Randomization and the Fourth Amendment

Tracey L. Meares  
TraceyL.Meares@chicagounbound.edu

Bernard E. Harcourt  
bernard.harcourt@columbia.edu

Follow this and additional works at: https://chicagounbound.uchicago.edu/law_and_economics

Part of the Law Commons

Recommended Citation

This Working Paper is brought to you for free and open access by the Coase-Sandor Institute for Law and Economics at Chicago Unbound. It has been accepted for inclusion in Coase-Sandor Working Paper Series in Law and Economics by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
RANDOMIZATION AND THE FOURTH AMENDMENT

Bernard E. Harcourt and Tracey L. Meares

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

August 2010

RANDOMIZATION AND THE FOURTH AMENDMENT

Bernard E. Harcourt¹ & Tracey L. Meares²

¹ Julius Kreeger Professor of Law and Chair and Professor of Political Science, University of Chicago.

² Deputy Dean and Walton Hale Hamilton Professor of Law, Yale Law School. We thank Richard Helmholz, Aziz Huq, Jonathan Masur, Richard McAdams, Adam Samaha, David Sklansky, and Carol Steiker for valuable comments on earlier drafts. For outstanding research assistance, we thank Liza Khan, Sam Lim, Diana Watral, Basha Rubin, and Nicolas Thompson.

DRAFT: AUGUST 18, 2010
© BERNARD E. HARCOURT AND TRACEY L. MEARES
RANDOMIZATION AND THE FOURTH AMENDMENT

Bernard E. Harcourt & Tracey L. Meares

I. Introduction

In the eyes of most jurists and constitutional commentators, checkpoint searches symbolize the exact antitheses of Fourth Amendment reasonableness. No matter whether the checkpoints operate on a randomized or exhaustive basis, 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—namely, individualized suspicion. Justice 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.” 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.” This conflation is illustrated well in the constitutional debates over random drug testing, border patrol checkpoints, and administrative inspections, where the controversy inevitably turns on the costs to privacy of having suspicionless searches versus the benefits of evenhandedness that flow from randomized searches. The conflation of the suspicion and randomization elements ultimately reinforces the negative view of checkpoint searches.

We take a different view: we contend, first, that the model of the checkpoint should serve as the loadstar for reasonableness under the Fourth Amendment and that the concept of “individualized suspicion” should be, well,
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, second, 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 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 in order to capture the benefits of both privacy-protection (by ensuring a minimum level of suspicion) and evenhandedness (by cabining police discretion).

The notion of reasonableness at the core of the Fourth Amendment has a few aims. Two of the most important are controlling police discretion and avoiding discrimination, whether political, racial, or other. Our contention, primarily, is that the Fourth Amendment ought to be interpreted in a way that best constrains police power and makes it 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 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 begin by noting that the “individualized suspicion” concept is based on a faulty understanding of suspicion. The term “individualized suspicion,” 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.

To be more precise, 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 suspicion is either individualized and meets constitutional requirements, or it is not. The term implies that the process of suspicion-based judgments is binary. In reality, suspicion is a probabilistic
concept. It is, in technical terms, a continuous variable, not a categorical one. Second, the term is misleading in another way because it suggests that law enforcers come to judgments about individuals by evaluating unique individual traits. In reality, most individuals become suspicious because of the group-based type behavior that they exhibit or the fact that they belong 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. To be sure, there are cases when suspicion attaches to an individual because of his or her unique identification. Arrests warrants executed for a fugitive of the law are the best example, and the case of Roman Polanski comes to mind here. But these cases obviously are rare in contrast to the more typical police-civilian encounter. Let us explain.

First, the proper way to think about suspicion is with reference to a probability scale of 0 to 1, not as individualized or not. 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, place of birth, etc.—to an outstanding arrest warrant, the level of suspicion is again high, at or very close to 1. 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've described. 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. 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

---

4 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.

5 We refer here, obviously, to the facts recounted by Officer McFadden to justify his stop and search of John W. Terry in the famous case of Terry v. Ohio, 392 U.S. 1 (1968).
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.”

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, Officer McFadden became suspicious of the suspects there 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. In other cases, suspicion attaches to the individual who has a bulge in his pants pocket, who fits a description in the vicinity of a recently committed offense, who throws away a plastic vial at the sight of a police patrol car, or who has Florida license plates on the New Jersey Turnpike. These are group-based determinations, and suspicion potentially attaches to all individuals within those categories. Suspicion in these cases is “individualized” only in the sense in 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.

---

6 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, 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.

7 392 U.S. at 5-7.
By modeling suspicion with respect to a binary standard rather than to the more realistic 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. In reality, police practice is dominated by discretionary decisions about whom to stop and investigate based on leads and suspicious behavior—prospective and preventative actions that are based on levels of suspicion far short of “1.” In the vast majority of cases, what we really want to know is whether there is enough suspicion (in probability terms) to conclude that the Constitution has been satisfied. To use existing language, what we want to know is that there is “individualized suspicion” in the binary sense.

It is true that if law enforcement officers were authorized to act only when presented with a case in which the offender and crime were clearly identified—where the level of suspicion is close to “1”—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 individuals in which the level of suspicion falls well below “1,” and there the binary model the courts employ offers no guidance to the law enforcers subject to it.

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 rule 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

---

8 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. In those cases, 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 they distort the functioning of the Fourth Amendment.
courts have completely punted the question. The binary model is essentially unidentified, and so it offers no guidance to the police to insure 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.⁹

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 structure of the Fourth Amendment text 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, as we all know, contains two clauses.¹⁰ 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. But in so doing, the Court has created a fictional rubric of “individualized suspicion” that does more harm than good.

---

⁹ 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 we urge courts to use, 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 that probabilistic approach to suspicion to address the constitutional question whether there is reasonable suspicion sufficient to justify a stop.

¹⁰ “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.” U.S. Const. Amend. IV.
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.  

Nothing about what 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, etc. In order to pick from within that group—all of whom satisfy 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.

Second, and relatedly, 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. 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

---

11 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.”
populations. What the checkpoint can provide is an updated and accurate profile of the offending population—a snapshot of offender distributions.\(^\text{12}\) 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 essay, we argue that the expression “individualized suspicion” should be abandoned. But we also go further and suggest that randomized stops at suspicion-sufficient checkpoints should be the focal point of Fourth Amendment reasonableness: that randomized engagement of citizens offers a better constitutional model for controlling the exercise of police power against individuals.

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.”\(^\text{13}\) 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.

\(^\text{12}\) In most cases, the construction of profiles is actually based on random sampling. 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 50,000 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. To be sure, there are dangers in using profiles prospectively if the targeted population is less elastic to policing than the non-targeted population. See generally Bernard E. Harcourt, Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age (Chicago 2007). So using the information prospectively may not be wise. But what the 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.

\(^\text{13}\) U.S. Const. Amend. IV.
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 able to be determined 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. However, there will be times 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 (on a workman’s compensation model) for the set of individuals ultimately burdened by an unreasonable (insufficient suspicion) checkpoint search.14

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 and demonstrate how our proposal accords with Fourth Amendment values. Using a case that illustrates the contour of our argument, Indianapolis v. Edmond, 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

14 We are not the first to advocate compensating individuals for police encounters, (see Lempert, others) but combining a compensation scheme with randomization is new.
constructed for purposes of randomization, and so we discuss in some detail the pooling issues. We also offer a number of examples. One preliminary 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.

