in each case and determine whether that quantum satisfies constitutional requirements based on a measured comparison between the quantum in those cases and the level of suspicion necessary to satisfy the constitutional values underlying the Fourth Amendment. The court would have to code the cases along a continuous scale and would have to specify what amount of suspicion satisfies the constitutional mandate.

Second, the most natural way to think about suspicion is in terms of group-based identifiers. For the most part, suspicion attaches to group-based traits, conditions, and behaviors; the police identify sets of individuals with motives, individuals who match a drug-courier profile, individuals who fit an eye-witness description, individuals who are in a specific location, or individuals who have the same blood type. In the *Terry* case, for instance, Detective Martin McFadden became suspicious of the suspects because they displayed a number of behaviors that McFadden, through his years of experience, had come to equate with criminal behavior: walking back and forth, looping back to a location, looking around furtively.<sup>8</sup> In other cases, suspicion attaches to a group trait that an individual displays, such as having a bulge in one's pants pocket, fitting a description in the vicinity of a recently committed offense, throwing away a plastic vial at the sight of a police patrol car, or driving a car with Florida license plates on the New Jersey Turnpike. These are group-based determinations often made irrespective of the officer's knowledge of whether a specific offense has been committed, and suspicion potentially attaches to *all* individuals *within* these categories. Suspicion in these cases is "individualized" only in the sense that it attaches to an individual because he or she is a member of the suspect group. In other words, in most cases of policing, suspicion does not originate at the individual level.

By modeling suspicion on a binary standard rather than a probabilistic one, courts have created a mismatch between Fourth Amendment jurisprudence and everyday police work. As an empirical matter, only a small fraction of police practice involves retrospective criminal investigations in which law enforcement officers have sufficient information to identify one individual—"the one who did it." Very few cases involve police officers witnessing a known culprit engaging in crime.<sup>9</sup> In reality, police practice is dominated by discretionary decisions about whom to stop and investigate based on leads and suspicious behaviors that fit within group categories—prospective and preventative actions that are based on levels of suspicion short of 1. In the vast majority of cases, what we really want

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<sup>8</sup> 392 US at 5–7.

<sup>9</sup> See Part I.B. To be sure, in those very few cases, there would be good reason to use a binary standard as the model of suspicion under the Fourth Amendment. Such a binary standard would fit those exceptional cases comfortably because, in those cases, the binary and the spectrum essentially coincide. That is, the level of suspicion is practically a 1 on the probability scale and is certainly a 1 in binary terms. But those are the exceptional cases—and using them as the loadstar distorts the functioning of the Fourth Amendment.

to know is whether there is *enough* suspicion (in probability terms) to conclude that the Constitution has been satisfied.

It is true that if law enforcement officers were authorized to act only in those rare cases where they are pursuing that “one individual,” then the binary model would fit police work more comfortably and would help guide police officers and courts reviewing police officers’ actions. But that is far from the case. As we detail below, the vast majority of police work is made up of interactions with group-based traits, and there the binary model courts employ offers no guidance.<sup>10</sup>

Let us take a moment here to be clear: we do not believe that the “individualized suspicion” standard is *too* stringent or that it asks for *too* much or *too* high a degree of suspicion. The problem is *not* that the binary model requires that there be practical certainty in all cases—that the level of suspicion reach 1. (It should be obvious that it does not, as evidenced by the fact that *Terry* stops satisfy individualized suspicion.) To the contrary, the problem is that the binary model does not *specify* in any way what level of suspicion the Constitution requires, and therefore courts have completely punted the question. The binary model is essentially unidentified, and so it offers no guidance to the police to ensure that their decisions comport with the Constitution. By contrast, we will detail here a model of suspicion that realistically produces an explicit analysis of the amount of suspicion needed in any police case.<sup>11</sup>

Another way to say this—a more legally stylized way, perhaps—is that the “individualized suspicion” standard relies on a “Warrant Model” of reasonable searches that is entirely out of step with ordinary policing, which is characterized in truth by a “Patrol Model,” and that the clash between the two models undermines the constitutional standard of reasonableness. Drawing metaphorically on the text of the Fourth Amendment itself, it is possible to think of the constitutional provision as itself containing two models—a Patrol Model and a Warrant Model. The text of the amendment contains two

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<sup>10</sup> See Part I.B.

<sup>11</sup> One further clarification: if someone were to respond here that individualized suspicion is not 1 on the probability scale, but 0.5, and therefore that individualized suspicion *is*, in effect, an expression of the probability scale that we urge courts to use, then we would emphasize again that, especially on that understanding, the term “individualized suspicion” is being used in a conclusory manner—it overlaps completely with “constitutional” or “reasonable” suspicion. It does no independent work at all. What, then, is the point of using the term “individualized suspicion”? Why not call it “constitutional” or “reasonable suspicion” *tout court*? Our point is that it is far better for the police, for citizens, and for the courts to define the level of suspicion that attaches to any particular situation and to use this probabilistic approach to suspicion to address the constitutional question whether there is reasonable suspicion sufficient to justify a stop.

clauses.<sup>12</sup> The first clause goes to the larger issue of reasonableness; the second, to the requirement that warrants issue only on probable cause.

Our contention is that the Court has created the “individualized suspicion” requirement in the image of the second clause and embraced a Warrant Model—one in which the police must be able to describe with particularity the individual or things to be searched or seized.<sup>13</sup> But in so doing, the Court has created a fictional rubric of “individualized suspicion” that does more harm than good. Instead of ensuring a heightened requirement for police encounters, the standard actually masks the required level of suspicion in most cases. We think that the Court should instead craft a standard of reasonableness driven by the Patrol Model of policing, which is the reality on the street. Such a standard would be tied to the first clause of the Fourth Amendment and would assess reasonableness in light of the *amount of suspicion* underlying a search or seizure *and* also with reference to the extent of evenhandedness law enforcers employ when engaging in searches and seizures.<sup>14</sup>

Nothing we have said so far requires that we advocate for randomization, of course. We could simply urge that courts use a more honest metric of suspicion and stop there. We promote the concept of randomization for two reasons: First, because suspicion predominantly attaches to groups, at least in the ordinary policing context. When we require a certain level of suspicion, it turns out, we have identified a group of individuals—generally, a group that contains individuals of different races, ethnicities, gender, and so on. In order to pick from within that group—wherein each member satisfies the required level of suspicion—we ought to use a neutral sorting mechanism. We must pick fairly from the group. Once we have decided to search within any category, we are in effect searching within the group. The only way to do that without injecting bias and prejudice is to randomly search the group, because randomization allows us to select from the group while avoiding illegitimate criteria to discriminate within the group.

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<sup>12</sup> See US Const Amend IV:

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.

<sup>13</sup> See Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 Utah L Rev 977, 994–98.

<sup>14</sup> One other option going forward, naturally, would be to tack more closely to the Warrant Clause and actually require warrant-like specificity and probable cause for *all* police–civilian encounters. That would require reversing *Terry*, the Court’s jurisprudence on articulable suspicion, and strengthening or defining the level of suspicion required by “probable cause.”

Second, and related, randomization allows for perfectly representative sampling within a group. The only way to obtain a fair and representative sample within a group that does not skew on other dimensions is to use a randomization mechanism.<sup>15</sup> Suspicion-sufficient checkpoints help to ensure that the population touched by policing (the population with police and correctional contacts) will reflect accurately the offending population. As we explain in greater detail below, suspicion-sufficient checkpoints avoid the risk of ratchets and disproportionality in the arrestee, jail, or prison populations. What the checkpoint can provide is an updated and accurate profile of the offending population—a snapshot of offender distributions.<sup>16</sup> And that, we believe, promotes the values at the heart of the Fourth Amendment and of due process, values that require the state to treat all similarly situated individuals—here, offenders—similarly.

In this Article, we argue that the expression “individualized suspicion” should be abandoned. The term, which was born relatively recently in the 1960s, has become today a placeholder for the *conclusion* that a search or seizure is constitutional. As such, the term masks the level of suspicion that courts do and should demand in police encounters, and it undermines the value of requiring suspicion as a protection of privacy interests. We also go further and suggest that randomized stops at suspicion-sufficient checkpoints should be the focal point of Fourth Amendment reasonableness: randomized engagement of citizens offers a better constitutional model for controlling the exercise of police power against individuals. This satisfies some of the core aims of reasonableness at the heart of the Fourth Amendment. Two of the most important are controlling police discretion and avoiding discrimination, whether political, racial, or other. Our contention is that the Fourth Amendment ought to be interpreted in a way that best constrains police power and makes it

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<sup>15</sup> For an overview of random sampling and its practical limitations, see Julian L. Simon and Paul Burstein, *Basic Research Methods in Social Science: The Art of Empirical Investigation* 111–19 (Random House 3d ed 1985).

<sup>16</sup> In many cases, the construction of profiles is actually based on random sampling. See Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* 7–16 (Chicago 2007). That was the idea, for instance, behind the IRS audits that were conducted to create the “Discriminant Index Function” (DIF) used to flag likely tax evaders. The DIF was last updated in 1992 based on a multiple-regression analysis of approximately fifty thousand tax returns that had been randomly audited in 1988. By using random sampling, the IRS can obtain an accurate picture of suspicious traits at a particular point in time. See *id.* at 9–10, 218. To be sure, there are dangers in using profiles prospectively if the targeted population is less elastic to policing than the nontargeted population. See *id.* at 111–44. So using the information prospectively may not be wise. But what randomization unquestionably affords is an accurate snapshot of the offending population, and it ensures that the carceral population will accurately reflect all distributions within the offending population.



politically accountable to those against whom it is being deployed. In emphasizing discretion and discrimination, we do not mean to slight privacy protection. We think that randomization protects privacy by ensuring an honest and open evaluation of the level of suspicion necessary to trigger the possibility of police intervention and coercion.

We want to emphasize here that this argument does not require that we promote *suspicionless* searches and seizures. Quite to the contrary, the motivation to eliminate the term “individualized suspicion” from Fourth Amendment jurisprudence is precisely in order to focus the relevant actors’ attention on the *amount* of suspicion necessary for constitutionally justified police–civilian encounters. We advocate a model of randomized searches within groups of individuals who all satisfy a threshold level of suspicion consistent with Fourth Amendment values. A threshold level of suspicion is a critical element to satisfy the constitutional mandate “against unreasonable searches and seizures.”<sup>17</sup> The *amount* of suspicion, not the concept of *individualized* suspicion, protects our privacy, and the method of *randomization*, not retrospective judicial *supervision of discretion*, will ensure reasonable searches and seizures.

Two additional observations. First, where that reasonable level of suspicion should lie is a matter that should be addressed by the United States Supreme Court in dialogue with the American people. Accordingly, we will take no position on the matter here. The fact that this issue has never been squarely addressed by the Court and that, still today, we have no good idea how much suspicion is enough to satisfy the constitutional standards of probable cause or articulable suspicion (under *Terry*) is the best evidence of the damage that the concept of “individualized suspicion” has wreaked.

Second, the level of suspicion that attaches to a randomized search program may often—but will not always—be determinable *ex ante*. Once a randomized search program has been put in place, it will be possible to predict the level of suspicion that will likely attach to future searches. There will be times, however, when randomized search programs are implemented without first knowing the exact level of suspicion attached to the program. In such cases, a compensatory system should be implemented to provide damages (modeled on workman’s compensation) for the set of individuals burdened by what ultimately is determined to be an unreasonable checkpoint search—that is, a search lacking adequate suspicion.<sup>18</sup>

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<sup>17</sup> US Const Amend IV.

<sup>18</sup> We are not the first to advocate compensating individuals for police encounters through a regulatory regime. See Richard Lempert, *Low Probability/High Consequence Events: Dilemmas of Damage Compensation*, 58 DePaul L Rev 357, 360–61, 390 (2009). Combining a

We begin by discussing the real world and workload of police officers as a way to set forth, more precisely, our model of suspicion. We then turn to the constitutional doctrine to demonstrate how our proposal accords with Fourth Amendment values. Using a case that illustrates the contours of our argument, *City of Indianapolis v Edmond*,<sup>19</sup> we explore what it means to model searches on a suspicion-sufficient randomization paradigm. Our argument about why randomization, and not individualization, is the most helpful construct for Fourth Amendment reasonableness comes next. Finally, while it is especially important to distinguish between the constitutional question of reasonableness and the public policy question of efficient policing, we explore some objections and implementation issues. It is not always the case that constitutional requirements and good public policy will necessarily overlap; however, we believe our constitutional paradigm allows for best police practices. Naturally, for our paradigm to work well, a great deal will turn on the pool that is constructed for purposes of randomization, and so we discuss in some detail the pooling issues. We also offer a number of examples. One preliminary matter is clear to us, though: in order to render possible those best practices, a judicial commitment to a new constitutional paradigm of randomization is necessary.

### I. GROUNDED THEORY: THE REALITY OF POLICE PRACTICES

In 2006, New York Police Department (NYPD) police officers stopped, questioned, and frisked 508,540 people.<sup>20</sup> In 2008, the NYPD frisked close to 23,000 more people—531,159—a record, but one that was short-lived. For the calendar year 2009, the NYPD stopped and interrogated a remarkable 575,304 persons.<sup>21</sup> And 2010 promises to break even that record.

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compensation scheme with randomization, however, is new. See Bruce Ackerman, *Before the Next Attack* 54–55 (Yale 2006).

<sup>19</sup> 531 US 32 (2000), affg *Edmond v Goldsmith*, 183 F3d 659 (7th Cir 1999).

<sup>20</sup> Summary of the RAND Report on NYPD's Stop, Question, and Frisk, Hearing before the New York City Council Committee on Public Safety and Committee on Civil Rights (2009) (statement of Greg Ridgeway, RAND Corporation), online at [http://www.rand.org/pubs/testimonies/2009/RAND\\_CT329.pdf](http://www.rand.org/pubs/testimonies/2009/RAND_CT329.pdf) (visited Apr 17, 2011). See also New York Civil Liberties Union (NYCLU), *NYPD Stop and Frisk Practices*, online at <http://www.nyclu.org/stopandfrisk> (visited Apr 17, 2011) (explaining that the vast majority of those stopped are black and Latino). For a detailed description of NYPD frisking procedure, see NYPD, *New York City Police Department Patrol Guide Manual* § 208-05 (2006).

<sup>21</sup> See NYCLU, *NYPD Stop and Frisk Practices* (cited in note 20) (noting that, by the NYPD's own admission, nearly 90 percent of those individuals stopped by police between 2004 and 2010 were completely innocent). See also Commissioner Raymond W. Kelly, *New York City Police Department Stop Question & Frisk Activity: Reports Prepared during the Period January 1 through Mar 31, 2009*, online at [http://www.nyclu.org/files/NYPD\\_Stop-and-Frisk\\_Report](http://www.nyclu.org/files/NYPD_Stop-and-Frisk_Report)

By contrast, adult felony arrests in New York City represent a fraction—approximately one-fifth—of these numbers. In 2006, there were 97,211 felony arrests of adults, of which 27,547 were for violent crimes and 29,058 for drug-related offenses—and some number of these grew out of the stop-and-frisk practices.<sup>22</sup> In 2008, there were 99,960 felony arrests of adults, which included 28,324 violent and 28,764 drug-related offenses.<sup>23</sup>

There is also a Violent Felony Warrant Squad in the NYPD that tracks down individuals wanted on felony warrants in New York City, but its numbers are miniscule in comparison to the ordinary felony arrests. The New York State Police has a Violent Felony Warrant Squad that works in cooperation with every city and local police department in the state of New York, and in 2000, for instance, it arrested 982 persons for violent felonies across the state.<sup>24</sup>

In other words, more than half a million people were stopped and frisked under a Patrol Model in New York City alone, while less than a thousand persons were arrested under the paradigmatic Warrant Model in the entire state of New York.

Even more telling than the raw numbers are the reasons given for stops, questions, and frisks by the NYPD. The NYPD report for the first quarter of 2009 lists reasons for stops, reasons for frisks, reasons for full searches, and additional circumstances that accompanied the incident.<sup>25</sup> The following tables summarize the totals for each category.

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\_1stQtr2009.pdf (visited Apr 17, 2011) (“NYPD Report”); NYCLU, *Record Number of Innocent New Yorkers Stopped, Interrogated by NYPD* (May 12, 2009), online at <http://www.nyclu.org/node/2389> (visited Apr 17, 2011).

<sup>22</sup> Compare New York State Division of Criminal Justice Services, *Adult Arrests: 2001–2010*, online at <http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/NewYorkCity.pdf> (visited Apr 17, 2011) (listing total number of arrests per year in New York City by type of offense, and showing a general decline in total arrests from 2001 to 2005, followed by a dramatic spike in 2007), with NYCLU, *Stop and Frisk Charts*, online at <http://www.nyclu.org/node/1597> (visited Apr 17, 2011) (demonstrating that 4 percent of the stop-and-frisks citywide resulted in arrests, and listing “Area Has a High Crime Incidence,” “Furtive Movements,” and “Time of Day Fits Crime Incidence” as the most frequently cited reasons for the stop).

<sup>23</sup> See New York State Division of Criminal Justice Services, *Adult Arrests: 2001–2010* (cited in note 22). There were twice as many adult misdemeanor arrests during the relevant periods in New York City—206,313 in 2006 and 233,477 in 2008—but those are far more analogous to order-maintenance policing and the stop-and-frisk model than they are to adult felony arrest practices. *Id.*

<sup>24</sup> See New York State Division of State Police, *State Police Violent Felony Warrant Squad Arrest Wanted Felon, the Third in 48 Hours* (July 12, 2001), online at [http://www.troopers.state.ny.us/Public\\_Information/2001\\_News\\_Releases/07-12-01\\_State\\_Police\\_Violent\\_Felony\\_Warrant\\_Squad\\_arrest\\_wanted\\_felon\\_the\\_third\\_in\\_48\\_hours.cfm](http://www.troopers.state.ny.us/Public_Information/2001_News_Releases/07-12-01_State_Police_Violent_Felony_Warrant_Squad_arrest_wanted_felon_the_third_in_48_hours.cfm) (visited Apr 17, 2011). See also Patrice O’Shaughnessy, *Warrant Squad Cops Track Worst Felons*, NY Daily News 12 (Jan 20, 2008), online at [http://www.nydailynews.com/news/2008/01/20/2008-01-20\\_warrant\\_squad\\_cops\\_track\\_worst\\_felons-3.html#ixzz0SQZa3P3O](http://www.nydailynews.com/news/2008/01/20/2008-01-20_warrant_squad_cops_track_worst_felons-3.html#ixzz0SQZa3P3O) (visited Apr 17, 2011).

<sup>25</sup> See *NYPD Report* at 334–35 (cited in note 21).

What is striking is how many of the suspicion categories are group based.

TABLE 1. REASONS FOR STOP

Reason for Stop	Number of Stops
Carrying Suspicious Object	4,122
Fits a Relevant Description	23,053
Casing a Victim or Location	51,015
Suspect Acting as a Lookout	30,121
Suspicious Bulge	16,552
Other	34,708
Actions Indicative of a Drug Transaction	16,124
Furtive Movements	81,692
Actions of Engaging in a Violent Crime	14,479
Wearing Clothes Commonly Used in a Crime	8,856

Source: *NYPD Report* at 334 (cited in note 21).

