

ARTICLES

The Fourth Amendment Without Police

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What role will the Fourth Amendment play in a world without police? As academics, activists, and lawmakers explore alternatives to traditional law enforcement, it bears asking whether the amendment primarily tasked with regulating police investigations would also regulate postpolice public safety agencies. Surprisingly, the answer is often no. Courts are reluctant to recognize protections from government searches or seizures outside criminal investigations, and they are even more reluctant to require probable cause or a warrant for such conduct. Thus, by removing most public safety functions outside the criminal sphere, abolitionists also move intrusive government conduct outside these traditional strictures and guardrails.

This Article provides the first sustained evaluation of the Fourth Amendment's limited role in a postpolice world and examines the implications of this reality. In doing so, it makes three contributions to existing scholarship. First, Part I catalogues comprehensive abolitionist proposals to replace traditional police while situating these proposals within the various semipermanent and permanent abolitionist perspectives animating them. Second, Part II applies current Fourth Amendment "special needs" doctrine to these burgeoning postpolice agencies and explores the troubling implications of nonpolice public safety entities operating largely free of the amendment's search and seizure restrictions. Third, Part III suggests three novel lenses through which to view a postpolice Fourth Amendment—abolition subconstitutionalism, abolition endogeneity, and objective intrusion theory—that accord with the core purpose of the amendment and respond to potential privacy and liberty concerns in a world without police.

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INTRODUCTION

What role would the Fourth Amendment play in a world without police? As academics, activists, and lawmakers explore alternatives to police, it bears asking whether the amendment tasked with regulating police investigations would also regulate postpolice public safety agencies. Surprisingly, the answer is often no. The U.S. Supreme Court has emphasized that the “primary purpose” of the Fourth Amendment is to restrain criminal investigations by law enforcement.¹ Outside that context, courts

¹ See *J.L. v. N.M. Dep’t of Health*, 165 F. Supp. 3d 996, 1042 (D.N.M. 2015) (noting that the Supreme Court has suggested that “a primary purpose of the Fourth Amendment was to prohibit unreasonable intrusions in the course of criminal investigations” (citing *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977))); *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (first citing *United States v. Chadwick*, 433 U.S. 1, 7–8 (1977); and then citing *Boyd v. United States*, 116 U.S. 616, 624–29 (1886)):

are reluctant to grant protections from government searches or seizures, and they are even more reluctant to require probable cause or a warrant for such conduct.²

Herein lies a major, unexplored challenge for the police abolition movement. By removing most public safety functions outside the criminal sphere, reformers would also move intrusive government conduct outside these traditional strictures and guardrails. The unintended consequences of this diminution in constitutional privacy protections might frustrate many of the objectives of abolitionists seeking to reduce the role of the carceral state. This Article provides the first sustained evaluation of the Fourth Amendment's limited applicability in a postpolice world and examines the implications of this reality.

The time is right to consider the constitutional dimensions of an abolitionist, postpolicing world. The police-reform conversation has intensified in the wake of George Floyd's murder and subsequent worldwide protests against police brutality and racial injustice.³ The nature and scope of the reforms advocated have changed as well: prior moments of reflection on America's police violence problem resulted largely in calls for increased training and education, minor modifications to policing tactics, and more funding for more cops.⁴

It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the Crown. But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police.

Cf. Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 901 (2010) ("[T]he Fourth Amendment should not be thought of primarily as a rule of criminal procedure but there is no denying that, rightly or wrongly, this is what the Fourth Amendment has become.").

² See *infra* note 15.

³ See Michelle Jacobs, *Sometimes They Don't Die: Can Criminal Justice Reform Measures Help Halt Police Sexual Assault on Black Women?*, 44 HARV. J.L. & GENDER 251, 266–67 (2021) (indicating that "calls for police reform have intensified and taken on greater urgency" since the deaths of George Floyd, Breonna Taylor, and Rayshard Brooks); Tahman Bradley, *Police Reform One Year After George Floyd*, WGN (May 25, 2021), <https://perma.cc/2D3T-B8MV> ("Release of the George Floyd video intensified the nationwide movement to reform police. As protests grew, cities and states introduced policing bills.").

⁴ See, e.g., Tom Tyler, *From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century*, 111 NW. U. L. REV. 1537, 1546 (2017); see also *id.* at 1556–67 (calling for greater community engagement and increased policing presence in civic life); PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 3–

This moment is different. Demands to drastically reduce, or even abolish, police presence in America have gained widespread traction.⁵ While the theoretical seeds of police abolition predate the current “defund the police” movement, never before have so many lawmakers and activists seriously considered the notion of a world without police.⁶ Pilot programs replacing police with mental health first responders, social workers, and violence interrupters have proliferated since 2020.⁷ Existing crisis-intervention teams, who once acted as co-responders with police, are increasingly separating themselves from law enforcement.⁸ And the Biden administration has committed millions in funding to similar public safety alternatives.⁹

Reflecting the urgency of the moment, a growing body of legal scholarship has begun wrestling not just with why, but how to implement abolitionist reforms.¹⁰ But the race to abolish police

4 (2015) (calling for increased funding for implicit bias and other trainings); cf. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2061 (2017) (critiquing the fixation on “procedural justice as a diagnosis and solution to the current policing crisis” as implying that “the problem of policing is better understood as a result of African American criminality than as a badge and incident of race- and class-based subjugation”).

⁵ See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1783 (2020) (“[T]he 2020 uprisings following the police murder of George Floyd . . . catapulted prison and police abolition into the mainstream.”); Tiffany Yang, “Send Freedom House!”: *A Study in Police Abolition*, 96 WASH. L. REV. 1067, 1070–71 (2021) (“Calls for police abolition . . . surged when the 2020 police killings of George Floyd” and others “sparked a renewed reckoning.”).

⁶ See *Legislative Resources*, DEFUND THE POLICE, <https://perma.cc/BS3D-58P2> (cataloguing police-reform initiatives across the country); *Berkeley City Council Meeting Annotated Agenda*, CITY OF BERKELEY 13–14 (July 14, 2020), <https://perma.cc/ZP8J-XR8P> (describing a proposal to cut police funding by approximately \$36.4 million and use unarmed Department of Transportation employees to make traffic stops); Kat Stafford, *Movement for Black Lives Seeks Sweeping Legislative Changes*, WASH. POST (July 7, 2020), <https://perma.cc/2PLM-2WNS> (describing two congresswomen’s early sponsorship of the BREATHE Act, “federal legislation that would radically transform the nation’s criminal justice system” in a number of ways, including by “divest[ing] federal resources from incarceration and policing”).

⁷ See *infra* Part I.D.

⁸ *Id.*

⁹ Jon Schuppe, *Biden Wants to Give Anti-Violence Groups \$5 Billion. Here’s How It Could Be Spent.*, NBC NEWS (Apr. 14, 2021), <https://perma.cc/T6JQ-54AE>; *Fact Sheet: More Details on the Biden-Harris Administration’s Investments in Community Violence Interventions*, WHITE HOUSE (Apr. 7, 2021), <https://perma.cc/AY92-35Z9>.

¹⁰ See generally V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453 (2019) (providing the first piece of full-length legal scholarship on the question of police abolition); Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925 (2021) (proposing how to remove police from noncriminal public safety functions). See also, e.g., Anthony O’Rourke, Rick Su, & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV.

and reimagine the nature of public safety has yet to account for the postpolice role of the Fourth Amendment, which is designed to protect unwarranted government intrusion and yet aimed primarily at “the conduct of law enforcement officials engaged in [the very] criminal investigations” that abolitionists seek to eliminate.¹¹ This accounting is critical, as application of the Fourth Amendment unlocks the important remedies of exclusion of illegally obtained evidence in criminal trials¹² and civil rights redress pursuant to 42 U.S.C. § 1983.¹³

This Article proceeds in three parts. Part I surveys the landscape of police abolition proposals, with particular attention paid to the types of activities abolitionists seek to remove from the policing function and the types of public and private actors proposed to assume these activities. Many of these proposals replace an armed government actor intruding into the often private, often intimate conduct of citizens with an unarmed actor doing largely the same things. While these agencies would remain limited to noncriminal investigations, their actions would continue to significantly intrude upon the very privacy and liberty interests of citizens protected by the Fourth Amendment.

Would nonpolice conduct implicating the search and seizure threshold of the Fourth Amendment remain subject to that amendment’s traditional probable cause and warrant requirements?¹⁴ No. Part II explores why. The Court has shown great hesitancy to apply the Fourth Amendment to nonpolice searches

1327, 1337–55, 1388–1400 (2021) (describing benefits, risks, and challenges of defunding and dismantling police departments). *See also generally* Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471 (2021) (proposing a framework to permanently remove police from traffic enforcement).

¹¹ *United States v. Attson*, 900 F.2d 1427, 1432 (9th Cir. 1990). Police abolition scholarship, if it mentions the Fourth Amendment at all, does so to highlight the failures of the amendment to adequately restrain police. *See, e.g.*, Akbar, *supra* note 5, at 1791 (stating in its only discussion of the Fourth Amendment that: “[T]he Fourth Amendment is not simply permissive of police violence; it amplifies the racialized ‘risks of being subjected to violence’”); Barbara Fedders, *The End of School Policing*, 109 CALIF. L. REV. 1443, 1500 (2021) (“[Anti-school-police] activists demand that education policymakers attend to concerns outside of Fourth Amendment jurisprudence.”); Woods, *supra* note 10, at 1482 (observing that “Fourth Amendment protections have become so diluted in traffic settings” without addressing how the amendment might apply to a proposed civilian traffic agency).

¹² *See generally* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

¹³ *See generally* *Graham v. Connor*, 490 U.S. 386, 394 (1989).