II. Grounded Theory: The Reality of Police Practices

In 2006, NYPD police officers in New York City stopped, questioned, and frisked 508,540 people.\textsuperscript{15} In 2007, the NYPD frisked close to 30,000 more people—531,159—a record, but one was short-lived. For the calendar year 2009, the NYPD stopped and interrogated a remarkable 575,304 persons.\textsuperscript{16} And 2010 promises to break even that record.

By contrast, adult felony arrests in New York City represent a fraction—approximately one-fifth—of these numbers. In 2006, there were 97,158 felony arrests of adults, of which 27,516 were related to violent crime and 29,053 to drug-related offenses—and some number of these grew out of the stop and frisk practices;\textsuperscript{17} in 2008, there were 100,043 felony arrests of adults, which included 28,296 violent and 28,765 drug-related offenses.\textsuperscript{18}

There is also a Violent Felony Warrant Squad in the NYPD that tracks down individuals wanted on felony


\textsuperscript{18} Id. There were twice as many adult misdemeanor arrests during the relevant periods in New York City—206,259 in 2006 and 233,291 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.
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.\textsuperscript{19}

In other words, more than half a million people were stopped-and-frisked under a Patrol Model in New York City, 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 attached to the incident.\textsuperscript{20} The following table summarizes the totals for each category. What is striking is how many of the suspicion categories are group-based.

Table: Reasons for Stop

<table>
<thead>
<tr>
<th>REASON FOR STOP</th>
<th>NUMBER OF STOPS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carrying Suspicious Object</td>
<td>4,122</td>
</tr>
<tr>
<td>Fits A Relevant Description</td>
<td>23,053</td>
</tr>
<tr>
<td>Casing A Victim Or Location</td>
<td>51,015</td>
</tr>
<tr>
<td>Suspect Acting As A Lookout</td>
<td>30,121</td>
</tr>
<tr>
<td>Suspicious Bulge</td>
<td>16,552</td>
</tr>
<tr>
<td>Other</td>
<td>34,708</td>
</tr>
<tr>
<td>Actions Indicative Of A Drug Transaction</td>
<td>16,124</td>
</tr>
<tr>
<td>Furtive Movements</td>
<td>81,692</td>
</tr>
<tr>
<td>Actions Of Engaging In A Violent Crime</td>
<td>14,479</td>
</tr>
<tr>
<td>Wearing Clothes Commonly Used In A Crime</td>
<td>8,856</td>
</tr>
</tbody>
</table>


\textsuperscript{20} See NYPD Report, \textit{supra} note 16, at 334-35.
Table: Reasons for Frisk

<table>
<thead>
<tr>
<th>REASON FOR FRISK</th>
<th>NUMBER OF FRISKS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inappropriate Attire For Season</td>
<td>15,119</td>
</tr>
<tr>
<td>Verbal Threats By Suspect</td>
<td>1,027</td>
</tr>
<tr>
<td>Knowledge Of Suspect's Prior Criminal Behavior</td>
<td>2,223</td>
</tr>
<tr>
<td>Other Suspicion Of Weapons</td>
<td>6,005</td>
</tr>
<tr>
<td>Furtive Movements</td>
<td>64,068</td>
</tr>
<tr>
<td>Actions Of Engaging In A Violent Crime</td>
<td>10,822</td>
</tr>
<tr>
<td>Refuse To Comply W/ Officer's Directions</td>
<td>16,874</td>
</tr>
<tr>
<td>Violent Crime Suspected</td>
<td>18,753</td>
</tr>
<tr>
<td>Suspicious Bulge</td>
<td>15,900</td>
</tr>
</tbody>
</table>

Table: Basis for Search

<table>
<thead>
<tr>
<th>BASIS FOR SEARCH</th>
<th>NUMBER OF SEARCHES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hard Object</td>
<td>8,122</td>
</tr>
<tr>
<td>Admission By Suspect</td>
<td>548</td>
</tr>
<tr>
<td>Outline Of Weapon</td>
<td>1,090</td>
</tr>
<tr>
<td>Other</td>
<td>6,300</td>
</tr>
</tbody>
</table>

Table: Additional Circumstances

<table>
<thead>
<tr>
<th>ADDITIONAL CIRCUMSTANCES</th>
<th>NUMBER OF CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Report By Victim/Witness</td>
<td>17,247</td>
</tr>
<tr>
<td>Area Has High Crime Incidence</td>
<td>97,170</td>
</tr>
<tr>
<td>Time Of Day Fits Crime Incidence</td>
<td>66,996</td>
</tr>
<tr>
<td>Proximity To Scene Of Offense</td>
<td>30,563</td>
</tr>
<tr>
<td>Associating With Known Criminals</td>
<td>5,902</td>
</tr>
<tr>
<td>Other</td>
<td>5,568</td>
</tr>
<tr>
<td>Evasive Response To Questioning</td>
<td>33,949</td>
</tr>
<tr>
<td>Change Direction At Sight Of Officer</td>
<td>43,565</td>
</tr>
<tr>
<td>Ongoing Investigation</td>
<td>21,301</td>
</tr>
<tr>
<td>Sights Or Sounds Of Criminal Activity</td>
<td>3,789</td>
</tr>
<tr>
<td>Radio Run</td>
<td>40,917</td>
</tr>
</tbody>
</table>

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 of 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 jurisdictions across the country and, now, is viewed as the dominant and preferred model of policing.²¹ The result is that, today, policing agencies claim a greater commitment to community-oriented policing than they did thirty years ago.²²

Much of the research on police workload was conducted during the period of professionalized policing in the 1960s and 70s.²³ The lessons from those earlier studies are consistent with and document two important facts about ordinary policing both in urban and rural settings: First, that 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

²¹ Cite Moore here plus recent Mastrofski piece on prevalence, Stephen Mastrofski, et al., The Challenges of Implementing Community Policing in the United States, 1 Policing 223-234 (2007)
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.” 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. 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.

The Warrant Model and the Patrol Model of policing do not perfectly map onto the workload studies we will 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. 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 13-month period from April 1997 through April

---


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. The researchers coded the work activities of the observed officers minute-by-minute by 125 different categories of activities and encounters. The activities categories were defined as non-contact as 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 16-category list of workload, ranging from “personal” and “en route/waiting” to “administrative,” “order maintenance,” or “ordinance enforcement.”

For our purposes, the most important categories are the encounter categories 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 “Activities involving a response to a violation of criminal law, for example searching property, serving warrants, or responding to crime calls (e.g., burglary).” Serving warrants, clearly, maps on well to our category, 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 on to our model of patrol policing. This category includes three rubrics: the first, “Investigative,” is defined as “Activities involving an unknown problem (e.g., checking out suspicious circumstances, alarm response, or interrogation)”; the second, “Order-maintenance,” is defined as “Proportion 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 “Activities involving vehicles or

---

28 *Id.* at 37.
the roadways, for example traffic enforcement, traffic or road problems, road block, or accidents.\textsuperscript{29}

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. 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 more reactive crime-solving and warrant-type policing. Beat officers, for instance, spend about 76 minutes per shift (or 16 percent of their shift) on average engaged in Patrol Model tasks, and 58 minutes or 12 percent of their shift in Warrant Model activities. Even using these very rough measures of the warrant versus patrol models, police officers in this jurisdiction are spending more of their shifts 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”).\textsuperscript{30} 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.\textsuperscript{31} 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.\textsuperscript{32} Each officer was observed

\textsuperscript{29} Id. 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 “Proportion of time spent patrolling on foot” or “in vehicle,” respectively, do not include the interaction time with civilians; whereas “Service,” which is defined as “Activities 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.