TABLE 2. REASONS FOR FRISK

Reason for Frisk	Number of Frisks
Inappropriate Attire for Season	15,119
Verbal Threats by Suspect	1,027
Knowledge of Suspect's Prior Criminal Behavior	2,223
Other Suspicion of Weapons	6,005
Furtive Movements	64,068
Actions of Engaging in a Violent Crime	10,822
Refuse to Comply with Officer's Directions	16,874
Violent Crime Suspected	18,753
Suspicious Bulge	15,900

Source: *NYPD Report* at 334 (cited in note 21).

TABLE 3. BASIS FOR SEARCH

Basis for Search	Number of Searches
Hard Object	8,122
Admission by Suspect	548
Outline of Weapon	1,090
Other	6,300

Source: *NYPD Report* at 334 (cited in note 21).

TABLE 4. ADDITIONAL CIRCUMSTANCES

Additional Circumstances	Number of Cases
Report by Victim/Witness	17,247
Area Has High Crime Incidence	97,170
Time of Day Fits Crime Incidence	66,996
Proximity to Scene of Offense	30,563
Associating with Known Criminals	5,902
Other	5,568
Evasive Response to Questioning	33,949
Change Direction at Sight of Officer	43,565
Ongoing Investigation	21,301
Sights or Sounds of Criminal Activity	3,789
Radio Run	40,917

Source: *NYPD Report* at 334–35 (cited in note 21).

These tables demonstrate well that policing is dominated by group-based determinations of suspicion.

#### A. Studies of Police Workload

The place to begin, then, is to look at what the police do on the ground. Here, the data from New York City are entirely consistent with the best available research, which suggests that order-maintenance and preventative policing (the Patrol Model) by far trumps policing tasks directed to the investigation of serious crimes (the Warrant Model).

Policing strategies in the United States have varied over time. An earlier era of “beat policing” was replaced in the 1960s and 1970s—in large part because of perceived problems of corruption—with a more professionalized model of policing based on heavy reliance on patrol cars and dispatching officers through 911-response mechanisms. The 1980s, however, saw the pendulum swing back to beat policing through the concept of “community policing” that eventually swept across jurisdictions throughout the country and, now, is viewed as the dominant and preferred model of policing.<sup>26</sup> The result is that, today,

<sup>26</sup> See George L. Kelling, *Police and Communities: The Quiet Revolution*, in Persp Policing 1 (National Institute of Justice Report Series No 1, Feb 1988) online at <http://www.ojp.usdoj.gov/nij/topics/law-enforcement/administration/executive-sessions/past.htm> (visited Apr 15, 2011) (describing the “reshaping of American policing” in many communities toward a strategy that increasingly focuses on the police’s “contribution to the quality of neighborhood life, not just crime statistics”). See also Stephen D. Mastrofski, James J. Wills, and Tammy Rinehart Kochel, *The Challenges of Implementing Community Policing in the United States*, 1 Policing: J Pol & Prac 223, 225 (2007); Mark Harrison Moore, *Problem-Solving and Community Policing*, 15 Crime & Just: Rev Rsrch 99, 111–27 (1992).

policing agencies claim a greater commitment to community-oriented policing than they did thirty years ago.<sup>27</sup>

Much of the research on police workload was conducted during the period of professionalized policing in the 1960s and 1970s.<sup>28</sup> The lessons from those earlier studies are consistent with and document two important facts about ordinary policing in both urban and rural settings. First, police officers spend only a small fraction of their time in contact with civilians on the street—far less time than we tend to imagine. As one researcher in the field comments, “A major theme of the earliest studies concerning urban police officer workload involved dispelling the popular myth that police spend most of their time protecting the ‘thin blue line’ between law and order . . . by highlighting the predominance of time spent performing service and order maintenance functions.”<sup>29</sup> The second consistent finding is that, of that small portion of their workload dedicated to crime fighting, police officers spend a greater share in their order-maintenance capacity than in their crime-solving capacity. The early studies, in effect, revealed that police officers spent little of their time in reactive crime-solving activities.<sup>30</sup> Since the advent of community policing, a number of studies have returned to the workload question in part to determine whether community-oriented officers are in fact more involved with the community and perform even more service-oriented tasks.<sup>31</sup>

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<sup>27</sup> See Michael D. Reisig, *Community and Problem-Oriented Policing*, 39 *Crime & Justice: Crim. Just. Rev.* 1, 1–2 (2010). See also Roger B. Parks, et al., *How Officers Spend Their Time with the Community*, 16 *Just Q* 483, 514–15 (1999); Gordon P. Whitaker, *What Is Patrol Work?*, 4 *Police Stud.* 13, 13–17 (Winter 1982).

<sup>28</sup> See Brad W. Smith, Kenneth J. Novak, and James Frank, *Community Policing and the Work Routines of Street-Level Officers*, 26 *Crim. Just. Rev.* 17, 17 (2001). For a sample of the early workload studies, see Elaine Cummings, Ian Cummings, and Laura Edell, *Policeman as Philosopher, Guide and Friend*, 12 *Soc. Probs.* 276, 285–86 (1965); Thomas E. Bercal, *Calls for Police Assistance: Consumer Demands for Government Service*, 13 *Am. Behav. Scientist* 681, 689 (1970); John A. Webster, *Police Task and Time Study*, 61 *J. Crim. L., Criminol., & Police Sci.* 94, 100 (1970); Albert J. Reiss Jr., *The Police and the Public* 63–102 (Yale 1971); Gary W. Cordner, *Police Patrol Work Load Studies: A Review and Critique*, 2 *Police Stud.* 50, 57 (Summer 1979); Stephen D. Mastrofski, *The Police and Non-crime Services*, in Gordon P. Whitaker and Charles David Phillips, eds., *Evaluating Performance of Criminal Justice Agencies* 33, 43 (Sage 1983).

<sup>29</sup> John Liederbach, *Addressing the “Elephant in the Living Room”: An Observational Study of the Work of Suburban Police*, 28 *Policing: Intl J. Police Strat. & Mgmt.* 415, 431 (2005).

<sup>30</sup> See Cummings, Cummings, and Edell, 12 *Soc. Probs.* at 284 (cited in note 28); Bercal, 13 *Am. Behav. Scientist* at 688–89 (cited in note 28); Reiss, *The Police and the Public* at 95 (cited in note 28); Webster, 61 *J. Crim. L., Criminol., & Police Sci.* at 95 (cited in note 28).

<sup>31</sup> See Smith, Novak, and Frank, 26 *Crim. Just. Rev.* at 32 (cited in note 28); Parks, et al., 16 *Just Q.* at 500 (cited in note 27); Liederbach, 28 *Policing: Intl J. Police Strat. & Mgmt.* at 430–31 (cited in note 29); James Frank, Steven G. Brandl, and R. Cory Watkins, *The Content of Community Policing: A Comparison of the Daily Activities of Community and “Beat” Officers*, 20 *Policing: Intl J. Police Strat. & Mgmt.* 716, 725–26 (1997).

The Warrant Model and the Patrol Model of policing do not perfectly map on to the workload studies we review here because the research categories are a bit larger and broader. Nevertheless, it is possible to find relatively good proxies for these two different models, and when we do, it is clear that the Patrol Model dominates the Warrant Model. Even a crude measure of police tasks makes clear that police officers today spend a greater amount of their time in the kind of preemptive, preventative, and investigative type of policing activities that are associated with group-probability assessments than they spend in the kind of crime-response or warrant-execution types of activities that are associated with defined or identified suspicion. We review three recent studies here.

One of the most reliable and interesting studies details and compares the workload of community-oriented police officers (known as “COP officers”) to more traditional crime-solving police officers (known as “beat officers”) in the same police department in Cincinnati, Ohio. The data were collected using systematic social observation—actual observations of police officers by trained social scientists—during a thirteen-month period from April 1997 through April 1998.<sup>32</sup> In all, the researchers studied 31 different COP officers over 1,648 hours and 131 different beat officers over 1,888 hours, spanning a total of 442 police shifts over 3,536 hours. Minute by minute, the researchers coded the work activities of the observed officers by 125 different categories of activities and encounters. The activities categories were defined as non-contact because they included behaviors that did not involve face-to-face interaction with civilians. The encounter categories, on the other hand, involved personal interactions between a police officer and a citizen. Every minute of an observed police officer’s activity was coded using 23 different *activity* categories and 102 different *encounter* categories. These categories were then aggregated into a sixteen-category list of workload, ranging from “Personal” and “En route/waiting” to “Administrative,” “Order maintenance,” and “Ordinance enforcement.”<sup>33</sup>

For our purposes, the most important encounter categories are those that involve, on the one hand, “Crime incidents,” and, on the other hand, “Investigative,” “Order maintenance,” and “Traffic enforcement.” The first category, “Crime incidents,” corresponds more closely to our model of warrant policing. It does not map on exactly, and is probably broader, but it is the closest category. It is defined as “[a]ctivities involving a response to a violation of criminal law, for

<sup>32</sup> Smith, Novak, and Frank, 26 *Crim Just Rev* at 22–23 (cited in note 28).

<sup>33</sup> *Id.* at 22–25.

example searching property, serving warrants, or responding to crime calls (e.g., burglary).”<sup>34</sup> Serving warrants, clearly, maps on to our category well, but responding to crime calls is also more likely to trigger encounters with identified suspects—especially in domestic abuse cases or where there are acquaintance crimes. The second category is intended to get at more proactive police tasks that tend to include stops, questioning, and frisks—and more closely maps onto our model of patrol policing. This category includes three rubrics. The first, “Investigative,” is defined as “[a]ctivities involving an unknown problem (e.g., checking out suspicious circumstances, alarm response, or interrogation).” The second, “Order maintenance,” is defined as “[p]roportion of time spent on activities intended to maintain or restore order, such as attempting to keep the peace and dealing with public nuisance problems (i.e., disorderly, drunk, noise disturbance, or arguments).” And the third, “Traffic enforcement,” is defined as “[a]ctivities involving vehicles or the roadways, for example traffic enforcement, traffic or road problems, road block, or accidents.”<sup>35</sup>

What the Ohio study reveals is that, first, consistent with earlier studies, the bulk of a police officer’s workload does not involve civilian contact or crime-fighting activities. Police officers spend more than 75 percent of their time in activities that involve either no contact with citizens or no crime-related activities.<sup>36</sup> This is, of course, an ancillary point, but it remains true even in today’s more community-oriented policing models.

But second, and more importantly, the typical police officer, whether a COP officer or a beat officer, spends more of her time on proactive patrol-model policing than on reactive crime-solving and warrant-type policing. Beat officers, for instance, spend about seventy-six minutes per shift (or 16 percent of their shift) on average engaged in Patrol Model tasks and fifty-eight minutes (or 12 percent of their shift) in Warrant Model activities.<sup>37</sup> Even using these very rough measures of the warrant versus patrol models, police officers in this jurisdiction are spending a greater portion of time in their shifts

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<sup>34</sup> *Id.* at 30.

<sup>35</sup> *Id.* at 37 (explaining their research methods). The other activity categories are of little interest to us either because they exclude civilian contact or because they have nothing to do with crime. So, for instance, “Foot patrol” and “Motor patrol,” which are defined as “[p]roportion of time spent patrolling on foot” or “in vehicle,” respectively, do not include the interaction time with civilians, whereas “Service,” which is defined as “[a]ctivities providing service or assistance to citizens, for example assisting motorists, returning lost property, giving information, providing medical assistance, assisting a citizen locked out of a building, or giving directions,” is not crime related. *Id.*

<sup>36</sup> Smith, Novak, and Frank, 26 *Crim Just Rev* at 37 (cited in note 28).

<sup>37</sup> See *id.* at 26.



engaged in the preemptive, preventative tasks of investigating suspicious behavior and maintaining order.

A second study, conducted by James Frank, Steven Brandl, and R. Cory Watkins, compared the tasks and workloads of traditional crime-solving officers (“beat officers”) to neighborhood officers (“COP officers”).<sup>38</sup> The data were collected using systematic observations between January and August 1995 in Cincinnati, Ohio, as part of a larger study on the effectiveness of community policing efforts.<sup>39</sup> Over the course of the study, the researchers examined sixteen community police officers and fourteen beat officers assigned to the same neighborhoods as the community police officers.<sup>40</sup> Each officer was observed during two eight-hour shifts; observations of COP officers occurred during fifty-nine shifts (totaling 432.20 hours), while observations of beat officers occurred during twenty shifts (totaling 171.48 hours).<sup>41</sup>

The researchers distinguished between crime-related activities and other kinds of service and administrative activities. Crime-related activities involved a specific reported criminal occurrence and included such tasks as “serving warrants on suspects, making arrests, issuing citations, conducting investigations involving specific occurrences, and preparing reports related to specific criminal incidents.”<sup>42</sup> The study revealed that both beat officers and COP officers spent most of their crime-related time conducting vehicle and foot patrol, as compared to the amount of time actually engaged in effectuating an arrest. The activity with the greatest frequency was “Vehicle patrol,” which accounted for 22.01 percent of a COP officer’s time and 32.97 percent of a beat officer’s time.<sup>43</sup> By contrast, making arrests accounted for only 0.90 percent of a COP officer’s time and 6.48 percent of a beat officer’s time.<sup>44</sup> As the authors emphasized, “almost one-third (32.97 percent) of all patrol officer time was spent performing routine vehicle patrol.”<sup>45</sup>

This is even more true in rural, small town, and suburban police forces, which spend an even greater proportion of their time engaged in the kind of traffic enforcement activities that are generally

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<sup>38</sup> See Frank, Brandl, and Watkins, 20 Policing: Intl J Police Strat & Mgmt at 718–20 (cited in note 31).

<sup>39</sup> See id at 717.

<sup>40</sup> See id at 719.

<sup>41</sup> See id at 719–20.

<sup>42</sup> Frank, Brandl, and Watkins, 20 Policing: Intl J Police Strat & Mgmt at 720 (cited in note 31).

<sup>43</sup> See id at 724 table II (beat officer); id at 721 table I (COP officer).

<sup>44</sup> See id at 721, 724.

<sup>45</sup> Id at 723.

associated with preemptive policing—and also, tragically, in this country, with racial profiling. A number of studies have focused on the smaller police agencies in small towns and rural places—policing Mayberry, as it were—and the findings converge here as well.<sup>46</sup>

In a third study, a recent observational study of the workload of the suburban police that used very similar methods and categories—in order to be able to precisely compare their findings with the existing studies on urban forces—the author, John Liederbach, discovered far more time spent on traffic enforcement. This study, too, relied on systematic social observation conducted over a fourteen-month period between April 1999 and May 2000, involving 3,537 hours of observation (the equivalent of 442 eight-hour shifts).<sup>47</sup> The study sites included fourteen different suburban police agencies in Hamilton County, Ohio, with very diverse demographic, socioeconomic, and land use variations. Two of the communities were exclusive upper income, three were middle income residential, two middle income diversified, one middle income integrated, three working class residential, and three working class urbanized. The study utilized the same coding instruments, including both activity and encounter categories.<sup>48</sup>

We can draw four conclusions from this study. First, suburban police officers spent 83 percent of their time on activities that involved no contact with civilians.<sup>49</sup> Second, and more importantly, traffic enforcement was one of the five dominant uses of time and, of those five, the only one involving civilian encounters (the other four top activities were motorized patrol, administrative tasks such as report writing, personal off-duty tasks, and traveling en route to specific locations).<sup>50</sup> Third, of all citizen encounters, traffic enforcement (again) was the most time consuming, representing 30.1 percent on average of police–citizen encounters, in contrast, for example, to 19.1 percent for crime-related activities. Traffic problems “consumed the largest percentage of encounter time” in a large majority of the suburban agencies, as compared to at least nine other categories of tasks (including crime related, investigative, and order maintenance).<sup>51</sup>

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<sup>46</sup> See, for example, John Liederbach and James Frank, *Policing Mayberry: The Work Routines of Small-Town and Rural Officers*, 28 *Am J Crim Just* 53, 69–70 (2003); Ralph A. Weisheit, David N. Falcone, and L. Edward Wells, *Crime and Policing in Rural and Small Town America* 77 (Waveland 1996); Liederbach, 28 *Policing: Intl J Police Strat & Mgmt* at 430 (cited in note 29).

<sup>47</sup> See Liederbach, 28 *Policing: Intl J Police Strat & Mgmt* at 419–20 (cited in note 29).

<sup>48</sup> See *id.* at 421–23 (noting that, depending on their length and whether they included “police business,” interactions with citizens could be coded “brief,” “casual,” or “full”).

<sup>49</sup> See *id.* at 423.

<sup>50</sup> See *id.* at 424.

<sup>51</sup> See Liederbach, 28 *Policing: Intl J Police Strat & Mgmt* at 425 (cited in note 29).

Together, traffic enforcement, investigations, and order maintenance clearly outweighed the other civilian contact hours. Fourth, the amount of time engaged in actually serving warrants was miniscule. The study coded the number of times that police officers encountered different types of problem interactions with civilians, and the tally is revealing.

TABLE 5. QUANTITATIVE COMPARISON OF PATROL VERSUS WARRANT-TYPE POLICE ENCOUNTERS WITH CIVILIANS

Type of Problem	Number of Civilian Encounters
<u>Patrol-type encounters:</u>	
1. Traffic problems	714
2. Investigative problems	197
3. Order maintenance problems	159
Subtotal	1,070
<u>Warrant-type encounters:</u>	
1. Warrant to be served	37
2. Other crime problems	378
Subtotal	415

Source: Liederbach, 28 Policing: Intl J Police Strat & Mgmt at 427–29 (cited in note 29).

The author concluded that these findings “show the predominance of traffic issues for suburban officers in terms of both the large degree of time that traffic problems consumed and the frequency with which these officers encountered traffic problems while on shift.”<sup>52</sup> The author emphasized that “[s]ix of the top problems were traffic related. Excess speed was the most frequently encountered problem as a whole, and traffic was the primary problem in 29.7 percent of all citizen encounters across the fourteen agencies.”<sup>53</sup> These findings are very similar to the findings in small town and rural police departments.<sup>54</sup>

In addition to these three often cited studies, a 2009 study examining the time allocated to proactive and reactive activities by

<sup>52</sup> Id at 427.

<sup>53</sup> Id.

<sup>54</sup> See note 46 and accompanying text.

traditional and community officers provides further support.<sup>55</sup> This study, by Christine Famega, focused more directly on the workload difference between preemptive, proactive policing methods in the mold of the Patrol Model and more reactive, 911-response policing in the mold of the Warrant Model.<sup>56</sup>

Using a method of systematic observation of officers similar to that used in the three earlier studies, the Famega study collected data during a two-week period in 1999.<sup>57</sup> Trained observers accompanied officers during 251 shifts, took notes of the officers' activities during each shift, and recorded 180 types of officer conduct.<sup>58</sup> These observed activities were then classified as either proactive (defined as any "activity initiated by the officer, initiated in response to a citizen at the scene, or based on information of instructions provided by the police") or reactive (defined as any "activity conducted in response to a 911, 311, or district dispatch").<sup>59</sup>

Consistent with earlier studies, the research found that the greatest proportion of officers' proactive time was consumed by patrol activities (34.76 percent for beat officers and approximately 30 percent for community-oriented officers). Proactive policing far outweighs reactive policing: beat officers "spend approximately 21% of their time engaged in reactive activities, 50% of their time engaged in proactive activities, and 29% of their time engaged in other activities."<sup>60</sup>

Although none of the studies map on perfectly to the Patrol Model versus Warrant Model and are, in this sense, only rough proxies for our distinction, each one of them corroborates the central insight that policing today involves far more group-based preemptive suspicion than warrant-like encounters focused on a particular individual. Famega's study may come closest, and its conclusion serves well here:

Overall, 50% of [beat] officer time is spent engaged in proactive activities, as compared to 29% of time engaged in administrative and personal activities (other activities), and 21% of time is spent

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<sup>55</sup> See Christine N. Famega, *Proactive Policing by Post and Community Officers*, 55 *Crime & Delinquency* 78, 98 (2009).