¹⁴ JOSHUA DRESSLER & ALAN C. MICHAELS, 2 UNDERSTANDING CRIMINAL PROCEDURE 293 (7th ed. 2017) (“[T]he Supreme Court once declared that search warrants, supported by probable cause, were presumptively required. Although warrants today are the exception rather than the rule, they are still required in various situations (e.g., the home), and probable cause remains the touchstone in criminal investigations.”).

and seizures where the primary intent of the actor is noncriminal.¹⁵ And when it has done so, the Court has created a two-tiered rubric in which noncriminal investigative conduct is governed by significantly relaxed reasonableness standards even when evidence found during a noncriminal search is used for criminal prosecution.¹⁶ In addition to evaluating Fourth Amendment thresholds and standards, Part II charts the implications of applying such thresholds and standards to a world without police. Here, I highlight the inefficacy of subconstitutional postpolice checks on nonpolice actors and illustrate how the root of mistrust between citizens and postpolice entities will likely persist without greater constitutional accountability.¹⁷

Having identified problems with adapting current Fourth Amendment jurisprudence to a postpolice regime, Part III suggests three Fourth Amendment reforms that may prove necessary for abolitionists to achieve their stated objectives. First, this Article posits that subconstitutional checks on public actors' power (i.e., implementing state and local regulations that restrain the authority of nonpolice alternate responders) can and should inform Fourth Amendment doctrine.¹⁸ For an amendment driven by value-laden reasonableness balancing inquiries, the lawfulness of an actor's search or seizure is relevant to the determination that the conduct was or was not reasonable. At a minimum, a true commitment to unshackling public safety from the carceral state will require judicial acknowledgement that state and local restrictions on search and seizure also elevate the constitutional floor for unreasonable search and seizures.

Second, as nonpolice internal regulations gain a sizeable foothold in America's public safety apparatus, the protocols governing these agencies can begin to redefine the contours of the Fourth

¹⁵ See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding suspicionless sobriety-checkpoint program because the primary purpose was to ensure roadway safety, not investigate criminal wrongdoing); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–57 (1976) (upholding suspicionless border checkpoints as motivated by enforcing administrative immigration law); see also DRESSLER, *supra* note 14, at 294 (“[O]nce one moves to the *non*-criminal investigatory side of the line . . . warrants . . . and ‘probable cause’ . . . are typically treated as irrelevant.” (emphasis in original)).

¹⁶ See *infra* Part II.C. (exploring administrative reasonableness in “mixed motive” investigations).

¹⁷ “Subconstitutional” in this context refers to any body of law that does not emanate from the U.S. Constitution or an interpretation thereof. Primarily, this term, as applied in this Article, refers to state statutes and local ordinances regulating the conduct of police officers and the various nonpolice public-safety responders discussed herein.

¹⁸ See *infra* Part III.A.

Amendment's reasonableness inquiry even in the absence of positive subconstitutional law.¹⁹ This bottom-up form of constitutional interpretation may seem strange to those who assume a top-down hierarchy in which the Constitution dictates to government agencies what policies and practices are permitted.²⁰ But the opposite has proven true for some Fourth Amendment doctrine, particularly use of force law, where the Court defers to police departments to define through their own protocols what constitutes reasonable force.²¹ This sort of legal endogeneity lacks credibility when the actors subjected to constitutional scrutiny work to insulate themselves at the expense of others' constitutional rights.²² But where public actors seek to raise reasonableness standards through increased self-regulation, either through internal nonpolice agency protocols or through state or municipal regulations, limited endogeneity may prove more appropriate.

Third, the inconsistent and often arbitrary Fourth Amendment rules governing noncriminal searches and seizures do more than create a confusing subset of "special needs" Fourth Amendment law.²³ They highlight the need for a more capacious reimagining of Fourth Amendment analysis, one which measures the reasonableness of an intrusion not from the perspective of the government actor but from the citizen whose peace has been disturbed.²⁴ While the amendment's "reasonable expectation of pri-

¹⁹ See *infra* Part III.B.

²⁰ See *id.*

²¹ See Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1289 (2019) (exploring how "police preferences concerning excessive force can shape the Fourth Amendment (rather than the Fourth Amendment driving police behavior)").

²² See *infra* Part III.B.

²³ See DRESSLER, *supra* note 14, at 293 (describing the line drawn by the Court between "criminal" and "non-criminal" investigations as "thin and, quite arguably, arbitrary" (emphasis in original)).

²⁴ For some cases highlighting the importance of individual privacy and security in determining whether a Fourth Amendment search or seizure was reasonable, see *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1206 (10th Cir. 2003) ("The focus of the Amendment is thus on the security of the person, not the identity of the searcher or the purpose of the search."), *Camara v. Mun. Ct. of the City & Cnty. of San Francisco*, 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."), and *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312–13 (1978) ("If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.").

vacancy” test does consider the subjective and objective privacy interests of the citizen,²⁵ that test applies consistently only in a traditional criminal investigation. Outside that core Fourth Amendment context, the Court often focuses on the subjective intent and the uniform worn by the government actor with little regard for the severity of the intrusion.²⁶ This approach has it exactly backwards. The original design of the Fourth Amendment restricted oppressive and unwanted government intrusion of all kinds, and early special needs cases acknowledged as much.²⁷ A return to these first principles is warranted and may prove necessary for abolitionists seeking a more just and secure world without police.

I. A WORLD WITHOUT POLICE

Outside police investigations, courts have long limited application of the Fourth Amendment to noncriminal activities *intentionally* designed to “elicit a benefit for the government in an investigatory or, more broadly, an administrative capacity.”²⁸ When they have applied the amendment to these activities, they have nonetheless refused to apply traditional probable cause and warrant requirements unless the act had an overriding penal *motive* or “[t]he extensive entanglement of law enforcement [could not] be justified by reference to legitimate needs.”²⁹ Thus, given the importance of actor intent in determining Fourth Amendment scope, any discussion of the amendment’s application to abolitionist postpolice entities must account for the underlying purpose and function of these entities.

This Part provides that necessary backdrop, exploring the origins and intent behind the police abolition movement. This Part also considers the most common postpolice agency proposals, their structure vis-à-vis the existing carceral state, and their precise function in society.

A. The Modern Police Abolition Movement

Activists use many verbs to describe exactly how they want to shrink the role of police in society: abolish, dismantle, defund,

²⁵ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

²⁶ *See infra* Part II.

²⁷ *See, e.g., Camara*, 387 U.S. at 528; *Marshall*, 436 U.S. at 312–13.

²⁸ *Doe v. Luzerne Cnty.*, 660 F.3d 169, 179 (3d Cir. 2011) (quoting *United States v. Attson*, 900 F.2d 1427, 1429 (9th Cir. 1990)).

²⁹ *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.20 (2001).

disaggregate, unbundle.³⁰ The terminology used and the reforms advocated often reflect the relative totality of the shift away from policing, which also often corresponds with the critiques animating these proposals. Abolitionists who argue that the police as an institution is historically and inextricably linked to racism, violence, and exploitation demand a complete dismantling of the entire police apparatus. In contrast, those who focus on the inefficacy of current one-size-fits-all policing and claim that police are ill-equipped to handle the wide variety of services municipalities thrust upon them may seek a more limited unbundling of services. But both strands of thought share the essential characteristic of a radically reduced role for police.

“The police abolition movement has its intellectual roots in the work of African American prison abolitionists Angela Davis and Ruth Wilson Gilmore.”³¹ In *Are Prisons Obsolete?*, Davis charted the history of U.S. prisons as indelibly tied to racism and the prison industrial complex as a tool of White supremacy designed intentionally to maintain a marginalized and criminalized Black underclass.³² Davis and Gilmore both linked the oppression of prisons to the discriminatory violence of police in filling these prisons.³³ Through their group Critical Resistance, Davis and Gilmore turned this scholarly work into advocacy for prison and police abolition in the United States.³⁴ The Critical Resistance group has claimed that the expanding carceral state was a response not only to growing racial equality but to other perceived

³⁰ See Ben Kessler, *Calls to Reform, Defund, Dismantle, and Abolish the Police, Explained*, NBC NEWS (June 8, 2020), <https://perma.cc/G343-XDGM> (“[D]ifferent—but sometimes overlapping—proposals for how to address police violence have emerged, from reforming to defunding to dismantling to abolishing the police.”); Friedman, *supra* note 10, at 932.

³¹ Matthew Yglesias, *The End of Policing Left Me Convinced We Still Need Policing*, VOX (June 18, 2020), <https://perma.cc/M8QQ-9XZX> (noting that Davis and Gilmore “took inspiration from the earlier work of Norwegian sociologist Thomas Mathiesen”). Mathiesen viewed prisons as a tool to marginalize “people from the lower strata of the working class.” THOMAS MATHIESEN, *PRISON ON TRIAL* 76 (2006); see also Allegra M. McLeod, *Beyond the Carceral State, Caught: The Prison State and the Lockdown of American Politics*, 95 TEX. L. REV. 651, 696 (2017) (describing Mathiesen’s role in the early prison abolition movement).

³² See generally ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); see also Lanre Bakare, *Angela Davis: ‘We Knew that the Role of the Police Was to Protect White Supremacy’*, THE GUARDIAN (June 15, 2020), <https://perma.cc/X2DZ-XTG9>.

³³ See Davis, *supra* note 32, at 113; Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://perma.cc/2CBW-9232>.

³⁴ *Mission & Vision*, CRITICAL RESISTANCE, <https://perma.cc/D2P4-KEST>.

social ills, including homelessness, immigration, and gender non-conformity.³⁵ The only solution to such an inherently corrupt system, they argued, was complete dismantlement.³⁶

In contrast to these early abolition antecedents, most legal scholarship on police reform remained rooted in the idea that police *could be reformed*, at least with enough training and resources. As a result, “[f]or decades, law faculty have dismissed demands to divest from and dismantle the police as fringe and unworkable.”³⁷ This fixation on “investing in the police to repair and relegitimize their social function” failed to pay “sufficient attention to alternate frameworks for reform.”³⁸

The nature of these reforms has changed markedly in the last decade, with legal scholarship undergoing “a profound reckoning with police violence. The emerging structural account of police violence recognizes that it is routine, legal, takes many shapes, and targets people based on their race, class, and gender.”³⁹ The most recent watershed moment has generated a wealth of “new proposals for structural police reforms” within scholarly, advocacy, and legislative circles.⁴⁰ Indeed, the pace at which reform proposals have gained mainstream traction has caught some of the very scholars advancing these proposals by surprise.⁴¹

³⁵ CRITICAL RESISTANCE, ABOLITION NOW!: TEN YEARS OF STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX xi (2008); see also Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 6–7 (2019) (“It is hard to pin down what prison abolition means [M]ovements that refer to themselves as abolitionist are working to dismantle a wide range of systems, institutions, and practices beyond criminal punishment . . . and forms of oppression beyond white supremacy.”).