\textsuperscript{30} Frank, Brandl, and Watkins, supra note 26, at 718.

\textsuperscript{31} Id.

\textsuperscript{32} Id. at 719.
during two eight-hour shifts: observations of COP officers occurred during 59 shifts (totaling 432.20 hours), while observations of beat officers occurred during 20 shifts (totaling 171.48 hours).\footnote{Id. at 720.}

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.”\footnote{Id.} The study revealed that both beat officers and COP officers spent most of their crime-focused 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.\footnote{Id. at 724 (Table II for beat officer); and 721 (Table I for COP officer).} 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.\footnote{Id. at 723.} As the authors emphasized, “almost one-third (32.97 percent) of all patrol officer time was spent performing routine vehicle patrol.”\footnote{Id. at 723.}

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 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 \textit{Mayberry} as it were—and the findings here converge as well.\footnote{See, e.g., Ralph A. Weisheit, David N. Falcone, and L. Edward Wells, \textit{Crime and Policing in Rural and Small Town America} (Waveland Press 1996); John Liederbach and James Frank, \textit{Policing Mayberry: the work routines of small-town and rural officers}, American Journal of Criminal Justice, 28(1): 53-72 (2003); Liederbach, supra note 24.}

In a third study, a recent observational study of the workload of the suburban police that used very similar methods and categories—in order, precisely, to be able to
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 14-month period between April 1999 and May 2000 and involving 3,537 hours of observation (the equivalent of 442 eight-hour shifts). The study sites included fourteen different suburban police agencies in Hamilton County, Ohio, with very diverse demographic, socio-economic, 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.

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. Second, though, 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 (primarily report writing), personal off-duty tasks, and traveling en route to specific locations). Third, of all citizen encounter time, 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). 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>
<thead>
<tr>
<th>TYPE OF PROBLEM</th>
<th>NUMBER OF CIVILIAN</th>
</tr>
</thead>
</table>

39 Liederbach, supra note 24, at 419.
40 Id. at 423.
41 Id. at 424.
42 Id. at 425.
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.”\textsuperscript{43} The author emphasized, “Six 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 14 agencies.”\textsuperscript{44} These findings are very similar to the findings in small town and rural police departments.

In addition to these three often-cited studies, a more recent 2009 study examining the time allocated to proactive and reactive activities by traditional and community officers provides further support.\textsuperscript{45} This study, by Christine Famega, focused more directly on the workload difference between preemptive, proactive policing methods in the mold of the

\begin{table}[h]
\centering
\begin{tabular}{|l|c|}
\hline
\textbf{ENCOUNTERS} & \\
\hline
\textbf{Patrol-type encounters:} & \\
\hline
1. Traffic problems & 714 \\
\hline
2. Investigative problems & 197 \\
\hline
3. Order maintenance problems & 159 \\
\hline
\textbf{Subtotal} & 1,070 \\
\hline
\textbf{Warrant-type encounters} & \\
\hline
1. Warrant to be served & 37 \\
\hline
2. Other crime problems & 378 \\
\hline
\textbf{Subtotal} & 415 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{43} Id. at 427.
\textsuperscript{44} Id.
Patrol Model and more reactive, 911-response policing in the mold of the Warrant Model.\footnote{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.”. \textit{Id} at 78.}

Like the three earlier studies, the 2009 study collected data by means of systematic observation of officers during a two-week period in 1999.\footnote{\textit{Id}. at 86.} Trained observers accompanied officers during 251 shifts, taking notes of the officers’ activities during each shift, and recorded 180 types of officer conduct. 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”).\footnote{\textit{Id}. at 87-88.}

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). The evidence clearly demonstrated that 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.”\footnote{\textit{Id}. at 88.}

Although none of the studies map on perfectly to the Patrol versus Warrant Models 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. Christine 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 on reactive activities. Clearly, [beat] officers have a good deal of

\begin{itemize}
\item \textbf{46} 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.”. \textit{Id} at 78.
\item \textbf{47} \textit{Id}. at 86.
\item \textbf{48} \textit{Id}. at 87-88.
\item \textbf{49} \textit{Id}. at 88.
\item \textbf{50} \textit{Id}. at 90.
\end{itemize}
time for proactive work, though most of it is spent on patrol."

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 opposed 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 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 the Warrant Model end, which is also to say that most of the time when police officer engage people, they are operating on the basis of a probability of suspicion that is far smaller than 1. This is illustrated in the following figure:

---

51 Id. at 98.
As this figure 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.

Another way to visualize our point works in two dimensions. 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 (red) can be distinguished from the Warrant Model incidents (yellow):

![Graph: Two Dimensional View](image)

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,\textsuperscript{52} where a crime has been committed and all the police have is an eyewitness lead based on some general demographic traits. The witness identification there leads to the interrogation and hand search of all young African-Americans in the town. This qualifies as the Patrol Model. In the lower left quadrant there are odd-ball cases of identified persons whose crime has not yet been identified perfectly—for instance, Al Capone. 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), suspicion is probabilistic, and its reasonableness 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 \textit{qua} individual, rather than to the individual as a member of a group. What we care about is the \textit{level of suspicion} that attaches to the group of individuals who are identified as sharing whatever combination of traits, conditions and behaviors are identified and how \textit{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 \textit{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.

\textsuperscript{52} 221 F3d 329 (2d Cir 2000).
We don’t 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 and track the level of suspicion 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.

III. 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 and administrative and public school drug-testing programs. In all 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.” As Justice 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

---


54 See, e.g., Vernonia, 515 U.S. at 653-54 (Scalia, J.); id. at 667-68 (O’Connor, J., 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).
interdiction; and to maintain automobile checkpoints looking for illegal immigrants and contraband.\textsuperscript{55}

In \textit{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.\textsuperscript{56} We believe that reasonable searches and seizures in the policing context require a certain level of suspicion. What we argue, though, is that it is precisely the \textit{level of suspicion} that should be the focus of the reasonableness inquiry—a long with the evenhandedness of the searches. Search programs that reveal levels of suspicion that fall below constitutional minimums \textit{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 \textit{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 later.

A. \textit{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.\textsuperscript{57} The Warrant Clause does not apply to searches of cars, since they might move,\textsuperscript{58} or to

\textsuperscript{55} See id. at 653-54 (emphasis added).
\textsuperscript{56} We are only interested in the policing context and, for that reason, do not really engage the question of the propriety of suspicionless searches in administrative or other non-criminal contexts. We lean in favor of requiring suspicion there too, though the level of suspicion could be set lower and established after the fact; but we have no deep stake in taking a position outside the criminal justice context.
\textsuperscript{57} See generally Carroll v. United States, 267 U.S. 132 (1925); Payton v. New York, 445 U.S. 573 (1980); see also U.S. Const. Amend. IV.
\textsuperscript{58} See generally, e.g., Carroll, 267 U.S. 132 (holding that police were not required to obtain a warrant for the search of a car).
suspects on the street during unanticipated encounters. 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 this is standard fare.