<sup>56</sup> The author's own description is instructive. She notes that the point of the study is to distinguish "between reactive policing, in which citizens mobilize the police to intervene in private affairs (typically through calls for service), and proactive policing, in which police intervene on their own initiative." *Id.* at 78–79.

<sup>57</sup> See *id.* at 86.

<sup>58</sup> See *id.* at 87–88.

<sup>59</sup> Famega, 55 *Crime & Delinquency* at 88 (cited in note 55).

<sup>60</sup> *Id.* at 90.

on reactive activities. Clearly, [beat] officers have a good deal of time for proactive work, though most of it is spent on patrol.<sup>61</sup>

#### B. Modeling Suspicion and Police Practices

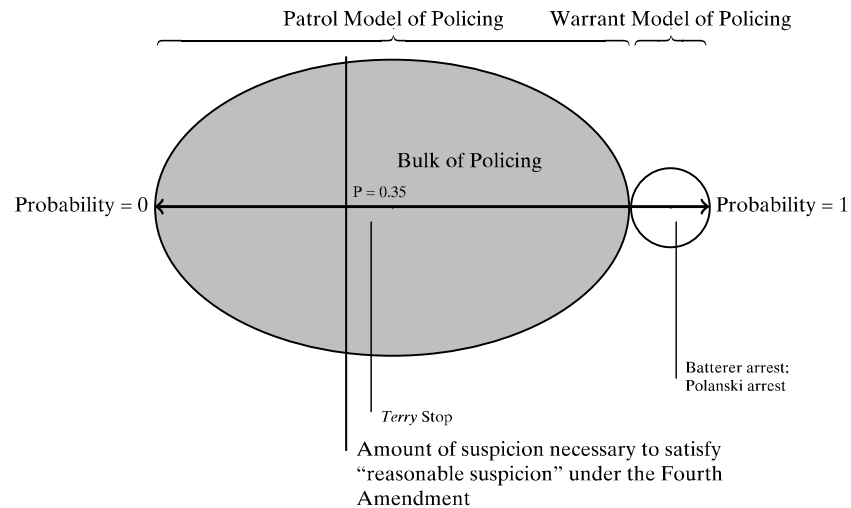
The empirical evidence and workload research suggest a couple of ways of visualizing our main point. The first works in one dimension, along a spectrum delineated by the two opposing ideal types of police–civilian encounters—the Warrant and the Patrol Models. At one end of the spectrum lies the warrant type of encounter: for instance, the situation where the police have unique identifying information concerning a specific individual, such as the spouse batterer who has committed the act in front of the police or the individual bearing Roman Polanski’s passport. This type of encounter is what we have characterized as fitting into a Warrant Model of policing. At the other extreme lies a more speculative group-based identification of a person for an encounter: for instance, a situation involving an apparent truant with a bulge in his pocket, or someone who fits the description of the perpetrator of a recent armed robbery, or an individual who seems to be casing a car or a store. These types of situations, when they give rise to an investigative stop or search, are what we have characterized as fitting into a Patrol Model of policing.

The police research suggests that most police–civilian encounters are arrayed along this spectrum ranging from warrant to patrol models of policing. Not entirely coincidentally, the spectrum also coincides with the range of probabilities of suspicion. The warrant-type encounters are stacked on the side of higher probabilities of suspicion, while the patrol-type encounters are arrayed toward the lower end of the probabilities scale. We believe, and research demonstrates, that most police work loads onto the Patrol Model end of the spectrum as opposed to the Warrant Model end, which is also to say that most of the time when police officers engage people, they are operating on the basis of a probability of suspicion that is far smaller than 1. This is illustrated in Figure 1.

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<sup>61</sup> Id at 98.

FIGURE 1.

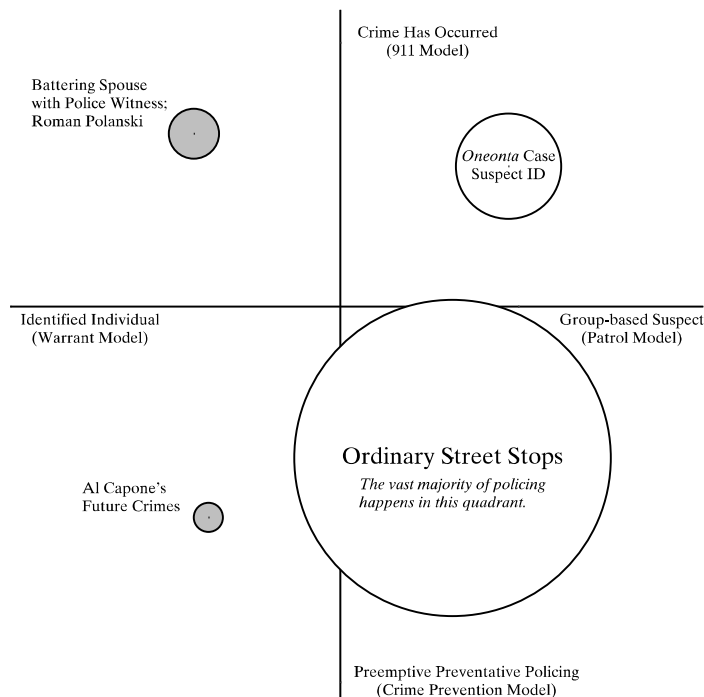


As Figure 1 suggests, there are, on the right-hand side, a limited number of police encounters that come close to the execution of an arrest warrant for a fugitive or for an accused who committed his crime on videotape. These are the extreme cases where the level of suspicion is close to 1 on a probability scale and where the proper model to evaluate reasonable suspicion may as well be binary. The suspect is “the one” in most of these warrant model cases. Reconsider our previous example of a police officer who witnesses a known batterer beat his wife. Again, the suspect here is almost surely the right person. To the left of that small set of cases, though, is the vast majority of policing encounters. These cases are far more speculative, and the probability that the suspect is in fact guilty of a crime ranges widely. Individuals may be suspected because they fit a description (young black male near the scene of the robbery), or fit a suspect behavior (glancing furtively while “casing” an establishment), or demonstrate a suspect trait (wearing a heavy overcoat in the summer heat or displaying a bulge in his pants pocket). The probability of the suspicion varies in all of these cases based on the group-based nature of the suspicious trait or behavior. There is no “on” or “off” of individual suspicion here; rather, there are just levels of suspicion that may or may not meet constitutional muster. Somewhere along that spectrum, the Supreme Court must draw the line of reasonableness.

Our point can also be represented two dimensionally. The first dimension (x-axis) has to do with whether the police have identified a particular individual or whether the police are engaged in purely preventative policing. The second dimension (y-axis) has to do with

whether there is a crime that has occurred and needs to be solved or whether the police are merely policing to prevent crimes from happening. The two dimensions give rise, essentially, to a two-by-two graph where the Patrol Model cases (white) can be distinguished from the Warrant Model incidents (grey).

FIGURE 2.



In the upper-left quadrant, the prototypical case is that of an identified individual who has been accused of an identifiable crime—say, the battering husband or Roman Polanski. These cases fit the Warrant Model. The upper-right-hand quadrant contains cases, like the famous case of *Brown v City of Oneonta*,<sup>62</sup> where a crime has been committed and all the police have is an eyewitness lead based on some general demographic traits.<sup>63</sup> The witness identification there led to the interrogation and search of the hands of all the young African

<sup>62</sup> 221 F3d 329 (2d Cir 2000).

<sup>63</sup> See id at 333–34.

Americans in the town.<sup>64</sup> This qualifies as the Patrol Model. In the lower-left quadrant there are oddball cases of identified persons whose crime has not yet been identified perfectly—for instance, Al Capone.<sup>65</sup> These few cases would be characterized as warrant-type investigations. In the bottom-right quadrant, well, that is the bulk of policing: cases of ordinary street stops.

It should be clear by now that the vast majority of police work covers the bottom-right part of the graph. In that quadrant (and in the adjoining area above), the reasonableness of the suspicion bears little relationship to a model that targets a particular individual. In these cases, we do not really care that suspicion attaches to an individual qua individual, rather than to the individual as a member of a group. What we care about is the *level of suspicion* that attaches to the group of individuals who are identified as sharing whatever combination of traits, conditions, or behaviors and how *reliably* that level of suspicion can be demonstrated. The police do not need individualized suspicion in these cases. What they need is the right quantum of probabilistic suspicion for the group. Once one accepts this point, it should be clear that adding the word “individualized” to suspicion is not helpful to answering the central question in these Fourth Amendment cases: whether the police activity is “reasonable.”

In truth, the only way to make semantic sense of the term “individualized suspicion” in the vast majority of cases that lie in the lower right quadrant of the table would be to require that the intersection of suspicious group-based traits, conditions, and behaviors identify a *unique* individual. Obviously, that requirement would represent a degree of certainty of suspicion that is exponentially greater than the level of suspicion that courts conventionally attach to the term “individualized suspicion” in Fourth Amendment jurisprudence. Such a requirement would defy common sense, and most people would likely find it intolerable.

We do not think it is necessary or desirable to reduce the quantum of suspicion necessary to satisfy the Fourth Amendment in order to pursue the goal of randomization. Our goal instead is to propose a constitutional framework that allows courts to better define

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<sup>64</sup> Id at 334 (noting that, because the witness had told police that the assailant had cut his hand during the attack, police inspected the hands of over two hundred nonwhite residents of Oneonta).

<sup>65</sup> See Daniel C. Richman and William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum L Rev 583, 583–84 (2005) (noting that “Al Capone [remains] the poster child for pretextual prosecution” because, although the government strongly suspected him of serious crimes such as murder and racketeering, it opted instead to prosecute him for the lesser charge of tax evasion).



and track the level of suspicion that police officers and agencies need in order to satisfy constitutional mandates. By paying attention to the *level* of suspicion in searches and seizures, rather than the *individualization* of suspicion, courts will be in a better position to give meaning to the notion of reasonableness.

## II. RETHINKING FOURTH AMENDMENT PRINCIPLES

The Supreme Court has debated the pros and cons of randomized search programs in a number of discrete Fourth Amendment contexts—such as border patrol roadblocks as well as administrative and public school drug-testing programs.<sup>66</sup> In all of these situations, the Court has considered the propriety of extending the requirement of “individualized suspicion” outside the nucleus of police and crime-related searches and seizures. It is important to emphasize at the outset, though, that in all of those other areas the notion of “individualized suspicion” is opposed to *suspicionless* searches and seizures. The debate is not between “individualized suspicion” versus a probabilistic notion of suspicion like ours. The debate is *always* cast in terms of a choice between “individualized suspicion” on the one hand and *no suspicion at all* on the other.

The Court has repeatedly made clear that the exceptional categories of searches that are exempt from the “individualized suspicion” requirement fall under the rubric of “*suspicionless* searches and seizures.”<sup>67</sup> As Justice Antonin Scalia emphasized in the public school drug-testing context, “We have upheld *suspicionless* searches and seizures to conduct drug testing of railroad personnel involved in train accidents; to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction; and to maintain automobile checkpoints looking for illegal immigrants and contraband.”<sup>68</sup>

In *that* debate—the debate between suspicion-full and suspicionless searches and seizures—we fall on the side of requiring suspicion, especially in the policing context.<sup>69</sup> We believe that reasonable searches

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<sup>66</sup> See *United States v Martinez-Fuerte*, 428 US 543, 562 (1976); *Board of Education v Earls*, 536 US 822, 836 (2002); *Vernonia School District 47J v Acton*, 515 US 646, 661–65 (1995).

<sup>67</sup> See, for example, *Vernonia*, 515 US at 653–54 (emphasis added); *id.* at 667–68 (O’Connor dissenting) (“For most of our constitutional history, mass, *suspicionless* searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment.”) (emphasis added).

<sup>68</sup> *Id.* at 653–54 (majority) (emphasis added).

<sup>69</sup> We are interested only in the policing context and, for that reason, do not really engage the question of the propriety of suspicionless searches in administrative or other nonpolicing contexts, such as the issue presented in *Ferguson v City of Charleston*, 532 US 67 (2001). We lean in favor of requiring suspicion in those contexts, too, though the level of suspicion could be set

and seizures in the policing context require a certain level of suspicion. What we argue, though, is that it is precisely *the level of suspicion* that should be the focus of the reasonableness inquiry<sup>70</sup>—along with the evenhandedness of the searches. Search programs that reveal levels of suspicion that fall below constitutional minimums *are* inappropriate in the criminal justice context; what reasonableness and privacy require are a certain acceptable quantum of suspicion. In this sense, we do not espouse suspicionless mass searches, but rather randomized programs that meet target levels of suspicion. We acknowledge that the level of suspicion may need to be determined *ex post* in certain cases and, as a result, would need to go hand in hand with a compensation mechanism for those randomized programs that do not meet the minimum level of suspicion. We address this in Part IV.B.

#### A. Suspicionless Search Programs

The Court has addressed the question of suspicionless search programs in a number of different situations. As a doctrinal matter, the framing of the question is identical in all of the “exceptional cases” where suspicionless searches are or are not deemed constitutional. As the Supreme Court made clear in a number of early cases, the Fourth Amendment’s Warrant Clause is not applicable to all searches and seizures, especially not to those that are conducted on the street in a volatile or fluid context.<sup>71</sup> The Warrant Clause does not apply to searches of cars, since they might move,<sup>72</sup> or to suspects on the street during unanticipated encounters.<sup>73</sup> As such, the probable cause requirement specified in the Warrant Clause also does not attach. The Court has, however, imposed the same requirement of probable cause—and subsequently, in certain situations, of articulable suspicion—as the standard to evaluate reasonableness under the more general “reasonableness” subclause of the Fourth Amendment. It is the probable cause standard that has evolved, over time, into the requirement that there be “individualized suspicion.” All of this is standard fare.

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lower and established after the fact; but we have no deep stake in taking a position outside the criminal justice context.

<sup>70</sup> For a similar argument, see Christopher Slobogin, *The World without a Fourth Amendment*, 39 UCLA L Rev 1, 38–75 (1991).

<sup>71</sup> See *Carroll v United States*, 267 US 132, 146 (1925); *Payton v New York*, 445 US 573, 576 (1980). See also US Const Amend IV.

<sup>72</sup> *Carroll*, 267 US at 162 (holding that police were not required to obtain a warrant for the search of a car).

<sup>73</sup> *United States v Watson*, 423 US 411, 423–24 (1976) (“[T]he judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation.”).

In a line of Fourth Amendment cases, however, the Supreme Court has drawn exceptions to the “individualized suspicion” requirement. These exceptional situations traditionally have lain outside the conventional crime and policing contexts and have been justified on the grounds of necessity or efficacy. As Justice O’Connor explained, dissenting in *Vernonia School District 47J v Acton*,<sup>74</sup> the public school drug-testing case, “[W]e have allowed exceptions in recent years only where it has been clear that a suspicion-based regime would be ineffectual.”<sup>75</sup> As a result, and as the Court declared in one of the first such cases, *Skinner v Railway Labor Executives’ Association*,<sup>76</sup> involving a drug-testing scheme for railroad engineers involved in a train accident, “In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.”<sup>77</sup> These cases, in fact, have spawned a constitutional maxim of their own: “the Fourth Amendment imposes no irreducible requirement of such [individualized] suspicion.”<sup>78</sup>

The Court has articulated a number of exceptions to suspicion-based search regimes in discrete areas such as randomized drug testing in public schools and suspicionless roadblocks at or near the border. These are the cases that have given rise to what the Court refers to as “the closely guarded category of constitutionally permissible suspicionless searches.”<sup>79</sup>

### 1. Drug testing in public schools.

The first line of cases—*Vernonia School District 47J v Acton* and *Board of Education v Earls*<sup>80</sup>—involve suspicionless drug testing in public schools. In *Vernonia*, the Court, with Justice Scalia writing, held that random drug testing of student athletes did not violate the Fourth Amendment.<sup>81</sup> During the 1980s, drug use in Vernonia schools had increased sharply, or so the majority found, and athletes were

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<sup>74</sup> 515 US 646 (1995).

<sup>75</sup> *Id.* at 667–68 (O’Connor dissenting).

<sup>76</sup> 489 US 602 (1989).

<sup>77</sup> *Id.* at 624–25.

<sup>78</sup> The famous passage is originally from *Martinez-Fuerte*, 428 US at 560–61, and has been repeated in myriad subsequent cases. See, for example, *Vernonia*, 515 US at 643; *New Jersey v T.L.O.*, 469 US 325, 342 n 8 (1985); *Earls*, 536 US at 829–30; *Samson v California*, 547 US 843, 855 n 4 (2006).

<sup>79</sup> *Earls*, 536 US at 854 (Ginsburg dissenting). See also *Chandler v Miller*, 520 US 305, 309 (1997).

<sup>80</sup> 536 US 822 (2002).

<sup>81</sup> 515 US at 664–65.

perceived as the “leaders of the drug culture.”<sup>82</sup> After exploring a variety of alternatives, the school district implemented a policy directing school officials to randomly choose 10 percent of student athletes to drug test each week. If a student tested positive, then that student had to participate in a six-week assistance program or suffer suspension from athletics for the remainder of the current season and the subsequent season.<sup>83</sup>

In his opinion for the Court, Justice Scalia considered a three-factor test to ascertain whether “individualized suspicion” was necessary—looking first at the nature of the privacy interest at stake, second at the nature of the privacy invasion, and third at the nature and immediacy of the governmental concern.<sup>84</sup> Because legitimate privacy expectations are attenuated in a school setting (and to an even greater degree in student athletic settings), because the results of the test were disclosed to others only on a “need to know” basis, and because the state has a strong interest in deterring drug use among schoolchildren, Justice Scalia concluded that random drug testing did not violate the Fourth Amendment.<sup>85</sup>

Seven years later, in *Board of Education v Earls*, the Court expanded its decision in *Vernonia* to hold that mandatory drug testing for all students who participated in extracurricular activities was constitutional.<sup>86</sup> The Court rejected the Tenth Circuit’s holding that a school must be able to identify drug abuse among a sufficient number of students and demonstrate that the testing will actually capture those groups of students.<sup>87</sup> Applying *Vernonia*’s “fact-specific balancing inquiry,” Justice Clarence Thomas, writing for the Court, found that students participating in extracurricular activities had only a limited expectation of privacy and that the intrusion on their privacy was minor because the information was distributed on a “need to know” basis and no authorities would be notified.<sup>88</sup> The Court also found that the nature and immediacy of protecting schoolchildren’s health—even absent a factual showing of a serious drug problem—was a sufficiently important government interest.<sup>89</sup>

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<sup>82</sup> Id at 648–49.

<sup>83</sup> Id at 650–51.

<sup>84</sup> See id at 654–64.

<sup>85</sup> See *Vernonia*, 515 US at 664–65.

<sup>86</sup> See *Earls*, 536 US at 838 (holding that, since the school’s drug-testing policy was constitutional in light of its custodial responsibilities toward its students, it need not focus solely on those students most likely to be using drugs).

<sup>87</sup> See *Earls v Board of Education*, 242 F3d 1264, 1278 (10th Cir 2001), revd 536 US 822 (2002).