³⁶ See *Mission & Vision*, CRITICAL RESISTANCE, <https://perma.cc/D2P4-KEST> (“Critical Resistance seeks to build an international movement to end the prison industrial complex (PIC) As PIC abolitionists we understand that the prison industrial complex is not a broken system to be fixed.”).

³⁷ Akbar, *supra* note 5, at 1783 (quoting Rachel Herzing, Address to the Critical Prison Studies Caucus of the American Studies Association: Keyword Police (Nov. 8, 2014), <https://perma.cc/6D8U-UV6K> (noting that activists “used to think that if we improved police we would escape its violence”)).

³⁸ Akbar, *supra* note 5, at 1781; see also Bell, *supra* note 4, at 2058–59 (criticizing legal scholars for settling on “legitimacy deficit[s]” and lack of “procedural justice” as the primary problems with policing rather than considering whether police are necessary at all).

³⁹ Akbar, *supra* note 5, at 1781; see also *id.* at 1814 (“[D]emands to defund and dismantle the police did not come from nowhere. They came out of decades of prison abolitionist organizing.”).

⁴⁰ Woods, *supra* note 10, at 1476.

⁴¹ See Friedman, *supra* note 10, at 932–33 (“Between the time this article was written, and the time it came into print, the questions it asks reached the very top of the national agenda This Article [was] seemingly a pipe dream of sorts at the time it originally was written.”).

Increasingly, abolitionists posit that “the only way to stop the violence of policing is to make the cops obsolete.”⁴² As Professor Amna Akbar explained in *An Abolitionist Horizon for (Police) Reform*, these total abolitionists view the existence of modern police as “rooted in histories of enslavement and conquest,” with the current “scale, power, and violence of police . . . becom[ing] defining pieces of architecture within our political economy.”⁴³ When viewed through this lens, the discretion granted to law enforcement by a Supreme Court that has “abdicated” its role in protecting citizens from discriminatory police abuses becomes less acquiescent and more intentional in nature.⁴⁴

Not surprisingly, those who view police as inherently racialized, exploitative, and designed to prioritize power over safety also tend to advocate total abolition. In *The End of Policing*, Professor Alex Vitale argues that police reform as conventionally understood is doomed to fail precisely because “policing [is] fundamentally a tool of social control to facilitate our exploitation.”⁴⁵ Because “[t]he origins and function of the police are intimately

⁴² Akbar, *supra* note 5, at 1783 (quoting Rachel Herzing, Address to the Critical Prison Studies Caucus of the American Studies Association: Keyword Police (Nov. 8, 2014), <https://perma.cc/6D8U-UV6K>).

⁴³ Akbar, *supra* note 5, at 1785; *see also id.* at 1787 (“[P]olice are a regressive and violent force in a historical struggle over the distribution of land, labor, and resources, and [] their power has historical, material, and ideological bases.”); Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 941 (2019) (exploring the evolution of local law enforcement from slave patrols to the Ku Klux Klan and related domestic terror groups to modern-day municipal police).

⁴⁴ Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court’s Abdication in Criminal Procedure Jurisprudence*, 51 U.C. DAVIS L. REV. 2033, 2038 (2018) (observing that the Supreme Court has disabled itself from directly regulating some police stops by limiting the remedy for Fourth Amendment violations to the exclusion of evidence); *see also* SHAWN E. FIELDS, NEIGHBORHOOD WATCH: POLICING WHITE SPACES IN AMERICA 120–21 (2022) (cataloguing how the Court’s qualified immunity jurisprudence has “stacked the [] deck against plaintiffs claiming police brutality” and evolved into a thin blue robe insulating police from virtually all legal challenge).

⁴⁵ Micah Uetracht, “Policing Is Fundamentally a Tool of Social Control to Facilitate Our Exploitation”: An Interview with Alex S. Vitale, JACOBIN (June 8, 2020), <https://perma.cc/F8HL-CDGW>; ALEX S. VITALE, THE END OF POLICING 186–87 (2017):

As long as the basic mission of police remains unchanged, none of these reforms will be achievable [Political actors] may adopt a language of reform and fund a few pilot programs, but mostly they will continue to reproduce their political power by fanning fear of the poor, nonwhite, disabled, and dispossessed and empowering police to be the ‘thin blue line’ between the haves and the have-nots.

See also Yglesias, *supra* note 31 (noting that Vitale views police “as instruments of social control more than public safety, reflecting various kinds of elite fears about urban working classes, immigrants, and runaway enslaved people”).

tied to the management of inequalities of race and class[,] . . . [a] kinder, gentler, and more diverse war on the poor is still a war on the poor.”⁴⁶ Thus, “[a]ny real agenda for police reform must replace police with empowered communities working to solve their own problems.”⁴⁷ This view inherently “demands that we focus on shrinking the scale of prisons and police as we build alternatives.”⁴⁸

These alternatives, discussed in detail below, form the new public safety infrastructure to which the Fourth Amendment may—or may not—apply.

B. Abolition and Violent Crime

While abolitionist proposals gain scholarly traction, the notion of removing all police officers from the street remains unpopular in mainstream society. A 2020 Gallup survey found a large majority of respondents agreeing that police should undergo major changes, but “just 15 percent of Americans support getting rid of the police.”⁴⁹ There remains relatively little enthusiasm in Black communities for ending policing, with only 22% of African American respondents in favor of abolishing the police.⁵⁰ While polling has found overwhelming support for redirecting some government funds away from law enforcement to other forms of community investment, little appetite exists for ending policing altogether.⁵¹

⁴⁶ Vitale, *supra* note 45, at 28–29; *see also id.* at 9 (“Much of the public debate has focused on new and enhanced training, diversifying the police, and embracing community policing as strategies for reform, along with enhanced accountability measures. However, most of these reforms fail to deal with the fundamental problems inherent to policing.”); Meghan G. McDowell & Luis A. Fernandez, “Disband, Disempower, Disarm”: *Amplifying the Theory and Practice of Police Abolition*, 26 *CRITICAL CRIMINOLOGY* 373, 373 (2018) (advancing “the theory and practice of police abolition” by “directly challeng[ing] the legitimacy of police” as lawless enforcers of a “racial capitalist order”).

⁴⁷ Vitale, *supra* note 45, at 30.

⁴⁸ Akbar, *supra* note 5, at 1787; *see also id.* at 1823 (“Abolitionists seek to counter an ideological framework . . . that criminalization is for the collective good, and police are agents of public safety.”).

⁴⁹ Ben Guarino, *Few Americans Want to Abolish Police, Gallup Survey Finds*, WASH. POST (July 22, 2020), <https://perma.cc/Q5PF-3YZX>.

⁵⁰ *June 14-16, 2020 – 1500 US Adult Citizens* 44, THE ECONOMIST & YOUGOV, (June 16, 2020), <https://perma.cc/P4Y7-NEQB>.

⁵¹ Steve Crabtree, *Most Americans Say Policing Needs ‘Major Changes’*, GALLUP (July 22, 2020), <https://perma.cc/6AQK-NDX8> (reporting on a poll in which 47% of Americans indicated that they were in favor of “reducing police department budgets and shifting the money to social programs”).

To date, the total-abolition movement remains an outlier in part because of the lack of a substantive response to literature evidencing a relationship between police presence and decreases in violent crime. When talking narrowly about violent crime, it appears some limited police presence makes sense. One study analyzing the effects of post-9/11 “high alert” days in Washington, D.C., when more police were deployed to certain areas, found that violent crime decreased significantly on those days.⁵² A study analyzing the effects of University of Pennsylvania campus police deployments to certain defined zones in Philadelphia found a 153% higher rate of violent crime outside of the patrolled zones.⁵³ Another study reviewed data sets from 1960 to 2010 and found that every \$1 spent on extra policing generated approximately \$1.63 in social benefits, primarily by reducing murders.⁵⁴ In other words, for all the social harms that armed officers currently inflict on society—overpolicing minority neighborhoods, targeting poor and marginalized populations for nonviolent activity, using unnecessary and unlawful force—police create a net social benefit in the narrow category of preventing and responding to violent crime.

These findings are not trumpeted only by propolice activists. Patrick Sharkey, a Princeton sociologist and supporter of more limited police defunding proposals, noted that “[t]hose who argue that the police have no role in maintaining safe streets are arguing against lots of strong evidence.”⁵⁵ The failure of abolitionists to provide “a detailed vision about what [postpolice] empowered communities are going to do about violent crime” remains a sticking point for those skeptical about a proposed postpolice world.⁵⁶

Even self-styled abolitionists often advocate for less than a total dismantling of the existing police state. In a powerful *New*

⁵² Jonathan Klick & Alexander Tabarrok, *Using Terror Alert Levels to Estimate the Effect of Police on Crime*, 48 J.L. & ECON. 267, 271 (2005).

⁵³ John M. MacDonald, Jonathan Klick, & Ben Grunwald, *The Effect of Private Police on Crime: Evidence from a Geographic Regression Discontinuity Design*, 179 J.R. STAT. SOC. 831, 838 (2016) (“For violent crime we found an increase between 119% and 153% associated with crossing the Penn patrol zone boundary.”).

⁵⁴ Aaron Chalfin & Justin McCrary, *Are U.S. Cities Underpoliced? Theory and Evidence*, 100 REV. ECON. & STAT. 167, 183–84 (2018).

⁵⁵ Patrick Sharkey, *Why Do We Need the Police?*, WASH. POST (June 12, 2020), <https://perma.cc/VEV2-MUCP> (“One of the most robust, most uncomfortable findings in criminology is that putting more officers on the street leads to less violent crime.”).

⁵⁶ Yglesias, *supra* note 31; *see also id.* (“[Vitale’s] book didn’t contain an answer to the question about what a huge reduction in the number of police would mean for violent crime.”).