In a line of Fourth Amendment cases, however, the Supreme Court has drawn exceptions to the “individualized suspicion” requirement. These exceptional situations have traditionally 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 v. Acton, 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.” As a result, as the Court declared in one of the first such cases, Skinner v. Railway Labor Executives’ Association, 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.” These cases, in fact, have spawned a constitutional maxim of their own: “the Fourth Amendment imposes no irreducible requirement of such [individualized] suspicion.”

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

---

59 See, e.g., United States v. Watson, 423 U.S. 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.”).
60 515 U.S. at 667-68 (O’Connor, J., dissenting).
randomization and the fourth amendment

(1) Drug-Testing in Public Schools

The first line of cases—Vernonia School District v. Action, 64 and Board of Education v. Earls 65—involves suspicionless drug testing in public schools. In Vernonia, Justice Scalia, writing for the Court, held that random drug testing of student athletes did not violate the Fourth Amendment. 66 During the 1980s, drug use in Vernonia schools had increased sharply, or so the majority found, and athletes were perceived as the “leaders of the drug culture.” 67 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 6-week assistance program or suffer suspension from athletics for the remainder of the current season and the subsequent season. 68

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. 69 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 amongst schoolchildren, Justice Scalia concluded that random drug-testing did not violate the Fourth Amendment. 70

---

63 Earls, 536 U.S. at 854 (Ginsburg, J., dissenting); see also Chandler v. Miller, 520 U.S. 305, 309 (1997).
66 515 U.S. at 664-65.
67 Id. at 648-49.
68 Id. at 650-51.
69 Id. at 654-64.
70 Id.
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. 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. Applying *Vernonia*’s “fact-specific balancing inquiry,” Justice 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. 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.

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 Ginsburg. All sides made significant use of history—the first by its absence, the second 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.’” 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.”

---

71 536 U.S. at 838.
72 Id. at 833.
73 Id. at 834-38.
74 *Vernonia*, 515 U.S. at 653.
75 Id. (quoting *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 619 (1989)).
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.”76 Justice O’Connor rested strongly on Carroll v. United States, 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.”77 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.78

The fact is, however, 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: “we have allowed exceptions in recent years only where it has been clear that a suspicion based regime would be ineffectual.”79 In a surprisingly similar passage, Justice Scalia argued that because the Fourth Amendment has “no irreducible requirement of suspicion,”80 in situations where it would be “impracticable” due to “special needs” to determine individualized suspicion, a search will not violate the Fourth Amendment.81 Both sides agree that there ought to

---

76 Id. at 669 (O’Connor, J., dissenting).
77 267 U.S. at 154.
79 Vernonia, 515 U.S. at 668 (O’Connor, J., dissenting).
80 Id. at 653 (quoting Martinez-Fuerte, 428 U.S. at 560-61).
81 Id. (quoting Griffin v. Wisconsin, 483 U.S. 868, 973 (1987)).
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*, 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 100 miles of the Mexican border.83

The *Martinez-Fuerte* case arose from arrests made at two different permanent immigration checkpoints within 100 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” which authorized the Border Patrol to conduct roadblock operations at the site.84 At the Sarita, Texas, checkpoint, Border Patrol officers would stop all northbound traffic for brief questioning, with the exception of local residents who the officers recognized. In contrast to the San Clemente checkpoint, there was no judicial warrant regarding the operations at Sarita.85

In a 7-to-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.86 In other words, no suspicion was required. Justice Powell wrote the opinion for the court and began by considering the balance of interests. Permanent checkpoints, the government had

---

83 *Id.* at 566-67.
84 *Id.* at 545-47.
85 *Id.* at 549-50.
86 *Id.* at 566-67.
maintained before the Court, were “the most important of the traffic-checking operations.”\(^{87}\) They were also highly effective, Justice Powell suggested. The San Clemente checkpoint, for instance, resulted in the apprehension of 17,000 illegal aliens in 1973 from about 10 million cars that passed through the checkpoint.\(^{88}\) Their effectiveness, 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.”\(^{89}\)

By contrast, the intrusion on liberty was relatively minor—in Justice Powell’s words, “quite limited.”\(^{90}\) All that was required was a “brief detention of travelers,” “a response to a brief question or two,” and “possibly the production of a document evidencing a right to be in the United States.”\(^{91}\) Justice Powell emphasized that the subjective intrusion was “appreciably less in the case of a checkpoint stop.”\(^{92}\) These stops involve less discretion on the part of the agents, 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,” Justice Powell suggested.\(^{93}\) “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.”\(^{94}\) As a result, and because of the more limited expectation of privacy in cars as opposed to homes, Justice

---

\(^{87}\) Id. at 556.
\(^{88}\) Id. at 554.
\(^{89}\) Id. at 557.
\(^{90}\) Id.
\(^{91}\) Id at 558 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)).
\(^{92}\) Id.
\(^{93}\) Id. at 560.
\(^{94}\) Id.
Powell concluded that no individualized suspicion at all was needed "at reasonably located checkpoints."\(^{95}\)

Justice Brennan wrote a heated dissent, in which Justice Marshall joined. Justice Brennan described the result as the "defacement of Fourth Amendment protections,"\(^{96}\) declaring that "today's decision is the ninth this Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures."\(^{97}\) What 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, United States v. Ortiz, and United States v. Brignoni-Ponce—the Court had required some modicum of reasonableness,\(^{98}\) here the Court had 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.'"\(^{99}\)

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.

(3) Other Contexts

In addition, the Court has upheld a number of suspicionless search programs outside the criminal context, including inspections of commercial establishments\(^{100}\) and searches in correctional facilities.\(^{101}\) There are other cases, however, where, drawing on the very same logic and rationale, the Court has struck down suspicionless search programs. An example is Chandler v. Miller, where the Court reviewed the state of Georgia’s legal requirement that

---

\(^{95}\) Id. at 562.
\(^{96}\) Id. at 569 (Brennan, J., dissenting).
\(^{97}\) Id. at 567.
\(^{98}\) See generally Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Ortiz, 422 U.S. 891 (1975); Brignoni-Ponce, 422 U.S. 873.
\(^{99}\) Martinez-Fuerte, 428 U.S. at 569-70 (Brennan, J., dissenting).
\(^{101}\) See Bell v. Wolfish, 441 U.S. 520 (1979).
any candidate for state office pass a drug test. 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. 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 “exigent” circumstances, “after balancing the invasion of privacy against the government’s strong need.” The Court’s construction of the Fourth Amendment is that “individualized suspicion” should reign in the core criminal contexts 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.

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. We are not arguing for suspicionless 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

---

103 *Id.* at 318-19.
104 *Vernonia*, 515 U.S. at 673 (O’Connor, J., dissenting).
105 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 athlete students 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 651. So, even though the Court and the parties considered the program “suspicionless,” there is reason to believe that there was, in fact, suspicion underlying the targeting of the school athletes. Depending on the level of suspicion, then, it could have been reasonable to use a targeted random testing program in our view.
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, instead, is with the idea of “individualized suspicion,” which, we believe, is a misguided add-on to the notion of suspicion.