<sup>88</sup> See *Earls*, 536 US at 833.

<sup>89</sup> See id at 834–38.

The public school drug-testing cases gave rise to a sharp debate between, on the one hand, Justices Scalia and Thomas, and, on the other hand, Justices O'Connor and Ruth Bader Ginsburg. All made significant use of history—the first two by its absence, the second two by its presence. Justice Scalia's historical search for "clear practices" at the time of adoption left little room for reasoning by analogy. Because public schools did not exist at the time the Fourth Amendment was adopted and the drug problem (and related technology) is of more recent vintage, Justice Scalia found that no sufficiently analogous searches existed and therefore relied on the plain meaning of the text. "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"<sup>90</sup> And, where there was no clear practice either approving or disapproving the type of search at issue at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interest."<sup>91</sup>

Justice O'Connor, on the other hand, relied on the Court's historical treatment of the Fourth Amendment. Although the text of the Fourth Amendment does not explicitly require individualized suspicion, Justice O'Connor argued in dissent that, "[f]or most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment."<sup>92</sup> Justice O'Connor relied heavily on *Carroll v United States*,<sup>93</sup> in which the Court stated in 1925 that "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the indignity of such a search."<sup>94</sup> Justice O'Connor used several historical studies to bolster her claim that the Framers believed that blanket searches were "intolerable and unreasonable" and intended to codify that conviction into the Fourth Amendment.<sup>95</sup>

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<sup>90</sup> *Vernonia*, 515 US at 652–53.

<sup>91</sup> *Id.*, quoting *Skinner*, 489 US at 619.

<sup>92</sup> *Vernonia*, 515 US at 667–68 (O'Connor dissenting).

<sup>93</sup> 267 US 132 (1925).

<sup>94</sup> *Id.* at 153–54.

<sup>95</sup> Justice O'Connor mentions the following scholarly resources: William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791* (Oxford 2009); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U Memphis L Rev 483 (1994); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S Cal L Rev 1 (1994); Leonard W. Levy, *Original Intent and the Framers' Constitution* (MacMillan 1988).

The fact is that the debate is narrowly circumscribed, rests on common legal ground, and is limited to a disagreement over the effectiveness of suspicion-based search programs. Both sides agree that “individualized suspicion” is not required in all contexts and that the effectiveness of a search program is key to the determination. They disagree, however, as to the *effectiveness* of suspicion-based searches in the public school context. Thus, Justice O’Connor wrote: “[W]e have allowed exceptions in recent years only where it has been clear that a suspicion based regime would be ineffectual.”<sup>96</sup> In a surprisingly similar passage, Justice Scalia argued that, because the Fourth Amendment has “no irreducible requirement of suspicion,”<sup>97</sup> in situations where it would be “impracticable” due to “special needs” to determine individualized suspicion, a search will not violate the Fourth Amendment.<sup>98</sup> Both sides agree that there ought to be a *preference* for suspicion, but the crux of their disagreement is over the technical effectiveness of the search programs.

## 2. Border Patrol roadblocks.

In another line of cases culminating in *United States v Martinez-Fuerte*,<sup>99</sup> the Supreme Court addressed the constitutionality of fixed immigration checkpoints and there, too, held that suspicionless searches passed constitutional muster—more specifically, that Border Patrol agents require no articulable suspicion to stop and question motorists at a roadblock within one hundred miles of the Mexican border.<sup>100</sup>

The *Martinez-Fuerte* case arose from arrests made at two different permanent immigration checkpoints within one hundred miles of the Mexican border: one in California, the other in Texas. Both checkpoints were marked in the traditional fashion with large black-on-yellow signs and flashing lights and subsequent warning signs as motorists got closer. At the first checkpoint in San Clemente, California, the point agent visually screened all northbound traffic, but did not conduct questioning there. Instead the agent would select a number of motorists for further investigation at a secondary inspection site, where other agents would stop and question the motorists about their citizenship and immigration status. At the time of the arrests at the San Clemente checkpoint, a magistrate had issued a “warrant of inspection” that authorized the Border Patrol to

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<sup>96</sup> *Vernonia*, 515 US at 668 (O’Connor dissenting).

<sup>97</sup> *Id* at 653, quoting *Martinez-Fuerte*, 428 US at 560–61.

<sup>98</sup> *Vernonia*, 515 US at 653, quoting *Griffin v Wisconsin*, 483 US 868, 973 (1987).

<sup>99</sup> 428 US 543 (1976).

<sup>100</sup> *See id* at 566–67.

conduct roadblock operations at the site.<sup>101</sup> At the Sarita, Texas, checkpoint, Border Patrol officers would stop all northbound traffic for brief questioning, with the exception of local residents whom the officers recognized. In contrast to the San Clemente checkpoint, there was no judicial warrant regarding the operations at Sarita.<sup>102</sup>

In a 7–2 decision, the Supreme Court held that neither articulable suspicion nor a judicial warrant was necessary as a precondition for a search at an immigration roadblock within one hundred miles of the border.<sup>103</sup> In other words, no suspicion was required. Justice Lewis Powell wrote the opinion for the Court and began by considering the balance of interests. Permanent checkpoints, the government argued, were “the most important of the traffic-checking operations.”<sup>104</sup> They were also highly effective, Justice Powell suggested. The San Clemente checkpoint, for instance, resulted in the apprehension of seventeen thousand illegal aliens in 1973 from about ten million cars that passed through the checkpoint.<sup>105</sup> Their effectiveness, Justice Powell intimated, would be greatly diminished if stops had to be based on reasonable suspicion; such a requirement

would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly.<sup>106</sup>

By contrast, the intrusion on liberty was relatively minor—in Justice Powell’s words, “quite limited.”<sup>107</sup> All that was required of travelers was a “brief detention,” “a response to a brief question or two,” and “possibly the production of a document evidencing a right to be in the United States.”<sup>108</sup> Justice Powell emphasized that the *subjective* intrusion was “appreciably less in the case of a checkpoint stop.”<sup>109</sup> These stops involve less discretion on the part of the agents,

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<sup>101</sup> See *id.* at 545–50.

<sup>102</sup> See *id.* at 549–50.

<sup>103</sup> See *Martinez-Fuerte*, 428 US at 566–67 (limiting the holding to the “types of stops described in [the] opinion—that is, stops that are brief, routine, and conducted at permanent checkpoints”).

<sup>104</sup> *Id.* at 556–57.

<sup>105</sup> See *id.* at 554.

<sup>106</sup> *Id.* at 557.

<sup>107</sup> *Martinez-Fuerte*, 428 US at 557.

<sup>108</sup> *Id.* at 558, quoting *United States v. Brignoni-Ponce*, 422 US 873, 880 (1975).

<sup>109</sup> *Martinez-Fuerte*, 428 US at 558.

less interference with legitimate traffic, and less potential for abuse. Even the secondary stops at the San Clemente checkpoint, Justice Powell argued, were relatively minor. Those referrals were “made for the sole purpose of conducting a routine and limited inquiry into residence status” and involved an “objective intrusion” that “remains minimal.”<sup>110</sup> “Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature.”<sup>111</sup> As a result, and because of the more limited expectation of privacy in cars as opposed to homes, Justice Powell concluded that no individualized suspicion at all was needed “at reasonably located checkpoints.”<sup>112</sup>

Justice William Brennan wrote a heated dissent, in which Justice Thurgood Marshall joined. Justice Brennan described the result as the “defacement of Fourth Amendment protections,”<sup>113</sup> declaring that “[t]oday’s decision is the ninth this Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures.”<sup>114</sup> What Justice Brennan objected to most was the lack of any objective standard to evaluate the reasonableness of the stop. Whereas in previous cases—*Almeida-Sanchez v United States*,<sup>115</sup> *United States v Ortiz*,<sup>116</sup> and *United States v Brignoni-Ponce*<sup>117</sup>—the Court had required some modicum of reasonableness,<sup>118</sup> here the Court abandoned the reasonableness standard completely:

We are told today [ ] that motorists without number may be individually stopped, questioned, visually inspected, and then further detained without even a showing of articulable suspicion, let alone the heretofore constitutional minimum of reasonable suspicion, a result that permits search and seizure to rest upon “nothing more substantial than inarticulate hunches.”<sup>119</sup>

On our view, naturally, there was a level of suspicion at the roadblocks, and the only important question would have been whether the hit rates at those checkpoints satisfied the minimum threshold to be established by the Court.

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<sup>110</sup> *Id.* at 560.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 562.

<sup>113</sup> *Martinez-Fuerte*, 428 US at 569 (Brennan dissenting).

<sup>114</sup> *Id.* at 567.

<sup>115</sup> 413 US 266 (1972).

<sup>116</sup> 422 US 891 (1974).

<sup>117</sup> 422 US 873 (1975).

<sup>118</sup> See *Almeida-Sanchez*, 413 US at 273–74; *Ortiz*, 422 US at 897–98; *Brignoni-Ponce*, 422 US at 878.

<sup>119</sup> *Martinez-Fuerte*, 428 US at 569–70 (Brennan dissenting), quoting *Terry*, 392 US at 22.



### 3. Other contexts.

In addition, the Court has upheld a number of suspicionless search programs outside the criminal context, such as inspections of commercial establishments<sup>120</sup> and searches in correctional facilities.<sup>121</sup> There are other cases, however, in which, drawing on the very same logic and rationale, the Court has struck down suspicionless search programs. An example is *Chandler v Miller*,<sup>122</sup> where the Court reviewed the state of Georgia's legal requirement that any candidate for state office pass a drug test.<sup>123</sup> The *Chandler* Court held that the drug-testing program did not respond to a "concrete danger," that there was no evidence of a particular drug problem, and that state office holders were not engaged in tasks that carried high risks or safety hazards for third parties.<sup>124</sup> In other words, there was no special need or compelling state interest and no good reason to infringe on privacy interests.

The upshot of this line of cases is that suspicionless searches ought to be strictly curtailed to all but the most "exigen[t]" circumstances, "after balancing the invasion of privacy against the government's strong need."<sup>125</sup> The Court's construction of the Fourth Amendment is that "individualized suspicion" should reign in the core criminal context of traditional policing, but that exceptions can be made outside that core context where the requirement of suspicion would render the program ineffectual and where there is both an important state interest and a limited infringement of privacy.<sup>126</sup>

But in all of these cases, the debate has been about suspicion-based versus *suspicionless* searches—and in that sense, they are all orthogonal to our argument.<sup>127</sup> We are *not* arguing for *suspicionless*

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<sup>120</sup> See *New York v Burger*, 482 US 691, 702 (1987) (upholding as constitutional a New York statute allowing warrantless investigations of vehicles in privately owned junkyards because junkyards fit within the "closely regulated industry" exception to the Fourth Amendment's warrant requirement).

<sup>121</sup> See *Bell v Wolfish*, 441 US 520, 557 (1979).

<sup>122</sup> 520 US 305 (1997).

<sup>123</sup> See *id.* at 309–10.

<sup>124</sup> See *id.* at 321–22.

<sup>125</sup> *Vernonia*, 515 US at 673 (O'Connor dissenting). See also *Skinner*, 489 US at 624.

<sup>126</sup> See *Vernonia*, 515 US at 673–74 (O'Connor dissenting).

<sup>127</sup> There is, however, something very interesting about *Vernonia*. It turns out, actually, that there may have been a suspicion basis to the random drug-testing program. The evidence of drug use from the school suggested (not only to the school authorities, but also to Justice Scalia) that the student athletes had a higher probability of using drugs—that the student athletes were, as a group, in a class of more likely drug abusers. As the lower court found, and Justice Scalia noted, "athletes were the leaders of the drug culture." *Id.* at 649. And it was this group that was singled out for random searches; as Justice Scalia emphasized, "The Policy applies to all students participating in interscholastic athletics." *Id.* at 650. So, even though the Court and the parties considered the program "suspicionless," there is reason to believe that there was, in fact,

searches. To the contrary, we are demanding that a level of suspicion be established as a precondition to the constitutionality of the search. We are setting the level of suspicion as the baseline. If anything, we are demanding *more* than the Court does in the traditional crime-related policing context. We are asking that the actual level of suspicion be articulated on a probability scale and that all search programs be evaluated against that chosen level.

Our challenge, then, is not to “individualized suspicion” as opposed to suspicionless searches. We are all for suspicion. Our trouble is instead with the idea of “*individualized* suspicion,” which, we believe, is a misguided add-on to the notion of suspicion.

#### B. The Birth of “Individualized Suspicion”

The term “individualized suspicion” is itself of recent vintage. The linguistic history of the term’s usage suggests that it was born in the 1970s and has been used increasingly at both the state and federal levels.<sup>128</sup> As both state and federal courts have become increasingly invested in developing a jurisprudence of Fourth Amendment reasonableness outside what we call the Warrant Model, use of the term “individualized suspicion,” as well as other synonyms, such as “particularized suspicion,” has proceeded apace.

In effect, the term “individualized suspicion” has become today a placeholder for the conclusion that a search is “reasonable”—or for that matter, that there is “probable cause” or “articulable suspicion.” When courts find (or do not find) “individualized suspicion,” they are in fact merely using a substitute term for the idea of probable cause, a term that itself was never properly defined.<sup>129</sup> The evidence surrounding the usage of the term “individualized suspicion” is entirely consistent with this.

The term “individualized suspicion” dates from the mid-1970s. One of the earliest uses of the term was, in fact, in the *Martinez-Fuerte* decision in 1976.<sup>130</sup> Usage of the term has mushroomed over the past few decades in both federal and state courts. The term actually emerged hand in hand with two others—“particularized suspicion”<sup>131</sup> and “unparticularized suspicion”—the latter term appearing first in

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suspicion underlying the targeting of the school athletes. Depending on the level of suspicion, then, it could have been reasonable, in our view, to use a targeted random testing program.

<sup>128</sup> For more on the development of the term in Supreme Court jurisprudence, see Clancy, 25 U Memphis L Rev at 531–85 (cited in note 95).

<sup>129</sup> See, for example, *Ornelas v United States*, 517 US 690, 695 (1996). But see *Brinegar v United States*, 338 US 160, 175–76 (1949), quoting *Carroll*, 267 US at 162.

<sup>130</sup> See 428 US at 560.

<sup>131</sup> See, for example, *id* at 564 n 18; *People v Hyde*, 524 P2d 830, 835 (Cal 1974).

*Terry v Ohio*.<sup>132</sup> It is revealing to look at the historical use of all three sets of terms.

The following graphs reflect the usage of the term in judicial decisions. The data were obtained using the LEXIS database. The first graph reflects usage of the term “individualized suspicion” in federal court cases; the second, in state court cases.

TABLE 6. NUMBER OF FEDERAL CASES USING THE TERM “INDIVIDUALIZED SUSPICION”

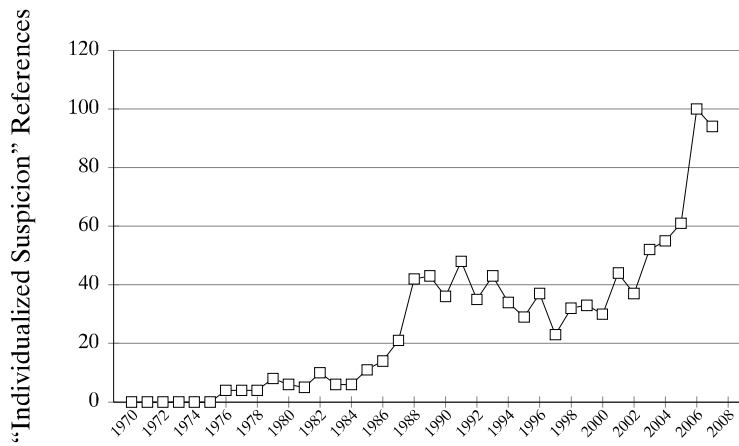
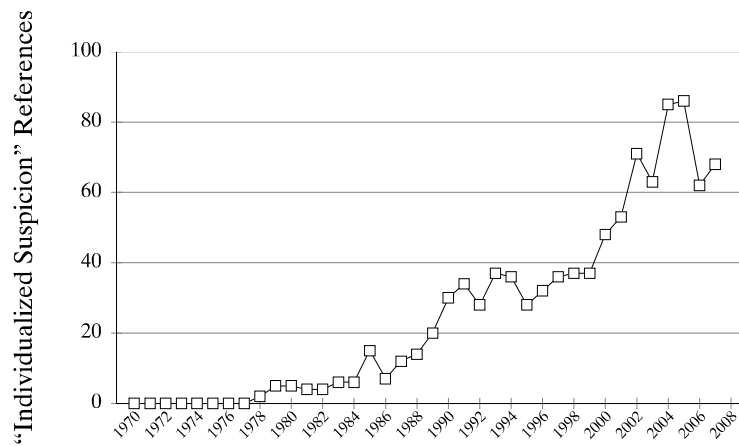


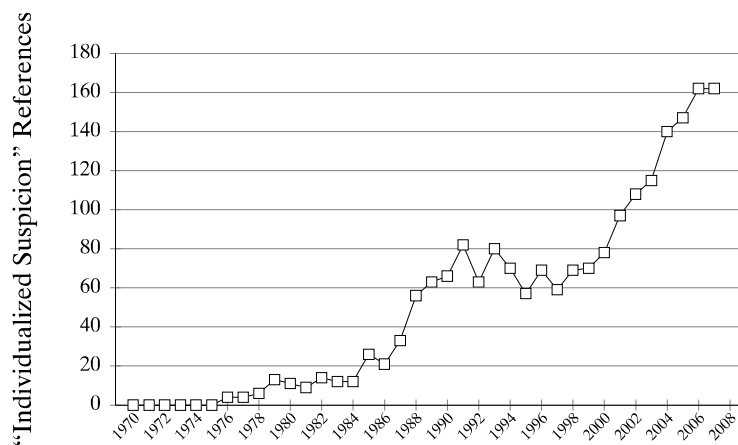
TABLE 7. NUMBER OF STATE CASES USING THE TERM “INDIVIDUALIZED SUSPICION”



<sup>132</sup> 392 US at 27.

Notice that there is a slight lag from the federal cases to the state cases, which reflects, naturally, that the term originated in the federal appellate courts.<sup>133</sup> The following graph is the combined state and federal cases using the term “individualized suspicion,” and it reflects a relatively consistent upward trend, with 164 uses of the term in 2006 and 162 in 2007.

TABLE 8. COMBINED STATE AND FEDERAL CASES



The pattern illustrated in the graphs is entirely consistent with the idea that the new term emerged in the 1970s and then took off as a way to render more concrete a notion of reasonable or articulable suspicion that—just like probable cause—was never specifically defined in probabilistic terms.<sup>134</sup> The term “individualized suspicion” was intended to carry some substantive meaning, but no courts has attempted that task. Instead, the term is a mere rhetorical trope: it is a conclusory statement that says nothing more than that the search was found to be reasonable.

This state of affairs also appears to be true for a related term, “particularized suspicion.”

<sup>133</sup> See, for example, *Martinez-Fuerte*, 428 US at 560; *State v McLaughlin*, 471 NE2d 1125, 1141 (Ind App 1984), citing *Delaware v Prouse*, 440 US 648, 654–55 (1979).

<sup>134</sup> Consider *Alabama v White*, 496 US 325, 329–30 (1990), quoting *INS v Delgado*, 466 US 210, 217 (1983).