York Times editorial, activist Mariame Kaba bluntly declared in her title, *Yes, We Mean Literally Abolish the Police*. The editorial persuasively articulated the ills of current policing.⁵⁷ Yet despite the seemingly nonnegotiable stance of her title, Kaba ultimately settled on demanding only that society immediately “[c]ut the number of police in half and cut their budget in half.”⁵⁸ While this proposal can fairly be read as an intermediate step along the way to “mak[ing] [police] obsolete,” Kaba nonetheless did not suggest a concrete replacement for responding to truly violent crimes.⁵⁹

What Kaba, Vitale, and others convincingly argue, however, is that very little of an officer’s actual time is spent “catch[ing] the bad guys.”⁶⁰ Vitale references the “big myth” that police officers “chase the bank robbers . . . [and] find the serial killers.”⁶¹ In reality, police spend most of their time “responding to noise complaints, issuing parking and traffic citations, and dealing with other noncriminal issues.”⁶² Vitale and others are surely correct that it would be better to actually solve America’s housing and mental health treatment problems rather than use police as Band-Aids. It is to this aspect of the defund movement I now turn.

C. Defund, Disentangle, Disaggregate

“Entirely defunding, or abolishing, police departments tomorrow would not abolish [] violence or vaporize the guns that accompany so much of it.”⁶³ Nonetheless, American policing has become “a gnarl of overlapping services” disconnected from fighting

⁵⁷ Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>:

There is not a single era in United States history in which the police were not a force of violence against black people. . . . So when you see a police officer pressing his knee into a black man’s neck until he dies, that’s the logical result of policing in America. . . . [H]e is doing what he sees as his job.

⁵⁸ *Id.*

⁵⁹ *Id.* (“We can build other ways of responding to harms in our society . . . People like me who want to abolish prisons and police [] have a vision of a different society, built on cooperation instead of individualism, on mutual aid instead of self-preservation.”).

⁶⁰ *Id.*; see also Uetricht, *supra* note 45.

⁶¹ Uetricht, *supra* note 45.

⁶² Kaba, *supra* note 57; see also Yglesias, *supra* note 31 (“Police officers spend a lot of time adjudicating conflicts between people experiencing homelessness and people annoyed by those people’s presence. They also spend a lot of time as de facto untrained community mental health providers.”).

⁶³ Derek Thompson, *Unbundle the Police*, THE ATLANTIC (June 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/unbundle-police/612913/>.

crime.⁶⁴ Thus, instead of eliminating police entirely, some scholars seek to remove certain functions from police by defunding or “unbundl[ing] the police.”⁶⁵

In *Disaggregating the Policing Function*, Professor Barry Friedman asked whether “force and law [are] the appropriate responses” to the wide range of services modern municipalities thrust upon police.⁶⁶ It is a fair question. Traditionally, “[c]rime-fighting actually is a very small part of what police do every day, and the actual work they are called upon to do daily requires an entirely different range of skills,” including the ability to mediate disputes and identify social welfare issues “to get people the long-term solutions they need.”⁶⁷

One national study found that 80–90% of an officer’s time is spent on handling noncriminal situations, where the majority of noncriminal complaints are “family, marital, mental health, and assistance type problems that respond better to social and psychological remedies.”⁶⁸ Similar localized studies from Baltimore, New Orleans, Sacramento, and Montgomery County, Maryland, found that police spend only an average of 4% of their time on violent crimes, compared with roughly 50% on noncriminal disturbances and traffic accidents.⁶⁹ Instead of focusing on serious crime—the primary area emphasized in an officer’s training and professional mindset—cops are asked to act as “veterinary surgeon, mental welfare officer, marriage guidance counselor, home-help to the infirm, welfare worker friend and confid[a]nt.”⁷⁰

⁶⁴ *Id.*

⁶⁵ *Id.* (describing the “bloat” plaguing the profession). For a piece describing one of many places where it is difficult to justify police presence, see generally Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646 (2021) (articulating the structural dangers of putting police in emergency rooms and suggesting alternatives).

⁶⁶ Friedman, *supra* note 10, at 926.

⁶⁷ *Id.*; see also Thompson, *supra* note 63 (People “might imagine a group of law-enforcement officers whose only job is to do the sort of stuff you see in cop shows But police work is a bundle of services, and much of it has little to do with the violent crime that shows up on television.”).

⁶⁸ See Harvey Treger, *Police Social Work*, in *ENCYCLOPEDIA OF SOCIAL WORK* 69 (Terry Mizrahi & Larry E. Davis eds., 2008).

⁶⁹ Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html>; see also Thomas Breen, *95.6% of Cops’ Calls Don’t Involve Violence*, NEW HAVEN INDEP. (June 19, 2020), <https://perma.cc/GPL4-96RH> (reporting similar data from the New Haven Police Department).

⁷⁰ Sylvester Amara Lamin & Consoler Teboh, *Police Social Work and Community Policing*, 2 COGENT SOC. SCI. 1, 6 (2016) (quoting Maurice Punch & Trevor Naylor, *The Police as Social Service*, 24 NEW SOC’Y 258, 260 (1973)).

But police are not adequately trained or equipped to be “ersatz social workers.”⁷¹ “Several studies indicate that ten to twenty percent of all U.S. police encounters with the public involve people showing signs of mental illness or alcoholism.”⁷² Additionally, at least 25% of people with mental disorders have been arrested.⁷³ A medical or mental health intervention would have been more appropriate in such cases.⁷⁴ Police also serve as “frontline workers for urban homelessness,” even though “officers aren’t adequately trained to deal with the issues that those people are dealing with.”⁷⁵ And of course, “stories abound of the police shooting and killing schizophrenic or mentally disabled people,” including the homeless, for exhibiting atypical behavior during a mental health episode.⁷⁶

But by far the greatest amount of noncriminal investigative time spent by police officers, as well as the most common contact between police and the public, involves traffic enforcement. Every year, approximately “50 million Americans come into contact with the police at least once,” and “half of them are pulled over in a car that they’re driving (19 million), or in which they are a passenger (6 million). Another 8 million are involved in a car accident.”⁷⁷ But while most police interaction with civilians involves “driving around in cars talking to other people driving around in cars,” there is no obvious connection between an officer “bedeck[ed] [] in cutting-edge weaponry” functioning as a meter maid or traffic-accident first responder.⁷⁸ This unnecessary marriage of nonviolent, noncriminal social need and violent “warrior cop” response

⁷¹ Thompson, *supra* note 63.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*; cf. Amy Watson, Melissa Schaefer Morabito, Jeffrey Draine & Victor Ottati, *Improving Police Response to Persons with Mental Illness: A Multi-Level Conceptualization of CIT*, 31 INT’L. J.L. PSYCH. 359, 362–64 (2008) (explaining that Crisis Intervention Team training supports “a shift in police discretion that accounts for mental illness” and “should enhance the skills of officers in encounters with those who have mental illness”).

⁷⁵ Thompson, *supra* note 63 (quoting Professor Michael Lens); cf. *CHPD: Over 30% of Calls to Police Dept. Are Homeless-Related*, CITRUS HEIGHTS SENTINEL (July 21, 2016), <https://perma.cc/5PJU-6X9R> (reporting that at least 30% of all calls to one California department involved services for homeless people).

⁷⁶ Thompson, *supra* note 63; see also Nancy Dillon, *Parents of Schizophrenic Man Shot Dead by Off-Duty Cop in Calif. Costco Say They ‘Begged’ for Son’s Life*, N.Y. DAILY NEWS (Aug. 26, 2019), <https://perma.cc/T5SM-HZPR>.

⁷⁷ Thompson, *supra* note 63 (reporting that nine-million additional contacts involved people calling police about a non-crime, most often involving traffic accidents).

⁷⁸ *Id.*

predictably leads to unnecessary and tragic violent confrontation.⁷⁹

Society cannot simply train away this problem. Institutionally, police “regard it as their duty to find criminals and prevent or solve crimes.”⁸⁰ But “[t]he public considers it the duty of the police to respond to its calls and crises,”⁸¹ much like a “24-hour general purpose responder.”⁸² Municipalities abide this public perception by placing an increasing number of social service issues at law enforcement’s feet.⁸³ Asking police to wear many ill-fitting civil servant hats often increases the harm to society.⁸⁴ As Professor Monica Bell observed, “routing rehabilitation and social services through the police could perversely widen the carceral net and reify the ‘culture of control’” over poor, Black, and other marginalized communities.⁸⁵ Police, by their nature, are often “more punitive or less empathetic than the average civil servant,” even when empathy and nonviolent, noncriminal solutions are required.⁸⁶ More training for more cops with more guns will not solve this problem.

Instead, the solution increasingly advocated is to “unbundle this unholy mess.”⁸⁷ While different commentators use different terminology—defund, disaggregate, disentangle, unbundle⁸⁸—the basic concept remains the same: remove from policing the social work, traffic, and other noncriminal functions currently assigned to officers and redirect funding to nonpolice agencies better

⁷⁹ See generally RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* (2018).

⁸⁰ ALBERT J. REISS, JR., *THE POLICE AND THE PUBLIC* 70 (1972).

⁸¹ *Id.*

⁸² Friedman, *supra* note 10, at 954.

⁸³ See Lamin & Teboh, *supra* note 70, at 6.

⁸⁴ Friedman, *supra* note 10, at 979–80 (“Much harm occurs because we send armed people—who are trained and see their mission as force and law—to deal with myriad problems not particularly susceptible to this solution.”).

⁸⁵ Bell, *supra* note 4, at 2147.

⁸⁶ *Id.* at 2148. Professor Rosa Brooks has suggested that the violence inherent to law enforcement might be explained by the composition of police forces: “Women make up just 12.6% of all police officers. . . . the[se] gender disparities [] . . . distort American policing. . . . Controlling for differences in assignments, studies show female officers are significantly less likely to use force than male officers, more likely to display empathy and more likely to de-escalate fraught encounters.” Rosa Brooks, *One Reason for Police Violence? Too Many Men with Badges.*, WASH. POST (June 18, 2020), <https://perma.cc/Y6DQ-K45E>.

⁸⁷ Thompson, *supra* note 63 (“[P]olice work is a bundle of services, and much of it has little to do with [] violent crime. . . . A bit of disentangling could make cities safer places for everyone.”); see Friedman, *supra* note 10, at 985 (calling for a “co-response by the police and other agencies, as well as inter-agency coordination”).