B. The Term “Individualized Suspicion” Is Misguided

The term “individualized suspicion” is an empty concept that functions as a mere substitute for the term “constitutional.” This is evident in a case such as Indianapolis v. Edmond, where the Seventh Circuit and later the Supreme Court were called upon to decide the constitutionality of police roadblocks intended to detect drug contraband.\(^\text{106}\) 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.”\(^\text{107}\) At each site, approximately thirty police officers were present, and they would stop a predetermined number of 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.\(^\text{108}\) 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.\(^\text{109}\) Over the course of the six roadblocks, 1,161 vehicles were stopped. The stops produced fifty-five drug-related arrests


\(^{107}\) Edmond, 531 US at 35–36.

\(^{108}\) Id at 35.

\(^{109}\) Id.
and forty-nine 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.\textsuperscript{110}

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 only slightly motorists’ privacy interests, and, according to everyone on the Seventh Circuit panel at least, produced very “high” rates of successful searches.\textsuperscript{111} They were also randomly administered, which means that police officers could not individually discriminate against African-American drivers—or at least, less easily.\textsuperscript{112} Despite this, Judge Posner reversed the lower federal 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.\textsuperscript{113} Judge Posner, like most commentators, sought “individualized suspicion” and found none. Posner wrote, “here 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.”\textsuperscript{114}

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: \textit{for each driver}, there was a 4.74 percent chance that he was carrying drugs. We know this 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 \textit{quantum} required by the Fourth Amendment. But that inquiry does not depend on whether the suspicion is “individualized” or not. It \textit{does} depend on whether Judge Posner (or courts generally) thinks that 4.74 percent is a high enough probability that crime is “afoot” to justify

\textsuperscript{110} \textit{Edmond v. Goldsmith}, 183 F3d 659, 661 (7th Cir. 1999).
\textsuperscript{111} Id at 662.
\textsuperscript{112} Id at 663.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 663.
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, 500 graduate students at the University of Chicago who wore Converse high-tops out of a student body of 10,000, 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 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 *ex ante* from the witness identification and other information the level of suspicion 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 so-called “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 individualized suspicion or probable cause, and as Chief Judge Easterbrook noted in dissent, individualized suspicion has been found at far less than 4.74 percent.115

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 reasonableness of

115 *Id.* at 669-70 (Easterbrook, J., dissenting).
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.” 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.”

Citing the *Martinez-Fuerte* Border Patrol case and the *Michigan Department of State Police v. Sitz* sobriety checkpoint case—cases which involved hit rates of 0.12 and 1.6 percent respectively—Easterbrook noted that “[r]oadblocks with much lower rates of success have been held consistent with the fourth amendment.”

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—is not really “spectacular,” as Easterbrook suggested. Hit rates from other law enforcement interventions have been far greater. For example, the Maryland state patrol 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. In Missouri for the year 2001, police traffic stops achieved drug hit rates—that is drugs only, not including faulty drivers’ licenses—of 19.7, 12.3, and 9.8 percent respectively for whites, African-Americans, and

---

116 *Id.* at 662.
117 *Id.* at 666 (Easterbrook, C.J., dissenting). We are not sure how Judge Easterbrook got to the 9.4 percent figure. Both Judge Posner and Justice O’Connor 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 (majority).
119 *Edmond*, 183 F3d at 666 (Easterbrook, C.J. dissenting) (citing *United States v Martinez-Fuerte*, 428 US 543 (1976) and *Michigan Department of State Police v Sitz*, 496 US 444 (1990)).
120 *Id.* at 661.
121 *Id.* at 666 (Easterbrook, C.J. dissenting) (suggesting that the hit rate is “spectacularly successful”).
Hispanics. 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. A government report analyzing New York City stop-and-frisks, prepared in 1999, revealed average hit rates (stop-to-arrest) of approximately 13.7 percent in situations found to present reasonable suspicion. 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.

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, “the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’” 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.

C. The Birth of “Individualized Suspicion”

The term “individualized suspicion” has become today a place holder 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 which itself was never properly defined. The evidence

---

123 Id. at 1293.
124 Harcourt, Against Prediction, supra note 12.
126 For an argument proposing increased use of social science evidence in constitutional criminal procedure, see generally id.
127 Vernonia, 515 U.S. at 652. See also Carroll, 267 U.S. at 147 (1925) (“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.
surrounding the usage of the term “individualized suspicion” is entirely consistent with this.

The term “individualized suspicion” dates from the mid-1970s and has mushroomed over the past few decades in both federal and state courts. One of the earliest uses of the term was, in fact, in the Martinez-Fuerte decision in 1976.\textsuperscript{128} The term actually emerged hand-in-hand with two others—“particularized suspicion” and “unparticularized suspicion”—the latter term appearing first in \textit{Terry v. Ohio}.\textsuperscript{129} It is impressive to look at the historical use of all three sets of terms.

As noted, the first, “individualized suspicion,” originates in the 1970s. 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:

\begin{itemize}
\item \textsuperscript{128} See generally 428 U.S. 543.
\item \textsuperscript{129} 392 U.S. 1 (1968).
\end{itemize}
Notice that there is a slight lag from the federal cases to the state cases, which reflects, naturally, that the term originated with the federal appellate courts. The following graph is the combined state and federal cases using the term “individualized suspicion,” and it reflects a relatively consistent upward trend, with 162 uses of the term both in 2006 and 2007:
These graphs suggest that the term “individualized suspicion” emerged in the 1970s and caught on, somewhat contagiously. The pattern is entirely consistent with the idea that this new term 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. The term “individualized suspicion” was intended to carry some substantive meaning, but it did not and does not today. It has become a rhetorical trope used to satisfy a standard that remains today undefined.

Interestingly, this is true as well of the term “particularized suspicion.” The data on usage reveals a similar pattern. The first graph, again, traces the usage of the term in federal cases; the second, in state cases:
Again, the combined data for federal and state uses of the term 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.

The other interesting trend, then, is the use of the term “unparticularized suspicion” or “non-particularized suspicion,” which is the term that appeared first in Terry. If one searches the LEXIS database for those two terms (“unparticularized” and “non-particularized”) from Terry to the present, there are over 2,000 uses of the terms. Again,
Randomization and the Fourth Amendment

the first two graphs are the federal and state usages, and the third graph contains the combined data:

**Federal Cases: Use of "Non-Particularized" and "Unparticularized Suspicion"**

**State Cases: Use of "Non-Particularized" and "Unparticularized Suspicion"**
Here too, the trend is consistently upward and mirrors the usage patterns for the (inverse) terms of “individualized suspicion” and “particularized suspicion.”

The bottom line is that these patterns are entirely consistent with our argument that the expression “individualized suspicion” has come to serve as a substitute for probable cause or articulable suspicion, terms that in truth were never properly defined by the Court.

IV. An Alternative Construct: Randomization

Our argument so far is that the term “individualized suspicion” is largely empty, and 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. If offers simply no direction to policing and other law enforcement agencies to develop practices that appropriately constrain discretion.