TABLE 9. NUMBER OF FEDERAL CASES USING THE TERM “PARTICULARIZED SUSPICION”

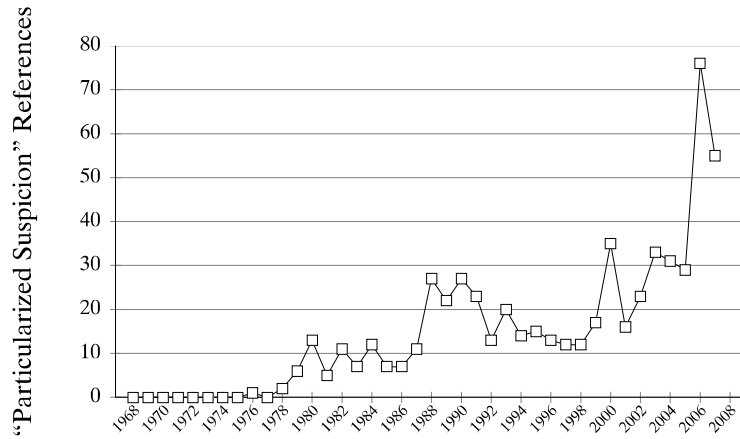
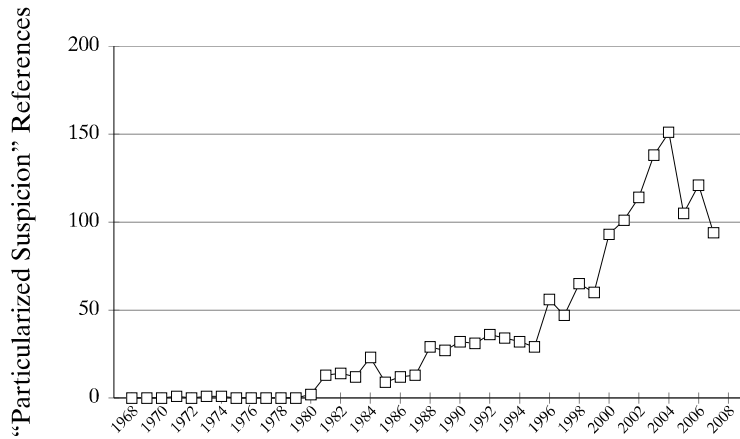
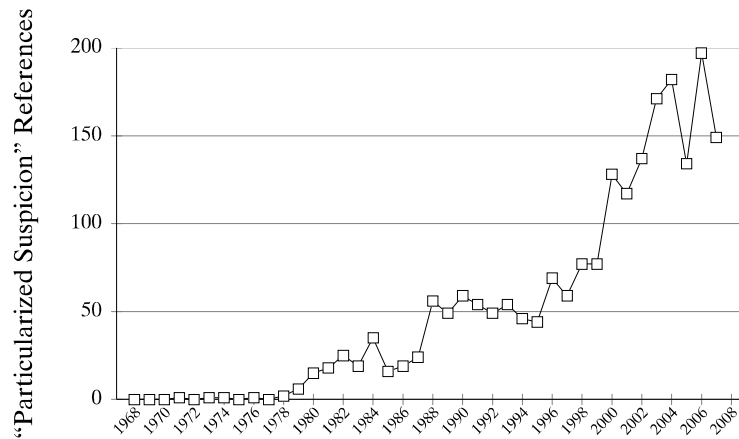


TABLE 10. NUMBER OF STATE CASES USING THE TERM “PARTICULARIZED SUSPICION”



Again, the combined data for federal and state uses of “particularized suspicion” show a relatively consistent increase, with a slight dip in the final year of the data (2007), but no indication of a significant shift in usage.

TABLE 11. COMBINED STATE AND FEDERAL CASES



Our argument is not that courts are being intentionally obscurantist. Instead, by looking at the empirical trajectory of the term, we simply mean to highlight the linguistic history and suggest that it is entirely consistent with our claim that the term “individualized suspicion” has become, today, a placeholder for the conclusion that a search is “reasonable”—or for that matter, that there is “probable cause” or “articulable suspicion.”

### C. The Term “Individualized Suspicion” Is Misguided

*City of Indianapolis v Edmond*, a case in which the Seventh Circuit and later the Supreme Court were called upon to decide the constitutionality of police roadblocks intended to detect drug contraband,<sup>135</sup> illustrates well the dynamic we are attempting to describe. A little background about the case first.

On six occasions between August and November 1998, the Indianapolis Police Department set up roadblocks on certain city streets to catch drug offenders. The locations of these roadblocks were determined weeks in advance based on information regarding area crime statistics and traffic flow. The roadblocks were conducted during the daytime and were identified with signs that read: “NARCOTICS CHECKPOINT \_\_ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP.”<sup>136</sup> At each site, approximately thirty police officers were present, and they would stop a predetermined number of

<sup>135</sup> See *Edmond v Goldsmith*, 183 F3d 659, 665–66 (7th Cir 1999), *affd*, *Edmond*, 531 US at 36.

<sup>136</sup> *Edmond*, 531 US at 34–36.

vehicles. A group of vehicles would be diverted to the search area, and the other traffic would then be allowed to go through until the police had finished processing the group of stopped vehicles.<sup>137</sup> As a result, the searches were randomized at the checkpoint.

During each stop, a police officer would approach the driver and request his or her driver's license and car registration. The stopped cars and their passengers would then be subject to a plain view search of the interior through the car windows and a dog-sniffing search of the exterior of the automobiles. According to the police, the entire process was designed not to exceed five minutes.<sup>138</sup> Over the course of the 6 roadblocks, 1,161 vehicles were stopped. The stops produced 55 drug-related arrests and 49 non-drug-related arrests (for offenses such as driving with an expired driver's license), resulting in a 4.74 percent drug-arrest hit rate and an overall hit rate of 8.96 percent.<sup>139</sup>

The roadblocks, it seemed, had everything going for them: they distributed the costs of enforcement evenly across motorists, interfered as minimally as possible with the motorists' movement, invaded motorists' privacy interests only slightly, and, according to everyone on the Seventh Circuit panel at least, produced very "high" rates of successful searches.<sup>140</sup> They were also randomly administered, which means that police officers could not individually discriminate against African American drivers—or at least could not easily do so.<sup>141</sup> Despite this, Judge Richard Posner reversed the federal district court—which had not enjoined the police practice—and put a stop to the roadblocks, resting the decision on the arguable notion that the police did not have any "individualized suspicion" to stop and question any motorist.<sup>142</sup> Judge Posner, like most commentators, sought "individualized suspicion" and found none. Judge Posner wrote, "[H]ere the roadblock is meant to intercept a completely random sample of drivers; there is neither probable cause nor articulable suspicion to stop *any* given driver."<sup>143</sup>

With respect to both statements, Judge Posner was formally correct. It is critical to see, however, that in the context of the checkpoint the second statement regarding probable cause and articulable suspicion was, in truth, inaccurate: *for each driver*, there was a 4.74 percent chance that he was carrying drugs. We know this

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<sup>137</sup> See *id.* at 35–36.

<sup>138</sup> See *id.*

<sup>139</sup> See *Edmond*, 183 F3d at 661.

<sup>140</sup> See *id.* at 662. See also *id.* at 666 (Easterbook dissenting).

<sup>141</sup> See *id.* at 663 (majority).

<sup>142</sup> See *id.* at 665–66.

<sup>143</sup> *Edmond*, 183 F3d at 663.

after the fact, but we know it nonetheless. For each and every one of those automobile travelers, there was “individualized suspicion” of 4.74 percent. That is a very specific and articulable level of suspicion. Whether it is reasonable suspicion depends entirely on whether that level—4.74 percent—satisfies the *quantum* required by the Fourth Amendment. But that inquiry does not depend on whether the suspicion is “individualized” or not. It *does* depend on whether Judge Posner (or courts generally) thinks that 4.74 percent is a high enough probability that crime is “afoot”<sup>144</sup> to justify interfering in an individual’s autonomy and privacy interests.

In truth, then, there was a level of suspicion that attached to all drivers. This notion of a *quantum* of suspicion is no different than in the classic case of witness identification. So, for instance, if a victim testifies that the perpetrator was a University of Chicago graduate student who wore Converse high-tops, and there are, say, five hundred graduate students at the University of Chicago who wore Converse high-tops out of a student body of ten thousand, then we can easily conclude that our “individualized suspicion” to question U of C grad students who wore Converse high-tops reaches 5 percent. We can quantify and establish before questioning the exact level of “individualized suspicion” that we require and determine whether it meets some minimum threshold to justify detaining and questioning any of those graduate students.

The only difference between these two cases is a temporal one: we do not know the level of individualized suspicion in the roadblock case until *after* we have begun to conduct stops and perform visual and canine searches at the roadblocks. (Though here, since this involves a random sample of motorists, we can be pretty confident that we would have similar levels of suspicion at similarly selected sites in the near future. We could also obtain this information through research or surveys.) In the second case, we know the level of suspicion *ex ante* from the witness identification and other information and can use that to assess whether there is sufficient justification to stop and question individuals. In both cases, though, we can pretty easily determine the level of suspicion—the actual level of “individualized suspicion.”

In other words, there *was* “individualized suspicion” in *Edmond*. Judge Posner could have found “individualized suspicion” at the level of 4.74 percent. What he meant to say, of course, is that there was not *enough* suspicion, but here, too, he could easily have found that there was. The courts have never established a percentage requirement for

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<sup>144</sup> *Terry*, 392 US at 30 (holding that a reasonable belief that “criminal activity may be afoot,” in conjunction with other factors, may legitimize a search of an individual’s clothing for weapons).



individualized suspicion or probable cause, and as now–Chief Judge Frank Easterbrook noted in dissent, individualized suspicion has been found at far less than 4.74 percent.<sup>145</sup>

Again, what matters is the quantum of suspicion. Was there enough in *Edmond*? That would be the only proper question to ask in order to assess the reasonableness of the searches. The answer, though, is not so clear. These hit rates were perceived by the Seventh Circuit as successful in detecting illicit drug and other criminal violations. Judge Posner repeatedly referred to these hit rates as “high” and added that they are “vastly higher than, for example, the probability of a hit as a result of the screening of embarking passengers and their luggage at airports.”<sup>146</sup> Judge Easterbrook, in dissent, similarly referred to the program in glowing terms: “The program is spectacularly successful as roadblocks go; 9.4% of those stopped are arrested, with the reason equally divided between driving and drug crimes.”<sup>147</sup> Citing the *Martinez-Fuerte* Border Patrol case and the *Michigan Department of State Police v Sitz*<sup>148</sup> sobriety checkpoint case—cases that involved hit rates of 0.12 and 1.6 percent respectively—Judge Easterbrook noted that “[r]oadblocks with much lower rates of success have been held consistent with the fourth amendment.”<sup>149</sup>

As a purely factual matter, though, the 4.74 percent drug hit rate—or, for that matter, the 8.96 percent overall hit rate including minor traffic violations<sup>150</sup>—is not really “spectacular,” as Judge Easterbrook suggested.<sup>151</sup> Hit rates from other law enforcement interventions have been far greater. For example, the Maryland State Police between January 1995 and January 1999 achieved drug contraband hit rates along Maryland’s I-95 corridor of 32 percent with regard to white drivers and 34 percent with regard to African American drivers.<sup>152</sup> In Missouri for the year 2001, police traffic stops achieved drug hit rates—

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<sup>145</sup> *Edmond*, 183 F3d at 669–70 (Easterbrook dissenting) (comparing the hit rate in *Edmond* with the less than 0.00001 percent hit rate in airport security and the less than 1 percent hit rate in *Martinez-Fuerte*).

<sup>146</sup> *Id.* at 662, 666 (majority).

<sup>147</sup> *Id.* at 666 (Easterbrook dissenting). We are not sure how Judge Easterbrook got to the 9.4 percent figure. Both Justice O’Connor and Judge Posner report similar search success rates of 104 motorists of a total pool of 1,161, or 8.96 percent. See *Edmond*, 531 US at 35; *Edmond*, 183 F3d at 661.

<sup>148</sup> 496 US 444 (1990).

<sup>149</sup> *Edmond*, 183 F3d at 666 (Easterbrook dissenting), citing *Martinez-Fuerte*, 428 US at 554; *Sitz*, 496 US at 448.

<sup>150</sup> See *Edmond*, 183 F3d at 661.

<sup>151</sup> *Id.* at 666 (Easterbrook dissenting) (suggesting that the hit rate is “spectacularly successful”).

<sup>152</sup> See John Knowles, Nicola Perisco, and Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J Polit Econ 203, 222 (2001). But see Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U Chi L Rev 1275, 1292 (2004).

that is drugs only, not including faulty drivers' licenses—of 19.1, 12.3, and 8.6 percent respectively for whites, African Americans, and Hispanics.<sup>153</sup> A 1982 Department of Justice study of airport searches using a drug-courier profile reported forty-nine successful searches based on ninety-six total searches, for a hit rate of 51.04 percent.<sup>154</sup> A government report analyzing New York City stops and frisks, prepared in 1999, revealed average hit rates (stop-to-arrest ratios) of approximately 13.7 percent in situations found to present reasonable suspicion.<sup>155</sup> In the abstract, devoid of any comparative evidence about search success rates in other contexts, the 4.74 percent drug hit rate may well seem “high” or even “spectacularly successful”; however that may be an artifact of judicial decisionmaking with no data, a perennial problem in constitutional criminal procedure.<sup>156</sup>

Ultimately, courts should have to decide whether a 4.74 percent probability of success is sufficient to satisfy the Constitution. But the decision turns on the *quantum* of evidence, not on whether it is “individualized” or not. If anything, the “individualized suspicion” construct prevents courts from conducting the right inquiry.

As the Supreme Court has repeatedly insisted, and as the plain text of the Constitution suggests, “[T]he ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’”<sup>157</sup> Our argument in no way casts doubt on that principle. It relies on it heavily. Our point is that the reasonableness of a governmental search does not turn on “individualized suspicion” but on whether it meets a certain level of suspicion.

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<sup>153</sup> See Rubén Hernández-Murillo and John Knowles, *Racial Profiling or Racist Policing? Bounds Tests in Aggregate Data*, 45 Intl Econ Rev 959, 970 table 1 (2004).

<sup>154</sup> See Harcourt, *Against Prediction* at 16 (cited in note 16), citing John Monahan and Laurens Walker, eds, *Social Science in Law: Cases and Materials* 452–53 (Foundation 2006), citing Edwin Zedlewski, *The DEA Airport Surveillance Program: An Analysis of Agent Activities* (1984).

<sup>155</sup> See Tracey L. Meares and Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J Crim L & Criminol 733, 789 (2000), citing Civil Rights Bureau, Office of the Attorney General, *The New York City Police Department's “Stop & Frisk” Practices: A Report to the People of the State of New York from the Office of the Attorney General* 135 (Dec 1, 1999) (“*Stop & Frisk Report*”), online at [http://www.ag.ny.gov/bureaus/civil\\_rights/pdfs/stp\\_frsk.pdf](http://www.ag.ny.gov/bureaus/civil_rights/pdfs/stp_frsk.pdf) (visited Apr 17, 2011).

<sup>156</sup> For an argument proposing increased use of social science evidence in constitutional criminal procedure, see Meares and Harcourt, 90 J Crim L & Criminol at 746 (cited in note 155).

<sup>157</sup> *Vernonia*, 515 US at 652. See also *Carroll*, 267 US at 147 (“The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.”) and all of the cases citing back to that famous statement. See Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U Pa J Const L 398, 445 (2001).

### III. AN ALTERNATIVE CONSTRUCT: RANDOMIZATION

Our argument so far is that the term “individualized suspicion” is largely empty and that the courts have not used it to provide police with anything close to concrete guidance in assessing their practices. It is, instead, a rhetorical placeholder used to bless police practices without providing policing agencies with any guidance or requirements for structuring decisionmaking in a way that limits and shapes discretion. It offers simply no direction to policing and other law enforcement agencies to develop practices that appropriately constrain discretion.

#### A. The Checkpoint as Lodestar

In this section, we suggest a construct that constrains discretion: the checkpoint. Checkpoints, or roadblocks, look very different from the world of policing envisioned by the individualized suspicion paradigm. The individualized suspicion paradigm imagines an officer, possibly roving, making judgments on the street about the suspicious nature of the activities, apparel, and appearance of individuals in a particular geographic area in light of that officer’s training and experience. When the officer stops or arrests someone, the Fourth Amendment question is whether the officer can tell a story that is sufficiently compelling to the decisionmaker so that he or she will conclude that there was “individualized suspicion” for the police action.<sup>158</sup> The randomization paradigm is entirely different: in this model, there is a fixed roadblock established on the basis of a prior plan that has been approved by those who supervise the officers who will actually be conducting the searches. The reason for establishing the checkpoint already has been approved by superiors in advance. Critically, checkpoints are constitutional only when every car is stopped unless a randomized stopping plan is adopted, as was the case in *Edmond*,<sup>159</sup> and the resulting hit rate meets a certain level of suspicion.

These last points, we contend, are the most important differences between the two models. Stops based on “individualized suspicion” attempt justification through the establishment of *good reasons* for interference, while checkpoint stops are justified primarily because there are *no reasons* for such actions beyond the justification for the checkpoint itself. Once the base level of suspicion has been satisfied, the

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<sup>158</sup> See text accompanying notes 4–14.

<sup>159</sup> See notes 136–37 and accompanying text.

stops are no longer justified by subjective beliefs, hunches, and prejudices about greater suspicion, but rather on the basis of evenhandedness.

Although this may, at first glance, seem to disregard constitutional norms, it is precisely what promotes the core constitutional values in the Fourth Amendment context. Take a moment to consider a key danger of the “individualized suspicion” regime—namely, the cost of being incorrectly targeted for police intervention. In a world in which the police must have good reasons for interfering with a person’s autonomy, the stakes of incorrect decisions are far higher. In the current constitutional regime, what makes a decision by a police officer a good one is whether we believe that officer has correctly (or correctly enough) identified or targeted a potential offender. As Sherry Colb elegantly explains, this targeting harm is a cost to individuals, in addition to the distinct costs of autonomy invasion and of privacy curtailment.<sup>160</sup> When police get it right, we do not care very much about the targeting costs. But when they get it wrong, those costs become a great concern not only to the individual but also to the legitimacy of the criminal justice system. And the fact is, the police stop and arrest many, many more people than are ultimately charged or convicted of crimes.<sup>161</sup>

In contrast to “individual suspicion” stops, random checkpoint stops are not justified with reference to good reasons, but because of *randomization*. Police are not required to have a good reason to stop a person at a checkpoint once there is a justification for that checkpoint procedure. It is enough that the person stopped is the third or fifth or thirteenth in line—or that the person is in the queue if every car is stopped. Importantly, while there may be no good reason for any particular car to be stopped, it should be clear that there is a complete absence of *bad* reasons. This is so because a randomization program effectively precludes officers from exercising *any* discretion to stop individual cars. Indeed, if an officer does exercise discretion, then that officer’s actions makes the checkpoint unconstitutional. And note that since we can be confident that police officers operating a checkpoint cannot exercise their discretion to make bad decisions, there is no targeting harm from a checkpoint-based stop for any individual.