⁸⁸ See Kessler, *supra* note 30.

trained and equipped to respond to these social problems. Some city councils have already approved slashing municipal policing budgets and reducing the number of police employed by the city.⁸⁹ These proposals typically call for less than total abolition of all police and admit a role for traditional law enforcement in preventing and responding to violent crime. But the natural consequence of disaggregation is a radically smaller policing footprint with less funding in the United States. I turn now to how governments might reallocate these resources and what these nonpolice entities might look like.

D. The New Look Public Safety

Some scholars and local municipalities have tentatively charted a course for what a postpolice new look public safety might resemble. This final Section introduces the various nonpolice agencies likely to make up this new public safety. Part II will then apply current Fourth Amendment doctrine to these entities.

1. Nonpolice emergency responders.

Nonpolice actors already respond to medical and other health crises: emergency medical technicians (EMTs). These medical technicians act as roving emergency rooms, ready to triage non-criminal health and safety emergencies on the spot. But these medically trained responders are almost always joined eventually by a police presence, at least in situations reported through 911.⁹⁰ In virtually all jurisdictions, police either have the option or are required to respond to all 911 calls, even where no criminal activity is reported.⁹¹ The presence of armed, nonmedically trained officers at a health emergency seems curious, and many argue that their presence can be counterproductive and even dangerous.⁹²

⁸⁹ See, e.g., Rebecca Ellis, *Portland City Council Approves Budget Cutting Additional \$ 15M from Police*, OR. PUB. BROAD. (June 17, 2020), <https://perma.cc/BUD9-MB32>; *LAPD Funding Slashed by \$ 150M, Reducing Number of Officers*, ASSOCIATED PRESS (July 1, 2020), <https://perma.cc/U4CQ-LDZZ>; cf. Daniel Beekman, *Seattle City Council Homes in on Police Department Cuts as Defunding Proponents and Skeptics Mobilize*, SEATTLE TIMES (July 18, 2020), <https://perma.cc/F9EA-H7H6> (describing proposed cuts to the police department, including a plan to cut police spending by 50% supported by seven of nine council members).

⁹⁰ See Fields, *supra* note 43, at 935.

⁹¹ *Id.* at 935 (“[M]ost police departments require officers to respond to all but the most patently unnecessary [911] calls.”).

⁹² See Editorial Board, *Opinion: Sending Armed Police Officers Isn’t the Right Answer for Every Emergency*, WASH. POST (Oct. 16, 2020), <https://perma.cc/6LPU>

And in cases where emergencies have resulted from drug use or minor disputes, the risk of an unnecessary and unhelpful carceral response to a medical issue only increases.

To respond to these issues, some localities have experimented with limiting police involvement in medical emergencies while simultaneously expanding the role of EMTs and other trained medical professionals. Perhaps the most well-known is Crisis Assistance Helping Out on the Streets, or CAHOOTS, run by the White Bird Clinic and operating out of Eugene and Springfield, Oregon.⁹³ CAHOOTS “provides immediate stabilization in case[s] of urgent medical need or psychological crisis,” and each response team is staffed with a medic (a nurse or EMT) and a crisis worker with significant mental health experience.⁹⁴ CAHOOTS runs out of Eugene’s central dispatch for police and fire response, but it responds to a different number not available to police, which allows it to provide services without police response or interference.⁹⁵

Other jurisdictions have adopted more limited nonpolice crisis intervention programs, virtually all of which are executed in conjunction with traditional policing operations. In Houston, Washington, D.C., and other major metro areas, EMTs and nurses housed within police departments often respond in tandem with officers but remain subject to police control.⁹⁶

A practical reason exists for allowing law enforcement to respond to noncriminal medical emergencies: time. Police officers often are closer to the site of a medical emergency and can respond more quickly than an EMT, which allows for a faster and more efficient response, at least in situations like cardiac arrest

-4RGK (challenging the “obvious illogic and cruelty of using force against a frightened, unarmed individual who poses no risk,” and asking, “Couldn’t people in crisis be assisted by someone other than an armed policeman?”); Taylor Elizabeth Eldridge, *Cops Could Use First Aid to Save Lives. Many Never Try.*, MARSHALL PROJECT (Dec. 15, 2020), <https://perma.cc/3Y4V-6PPM> (noting that officers are regularly the first responders on the scene of a medical emergency but often do not attempt to provide medical aid, focusing instead on detaining individuals).

⁹³ *CAHOOTS: Crisis Assistance Helping Out on the Streets*, WHITE BIRD CLINIC, <https://perma.cc/H49Q-4WJP>.

⁹⁴ *Id.* (detailing that CAHOOTS also offers crisis counseling, suicide prevention, conflict resolution, substance abuse counseling, housing crisis services, and transportation to service providers).

⁹⁵ *See id.* (explaining that the White Bird Clinic is a private nonprofit but that CAHOOTS is funded and jointly operated by the clinic, the cities of Eugene and Springfield, and Lane County).

⁹⁶ *Crisis Call Diversion Program (CCD)*, HOUSTON POLICE DEP’T MENTAL HEALTH DIV., <https://perma.cc/M3KF-XGGE>; Friedman, *supra* note 10, at 990.

and opiate overdose where officers receive some basic training.⁹⁷ Of course, this reality exists primarily because of municipalities' overreliance on one-size-fits-all policing and the corresponding bloat in police budgets to the detriment of emergency medical personnel. A defunding and reallocation program would reduce the need for civilians experiencing a medical emergency to rely on a barely trained crime fighter to save them.

2. Mental health first responders.

In contrast to strictly physiological medical emergencies where jurisdictions still rely overwhelmingly on police presence, a growing number of municipalities have created civilian units to respond to mental health emergencies either alongside or without police. The National Alliance on Mental Illness reports that as many as 2,700 local jurisdictions have created mental health crisis intervention teams to respond to emergencies that previously were handled solely by police.⁹⁸ This approach has broad support. A 2021 national survey on mental health found that “nearly 80 percent of respondents said mental health professionals, not police, should respond to mental health and suicide situations.”⁹⁹ And the National Suicide Hotline Designation Act mandates that all telephone service providers activate a new 988 emergency national suicide prevention hotline no later than July 2022.¹⁰⁰

Many early crisis intervention teams, like the Durham, North Carolina Crisis Intervention Team established in 2007, are structured as divisions within police departments with law en-

⁹⁷ See James Ellis, Law Enforcement's Role in the Delivery of Emergency Medical Services in Maine *23 (Aug. 2001) (“Police officers, with shorter response times than EMS can be particularly effective in the event of cardiac arrest.”) (available at <https://perma.cc/PLP3-WWR7>); Jane Perkins, *Ask a Firefighter: Why Do Firetrucks and Police Respond to 911 Medical Calls?*, WESTERLY SUN (May 4, 2019), <https://perma.cc/24DF-233G> (noting that “many emergency scenes benefit from the presence of additional personnel” and “[a]mbulance personnel are often grateful for a few more helping hands”).

⁹⁸ *Crisis Intervention Team (CIT) Programs*, NAT'L ALLIANCE ON MENTAL ILLNESS, <https://perma.cc/L4SB-GUJR>.

⁹⁹ Justine Coleman, *Most Say Police Shouldn't Be Primary Responders for Mental Health Crises: NAMI Poll*, THE HILL (Nov. 15, 2021), <https://perma.cc/343Z-Y6N7>.

¹⁰⁰ Anita Everett, *Groundbreaking Developments in Suicide Prevention and Mental Health Crisis Service Provision*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (May 14, 2021), <https://perma.cc/N4V4-5KUR>; see also Rhitu Chatterjee, *New Law Creates 988 Hotline for Mental Health Emergencies*, NPR (Oct. 19, 2020), <https://perma.cc/8P94-NCXD>.

forcement officers themselves receiving training in “[crisis intervention team] responses and best practices” and staffing intervention team response units.¹⁰¹ Likewise, San Diego’s Psychiatric Emergency Response Team (PERT) staffs licensed mental health clinicians to respond alongside police officers to behavioral health incidents.¹⁰² More recent pilot programs enacted after 2020’s police-reform protests have experimented with mental health response units that operate independently of police departments and respond to certain 911 calls without the involvement of law enforcement.¹⁰³

The goal of these programs is clear. Far too many mentally ill individuals in the United States have been detained, arrested, injured, and killed by armed officers interpreting bizarre or abnormal behavior as criminal or violent behavior and responding the way they were trained: with force.¹⁰⁴ Officers trained to ferret out criminal behavior often enter a mental health emergency with a jaundiced eye, interpreting anything out of the ordinary as suspicious.¹⁰⁵ Trained clinicians, on the other hand, approach identical situations with a different mindset and a different approach focused on de-escalation, validation, and empathy, and a far superior set of skills and training to more accurately interpret bizarre behavior for what it is: a mental health disturbance.¹⁰⁶ As New York City Police Commissioner William Bratton noted in announcing a New York City pilot program to centralize mental

¹⁰¹ *Crisis Intervention Team (CIT)*, CITY OF DURHAM, <https://perma.cc/4VG5-7GYL>.

¹⁰² *P.E.R.T. Psychiatric Emergency Response Team*, CNTY. OF SAN DIEGO, <https://perma.cc/TXZA-TT3Z>.

¹⁰³ See *Support Team Assisted Response STAR*, MENTAL HEALTH CTR. OF DENVER, <https://perma.cc/WR58-4BHU> (describing the creation of STAR mental health response team in Denver, allowing 911 callers to have their calls routed directly to STAR, rather than going through the police or the hospital system); Arianna MacNeill, *‘Unarmed Response Teams’ May Be Coming to a Massachusetts City Near You, and Soon*, BOSTON GLOBE (Aug. 3, 2021), <https://perma.cc/N7NC-P5KV> (describing allocation of funds for similar programs in Cambridge and elsewhere); Julie Heflin, *UofL to Help Lead in Development of 911 Alternative Response Model for Louisville*, UNIV. OF LOUISVILLE NEWS (May 20, 2021), <https://perma.cc/A6J7-L7G3> (discussing creation of unarmed DOVE Delegates to respond to some mental health emergencies).