A. The Checkpoint as Loadstar

In this Part, we suggest a construct that does: 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, on the street making judgments 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. The checkpoint paradigm is entirely different: on 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 would be constitutional only when every car is stopped unless a randomized stopping plan is adopted, as was the case in *Edmond*, 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 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.\(^{130}\) 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 in terms not only of the costs 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.

In contrast to “individual suspicion” stops, random checkpoint stops are not justified with reference to good reason, 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 cue 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 strips officers from exercising any discretion to stop individual cars. Indeed, if an officer does exercise discretion, then that officer’s actions would make 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 Michigan v. Sitz checkpoint on the one hand, and the Whren v. United States\textsuperscript{131} “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 this.

\textsuperscript{131} 517 U.S. 806 (1996).
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 this.

Here the tail on the left side of the curve reflects that the median person stopped is poorer, Black and less educated 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. 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.  

*B. Evidence of Racing Crime*

And 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 New York City Police Department (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 sensitivity of the data to the type of benchmark used to compare), officers frisked whites less 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 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.

The data and analysis confirmed the earlier studies of NYPD stops conducted by Jeff Fagan and Andrew Gelman. They analyzed 125,000 pedestrian stops by the NYPD from January 1998 to March 1999 and, using hierarchical multilevel models to adjust for precinct-level variability, they nevertheless found that African-Americans and Hispanics were stopped more frequently than whites,

---

132 Cf. David James piece on Ghetto; Meares on prison as race-making; Eli Anderson’s new book.

even after controlling for precinct variability and race-specific estimates of crime participation.\(^{134}\)

**[INSERT GRAPH OF 2006 STOPS IN NYC]**

In fact, study after study reveals discrimination. In August 2008, Professor Ian Ayres of Yale University published a study on police stops by the Los Angeles Police Department (LAPD).\(^{135}\) 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. In two neighborhoods, 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.”\(^{136}\)

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. 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. 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. The race of the stopping officer also


\(^{136}\) Id. at 5.
mattered—the disparities found decreased when the officer was of the same race as the person who was stopped.

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. 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. 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. Middle Easterners, who were searched at slightly higher rates than Whites (5 percent, compared to the 4 percent search rate of Whites), were found with contraband only 24 percent of the time. Additional evidence of differential racial treatment was found in the disparity of stop duration by race. Overall, minorities were held for longer periods during police stops, excluding stops that involved searches.

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. 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)...


138 Robin Engel, Jennifer Calnon Cherkauskas, and Michael R. Smith, Traffic Stop Data Analysis Study: Year 2 Final Report, University of Cincinnati Policing Institute, 2008, http://www.azdps.gov/agreement/pdf/DPS_Year_2_Stop_Data_Report_2008.pdf. 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.
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 significant at the .001 level. Analysis of the percentage of searches that successfully found contraband showed that for non-consent 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.

In February 2009, the state of West Virginia issued its “Traffic Stop Study” final report for 2008. 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 rate 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 and/or getting arrested were higher for Blacks (57.34 percent) and Hispanics (60.92 percent) than for white drivers (46.52 percent). Similar results were found on data at the county and agency level.

In mid-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 based on data collected annually starting in 2004 required under state law due to allegations of racial profiling. Weiss and Rosenbaum found that

---

139 Id. at 53-54.
141 Alexander Weiss and Dennis P. Rosenbaum, Illinois Traffic Stops Statistics Study 2008 Annual Report, University of Illinois at Chicago Center for Research in Law and Justice 2009,
minority drivers were around 13 percent more likely to get stopped than white drivers. 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 3 times more likely. 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.142

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 New York City Police Department.143 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.144 The study found that minorities were subjected to searches at over twice the rate compared to 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.145 While minorities were searched at twice the rate as Whites, the productivity of searches was less for minorities than Whites. For discretionary searches, Whites had a 26.5 percent hit rate, while minorities had a 22.3 percent hit rate.146

142 Id. at 12-13.
143 Ridgeway, supra note 133.
145 Id. at 68-70.
146 Id. at 78.
More recently, on June 30, 2009, the ACLU released its report to the U.N. Committee on the Elimination of Racial Discrimination: *The Persistence of Racial and Ethnic Profiling in the United States.*[^147] The report catalogued the independent and ACLU-based evidence of racial profiling in 22 states and the federal government, describing in an intricate and detailed 98-page report all 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 profiling in spite of the numerous public statements by state and federal government officials that the practice of racial profiling should end. Anecdotal examples of racial profiling—such as the illegal deportation of a cognitively impaired U.S. citizen from Los Angeles because officials did not believe he could possibly be a citizen[^148] or Detroit police officers accused of conducting bare-hand searches of genitals on a number of young black males[^149]—were supported by analyses of state level data from Minnesota to California finding consistent patterns of racial minorities being over-stopped, over-searched, and over-frisked in comparison to Whites.[^150]

**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 detainment, the amount of time any one person spends in a checkpoint tends to be shorter than the typical suspicion-based stop. 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 fulfils that function. As the graphs above 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.

[^148]: *Id.* at 46.
[^149]: *Id.* at 56.
[^150]: *Id.* at 41-68.
when shaping and developing policy. Discretion constraint plus enhanced accountability help 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 that are stopped today, they will be stopped for shorter period of time and for the purposes of enhancing more accurate targeting if and when suspicion-based engagement is appropriate. Because the suspicion-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.” That objection, however, is mistaken.

We disagree. 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 not mutually exclusive or in a zero-sum contest.

The point is best illustrated, actually, by returning to the precise discussion of this issue by Justice O’Connor in the public school randomized drug-testing case—precisely where she inveighs against evenhandedness. Justice O’Connor is discussing and embracing an original intent analysis of the Fourth Amendment. Specifically, the question of searching shops and vessels on the sea. O’Connor notes that, most telling of all, “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.”

O’Connor then turns to the example of the original congressional authorization regarding duty collector’s 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 collector] shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed.’”

---

151 Vernonia, 515 U.S. at 671 (O’Connor, J., dissenting)
152 Id. at 670.
153 Id. at 671, quoting The Collection Act of July 31, 1789, § 24, 1 Stat. 43 (emphasis added).
O'Connor maintains that it is precisely this requirement of suspicion that protected privacy. 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 "affect one person at a time," Krull, 480 U.S. at 365 (O'Connor, J., dissenting), 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.¹⁵⁴

It is precisely the fact that there is suspicion that satisfies privacy requirements. 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.”¹⁵⁵

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.

E. Measuring Suspicion

¹⁵⁴ Id. at 671.
¹⁵⁵ Id. at 668-69.
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—assuming that the Supreme Court were to articulate such a standard in probabilistic terms.\(^{156}\) Our earlier discussion was set in the context of the Supreme Court’s decision in *Illinois v. Wardlow*,\(^ {157}\) 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. The Court, in a 5-to-4 decision, decided that the stop was constitutional, and reversed the Illinois Supreme Court’s decision to the contrary.