The effect on the targeted population is likely to be immense. To see this, consider two different types of search paradigms, the *Sitz*

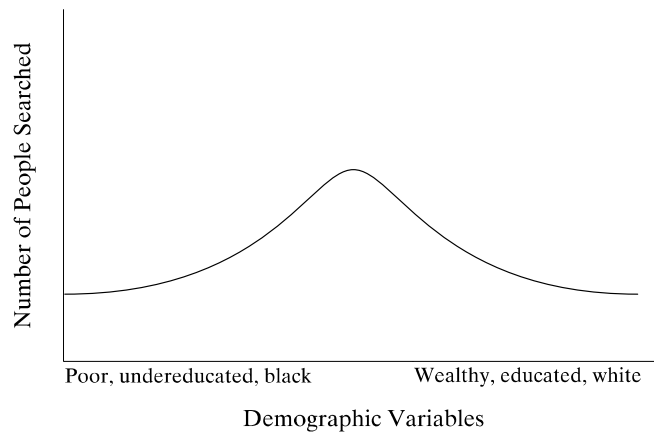
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<sup>160</sup> See Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 Colum L Rev 1456, 1464, 1485–1502 (1996).

<sup>161</sup> See, for example, *Stop & Frisk Report* at 111 (cited in note 155) (noting a 9-to-1 ratio of stops-to-arrests in a comprehensive review of a fifteen-month survey of traffic stops in New York City). See also Part III.B.

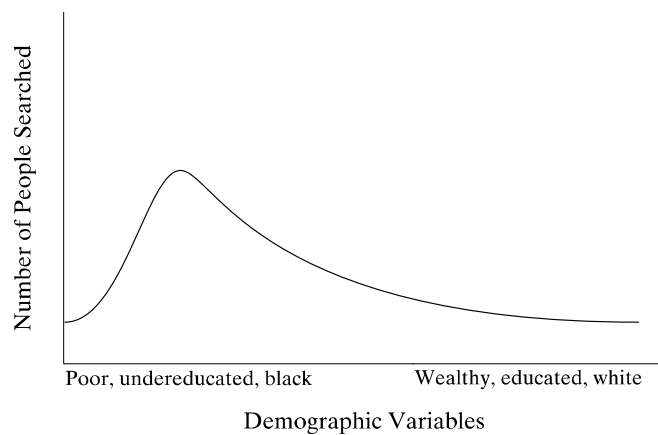
checkpoint on the one hand, and the *Whren v United States*<sup>162</sup> “individualized suspicion” model on the other. If one were to draw a distributional curve of the different groups of people who are stopped at a typical checkpoint in an “average” neighborhood, it would look like Figure 3.

FIGURE 3. *SITZ* CURVE



In the typical checkpoint, the median person stopped is likely to be the median population member. Also, note that the bulk of people stopped are likely to cluster around the median. By contrast, if one were to draw a distributional curve of the group of people stopped under the regime approved in *Whren*, it would look like Figure 4.

FIGURE 4. *WHREN* CURVE



<sup>162</sup> 517 US 806 (1996).

Here the tail on the left side of the curve reflects that the median person stopped is poorer, less educated, and more likely to be black than his counterpart on the *Sitz* Curve.

As a result, the two regimes impose potential costs with respect to targeting harms in predictable and troubling patterns. One way of understanding the central claim of the defendant in *Whren* is that the police use of traffic violations as probable cause to justify the investigation of other suspected offenses (such as drug offenses) imposes the costs of law enforcement on a group that is demographically aggregated in a predictable way.<sup>163</sup> The costs are even higher when the aggregation occurs at the intersection of demography and geography. This aggregation phenomenon helps to “race” crime in a particular way.<sup>164</sup>

#### B. Evidence of Racing Crime

The best available evidence suggests that this racing effect is a real problem today. The data and analyses on police stops consistently reveal disproportionate stops of African Americans and Hispanics. The evidence is overwhelming.

In 2007, the RAND Corporation issued a report on the racial disparities in the stop, question, and frisk practices of the NYPD. Using data on all street encounters between NYPD officers and pedestrians in 2006, RAND found that, although consistent estimates could not be obtained on any racial disparities in stop rates (due to the data’s sensitivity to the type of benchmark used to compare the disparities), officers frisked whites less often than they frisked similarly situated nonwhites (29 percent of stops, compared to 33 percent of stops). Search rates were roughly the same across races, at 6 percent to 7 percent (although the study notes that in Staten Island, the search rates of minorities was “significantly greater”); officers successfully recovered contraband less often from minorities than similarly situated whites. Specifically, the success rate for blacks was 5.7 percent, 5.4 percent for Hispanics, and 6.4 percent for whites.<sup>165</sup>

The data and analysis confirmed Jeff Fagan’s and Andrew Gelman’s earlier studies of NYPD stops. They analyzed 125,000 pedestrian stops by the NYPD from January 1998 to March 1999 and

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<sup>163</sup> See *id.* at 810.

<sup>164</sup> Consider David R. James, *The Racial Ghetto as a Race-Making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 *Law & Soc Inquiry* 407, 420–29 (1994); Jeffrey Fagan and Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 *Ohio St J Crim L* 173, 220–21 (2008).

<sup>165</sup> See Greg Ridgeway, *Analysis of Racial Disparities in the New York Police Department’s Stop, Question and Frisk Practices* xi–xiv (RAND 2007).

nevertheless found that African Americans and Hispanics were stopped more frequently than whites, “even after controlling for precinct variability and race-specific estimates of crime participation.”<sup>166</sup>

In fact, study after study reveals discrimination. In August 2008, Ian Ayres published a study on police stops by the Los Angeles Police Department (LAPD).<sup>167</sup> Ayres analyzed data obtained from over 810,000 “field data reports” collected by the LAPD from July 1, 2003, to June 30, 2004 (field data reports are completed whenever a police officer makes a pedestrian or motor vehicle stop). Ayres found that there were more than 4,500 stops per 10,000 African American residents, whereas there were only 1,750 stops per 10,000 white residents.<sup>168</sup> In two divisions, Central and Hollywood, Ayres actually found that “there were more stops of African Americans in one year than there were African American residents, meaning that the average number of stops per resident was greater than one.”<sup>169</sup>

Ayres controlled his findings for variables such as the rate of violent and property crime and found that the disparity was not the result of different crime rates in different areas—“the stop rate per 10,000 residents was 3,400 stops higher” for blacks than whites, “and more than 350 stops higher for Hispanics” than whites.<sup>170</sup> Once stopped, blacks were 29 percent more likely to get arrested than whites, and Hispanics were 32 percent more likely. Police were 127 percent more likely to frisk or pat down stopped blacks than stopped whites, and 43 percent more likely to do so for Hispanics.<sup>171</sup> While minorities were more likely to be stopped and then searched once stopped, the results of these searches were less productive than comparable searches with white residents. Searched blacks were 37 percent less likely to be found with weapons than searched whites, 24 percent less likely to be found with drugs, and 25 percent less likely to be found with other contraband. Similarly, searched Hispanics were 33 percent less likely to be found with weapons, 34 percent less likely to be found with drugs, and 12 percent less likely to be found with other contraband.<sup>172</sup> The race of the stopping officer also mattered—

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<sup>166</sup> Andrew Gelman, Jeffrey Fagan, and Alex Kiss, *An Analysis of the NYPD's Stop-and-Frisk Policy in the Context of Claims of Racial Bias* \*9, 13, 15 (unpublished manuscript, Dec 2005), online at <http://www.stat.columbia.edu/~gelman/research/unpublished/frisk7.pdf> (visited June 10, 2011).

<sup>167</sup> See generally Ian Ayres and Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* (ACLU 2008), online at <http://www.aclu.org/documents/view/47> (visited Apr 17, 2011).

<sup>168</sup> See *id.* at 1, 5–8.

<sup>169</sup> *Id.* at 5–6.

<sup>170</sup> *Id.*

<sup>171</sup> See Ayres and Borowsky, *Study of Racially Disparate Outcomes* at 6 (cited in note 167).

<sup>172</sup> *Id.* at 7–8.

the disparities found decreased when the officer was of the same race as the person who was stopped.<sup>173</sup>

A few months earlier, in April 2008, the ACLU of Arizona released a study analyzing the first full year of data on highway traffic stops collected under a settlement agreement with the Arizona Department of Public Safety (the period spanned July 1, 2006, to June 30, 2007).<sup>174</sup> The analysis revealed that patrol officers searched African Americans, Hispanics, and Native Americans at a higher rate than whites or other minorities; blacks and Hispanics who were stopped by police were searched 10 percent of the time and Native Americans 13 percent of the time. By contrast, whites, Asians, and Middle Easterners were searched around 3 to 5 percent of the time.<sup>175</sup> The study found no evidence to support such differential treatment by race—on average, 34 percent of whites searched were found with contraband, while only 22 percent of Hispanics searched were found with contraband. Blacks were found with contraband at similar rates as whites (38 percent) but were twice as likely to be searched.<sup>176</sup>

In a follow-up study commissioned by the Arizona Department of Public Safety using an additional six months of data, the researchers found that, conditional on being stopped, racial disparities existed in the outcome of the stop, even after controlling for other explanatory factors.<sup>177</sup> Whites were more likely to receive warnings (44.6 percent of stops) than blacks (41.3 percent of stops) and Hispanics (only 33.6 percent of stops). By contrast, Hispanics and blacks were more likely to be cited than whites (48.9 percent for Hispanics, 48.1 percent for blacks, and 43.4 percent for whites). Hispanics, blacks, and Native Americans were all significantly more likely to get searched or arrested. Whites were arrested only 2.1 percent of the time, while Native Americans were arrested 5.4 percent of the time, blacks 4.2 percent of the time, and Hispanics 3.9 percent of the time. Hispanics were searched at an 8.6 percent rate, blacks at 7.5 percent, Native Americans at 6.9 percent, and whites at 3.3 percent. All results were statistically

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<sup>173</sup> Id at 7.

<sup>174</sup> See ACLU of Arizona, *Driving While Black or Brown: An Analysis of Racial Profiling in Arizona* 2 (2008), online at <http://www.acluaz.org/sites/default/files/documents/DrivingWhileBlackorBrown.pdf> (visited Apr 17, 2011).

<sup>175</sup> Id at 6 table 2.

<sup>176</sup> See id at 10 table 4. See also id at 6 table 2.

<sup>177</sup> See Robin S. Engel, Jennifer Calnon Cherkauskas, and Michael R. Smith, *Traffic Stop Data Analysis Study: Year 2 Final Report* 126–29 (University of Cincinnati Policing Institute 2008), online at [http://www.azdps.gov/about/Reports/docs/Traffic\\_Stop\\_Data\\_Report\\_2008.pdf](http://www.azdps.gov/about/Reports/docs/Traffic_Stop_Data_Report_2008.pdf) (visited Apr 17, 2011). The study was commissioned by the law enforcement agency, and it emphasized that “no department-wide conclusions” could be made on any racial disparities in stopping behavior. Id at 125.



significant at the 0.001 level.<sup>178</sup> Analysis of the percentage of searches that successfully found contraband showed that for nonconsent discretionary searches, searches of Hispanics had the lowest success rates (37.5 percent); in comparison, the success rates were 52.9 percent for Native Americans, 50.4 percent for whites, 50.0 percent for blacks, and 46.4 percent for other races.<sup>179</sup>

In February 2009, West Virginia issued its “Traffic Stop Study” final report for 2008.<sup>180</sup> The state found that, on average, blacks were 1.64 times more likely to be stopped by police than whites, and Hispanics were 1.48 times more likely to be stopped than whites. Blacks and Hispanics were also more likely to be searched than whites, with the rates of being searched at 10.64 percent for blacks, 10.24 percent for Hispanics, and 4.32 percent for whites. While the rates of being stopped and searched were higher for minorities, the contraband “hit rates” (the rate at which contraband is found in a search) were lower. The hit rate for blacks was 43.11 percent, 30.23 percent for Hispanics, and 47.17 percent for whites. Finally, the rates of receiving a citation or getting arrested were higher for blacks (57.34 percent) and Hispanics (60.92 percent) than for white drivers (46.52 percent).<sup>181</sup> Similar results were found on data at the county and agency level.<sup>182</sup>

In 2009, Alexander Weiss and Dennis P. Rosenbaum of the University of Illinois at Chicago Center for Research in Law and Justice issued the 2008 annual report on traffic stops for the state of Illinois—the fifth annual traffic stop report required under state law due to allegations of racial profiling.<sup>183</sup> Weiss and Rosenbaum found that minority drivers were around 13 percent more likely to get stopped than white drivers.<sup>184</sup> Once stopped, minorities were around 10 percent more likely to receive a citation. Specifically, 64 percent of blacks were cited, 69 percent of Hispanics, 65 percent of Asians, and 70 percent of Native Americans, compared to 58 percent of whites. In terms of searches, Hispanic drivers were 2.4 times more likely to be subjected to a consented search than white drivers, and black drivers

<sup>178</sup> Id at 53–54.

<sup>179</sup> Id at 103–04 & figure 5.8.

<sup>180</sup> See generally Stephen M. Haas, Erica Turley, and Monika Sterling, *West Virginia Traffic Stop Study: Final Report* (West Virginia Division of Criminal Justice Services 2009), online at <http://www.dcjs.wv.gov/SAC/Documents/NEWOverviewofStatewideFindings2009.pdf> (visited Apr 17, 2011).

<sup>181</sup> Id at 9.

<sup>182</sup> Id at i–iii.

<sup>183</sup> See Alexander Weiss and Dennis P. Rosenbaum, *Illinois Traffic Stops Statistics Study 2008 Annual Report 2* (University of Illinois at Chicago Center for Research in Law and Justice 2009), online at <http://www.dot.state.il.us/travelstats/ITSS%202008%20Annual%20Report.pdf> (visited Apr 17, 2011).

<sup>184</sup> See id at 5–6 & figure 2.

3 times more likely.<sup>185</sup> While minorities were about 2.5 times more likely to be searched than whites, they were less likely to be found with contraband. Searches of white drivers turned up contraband 24.4 percent of the time, while searches of minorities did so only 15.1 percent of the time—in other words, police were searching minorities more even though searches of whites found contraband 1.6 times more than searches of minorities.<sup>186</sup>

These reports extend a long and consistent history of studies documenting racial profiling in American policing across the country. Earlier in 2007, for instance, the RAND Corporation had issued its report on racial disparities in the stop, question, and frisk practices of the NYPD.<sup>187</sup> And a year earlier, in 2006, the Northeastern University Institute on Race and Justice had issued a report on traffic stop disparities in Rhode Island.<sup>188</sup> The study found that minorities were subjected to searches at over twice the rate of whites (13.6 percent for minorities, 6.3 percent for whites). Limiting the data to only discretionary searches (searches not incident to a lawful arrest) still found minorities being searched at twice the rate of whites, with minorities being searched at 5.9 percent and whites being searched at 2.9 percent.<sup>189</sup> While minorities were searched at twice the rate of whites, the productivity of searches was less for minorities than for whites. For discretionary searches, whites had a 26.5 percent hit rate, while minorities had a 22.3 percent hit rate.<sup>190</sup>

More recently, on June 30, 2009, the ACLU released its report to the UN Committee on the Elimination of Racial Discrimination: *The Persistence of Racial and Ethnic Profiling in the United States*.<sup>191</sup> The report catalogued the independent and ACLU-collected evidence of racial profiling by twenty-two states and by the federal government, describing in an intricate and detailed ninety-eight page report all of the evidence for racial profiling by state and local law enforcement. The report concluded that both data and anecdotal evidence revealed that minorities in the United States are being subjected to racial

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<sup>185</sup> Id at 10–13 & figure 6.

<sup>186</sup> Id at 12–13.

<sup>187</sup> See Ridgeway, *Analysis of Racial Disparities* at xi–xiii (cited in note 165).

<sup>188</sup> See Amy Farrell and Jack McDevitt, *Rhode Island Traffic Stop Statistics Data Collection Study 2004–2005* 1–4 (Northeastern University Institute on Race and Justice, Apr 2006), online at <http://www.rijustice.ri.gov/documents/sac/Final%20Report%202004-2005.pdf> (visited Apr 17, 2011).

<sup>189</sup> Id at 67–71 tables 4.5 & 4.6.

<sup>190</sup> Id at 78.

<sup>191</sup> See generally ACLU and Rights Working Group, *Persistence of Racial and Ethnic Profiling in the United States: A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination* (2009), online at [http://www.aclu.org/pdfs/humanrights/ceerd\\_finalreport.pdf](http://www.aclu.org/pdfs/humanrights/ceerd_finalreport.pdf) (visited Apr 17, 2011).

profiling in spite of the numerous public statements by state and federal government officials that the practice of racial profiling should end.<sup>192</sup> Anecdotal examples of racial profiling—such as the illegal deportation of a cognitively impaired US citizen from Los Angeles because officials did not believe he could possibly be a citizen,<sup>193</sup> or Detroit police officers accused of conducting bare-handed searches of a number of young black males’ genitals<sup>194</sup>—were supported by analyses of state-level data from Minnesota to California finding consistent patterns of racial minorities being overstopped, oversearched, and overfrisked in comparison to whites.<sup>195</sup>

### C. Other Costs of “Individualized Suspicion”

There are additional differences between individual suspicion-based stops and checkpoints. If we define autonomy costs as the length of detention and the magnitude of the inconvenience, the amount of time and burden any one person spends in a checkpoint tends to be shorter than the typical suspicion-based stop.<sup>196</sup> The checkpoint also limits discretion in another way—by enhancing the political accountability of policing agencies to the people who are policed.

The primary purpose of the Fourth Amendment is to curtail, constrain, and shape police discretion, and only randomization fulfills that function. As Figures 3 and 4 demonstrate, the more likely it is that the typical person who encounters the police in a checkpoint reflects the median voter in a given community, the more likely it is that police will be attentive to the demands of that voter when shaping and developing policy. Combining discretion constraint with enhanced accountability helps ensure that checkpoints satisfy Fourth Amendment reasonableness.

The additive impact of these benefits will lead, we think, to fewer illegitimate invasions of individual autonomy and privacy. Moreover, we should expect law enforcement agencies to be more effective and efficient. Even if the same number of people may be stopped as are stopped today, they will be stopped for shorter periods of time and for the purposes of enhancing more accurate targeting if and when suspicion-based engagement is appropriate. Because the suspicion-

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<sup>192</sup> See, for example, *id.* at 12.

<sup>193</sup> *Id.* at 47–48.

<sup>194</sup> *Id.* at 56.

<sup>195</sup> ACLU and Rights Working Group, *Persistence of Racial and Ethnic Profiling in the United States* at 41–68 (cited in note 191).

<sup>196</sup> Compare Weiss and Rosenbaum, *Illinois Traffic Stops Statistics* at 9–10 & figure 5 (cited in note 183), with *Martinez-Fuerte*, 428 US at 547; *Edmond v Goldsmith*, 183 F3d 659, 661–62 (7th Cir 1999).

based stops will be more accurate, fewer people will be wrongfully stopped.

#### D. Ensuring Privacy Interests

Many may object that our approach does not adequately protect the value of privacy at the heart of the Fourth Amendment. As Justice O'Connor and others have repeatedly stated, "Protection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment."<sup>197</sup> That objection, however, is mistaken.

Under our scheme, privacy is protected by requiring a certain level of suspicion. What we propose is to have our cake and eat it, too: to have privacy *and* evenhandedness. The two constitutional values are neither mutually exclusive nor in a zero-sum contest.