¹⁰⁴ See Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1404 (2021) (discussing “police violence as it affects disabled people,” including the mentally ill); Jake Pearson, *Actors, Mentally Ill, Aid NYC Police Training Meant to Calm*, ASSOCIATED PRESS (Sept. 13, 2015), <https://perma.cc/64SG-SAHL> (noting that police “received more than 130,000 so-called ‘emotionally disturbed person’ calls [in 2014], about 23,000 more than in 2011”).

¹⁰⁵ See Friedman, *supra* note 10, at 981 (“If you train for force and law, force and law is what you get.”).

¹⁰⁶ See Bell, *supra* note 4, at 2148.

health services away from police response, “[f]or people who are sick, we will offer healthcare, not handcuffs.”¹⁰⁷

3. Social workers.

Beyond triaging urgent medical or mental health emergencies, many police departments have folded in—or increasingly, been partially replaced by—social workers who address intractable issues and connect individuals with appropriate long-term resources. The social work function represents a “prime example of what a reimagined policing agency leaning heavily on specialists might look like,” and there exists “a long history” of such collaboration.¹⁰⁸

The predominant co-responder model—where social workers are housed inside police departments—has borne fruit in some jurisdictions. Since 2014, the New York Police Department has put police and social workers together in subway stations to connect individuals with housing or other social support rather than issue loitering citations.¹⁰⁹ In Lumberton, North Carolina, the Lumberton Police Department found that “intervention by social workers has virtually eliminated repeat calls from chronic problem calling homes.”¹¹⁰ New York City, Sarasota, Houston, Honolulu, Martinsburg, and Salt Lake City have adopted similar co-responder models in recent years, with social workers connecting crisis victims to long-term housing, healthcare, childcare, and substance abuse programs.¹¹¹

But again, this apparent need to situate social workers alongside police derives from the existing overreliance on police as first responders to all emergency calls, including the around 95% of calls that do not involve violent crime.¹¹² Calls from abolitionists and social workers themselves to separate social work from polic-

¹⁰⁷ WILLIAM J. BRATTON, NEW YORK CITY POLICE DEP’T, BROKEN WINDOWS AND QUALITY-OF-LIFE POLICING IN NEW YORK CITY 5 (2015) (available at <https://perma.cc/QF2P-L8CS>).

¹⁰⁸ Friedman, *supra* note 10, at 983.

¹⁰⁹ Bratton, *supra* note 107, at 4.

¹¹⁰ CHARLES W. DEAN, RICHARD C. LUMB & KEVIN PROCTOR, SOCIAL WORK AND POLICE PARTNERSHIP: A SUMMONS TO THE VILLAGE STRATEGIES AND EFFECTIVE PRACTICES 24 (2000).

¹¹¹ Friedman, *supra* note 10, at 987–88.

¹¹² This 95% figure is based on studies of several cities’ police forces. Asher & Horwitz, *supra* note 69 (explaining that data from “a handful of cities” shows that “[t]he share devoted to handling violent crime is very small, about 4 percent”); *see also* Breen, *supra* note 69 (describing the dispatch data from the New Haven Police Department).

ing highlight the increased risk of violence and carceral consequences when officers are present, in addition to the increased reluctance of vulnerable individuals to open up in front of police.¹¹³ Yet cities that have piloted separate social worker response agencies have done so with mixed results. In Portland, Oregon, for example, the city set up a social worker hotline where a two-person team, consisting of a paramedic and a social worker, could respond to nonviolent calls.¹¹⁴ The hotline received only sixty calls in a forty-day period, perhaps reflecting the continued distrust of agencies historically closely aligned with law enforcement.¹¹⁵

4. Violence interrupters.

While EMTs, crisis intervention teams, and social workers seek to replace police in nonviolent situations, violence interrupters train to step into and de-escalate potentially volatile and violent encounters. Violence interruption “was conceived by Gary Slutkin, head of Cure Violence, in Chicago in the 1990s as a public health response to shootings.”¹¹⁶ Slutkin posited that violence “spreads like a disease,” with individuals and organized gangs alike retaliating in a never-ending cycle, but that interrupters could step in to end the cycle.¹¹⁷

Historically, nonpolice entities like Cure Violence and Advance Peace have recruited members of local communities with a history of violence and gang activity to serve as interrupters.¹¹⁸ By empowering those with personal knowledge of the issues plaguing communities, these experienced mediators attempt to de-escalate interpersonal conflict with a combination of positive motivation and cautionary “do as I say, not as I did” rhetoric.¹¹⁹ As with other policing alternatives, violence interrupters around

¹¹³ Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between “Child Welfare” and the Carceral State*, 17 STAN. J. C.R. & C.L. 255, 261 (2021).

¹¹⁴ Tess Riski, *A Portland Program Intended to Reduce Police Interactions with People in Crisis Is Off to a Slow Start*, WILLAMETTE WEEK (Apr. 14, 2021), <https://perma.cc/BP96-XJJ4>.

¹¹⁵ *Id.*

¹¹⁶ German Lopez, *The Evidence for Violence Interrupters Doesn’t Support the Hype*, VOX (Sept. 3, 2021), <https://perma.cc/8G6Q-N5NU>.

¹¹⁷ *Id.* (“[I]nterrupters hope to instill norms in a community against continued violence, showing a better path forward.”).

¹¹⁸ Gimbel & Muhammad, *supra* note 10, at 1510 (“The workers employed at local sites—the ‘violence interrupters’—all come directly from the communities they serve, and many have histories of violence and incarceration.”).

¹¹⁹ *Cf. id.* (describing how prior offenders in the community help prevent future violence).

the country have both worked in tandem with officers on the beat and alone as replacements for traditional police response.¹²⁰

In the short term, the goal is to curb violence. In the long term, interrupters hope to bring peace as a value to communities plagued by violence, which is an enticing idea for abolitionists looking for ways to reduce violent crime “without the need for armed officers capable of their own violence.”¹²¹ This decades-old concept received new life in 2020 as policymakers sought alternatives to traditional policing.¹²² President Biden even directed federal funding toward interrupter pilot projects, describing the approach as an “evidence-based model,”¹²³ despite inconsistent efficacy findings.¹²⁴

5. Civilian traffic enforcement.

The most radical, and potentially transformative, proposal to replace police is in the area of traffic enforcement. Police have no inherent role in traffic enforcement. Yet traffic stops are by far the most frequent interaction between police and citizens.¹²⁵ They also are rife with problems, with numerous studies showing that

¹²⁰ See Tom Crann & Megan Burks, *Now Better Trained and Resourced, Minneapolis Violence Interrupters to Hit Streets Next Month*, MPR NEWS (May 27, 2021), <https://perma.cc/UJG9-JZQ2> (explaining that violence interrupters played a key role in the “Minneapolis Office of Violence Prevention” after “the murder of George Floyd renewed calls for a drastic change in the way we police communities”); Yang, *supra* note 5, at 1105–06 (discussing violence-interrupter initiatives that were effective until governments withdrew support); Gimbel & Muhammad, *supra* note 10, at 1512–14 (describing Chicago’s CeaseFire program of violence interrupters that exhibited success before the city declined to renew its contract, “citing a lack of cooperation on the part of its workers with law enforcement”).

¹²¹ Lopez, *supra* note 116; see also Gimbel & Muhammad, *supra* note 10, at 1510 (arguing that “[l]everaging the trust and credibility of the violence interrupters” allows organizations like Cure Violence to “[m]obilize the community to change norms” (quoting *The Cure Violence Health Model*, <https://perma.cc/9TVF-HPGQ>)).

¹²² Crann & Burks, *supra* note 120 (“[T]he murder of George Floyd renewed calls for a drastic change in the way we police communities.”); see also Lopez, *supra* note 116 (explaining that the “spike in shootings and murders” in 2020 has created a “crisis that policymakers are dealing with now, with political pressure mounting to do something quickly”).

¹²³ See Lopez, *supra* note 116.

¹²⁴ See, e.g., Lopez, *supra* note 116 (collecting studies highlighting “decidedly mixed” results of programs); cf. Gimbel & Muhammad, *supra* note 10, at 1512–14 (describing the “substantial positive results” of early violence interrupter programs before funding was cut and contracts terminated).

¹²⁵ Bureau of Just. Stats., *Contacts Between Police and the Public, 2018—Statistical Tables* 4 (Dec. 2020), <https://perma.cc/5L7V-CZXG>; cf. Woods, *supra* note 10, at 1480–81 (indicating that people are “likely to violate at least one traffic law when driving from place to place”).

Black and Latinx motorists are “disproportionately stopped by police for traffic violations and disproportionately questioned, frisked, searched, cited, and arrested during traffic stops.”¹²⁶ Many of these stops are pretextual, serving as a fishing expedition for police to find minor criminal activity and funnel people into the criminal legal system.¹²⁷ Even without finding independent evidence of criminality, officers often fall back on “‘lawful order’ statutes” authorizing them to arrest motorists “whenever they view the actions of motorists as merely disobedient.”¹²⁸ This enormous discretion to invoke a violent carceral response to a minor traffic violation also disproportionately affects Black and Latinx motorists.¹²⁹

To redress these injustices, abolitionists and others have begun theorizing ways to replace police with a separate civilian agency tasked specifically with traffic enforcement. The United Kingdom has long separated armed police from unarmed traffic enforcers, and at least one U.S. jurisdiction—Berkeley, California—has experimented with this approach.¹³⁰ But to date, the idea remains mostly theoretical, with the most thorough and serious treatment coming from Professor Jordan Blair Woods in *Traffic Without the Police*. Drawing on experience in New Zealand¹³¹ and elsewhere, Woods posits that states could create “traffic agencies” staffed with “traffic monitors,” that traffic agencies “would operate wholly independently of the police,” and that “[t]raffic monitors would enforce routine traffic laws through in-

¹²⁶ Woods, *supra* note 10, at 1475.