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. Neither the majority nor the dissent looked to empirical evidence in *Wardlow*, choosing instead to answer the question with reference to commonsense judgments. 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.\(^ {158}\) The New York OAG study was an analysis of 175,000 forms collected over one year, using as well census data, crime statistics, and demographic information to yield a statistically valid, quantitative view of the practice of “stop and frisk.”\(^ {159}\) The New York OAG Report collected, in

---

\(^ {156}\) Meares and Harcourt, *supra* note 125, at 789.

\(^ {157}\) 120 S. Ct. 673 (2000).

\(^ {158}\) Although the report was not issued early enough for it to be included in the briefs in the case, 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.

\(^ {159}\) The forms that provide the fodder for this analysis are known as “UF-250s.” 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; (3) arrested; (4) stopped and refuses to identify oneself. *Id.* at 89. In situations that fall outside these four contexts, a police officer may fill out a form if he or she desires to do so. The pool of forms analyzed in the study contained about three quarters mandated reports and the rest voluntary.
addition to racial breakdowns on stops and frisks, a measure of how “good” those stops were: how many of the stops led to an arrest. Citywide, that ratio was 9:1. 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 based on facts that, as reported by the police, clearly met the constitutional standard of reasonable suspicion according to Terry and its progeny. Additionally, the study collected information on stops based on facts that courts have decided clearly do not constitute reasonable suspicion. 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 26:1. 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 20.3:1. (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.)

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” or “flight [that] was motivated by the presence of a

---

Id. at 91. The forms covered stops that occurred in 1998 and the first three months in 1999. Id. at v.


161 See id. at 111.

162 For this portion of the analysis, a sample of 15,000 out of the database of 175,000 stops were used. See id. at 135.

163 Categories of stop rationales were developed, and then the UF-250 forms were coded in accordance with these categories. See id. at 135-36. The researchers discussed with lawyers for the OAG the constitutional standard to code, and a great deal data was excluded as providing insufficient data, as the summary table below indicates.

164 See id. at 135.

165 120 S.Ct. at 676.
police officer”\textsuperscript{166} was suspicious enough to justify a police stop. The researchers who analyzed the data in the 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 suggest a tighter relationship than the general flight code. Indeed the 15.8:1 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 \textit{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 \textit{Wardlow}—a different relationship between stops and arrests emerges. But not what one would expect! These data reveal a stop-to-arrest ratio of 45:1.

Table: Summary of the OAG Report

<table>
<thead>
<tr>
<th>Category</th>
<th>Total Stops</th>
<th>Stops Resulting in Arrest</th>
<th>Ratio of Stops to Arrest</th>
</tr>
</thead>
<tbody>
<tr>
<td>\textit{Facts articulate reasonable suspicion}\textsuperscript{a}</td>
<td>2,678</td>
<td>368</td>
<td>7.3</td>
</tr>
<tr>
<td>\textit{Facts do not articulate reasonable suspicion}\textsuperscript{b}</td>
<td>673</td>
<td>23</td>
<td>29.3</td>
</tr>
<tr>
<td>\textit{Insufficient information}\textsuperscript{c}</td>
<td>1,032</td>
<td>76</td>
<td>13.6</td>
</tr>
<tr>
<td>Flight Alone\textsuperscript{d}</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>\textit{Fleeing crime scene}</td>
<td>104</td>
<td>4</td>
<td>26</td>
</tr>
<tr>
<td>\textit{Attempted flight}</td>
<td>79</td>
<td>5</td>
<td>15.8</td>
</tr>
<tr>
<td>Flight in High Crime Area</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>\textit{Fleeing crime}</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{166} \textit{id.} at 679 (Stevens, J., dissenting).
This astoundingly high relationship between stops and arrests is suggestive that in high-crime urban

<table>
<thead>
<tr>
<th></th>
<th>61</th>
<th>3</th>
<th>20.3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attempted flight</td>
<td>45</td>
<td>1</td>
<td>45</td>
</tr>
<tr>
<td>Total</td>
<td>4,383</td>
<td>467</td>
<td>9.4</td>
</tr>
</tbody>
</table>

Explanatory notes for categories above:

The researchers considered these categories of information reported by an officer as evidence meeting the reasonable suspicion justificatory standard:
- Crime observed (observed drug sale, jumping turnstile/metrocard fraud, theft of service, buy & bust, graffiti);
- Fit description (fit description, identified/information from third party at scene, bail jumping, known and wanted by police/active warrant);
- Weapon observed (waistband activity, bulge in waistband, observed object that could be (appeared to be) gun weapon, laser light activity/toy guns);
- Suspicious plus (eluding the police plus other factors, location prone to robbery plus suspicious behavior (pacing, talking to known dealers, loitering), carrying theft equipment/other paraphernalia, placing/retrieving object (drugs), location known for drug activity plus “suspicious behavior” (pacing, standing around talking with passersby or known drug dealers), location known for prostitution plus suspicious behavior, suspected break-in/burglary/on fire escape, extended observation of suspicious activity (trying multiple car doors, extended observation activity, walking back and forth on same street for period of time, etc.).

The researchers considered these categories of information reported by an officer as evidence not meeting the reasonable suspicion justificatory standard, rendering the reported stop unconstitutional:
- Activity deemed suspicious (pocket/clothing activity, bulge in clothing, attempting to elude police, suspicious behavior (nervousness, pacing), suspicious clothing, association with a suspect/person arrested/known dealer, gang affiliation (known member or clothing), loitering, known to police, loitering on subway platform, looking in to parked cars/trying one door, black or silver object/exchange of object; wrong place (location (out of place), location known for drug activity, location prone to robbery/burglary/grand larceny, location known for prostitution.

The researchers considered these categories of information reported by an officer as evidence insufficient to determine whether or not meeting the reasonable suspicion standard was met:
- Person in area that crime or suspicious activity was reported, fleeing crime scene, suspected drug sale, observed drug use, suspected alcohol consumption/open bottle, observed alcohol consumption/open bottle, moving furniture/carrying out of place objects (computers), panhandling, insufficient information, knife in pocket, questioned individual in an ongoing investigation.

The data on flight were categorized in two ways: attempting to elude police, eluding police plus other factors/suspicious activity, and fleeing the crime scene. The researchers considered information relevant to the first category evidence of an unconstitutional stop, and they considered evidence relevant to the second category insufficient to make a determination. 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.
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 the chart above provide a comparative measure of the intrusiveness of police stops for different categories of reasons.

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. Our point is that this deficiency can be cured.

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 Michigan v. Summers, 452 U.S. 692, 703 (1981). Despite the Court’s reluctance to discuss the level of certainty probabilistically, there is evidence that decision-makers 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 tbl. 3 (1982). In the same study, 25 percent of the judges indicated that 50% certainty was necessary for reasonable suspicion, while another 19 percent indicated that 60 percent certainty or more was necessary. This empirical evidence makes it quite clear that Fourth Amendment jurisprudence leaves open just how much liberty should be circumscribed.

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 the Lauria case. See People v. Lauria, 251 Cal. App. 2d 471 (Cal. District Ct App. 1967) (greater level of evidence of intent required in conspiracy case involving prostitution). The same type of distinction may apply in the Fourth Amendment
V. 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.

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, 90 to 95 miles per hour on even days and 85 to 90 mph 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. 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 stops-and-frisks in diverse socio-economic 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 socio-economic and demographic composition. In each location, police officers would be asked to stake out a block or intersection and context: we may require a higher threshold of suspicion in the case of more ordinary misdemeanors or more trivial felonies.

\[170\] See expert report in Desoto NJ case.
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, etc.), 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.