We can illustrate the point by returning to the discussion of this issue by Justice O'Connor in *Vernonia*, the public school randomized drug-testing case—precisely where she inveighs against evenhandedness. Justice O'Connor discusses and embraces an analysis of the Fourth Amendment centered on original intent. While examining the history of searching both ships and vessels on the sea, Justice O'Connor notes that it was most telling of all that

the particular way the Framers chose to curb the abuses of general warrants—and by implication, *all* general searches—was not to impose a novel “evenhandedness” requirement; it was to retain the individualized suspicion requirement contained in the typical general warrant, but to make that requirement meaningful and enforceable, for instance, by raising the required level of individualized suspicion to objective probable cause.<sup>198</sup>

Justice O'Connor then turns to the example of the original congressional authorization regarding duty collectors' searches of possibly concealed goods subject to import duties. There, warrants were required in the case of any search on land; however, for searches at sea, warrants were dispensed with, but Congress nevertheless “limited officials to searching only those ships and vessels ‘in which [a

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<sup>197</sup> *Vernonia*, 515 US at 671 (O'Connor dissenting). See also *New Jersey v T.L.O.*, 469 US 325, 361 (1985) (Brennan dissenting); *Camara v Municipal Court*, 387 US 523, 528 (1967); *Jones v United States*, 357 US 493, 498 (1958).

<sup>198</sup> *Vernonia*, 515 US at 670 (O'Connor dissenting). It turns out that the history is more contentious than Justice O'Connor maintains. See Fabio Arcila Jr., *The Death of Suspicion*, 51 Wm & Mary L Rev 1275, 1297–1326 (2010); Max Minzner, *Putting Probability Back into Probable Cause*, 87 Tex L Rev 913, 920–23, 948–51 (2009).

collector] *shall have reason to suspect* any goods, wares or merchandise subject to duty shall be concealed.”<sup>199</sup>

Justice O’Connor maintains that it is precisely this requirement of suspicion that protected privacy. Justice O’Connor writes:

True, not all searches around the time the Fourth Amendment was adopted required individualized suspicion—although most did. A search incident to arrest was an obvious example of one that did not, but even those searches shared the essential characteristics that distinguish suspicion-based searches from abusive general searches: they only “affec[t] one person at a time,” and they are generally avoidable by refraining from wrongdoing. Protection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment.<sup>200</sup>

It is precisely the fact that there is suspicion that satisfies privacy requirements.<sup>201</sup> And evenhandedness is no substitute for the protection of privacy, the Court has emphasized. Justice O’Connor writes:

The Court clearly indicated that evenhanded treatment was no substitute for the individualized suspicion requirement: “It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.”<sup>202</sup>

We fully embrace this reasoning. We are not arguing for evenhandedness as a substitute to suspicion, but as a complement to privacy.

We are not asking for suspicionless randomized searches. On the contrary, we want the level of suspicion spelled out. By ensuring a minimum level of suspicion, we ensure the protection of privacy. Our argument, in essence, is that the entire process of weighing governmental interests against privacy interests is a charade and that it can be replaced, very simply, by a determination of the threshold level of probable culpability tied to a level of offense. And we believe that this can be achieved in practice.

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<sup>199</sup> *Vernonia*, 515 US at 671 (O’Connor dissenting), quoting Act of July 31, 1789 § 24, 1 Stat 29, 43, repealed by Act of Aug 4, 1790 § 74, 1 Stat 145, 178.

<sup>200</sup> *Vernonia*, 515 US at 671 (O’Connor dissenting) (citation omitted).

<sup>201</sup> But see Arcila, 51 Wm & Mary L Rev at 1297–1310 (cited in note 198).

<sup>202</sup> *Vernonia*, 515 US at 668–69 (O’Connor dissenting), quoting *Carroll*, 267 US at 153–54.

### E. Measuring Suspicion

As we have demonstrated elsewhere, it is in fact possible to measure the level of suspicion associated with group traits and to assess whether that level of suspicion satisfies a constitutional standard<sup>203</sup> — assuming that the Supreme Court were to articulate such a standard in probabilistic terms. Our earlier discussion was set in the context of the Supreme Court's decision in *Illinois v Wardlow*,<sup>204</sup> where the Court was asked to determine whether a police officer's stop of a suspect, after the suspect fled upon seeing several police cruisers patrolling an area known for heavy narcotics trafficking, violated the Fourth Amendment.<sup>205</sup> The Court, in a 5–4 decision, decided that the stop was constitutional and reversed the Illinois Supreme Court's decision to the contrary.<sup>206</sup>

The way we framed the case was to explore, empirically, whether flight from the police is really a good indicator of guilt, and what we attempted to show is that there actually was good evidence to guide the resolution of that question.<sup>207</sup> Neither the majority nor the dissent looked to empirical evidence in *Wardlow*, choosing instead to answer the question with reference to commonsense judgments.<sup>208</sup> What we tried to show, by contrast, was that the constitutional issue was precisely the kind of question for which there may have been an empirical answer.

In particular, we turned to a pathbreaking study of street stops in New York City released on December 1, 1999—about six weeks before *Wardlow* was published.<sup>209</sup> The New York Office of the Attorney General (OAG) study was an analysis of 175,000 forms collected over 15 months, as well as “census data, crime statistics, and demographic information to yield . . . a statistically valid, quantitative view of the practice of ‘stop and frisk.’”<sup>210</sup> The New York OAG Report collected, in

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<sup>203</sup> See Meares and Harcourt, 90 J Crim L & Criminol at 789 (cited in note 155).

<sup>204</sup> 528 US 119 (2000).

<sup>205</sup> See id at 121–22.

<sup>206</sup> See id at 120, revg *People v Wardlow*, 701 NE2d 484, 486 (Ill 1998).

<sup>207</sup> See Meares and Harcourt, 90 J Crim L & Criminol at 790–92 (cited in note 155).

<sup>208</sup> See *Wardlow*, 528 US at 124; id at 128 (Stevens dissenting).

<sup>209</sup> See Meares and Harcourt, 90 J Crim L & Criminol at 787–92 (cited in note 155) (applying findings of the OAG report to the *Wardlow* case). Although the report was not issued early enough for it to be included in the briefs in *Wardlow*, it was available to the justices when they wrote the opinion. We explore the report here as an example of evidence that could be used in making a reasonableness determination rather than condemning the court for overlooking the report.

<sup>210</sup> *Stop & Frisk Report* at 88 (cited in note 155). The forms that provide the fodder for this analysis are known as “UF-250s.” Id. According to the NYPD's Patrol Guide, a police officer who stops and frisks an individual must complete a UF-250 if a person is (1) stopped by force; (2) stopped and frisked or searched; (3) arrested; or (4) stopped and refuses to identify oneself.

addition to racial breakdowns on stop-and-frisks, a measure of how “good” those stops were: how many of the stops led to an arrest. Citywide, that ratio was 9-to-1.<sup>211</sup> That is, nine stops were made by the NYPD for every arrest. But the OAG Report contained more fine-grained information. The study collected information on a sample of stops<sup>212</sup> based on facts that, as reported by the police, clearly met the constitutional standard of reasonable suspicion according to *Terry* and its progeny.<sup>213</sup> Additionally, the study relied upon information on stops based on facts that courts have decided clearly do not constitute reasonable suspicion.<sup>214</sup> Moreover, the report collected information pertinent to the very facts in *Wardlow*—suspects who flee from the police in high-crime areas. The table on the following page summarizes the OAG Report.

With respect to the particular issue presented in *Wardlow*, the chart provides a fascinating picture of police work. Stops reported as undertaken because the suspect fled the scene result in a high stop-to-arrest ratio—a ratio of 26-to-1. That ratio is quite close to that of stops based on factors generally understood to fail to satisfy reasonable suspicion under the Fourth Amendment. Note that even when flight in a high-crime area is considered, the ratio between stops and arrests lowers, but it does not lower by much. It stands at 20.3-to-1. (These data support the *Wardlow* dissenters’ argument that flight may be caused by a whole host of reasons that are not indicative of criminal activity.<sup>215</sup>)

Importantly, however, the *Wardlow* Court did not discuss merely the suspicious nature of flight generally; rather, the Court assessed whether flight “upon noticing the police”<sup>216</sup> or “flight [that] was motivated by the presence of a police officer”<sup>217</sup> was suspicious enough to justify a police stop. The researchers who analyzed the data in the

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See id at 89, citing Police Department City of New York, *Patrol Guide: Procedure No. 116-33* \*1 (Nov 14, 1986). In situations that fall outside these four contexts, a police officer may fill out a form if he or she desires to do so. See *Stop & Frisk Report* at 90 (cited in note 155) (providing a copy of the form). The pool of forms analyzed in the study contained about three-quarters mandated reports and the rest voluntary. Id at 91. The forms covered stops that occurred in 1998 and the first three months of 1999. Id at v.

<sup>211</sup> *Stop & Frisk Report* at 111 (cited in note 155).

<sup>212</sup> For this portion of the analysis, a sample of 15,000 out of the database of 175,000 stops was used. See id at 135.

<sup>213</sup> Categories of stop rationales were developed, and then the UF-250 forms were coded in accordance with these categories. See id at 135–38, 145. The researchers discussed with lawyers for the OAG the constitutional standard to code, and a great deal of data was excluded for insufficiency, as the summary table below indicates. See id at 145–58.

<sup>214</sup> See id at 147.

<sup>215</sup> See *Wardlow*, 528 US at 128–33 (Stevens dissenting).

<sup>216</sup> Id at 124 (majority).

<sup>217</sup> Id at 130 (Stevens dissenting).

New York OAG Report categorized this more specialized type of flight in a category separate from the general flight category. The ratio between stops and arrests with respect to flight to elude the police suggests a tighter relationship than the general flight code. Indeed, the 15.8-to-1 ratio of stops to arrests for this category is quite close to the ratio of the other categories of information for stops deemed insufficient to determine constitutionality with confidence—an indication that *Wardlow* is indeed the close case that it appears on first impression to be. When the data on flight to elude police are confined to high-crime areas—the very context presented by the facts in *Wardlow*<sup>218</sup>—a different relationship between stops and arrests emerges. But not what one would expect! These data reveal a stop-to-arrest ratio of 45-to-1.

TABLE 9. SUMMARY OF THE OAG REPORT

	Total Stops	Stops Resulting in Arrest	Ratio of Stops to Arrest
Facts articulate reasonable suspicion	2,678	368	7.3
Facts do not articulate reasonable suspicion	673	23	29.3
Insufficient information	1,032	76	13.6
<u>Flight Alone</u>			
<i>Fleeing crime scene</i>	104	4	26
<i>Attempted flight</i>	79	5	15.8
<u>Flight in High-Crime Area</u>			
<i>Fleeing crime scene</i>	61	3	20.3
<i>Attempted flight</i>	45	1	45
Total	4,383	467	9.4

Source: Meares and Harcourt, 90 J Crim L & Criminol at 791 table 2 (cited in note 155).<sup>219</sup>

This astoundingly high relationship between stops and arrests is suggestive that in high-crime urban communities where the population is disproportionately minority, flight from an identifiable police officer is a very poor indicator that crime is afoot. But more importantly, for our purposes here, the data suggest that it is possible to measure the level of suspicion attaching to group-based categories. The data in Table 9 provide a comparative measure of the intrusiveness of police stops for different categories of reasons.

<sup>218</sup> See id at 121 (majority).

<sup>219</sup> We are grateful to Jeffrey Fagan, Center for Violence Research and Prevention, Columbia University, for the analysis of stops and arrests based on the flight codes.



The difficulty, of course, is that the Supreme Court has never used exact proportions to explain the level of certainty a police officer must possess under the reasonableness approach.<sup>220</sup> Our point is that this deficiency can be cured.<sup>221</sup>

#### IV. IMPLEMENTATION CHALLENGES AND SOME OBJECTIONS

It is crucial to compare and evaluate different Fourth Amendment approaches against the appropriate baseline. That baseline is how police power is exercised *today*, not in some idealized world. We need to compare our proposal to actual police practices, not perfect or idealized possibilities. And while we may well agree that checkpoints might be intolerable in an idealized world, that world is not the one in which we live. The issue is whether the evenhandedness of randomized policing may improve the current situation, and here we believe that the answer is yes.

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<sup>220</sup> Rather than emphasizing a particular quantum of evidence necessary to justify a stop under the reasonable suspicion standard, the Court has emphasized the factual basis for the stop by requiring an officer to review all those factors that motivated him to act. See, for example, *Michigan v Summers*, 452 US 692, 703 (1981); *Wardlow*, 528 US at 124. Despite the Court's reluctance to discuss the level of certainty probabilistically, there is evidence that decisionmakers assess the level of evidence that justifies different police actions in implicit probabilistic terms. For example, in one study, 96 out of 166 federal judges surveyed indicated a belief that the reasonable suspicion standard requires 40 percent certainty or less that evidence of crime would be found by an officer after a stop. See C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 Vand L Rev 1293, 1327 table 3 (1982). In the same study, 25 percent of the judges indicated that 50 percent certainty was necessary for reasonable suspicion, while another 19 percent indicated that 60 percent certainty or more was necessary. *Id.* at 1327–28. This empirical evidence makes it quite clear that Fourth Amendment jurisprudence leaves open just how much liberty should be circumscribed. See Slobogin, 39 UCLA L Rev at 75–78 (cited in note 70).

<sup>221</sup> We would also suggest that, for serious crime, the level of suspicion could be lower than for trivial offenses or misdemeanors. If the offense is in fact trivial, perhaps we should augment the level of suspicion, in part because the triviality of the offense in all likelihood suggests that the general level of offending in society is probably higher. There is a sense in which we do that, intuitively, in many criminal contexts. In the case of conspiracy, for example, we require a higher level of evidence of intentionality to support a conspiracy or complicity charge. So, for example, when an individual who provides telephone message service to the public is accused of conspiring with prostitutes, we may require more evidence of intentional aiding in order to prove a conspiracy. We may not be as willing to impute intent based on knowledge—based on the fact that the telephone message provider simply knows that his customers include prostitutes. However, we may be willing to impute intent if an individual is accused of facilitating a terrorist act if, with knowledge, that individual sells a service that furthers the terrorist act. This is, famously, the distinction drawn in *People v Lauria*, 59 Cal Rptr 628, 634–35 (Cal App 1967) (requiring greater level of evidence of intent in conspiracy case involving prostitution). The same type of distinction may apply in the Fourth Amendment context: we may require a higher threshold of suspicion in the case of more ordinary misdemeanors or more trivial felonies.

### A. Models of Suspicion-Sufficient Randomized Policing

Before addressing some objections, though, let us be more precise about the exact kind of policing that we are proposing. Here are five examples of randomized police practices that we believe would satisfy constitutional values and improve on current police practices by promoting evenhandedness while ensuring the protection of legitimate privacy interests.

#### 1. Randomized consent searches on the highway.

Rather than allow the police to use profiles and hunches to seek consent to search on the highway, highway patrol officers would be instructed to seek consent to search vehicles in every third or fifth (or, if they have the time, every) stop of a vehicle traveling at a designated speed—for instance, ninety to ninety-five miles per hour on even days and eighty-five to ninety miles per hour on odd days. The evidence from traffic stops across the country suggests that, as the amount of discretion in the stopping and searching decreases, the racial disproportionality of the stops also decreases.<sup>222</sup> This randomized approach would protect privacy, since it is based on a traffic violation (excessive speeding), and at the same time ensure evenhandedness.

#### 2. Randomized evening street stop-and-frisks in diverse socioeconomic neighborhoods.

Instead of allowing targeted stop-and-frisk activity in minority, high-risk neighborhoods only, urban police officers would be instructed to conduct evening stop-and-frisks in, say, five different neighborhoods of diverse socioeconomic and demographic composition. In each location, police officers would be asked to stake out a block or intersection and then to stop, interview, and frisk each tenth (or fifth or twentieth, depending on traffic) person who walks by them. Police officers would hand each person searched a card with information about the search program. If the search program did not net the requisite level of suspicious activity (including drug contraband, firearms, and so on), then all persons searched under the program would be entitled to monetary compensation. As in all large metropolitan areas today, police would fill out a contact card for each stop-and-frisk encounter, which would make data collection very easy.

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<sup>222</sup> See *State v Soto*, 734 A2d 350, 354 (NJ Super Ct 1999).

3. Randomized subway and bus searches of bags and patdowns.

Here too, the idea would be to substitute a randomized program for the type of more targeted anti-terrorism searches of bags in the subway post-9/11.<sup>223</sup> Again, the police would be directed to locate themselves in such a way as to diversify the populations that they encounter. The searches would be conducted on a random basis (fifth, tenth, or twentieth person entering the station or boarding the bus) and would be accompanied by an information card in the event that the search program does not meet the threshold requirement of suspicion.

4. Randomized DUI roadblocks.

These would involve randomized administration of breathalyzer tests at roadblocks located at various diverse neighborhoods in the city or along roads in diverse rural areas. These, too, would be monitored and evaluated on a monthly basis and subject to the requirement that information be distributed for eventual compensation if the level of DUI detection falls below the minimum level of suspicion.

5. Randomized investigation of trades on any stock for which there is an important disclosure of good or bad corporate news.

Here, federal investigators would randomly select and investigate persons who bought or sold a quantity of shares in a company that, within a certain period of the trade, announced significant news affecting the stock price. The investigation could include, for example, the power of subpoena for phone records.

These are just five examples, of course, and the list could go on, for example, to include random IRS audits, immigration checks, or even random computer scans for illegal downloads or child pornography.<sup>224</sup>

We suspect that you may be saying to yourself that these police practices seem extreme and somewhat totalitarian. You may think that people will view these practices as unfair and illiberal, even perhaps un-American—that we have forgotten the lessons of the American Revolution (or something to that effect). This outrage rests on an

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<sup>223</sup> See, for example, *MacWade v Kelly*, 460 F3d 260, 263 (2d Cir 2006); *Cassidy v Chertoff*, 471 F3d 67, 87 (2d Cir 2006). But see generally Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 Duke L J 843 (2010).

<sup>224</sup> See, for example, Sarah Lawsky, *Fairly Random: On Compensating Audited Taxpayers*, 41 Conn L Rev 161, 163–68 (2008); Daniel Solove, *Data Mining and the Security–Liberty Debate*, 75 U Chi L Rev 343, 357 (2008).

intuition: people who have not done anything wrong ought to be left alone by the police. Our response may sound condescending, and for that we apologize (especially to our readers who may have extensive or other experience with police searches). But here we go anyway: the reason that you may be having that response, very likely, is because you may be part of an elite in the United States that is relatively sheltered from police stop-and-frisks. But for most young men living in the inner city, this *is* the American experience. Remember that in 2008 the NYPD stopped and frisked 531,159 individuals, and that about 90 percent of those stops and frisks resulted in no arrest or summons. That is half a million stop-and-frisks. Many of us have not experienced those kinds of police practices, because many of us are not the “usual suspects.” But for many youth in poor urban neighborhoods, being stopped and frisked is a common experience. What we are proposing, in effect, is simply to distribute more evenhandedly the burden of making us all safe and secure.

#### B. Compensation Questions

There is, today, no system of compensation for wrongful searches, and the existing mechanisms to police the Fourth Amendment—predominantly 42 USC § 1983 civil rights suits—are inadequate to the task.<sup>225</sup>

We propose compensation primarily because the level of suspicion for randomized search programs often will be difficult to ascertain *ex ante*, before the search program has been implemented. Under these circumstances, we believe that persons who are subject to randomized searches where there is ultimately an insufficient level of suspicion should be compensated for their time and inconvenience. By contrast, individuals who are inconvenienced at a proper checkpoint, where there is ultimately sufficient suspicion, should view the inconvenience as part of their civic obligations to ensure safety for all. We also propose compensation in order to incentivize the police to achieve the minimum level of suspicion that would be eventually set by the Supreme Court.