¹²⁷ See Marsha Mercer, *Police ‘Pretext’ Traffic Stops Need to End, Some Lawmakers Say*, PEW RSCH. CTR. (Sept. 3, 2020), <https://perma.cc/4GAW-L252> (noting that legislators, officials, advocates, and law enforcement personnel “have grappled for decades with complaints that traffic stops unfairly target minority motorists”); *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that these pretextual stops do not violate the Fourth Amendment). Police have used the enforcement of minor moving-vehicle violations as an entry point to engage in broad criminal investigations unconnected to vehicle codes. The Supreme Court has repeatedly authorized these pretextual encounters as consistent with the Fourth Amendment, in essence condoning as constitutional a practice that is rife with discrimination. *Whren*, 517 U.S. at 813.

¹²⁸ Woods, *supra* note 10, at 1485.

¹²⁹ See, e.g., Belén Lowrey-Kingberg & Grace Sullivan Buker, “*I’m Giving You a Lawful Order*”: *Dialogic Legitimacy in Sandra Bland’s Traffic Stop*, 51 LAW & SOC’Y REV. 379, 379 (2017) (analyzing the case of Sandra Bland, which began as a traffic stop for “failing to signal a lane change” but escalated into an arrest for failure to follow a lawful order, resulting in “Bland’s jailing and eventual suicide at Waller County jail”).

¹³⁰ *Berkeley City Council Meeting*, *supra* note 6.

¹³¹ Woods, *supra* note 10, at 1536 (“A strong indicator that it is possible to remove police from traffic enforcement without compromising traffic safety is the fact that New Zealand followed this approach for almost six decades.”).

person traffic stops” while monitoring certain automated aspects of traffic enforcement.¹³²

Woods proposes limiting the reach and authority of traffic agencies through positive law municipal regulations, explaining that “traffic monitors would be strictly limited to traffic-law enforcement, not criminal investigations.”¹³³ Traffic monitors “would not be vested with typical police powers to detain, search, or arrest.”¹³⁴ However, if a traffic monitor uncovers evidence of a serious felony offense (such as a motorist driving under the influence or driving a stolen vehicle), they could “contact police dispatch through a specialized channel” to assist with the more serious offense.¹³⁵ Perhaps recognizing the difficulties entailed with such a radical transformation of traffic enforcement, Woods cautions that “[a] true normative commitment to removing police from traffic enforcement would mean that traffic monitors could not serve as eyes for the police (or as mere substitutes that stand in place of the police).”¹³⁶

It is this concern—that crisis intervention teams, social workers, violence interrupters, and traffic monitors will serve as eyes and ears for the carceral state, and thus “simply subject vulnerable people to cops by a different name”—that represents perhaps the most fundamental structural hurdle for police abolitionists as the movement transitions from theory to reality.¹³⁷ As police department budgets shrink and officers are laid off or transitioned into new jobs, one can fairly assume that these former officers might begin to fill the ranks of the very nonpolice agencies created to replace them. With continued ties to what remains of armed law enforcement, concerns likely will remain regarding how truly independent or different these agencies are from traditional cops.

¹³² *Id.* at 1479.

¹³³ *Id.* at 1495; *see also id.* at 1496 (noting that, as a result, traffic monitors “would not be authorized [] to run criminal background checks, and traffic agencies would not have access to that information.”).

¹³⁴ *Id.* at 1495; *see also id.* at 1501 (describing how traffic monitors would not be able to give chase, but “simply use license-plate information to mail a traffic citation to the vehicle owner”).

¹³⁵ *Id.* at 1496.

¹³⁶ Woods, *supra* note 10, at 1499.

¹³⁷ Soc. Serv. Workers United-Chicago, *The NASW Is Failing Us. Either It Changes, or We Will Change It Ourselves.*, MEDIUM (July 13, 2020), <https://perma.cc/FKL5-T3E2> (criticizing calls for greater collaboration with police because replacing “police with social workers without eliminating these carceral aspects of social work” will perpetuate existing harms).

This issue has significant Fourth Amendment implications as well. If a government agency truly has a noncriminal investigative purpose, its search and seizure actions may be justified by a far less rigorous “administrative reasonableness” standard under the Fourth Amendment, if indeed the amendment applies at all. But if an agency retains extensive entanglement with law enforcement or acts with the intent to assist a criminal investigation, traditional probable cause and warrant requirements may apply. It is to these thorny Fourth Amendment issues we now turn.

II. THE POSTPOLICE FOURTH AMENDMENT

The Fourth Amendment is the primary source of legal regulation for and restraint on police investigative activity.¹³⁸ What, then, will become of the amendment when governments replace policing functions with nonpolice entities like crisis intervention teams and traffic monitors? Alternatively, what, if any, role will the Fourth Amendment play in regulating the activities of these nonpolice agencies? Part II evaluates Fourth Amendment legal thresholds and standards in noncriminal investigations and charts the implications of applying such thresholds and standards to a world without police.

A. The Fourth Amendment’s Primary Purpose

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects” from “unreasonable searches and seizures.”¹³⁹ “Implicit in this language is the notion that the amendment applies to a limited range of governmental conduct.”¹⁴⁰ “Unlike the ‘state actor’ requirement of the [F]ourteenth [A]mendment, the [F]ourth [A]mendment cannot be

¹³⁸ *Gardner v. Buerger*, 82 F.3d 248, 251 (8th Cir. 1996) (“[T]he Fourth Amendment is [] a ‘primary source[] of constitutional protection against physically abusive government conduct.’” (quoting *Graham v. Connor*, 490 U.S. 386, 394 (1989))); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 556 (1999) (“[T]he larger purpose for which the Framers adopted the text [was] to curb the exercise of discretionary authority by [law enforcement] officers.”).

¹³⁹ U.S. CONST., amend. IV.

¹⁴⁰ *United States v. Attson*, 900 F.2d 1427, 1429 (9th Cir. 1990).

triggered simply because a person is acting on behalf of the government,” and will apply only if the conduct in question can fairly be characterized as a “search” or “seizure.”¹⁴¹

Courts give special consideration to this threshold applicability inquiry when “the challenged conduct falls outside the area to which the [F]ourth [A]mendment most commonly and traditionally applies—law enforcement.”¹⁴² They do so in recognition of their view that a “primary purpose of the Fourth Amendment [is] to prohibit unreasonable intrusions in the course of criminal investigations.”¹⁴³

In a typical criminal investigation, where police pursue criminal evidence or suspects of a completed or in-progress crime, traditional Fourth Amendment restrictions apply. Warrants, supported by probable cause, are “presumptively required.”¹⁴⁴ Where an exception to the warrant clause exists, probable cause nonetheless “remains the touchstone in criminal investigations.”¹⁴⁵ And even where probable cause is not required, a search or seizure that takes place as part of a criminal investigation “is ordinarily unreasonable [and therefore constitutionally impermissible] in the absence of *individualized* [reasonable] suspicion of wrongdoing.”¹⁴⁶

However, in a noncriminal investigation, warrants and probable cause are “typically treated as irrelevant,” even if the conduct

¹⁴¹ *Id.*; see also *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 924 (9th Cir. 2001) (explaining that for the conduct of a non-law enforcement governmental party to be subject to the Fourth Amendment, they must have acted “with the intent to assist the government in its investigatory . . . purposes, and not for an independent purpose” (quoting *Attson*, 900 F.2d at 1433)); *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (finding that the Fourth Amendment did not apply to government police conduct where an officer chased a suspect but did not successfully apprehend him because the actions of the officer did not constitute a “seizure” under the Fourth Amendment).

¹⁴² *Attson*, 900 F.2d at 1430; see also *Blasko v. Doerpholz*, 2016 WL 11189804, at *15 (D. Mass. Aug. 22, 2016) (“[I]t is particularly important for courts to make a threshold inquiry as to [the Fourth Amendment’s] applicability.”).

¹⁴³ See *J.L. v. N.M. Dep’t of Health*, 165 F. Supp. 3d 996, 1042 (D.N.M. 2015); *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977) (“[T]he principal concern of [the Fourth] Amendment’s prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations.”); *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (“[T]he evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or ‘writs of assistance’ to authorize searches for contraband by officers of the Crown.”).

¹⁴⁴ DRESSLER, *supra* note 14, at 293.

¹⁴⁵ *Id.*

¹⁴⁶ *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (emphasis added) (citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997)).

in question is a “search” or “seizure.”¹⁴⁷ Individualized suspicion of some noncriminal wrongdoing is “not an ‘irreducible’ component of reasonableness.”¹⁴⁸ Suspicionless, broad, and often incredibly intrusive searches and seizures are frequently permitted in the noncriminal realm. Thus, “the line between a traditional criminal investigation . . . and a search or seizure designed primarily to serve *non*-criminal law enforcement goals . . . is [] a line of considerable constitutional significance.”¹⁴⁹ It is also “thin and, quite arguably, arbitrary.”¹⁵⁰

When the Court has considered the application of the Fourth Amendment to noncriminal investigations, “it has been careful to observe that the application of the amendment is limited.”¹⁵¹ This threshold becomes more difficult to cross when the challenged conduct comes from private parties, even when those parties act in furtherance of governmental investigative interests.¹⁵²

This truth reveals an irony about the Supreme Court’s treatment of noncriminal investigations. The Fourth Amendment’s restraints exist to protect law-abiding citizens from arbitrary and unnecessary intrusions. Yet in the noncriminal context, the Court has often required “such law-abiding persons to open up their homes, businesses, papers, effects, and even bodies to *greater* scrutiny than occurs with criminal suspects.”¹⁵³ And herein lies

¹⁴⁷ DRESSLER, *supra* note 14, at 294; Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (Special needs “beyond the normal need for law enforcement make the warrant and probable-cause requirement impracticable.” (quoting *T.L.O.*, 469 U.S. at 351)); cf. Gerald S. Reamey, *When Special Needs Meeting Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295, 299–300 (1992) (arguing that the Court’s special needs cases “are individually flawed for failing to adhere to their conceptual antecedents, and are collectively flawed by requiring that the Supreme Court interpret the [Fourth] [A]mendment in an ad-hoc and unprincipled fashion”).

¹⁴⁸ *Edmond*, 531 U.S. at 37.

¹⁴⁹ DRESSLER, *supra* note 14, at 293.

¹⁵⁰ *Id.*; see also York v. Wahkiakum Sch. Dist. No. 200, 163 Wash. 2d 297, 311 n.13 (2008) (en banc) (quoting DRESSLER, *supra* note 14, at 293); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) (“[L]ittle or no effort has been made to explain what these ‘special needs’ are; the term turns out to be no more than a label that indicates when a lax standard will apply.”).