(3) Randomized subway and bus searches of bags and pat-down: 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. 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, announces significant news affecting the stock price. The investigation could include the power of subpoena for phone records, etc.

These are just five examples, naturally, 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.

We suspect that you may be saying to yourself that these police practices seem extreme and somewhat totalitarian. You may think that people will think they are unfair and illiberal, even perhaps un-American—that we
have forgotten the lessons of the American Revolution. (Or something to that effect.) 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 stops and frisks. But for most young men living in the inner-city, this is the American experience. Let’s 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. Now 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 Section 1983 civil rights suits—are inadequate to the task.

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 only need to compensate individuals wrongfully searched (i.e. 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 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.

Compensation is not without its problems. First, it may create some moral hazards. 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. Second, the compensation scheme may also make the entire policy seem more unfair if compensation is being awarded in the higher-income neighborhoods (because of lower hit rates) and not in the inner-city neighborhoods (because of 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, etc. 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 costs associated with any such program that may take away from the benefits.

These problems are by no means trivial. However, 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, they are already required to fill out a form. 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. 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

One of the largest issues in terms of implementation 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.

D. Some Objections

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

First, using the checkpoint as the Fourth Amendment loadstar 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 an $n$ 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 search must compensated if 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 their roadblocks all on the South Side of Chicago or only in African-American neighborhoods, the distribution of arrests will inevitably be skewed along racial and socio-economic lines, very much like it is under the Whren model. Similarly, if the police use as their randomizing variable one that correlates with race, the police will be functionally profiling on race.

However, there are reasons to believe that these problems would be minimized under a random search paradigm—for 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 be subjecting themselves to far greater costs of compensation, 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 protection across the city, the police administrators will need to distribute search programs throughout the city.\footnote{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 stops and frisks disproportionately on certain groups and in certain neighborhoods. The problem today is not that the police do not police higher-income neighborhoods, but that they target their stops-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 be required to do so in the same way.}

Second, distributing the burden of policing within neighborhoods 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 will trigger, will likely put pressure on city administrators to distribute more widely the costs of policing. Even within a socio-economically 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.\textsuperscript{172}

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\textsuperscript{th}. 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 non-profiled group. There are long-term substitution effects and a ratchet effect on the profiled group that, in all likelihood, is counter-productive 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 and we will not rehash it here.\textsuperscript{173} 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 essay, 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 in another way, it is possible that the new constitutional paradigm may allow, as a constitutional matter, some policing

\textsuperscript{172} 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 the police practices is what would serve to distribute the burdens of policing.

\textsuperscript{173} See Harcourt, \textit{Against Prediction}, 2007.
practices that we do not embrace as a policy matter—and vice versa. Efficiency is not the litmus test of constitutional interpretation. Now, in this particular case, we believe that suspicion-sufficient randomized search program 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 device 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, etc. 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 essay 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 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 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. 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” 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. 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.\footnote{174}{Edmond, 183 F3d at 661 (majority).}

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, etc.). 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, earlier, as “the deterrence of drug offenses produced by these hits.”\footnote{175}{Id at 662. Judge Posner held that in conventional criminal law enforcement settings, an individual-level assessment is ordinarily appropriate: “courts do not usually assess reasonableness at the program level when they are dealing with searches related to general criminal law enforcement”—or at least, “ordinarily” so. 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. Second, there is an exception when law enforcement face a terrorist threat. Judge Posner offered the following example: “if 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}
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.

Since 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.

VI. 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 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 investigating 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 vast 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, which 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 essay is the desire to cabin police discretion so as to avoid socio-economic 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.
Readers with comments should address them to:

Professor Bernard E. Harcourt  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
harcourt@uchicago.edu
M. Todd Henderson, Credit Derivatives Are Not “Insurance” (July 2009)
Lee Anne Fennell and Julie Roin, Controlling Residential Stakes (July 2009)
Douglas G. Baird, The Holmesian Bad Man’s First Critic (August 2009)
Jonathan Masur and Eric A. Posner, Against Feasibility Analysis (August 2009)
Lee Anne Fennell, The Unbounded Home, Property Values beyond Property Lines (August 2009)
Stephen J. Choi, Mitu Gulati, Mirya Holman, and Eric A. Posner, Judging Women (September 2009)
Omri Ben-Shahar, One-Way Contracts: Consumer Protection without Law (October 2009)
Ariel Porat, Expanding Liability for Negligence Per Se (October 2009)
Ariel Porat and Alex Stein, Liability for Future Harm (October 2009)
Anup Malani and Ramanan Laxminrayan, Incentives for Surveillance of Infectious Disease Outbreaks (October 2009)
Anup Malani, Oliver Bembom and Mark van der Laan, Accounting for Differences among Patients in the FDA Approval Process (October 2009)
David Gilo and Ariel Porat, Viewing Unconscionability through a Market Lens (October 2009)
David Weisbach, Instrument Choice Is Instrument Design (October 2009)
M. Todd Henderson, Justifying Jones (November 2009)
Randal C. Picker, Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement (November 2009)
Richard A. Epstein, Against Permititis: Why Volunteer Organizations Should Regulate the Use of Cancer Drugs (November 2009)
Randal C. Picker, Easterbrook on Copyright (November 2009)
Omri Ben-Shahar, Pre-Closing Liability (November 2009)
Randal C. Picker, Assessing Competition Issues in the Amended Google Book Search Settlement (November 2009)
Saul Levmore, Ambigous Statutes (November 2009)
Saul Levmore, Interest Groups and the Problem with Incrementalism (November 2009)
Tom Ginsburg, The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration (December 2009)
Nuno Garoupa and Tom Ginsburg, Reputation, Information and the Organization of the Judiciary (December 2009)
Richard A. Epstein, Impermissible Ratemaking in Health-Insurance Reform: Why the Reid Bill is Unconstitutional (December 2009)
Tom Ginsburg and Eric A. Posner, Subconstitutionalism (January 2010)
Joseph Isenbergh, The Future of Taxation (January 2010)
511. Tom Ginsburg, James Melton, and Zachary Elkiins, The Endurance of National Constitutions (February 2010)
512. Omri Ben-Shahar and Anu Bradford, The Economics of Climate Enforcement (February 2010)
516. Omri Ben-Shahar and Carl E. Schneider, The Failure of Mandated Disclosure (March 2010)
518. Lee Anne Fennell, Unbundling Risk (April 2010)
522. Lee Anne Fennell, Possession Puzzles, June 2010
523. Randal C. Picker, Organizing Competition and Cooperation after American Needle, June 2010
526. Richard A. Epstein, Carbon Dioxide: Our Newest Pollutant, August 2010
527. Richard A. Epstein and F. Scott Kieff, Questioning the Frequency and Wisdom of Compulsory Licensing for Pharmaceutical Patents, August 2010
528. Richard A. Epstein, One Bridge Too Far: Why the Employee Free Choice Act Has, and Should, Fail, August 2010
530. Bernard E. Harcourt and Tracey L. Meares, Randomization and the Fourth Amendment, August 2010