Under our proposal, a police department would need only to compensate individuals wrongfully searched (that is, not arrested or fined) at a checkpoint *if* the overall level of suspicion at that checkpoint did not reach the minimum constitutional level required. In all cases where the randomized search program does achieve the

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<sup>225</sup> See William C. Heffernan and Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U Mich J L Ref 311, 361 n 123 (1991).

base level of successful searches, individuals at those checkpoints would not be compensated. Moreover, as discussed further below, individuals who are wrongfully searched outside the context of a checkpoint would also automatically be entitled to compensation with an additional penalty for their targeted harm.<sup>226</sup>

One might ask why we limit compensation simply to those who are subject to search without an *ex ante* determination of suspicion if it is subsequently determined that the search, as carried out, does not meet the required level of suspicion. The answer is that the regime we propose here is not a remedial one but rather simply an incentive structure designed to address the fact that people will have their autonomy and privacy interests infringed upon for no reason. As we have argued here, we think it is within legitimate constitutional interpretation for such search and seizures to occur without *ex ante* determination of suspicion so long as the incursion is evenhanded.<sup>227</sup> It may well be the case, however, that the Warrant Model of the Fourth Amendment would also be enhanced by a compensation regime. We take no position on that issue here.

Compensation is not without its problems. First, it may create perverse incentives. It is possible, for instance, that some people will be drawn to checkpoints in order to receive compensation, which would effectively reduce the hit rate at the checkpoint and make compensation even more likely. These incentives could be reduced, however, by maintaining an element of surprise in the checkpoint. Second, the compensation scheme may also make the entire policy seem more unfair if compensation is being awarded in the higher-income neighborhoods (if there are, for instance, lower hit rates) and not in the inner-city neighborhoods (if there are, correspondingly, higher hit rates). This latter point would militate in favor of not awarding compensation based on the hit rate and level of suspicion, but instead to all persons who are wrongly searched. Third, compensation may reduce the positive effects of policing, since it represents a cost that will have to be internalized by the policing budget. There will be costs associated with the compensation scheme, including not only the compensation itself, but also administration, notification, disputes over claims, and so on. If the costs are high, it may reduce the number of people that can be searched, which will further reduce the effects of policing—perhaps, the total level of deterrence, incapacitation, or retribution. In other words, there will be

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<sup>226</sup> Advances in technology make the regime we describe here quite easy to imagine in real life. Anyone who has used an E-ZPass has interacted with the kind of technology one could use to facilitate easy payment. We thank Jeff Meyer for pointing us to this example.

<sup>227</sup> See Parts III.A. and III.D.

costs associated with any such program that may take away from the benefits.

These problems are by no means trivial. But they need to be weighed against the important goal of ensuring evenhandedness in our policing. The turn to randomization means that certain policing programs will need to be implemented without *ex ante* knowledge of the exact level of suspicion and that calls for compensation for those who are burdened by those unsuccessful programs. We believe that some of the administrative costs will be absorbed by the new record-keeping requirements—in other words, there will be some economies of scale given current oversight. In most large metropolitan areas, the police are already required to gather information for each stop-and-frisk. Each time a police officer searches a suspect, the officer is already required to fill out a form.<sup>228</sup> As a result, the information gathering and dissemination associated with a potential compensation scheme should not increase those costs much. Moreover, there may be less civil rights litigation as a result of a more routine compensation scheme—in the same way that workman's compensation schemes decrease some litigation costs.<sup>229</sup> But there is no question that, overall, the very fact of compensation will increase costs. There is no easy way out of this dilemma. It has to be that we, as a society, value the benefits of evenhandedness enough to outweigh those costs and are thereby willing to invest additional resources into the problem.

### C. Pooling Issues

Another implementation issue concerns how the pools of individuals will be constructed for purposes of randomization. As the illustrations above suggest, most of the pooling that we envisage will be determined by space and time rather than by additional group traits. In other words, instead of randomizing within a suspect group trait, we propose randomizing by location and time. As a result, the pooling issues will be determined by the location of the checkpoint at the particular subway stop or street intersection and by the time of day. One reason to do this is that the stigmatizing harm of being publicly identified as a potential wrongdoer by a law enforcer is often a distinct conjunction of geography and group trait.<sup>230</sup>

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<sup>228</sup> See note 210.

<sup>229</sup> See L.I. Boden, *Worker's Compensation in the United States: High Costs, Low Benefits*, 16 *Ann Rev Pub Health* 189, 190–91, 206–08 (1995).

<sup>230</sup> See note 164 and accompanying text.

#### D. Some Objections

It is important to emphasize a few points before addressing some recurring objections.

First, using the checkpoint as the Fourth Amendment lodestar *would not* mean that the police could not *also* engage in the more traditional police practices of stopping and searching a suspect who is walking out of a bank with a ski mask over his face and a bag full of money. The constitutionalization of a randomization paradigm would not make it necessary to stop and search everyone surrounding the bank. It would not necessitate randomization in more conventional Warrant Model situations.

If the police have a compelling reason to stop a suspect outside of a randomized program, then that stop would be treated as if it had a probability of 1. If the search does not produce anything, then the individual must be compensated, and perhaps compensated at a higher rate than for randomization programs that do not reach the designated level of suspicion *because* the targeted harm to the profiled individual searched is greater. Since there is no randomization program in place here, and no other search results to aggregate, the individual searched must be compensated if the search is unsuccessful.

Second, there is no doubt that using checkpoints will not, by itself, cure all the evils of racial profiling. So, for instance, if the police set up all of their roadblocks on the South Side of Chicago or only in African American neighborhoods, then the distribution of arrests will inevitably be skewed along racial and socio-economic lines, very much like it is under the *Whren* model.<sup>231</sup> Similarly, if the police use as their randomizing variable one that correlates with race, the police will be functionally profiling *on race*.

But there are reasons to believe that these problems would be minimized under a randomization paradigm—two reasons in particular. First, the police themselves have an incentive to distribute searches widely so as to police all neighborhoods in the city, not just the at-risk neighborhoods. In order for the police administrators to have an effective police force throughout the city, they will have to set up randomized search programs in diverse neighborhoods. If they limit themselves to targeted policing for the lower-crime neighborhoods, they will necessarily subject themselves to far greater costs of compensation under our approach, since each wrongful search will have to be compensated, and perhaps compensated even more if there is an added price to targeted harms. So in order to ensure police

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<sup>231</sup> See text accompanying notes 162–64.

protection across the city, the police administrators will need to distribute search programs throughout the city.<sup>232</sup>

Second, distributing the burden of policing within neighborhoods likely would put political pressure on the city to distribute the burden more widely throughout the city. The wider distribution of the costs of policing, even within a neighborhood, and the resulting political pressure that the wider distribution triggers, will likely put pressure on city administrators to distribute more widely the costs of policing. Even within a socioeconomically depressed neighborhood, traditional forms of profiling are condoned in large part because they fall on the most marginalized populations in that neighborhood. By distributing the costs more widely, there is likely to be greater attention to any neighborhood-to-neighborhood disparities in the burden of policing.<sup>233</sup>

Let us turn then to some objections.

First, a reader may object that profiling is more efficient than randomized searching and that there is no reason to search low-probability suspects at checkpoints. This is a common reaction to our proposal, and it can be expressed along any of the dimensions of policing that we discuss—whether it involves searching grannies and toddlers at the airport or auditing low-income taxpayers on April 16. This argument from efficiency, however, is misplaced for a number of reasons.

The first reason is that, as a practical matter, profiling and statistical discrimination likely increase the overall rates of the targeted crime under the conservative assumption that the targeted population is less elastic than the nonprofiled group. There are long-term substitution effects and a ratchet effect on the profiled group that, in all likelihood, is counterproductive to the law enforcement goal of fighting crime. In other words, profiling is not likely to be more efficient. One of us has dedicated a full-length treatment to this point,

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<sup>232</sup> To be sure, the police today also have an incentive to police the entire city, they do police all neighborhoods, and, despite that, they target stop-and-frisks disproportionately on certain groups and in certain neighborhoods. See Matthew Petrocelli, Alex R. Piquero, and Michael R. Smith, *Conflict Theory and Racial Profiling: An Empirical Analysis of Police Traffic Stop Data*, 31 J Crim Just 1, 8 (2003). The problem today is not that the police do not police higher-income neighborhoods, but that they target their stop-and-frisks on certain identifiable populations and in certain parts of town. Under our scheme, the practices would be made more consistent across neighborhoods. It is the consistency in practices that would make all the difference. The police would have the same incentive to police all neighborhoods, but would now be required to do so in the same way.

<sup>233</sup> Here, too, naturally, the greater diffusion of searches may trigger political resistance in the more affluent neighborhoods; however, it is hard to imagine that any neighborhood would want to do without policing. Policing is, after all, a “good” and tends to be viewed as a desirable public service. Once again, the consistency in police practices is what would serve to distribute the burdens of policing.



and we will not rehash it here.<sup>234</sup> The basic point here is that we cannot be so sure about the efficiency gains of profiling and therefore that we should not be so willing to trade off the distributional concerns and the problems of subordination.

The second reason, though, is equally important: we are not dealing with public policy in this Article, but with constitutional interpretation. There is no reason to believe, *ex ante*, that the constitutional values we hold so dear coincide with the most effective policing techniques. There is no necessary overlap of the Constitution on one hand and public policy on the other. Or, to say this another way, it is possible that the new constitutional paradigm may allow, as a constitutional matter, some policing practices that we do not embrace as a policy matter—and vice versa. Efficiency is not the litmus test of constitutional interpretation.<sup>235</sup> Now, in this particular case, we believe that suspicion-sufficient, randomized search programs not only would satisfy the constitutional values of evenhandedness and privacy protection, but would also be wise public policy. We believe that the embrace of randomization would not only promote the kind of evenhandedness that will ultimately reduce bias and the disparate racial impact of policing, but also improve our policing practices. However, we would argue for this constitutional change even if it did have costs in efficiency.

One further point on this matter: one may not believe that the courts and constitutional interpretation are necessarily the right devices to use to address the fundamental problem of racial injustice in police patrolling. Undoubtedly, it would be better to look elsewhere than Fourth Amendment doctrine. The rate of review is low, and review comes late, plus the consequences of violations are largely insured against today, with immunities for police officers and so on. It is undoubtedly true that the values of the Fourth Amendment—privacy and evenhandedness—could be better implemented through administrative measures within police forces that reward (or punish) officers or supervisors for disparate hit rates along race lines, for instance. We do not argue, however, that there should be exclusive reliance on the courts or that the constitutional standard we advocate is a better way of achieving a less biased society. We are simply dealing in this Article with the constitutional standard to apply. In other words, even if one does not think that the courts are the best or even a good vehicle, one would want the constitutional standard to reflect the values we hold dear—privacy and evenhandedness. Our central point

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<sup>234</sup> See generally Harcourt, *Against Prediction* (cited in note 16).

<sup>235</sup> Consider *INS v Chadha*, 462 US 919, 944 (1983).

is that it is rarely related to issues of evenhandedness—and that is something we seek to redress.

Second, some readers may object that there are really two separate projects here: one involves abandoning the “individualized suspicion” standard, the other embracing randomization, and the two are not necessarily related to each other. Our response is that they are inextricably linked. The reason is that once you abandon the “individualized suspicion” standard and adopt a requirement that searches achieve a designated level of suspicion, it is important to then introduce the element of evenhandedness. It is important, in effect, to limit the focus on suspicion so that it does not have devastating distributional and subordinating consequences. In other words, we should not seek to simply increase as much as possible the level of suspicion (which protects only privacy), but should simultaneously, over a certain level of suspicion, protect the other value of evenhandedness at the heart of the Fourth Amendment.

Third and finally, some readers may object that the overall result might be too little policing. Assuming along with Randall Kennedy and others that policing is a “good,” some may argue that requiring checkpoints in high-income neighborhoods will incentivize the more politically powerful elites to minimize policing, which would effectively reduce the amount of policing in high-crime neighborhoods below the levels required there for safety and protection.<sup>236</sup> The fear here is not that the randomized searches would be too oppressive, but rather that there would not be enough of them. Our answer here is simple: it is unlikely that a constitutional standard alone will resolve all public policy questions and achieve a perfect equilibrium of policing in society. There may in fact be slight deviations from perfection. But we should not expect the constitutional standard to achieve perfection. It pushes in the right direction, we believe, and that is far better than the system that we have in place now. We need to compare what we are proposing against the reality of today’s policing.

#### E. Apples to Apples

To be sure, there are some implementation challenges. But again, that is equally, if not more, true in the case of “individual suspicion” searches. The challenges there are well illustrated, again, in the *Edmond* case. For what that case demonstrates well is that the constitutionality of a search under the “individualized suspicion”

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<sup>236</sup> See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 Harv L Rev 1255, 1255 (1994); Carolyn Wolpert, *Considering Race and Crime: Distilling Non-partisan Policy from Opposing Theories*, 36 Am Crim L Rev 265, 285–86 (1999).

model is likely to turn on the judge's decision whether to evaluate the search program at the level of the entire roadblock program or at the level of an individual stop. Judge Posner made this clear in the very first paragraphs of the opinion: if the court were to adopt a program-level analysis, Judge Posner suggested, then the court would perform a cost-benefit analysis and the outcome would most certainly favor law enforcement.<sup>237</sup> Most program-level evaluations of costs and benefits do. But if the court were to adopt an individual-level assessment focused on "individualized suspicion," the outcome would likely differ. Judge Posner wrote:

Whether the seizures effected by Indianapolis's drug roadblocks are reasonable may depend on whether reasonableness is to be assessed at the level of the entire program or of the individual stop. If the former, these roadblocks probably are legal, given the high "hit" rate and the only modestly intrusive character of the stops.<sup>238</sup>

In this sense, the distinction between program-level and individual-level analyses tends to be outcome-determinative under the "individualized suspicion" approach. The program-level assessment triggers a cost-benefit analysis that, under Judge Posner's analysis, favors law enforcement in practically all cases. The major cost in the case of the Indianapolis roadblocks was the waste of time and invasion of privacy suffered by each person stopped and questioned. Other costs included the opportunity cost of using those police officers on more pressing police business—such as solving or preventing serious crimes like murder or robbery—the equipment costs associated with setting up a barricade, and the costs of publicizing and justifying the intervention (maybe the police department had to issue a press release and conduct a press hearing, and so on). The benefits of the program included the detection of drug contraband, the detection of derelict drivers who either had no registration or no licenses, and the deterrent effect on illicit drug consumption associated with the publicity surrounding the program—what Judge Posner referred to as "the deterrence of drug offenses produced by these hits."<sup>239</sup> A program-level cost-benefit analysis would compare the aggregated costs and benefits. As Judge Posner suggested, at the program level the equation would likely favor the roadblocks because of the supposedly large deterrent effects.<sup>240</sup>

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<sup>237</sup> See *Edmond*, 183 F3d at 661–62.

<sup>238</sup> *Id.* at 661.

<sup>239</sup> *Id.* at 662.

<sup>240</sup> See *id.* at 662. Judge Posner held that in conventional criminal-law enforcement settings, an individual-level assessment is ordinarily appropriate: "[C]ourts do not usually assess reasonableness

Under our proposed approach, checkpoint searches would be analyzed on a program-level basis, but the use of a program-level approach would not necessarily bias the determination in the direction of rubberstamping all checkpoints. The determination of the constitutionality of the checkpoint would stand or fall instead on the rate of success of the police intervention—in other words, on whether the level of detection satisfied the minimum requirement of reasonable suspicion set by the Supreme Court as the probability of detection of crime. Each checkpoint, then, would have to be evaluated, either *ex ante* or *ex post*, based on the level of detection of crime that is achieved at the checkpoint in relation to the level of detection that society considers necessary to satisfy Fourth Amendment reasonableness.

Because it is practically impossible to know ahead of time the exact level of detection that is likely in many situations, a checkpoint model of policing would need to go hand in hand with a compensation framework for the set of individuals burdened by an unreasonable checkpoint search.

#### CONCLUSION

The Supreme Court has tailored Fourth Amendment jurisprudence to fit the exception. The cases that best fit the notion of “individualized suspicion” are those rare cases in which police attempt to track down clearly identified assailants, where evidence of the committed crime is plentiful, and where it converges on one individual. But such cases are truly exceptional. The more typical policing situation is one in which the relevant officers have no idea who the offenders are

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at the program level when they are dealing with searches related to general criminal law enforcement”—or at least, “ordinarily” so. *Id.* at 662, citing, for example, *Whren v. United States*, 517 US 806. Judge Posner, reviewing prior cases, found several exceptions to the ordinary situation. Those exceptions included, first, the case where police officers have information that a dangerous criminal is escaping along a certain route. Here, there is heightened risk that allows for preemption in favor of program-level review. See *Edmond*, 183 F3d at 662–63. Second, there is an exception when law enforcement faces a terrorist threat. Judge Posner offered the following example:

[I]f the Indianapolis police had a credible tip that a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis, they would not be violating the Constitution if they blocked all the roads to the downtown area even though this would amount to stopping thousands of drivers without suspecting any one of them of criminal activity.

*Id.* at 663. In this case of national emergency, the court should switch to the program-level review. Judge Posner identified a third exception for regulatory measures such as sobriety checkpoints or other randomized search programs involving drug testing for law enforcement officers or railroad engineers, *id.* at 663, and a fourth exception for immigration checkpoints searching for illegal immigrants or contraband crossing the borders. *Id.* at 664–65. In all these exceptional cases, Judge Posner declared, courts reviewing police practices should and do properly adopt a program-level cost-benefit analysis—which, not surprisingly, results in their being found constitutional. See *id.* at 665–66.

and rarely know the specific crime that has been committed. The typical case is about hunches, guesses, and intuitions about crime—cases in which police attempt to prevent crime as opposed to investigate crime that has been committed. These cases represent the vast majority of policing, and the Fourth Amendment jurisprudence that the Court has developed simply does not fit this majority of cases. As a result, the Court’s Fourth Amendment jurisprudence is not able to ensure the constitutional values that we hold most dear—limiting discretion, reducing racial discrimination, and promoting autonomy in interactions that citizens have with law enforcement agents.

It is time to discard the “individualized suspicion” standard. The expression is a misleading, conclusory, and substantively contentless term that has distorted Fourth Amendment jurisprudence. It has become, over time, a substitute for the expression “reasonable suspicion” to the detriment of constitutional interpretation because it has *distracted* courts and other criminal justice actors from focusing on what is truly important—namely, the level, the amount, the *degree* of *reliable* suspicion. Thus, instead of helping to guide relevant legal system actors to determine the quantity of suspicion necessary for government action in particular cases, the term “individualized suspicion” has functioned as a legal rubric that masks the actual basis of the judicial decision. It captures, essentially, the conclusion—namely, that the search is constitutional—without offering any reasoning.

The central impulse at the heart of this Article is the desire to cabin police discretion so as to avoid socioeconomic and racial discrimination and to distribute more evenly the costs of policing throughout society. The legal concept of “individualized suspicion” does not advance either of these two goals—and does not have any other redeeming virtue. It is, in essence, a semantic hat trick that masks the underlying factors that produce a constitutional conclusion. The concept of “individualized suspicion” needs to be abandoned, and we need instead to explore the virtues of randomization that are at the core of the checkpoint paradigm.