¹⁵¹ *Attson*, 900 F.2d at 1430 (collecting cases).

¹⁵² See *id.* at 1432–33; cf. United States v. DiTomasso, 81 F. Supp. 3d 304, 309 n.33 (S.D.N.Y. 2015) (“This language is difficult to reconcile with the line of Supreme Court authority recognizing that permitting private persons to relay incriminating evidence to law enforcement serves ‘society’s interest’ in ‘bringing criminal activity to light.’” (quoting *Georgia v. Randolph*, 547 U.S. 103, 116–17 (2006))).

¹⁵³ DRESSLER, *supra* note 14, at 294 (emphasis in original); see also *Camara v. Mun. Ct. of the City and Cnty. of San Francisco*, 387 U.S. 523, 530 (1967) (“It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”).

the risk of unintended consequences for abolitionists: by replacing police with a noncriminal public safety apparatus and reducing the role of criminal investigations, reformers may be subjecting a greater number of law-abiding citizens to greater intrusions on their privacy and liberty with fewer constitutional safeguards to protect them.

The following sections examine the complex case law governing noncriminal investigations and charts implications of applying this case law to the postpolice entities outlined in Part I.

B. Fourth Amendment Thresholds: Eliciting Benefits

Certain early cases found the Fourth Amendment applicable only when a search was undertaken for criminal investigatory purposes.¹⁵⁴ But the Court changed course in *Camara v. Municipal Court of San Francisco*¹⁵⁵ when it held that “administrative searches . . . are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual.”¹⁵⁶ In *Camara*, the lessee of a ground floor apartment sought a writ prohibiting his prosecution on a criminal charge of violating the city housing code by refusing to permit a warrantless inspection of his premises.¹⁵⁷ The Court agreed that “a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman’s search for the fruits and instrumentalities of crime,” but it could not agree

¹⁵⁴ See, e.g., *Camara*, 387 U.S. at 530 (discussing *Frank v. Maryland*, 359 U.S. 360, 372–73 (1959), where the Court upheld the conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect his home without a warrant, reasoning that “municipal fire, health, and housing inspection programs ‘touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment’s protection against official intrusion’ because the inspector does not seek evidence of criminal action to secure prosecution”); see also *In re Strouse*, 23 Fed. Cas. 261, 262 (D. Nev. 1871) (“[T]he [F]ourth [A]mendment . . . is applicable to criminal cases only.”); *In re Meador*, 16 Fed. Cas. 1294, 1299 (N.D. Ga. 1869) (“[T]his is a civil proceeding, and in no wise does it partake of the character of a criminal prosecution; no offense is charged against the Meadors. Therefore, in this proceeding, the [F]ourth [A]mendment is not violated.”).

¹⁵⁵ 387 U.S. 523 (1967).

¹⁵⁶ *Id.* at 534; see also *J.L.*, 165 F. Supp. 3d at 1041 (“[T]he Fourth Amendment’s protections are not limited to encounters with law enforcement officials, but rather extend to all persons against all government actors.”).

¹⁵⁷ See *Camara*, 387 U.S. at 525.

that “the Fourth Amendment interests at stake in these inspection cases are merely ‘peripheral.’”¹⁵⁸ In vacating *Camara*’s conviction, the Court found that the “basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials,” and that the Fourth Amendment “thus gives concrete expression to a right of the people,” and not just the criminally accused.¹⁵⁹

Lower courts have since applied *Camara* and its progeny to hold that the Fourth Amendment applies to involuntary seizures of individuals for noncriminal purposes, not just searches. For example, in *Pino v. E.P. Higgs*,¹⁶⁰ the Tenth Circuit found that the Fourth Amendment was applicable to involuntary civil-commitment activities.¹⁶¹ Three years later, the Tenth Circuit relied on *Pino* to hold that the Fourth Amendment applied to involuntary detoxification treatment as well.¹⁶²

The language of *Camara* suggested that the Court seemed poised to expansively apply the Fourth Amendment to all government conduct that could fairly be characterized as a search and seizure. Yet in subsequent cases, lower courts emphasized that the Fourth Amendment regulates searches and seizures only if they are “*designed to elicit a benefit* for the government in an investigatory or, more broadly, administrative capacity.”¹⁶³ This intent threshold is presumed in the typical Fourth Amendment case involving “challenges to the actions of law enforcement officers conducting criminal investigations.”¹⁶⁴ But determining whether noncriminal intrusions are subjectively motivated by investigative or administrative benefits has proven significantly more

¹⁵⁸ *Id.* at 530.

¹⁵⁹ *Id.* at 528; *see also* *Michigan v. Tyler*, 436 U.S. 499, 506 (1978) (holding the Fourth Amendment applicable to firefighters entering a home and stating that “there is no diminution in a person’s reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman”).

¹⁶⁰ 75 F.3d 1461 (10th Cir. 1996).

¹⁶¹ *See id.* at 1467.

¹⁶² *See Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 590 (10th Cir. 1999).

¹⁶³ *Doe*, 660 F.3d at 179 (emphasis added) (quoting *Attson*, 900 F.2d at 1429).

¹⁶⁴ *Blasko*, 2016 WL 11189804, at *14; *see also Attson*, 900 F.2d at 1430; *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015) (emphasizing that the Fourth Amendment’s applicability is sharply limited “where the ‘primary purpose’ of the [activity] is [d]istinguishable from the general interest in crime control” (quoting *Edmond*, 531 U.S. at 44)).

difficult, and cases in this area are inconsistent at best. This inconsistency raises significant questions about the Fourth Amendment's applicability to postpolice public safety entities.

For example, in *New Jersey v. T.L.O.*,¹⁶⁵ the Court applied the Fourth Amendment to public school administrators seeking evidence of school violations, finding that such investigative activities fall squarely within the amendment's ambit.¹⁶⁶ The Court noted that the Fourth Amendment applies to government conduct whether "the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards."¹⁶⁷ Applying that logic, in *National Treasury Employees Union v. Von Raab*,¹⁶⁸ the Court expanded the reach of the Fourth Amendment to involuntary drug testing of U.S. Customs Service employees because such "intrusion[s] serve[] special governmental needs" by eliciting desired governmental investigative benefits—namely, information about the sobriety of government employees.

In other contexts, however, noncriminal investigative activity has fallen outside the Fourth Amendment's scope even when that activity infringes upon reasonable expectations of privacy and appears to intentionally provide benefits for the government.¹⁶⁹ In *Heinrich v. Sweet*,¹⁷⁰ the District of Massachusetts rejected a Fourth Amendment claim where serious invasions of bodily privacy by government employees were in fact motivated by a governmental scientific investigative purpose, just not a "criminal or regulatory" one.¹⁷¹ In *Heinrich*, dozens of government doctors conducted decades of dangerous secret radiation experiments on nonconsenting terminally ill patients.¹⁷² While the court acknowledged that the doctors had acted under color of law for an

¹⁶⁵ 469 U.S. 325 (1985).

¹⁶⁶ *Id.* at 335.

¹⁶⁷ *Id.* (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312–13 (1978)).

¹⁶⁸ 489 U.S. 656, 665 (1989); see also *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620–21 (1989); *Marshall*, 436 U.S. at 313 (applying the Fourth Amendment to OSHA inspections of private businesses for regulatory compliance).

¹⁶⁹ This limitation makes sense where a government employee acts not under color of law but instead for personal gain. See, e.g., *United States v. Inman*, 558 F.3d 742, 746 (8th Cir. 2009) (rejecting the claim of a government paramedic whose supervisor accessed his computer and began snooping around to "satisfy [his own] curiosity about [defendant's] new girlfriend"); *Doe v. Luzerne Cnty.*, 660 F.3d 169, 179 (3d Cir. 2011) (rejecting a claim where male police officers took and disseminated videos of female coworkers in various states of undress).

¹⁷⁰ 62 F. Supp. 2d 282 (D. Mass. 1999).

¹⁷¹ *Id.* at 317.

¹⁷² *Id.* at 290.

investigative purpose, the primary purpose of the investigations were medical and scientific in nature rather than criminal or administrative.¹⁷³ As a result, the Fourth Amendment simply did not apply.¹⁷⁴

Likewise, in *United States v. Attson*,¹⁷⁵ the Ninth Circuit found that the Fourth Amendment did not apply to a government-employed doctor who had taken a blood sample from a criminal suspect and conducted a blood alcohol analysis on it, because the physician had acted “for purely medical reasons, [and] did not possess the requisite intent to engage in a search or seizure under the [F]ourth [A]mendment.”¹⁷⁶ Although evidence existed that police had requested that the doctor take and analyze a blood sample, the doctor had refused to provide the police the test results, and he averred that he had taken the blood sample for medical reasons independent of the criminal investigation.¹⁷⁷ Indeed, it was not until a year after the accident that the blood-sample test results were even received by the prosecution pursuant to a grand jury subpoena.¹⁷⁸ However, the fact that the doctor “offered specific medical reasons for taking the blood sample” sufficiently immunized this search from the requisite intent necessary to cross the Fourth Amendment threshold.¹⁷⁹

Attson, widely followed as a “leading” case by other circuits,¹⁸⁰ confirmed the narrowness of this intent requirement in an important way. Despite the fact that the government doctor did not cooperate with the prosecution’s receipt of the blood-sample test results, he knew that the patient was under suspicion and investigation for a crime, and thus knew by implication that the results of his toxicology report would be highly relevant and likely used by police in its investigation. Yet this knowledge was insufficient to trigger the Fourth Amendment, suggesting that awareness of a substantial possibility that an actor’s invasive search will be

¹⁷³ *Id.* at 317.

¹⁷⁴ *Id.*

¹⁷⁵ 900 F.2d 1427 (9th Cir. 1990).

¹⁷⁶ *Id.* at 1433; *see also Blasko*, 2016 WL 11189804, at *15 (noting that the doctor’s activity in *Attson* was found not to constitute a search “notwithstanding the fact that the prosecution ultimately obtained the evidence in response to a grand jury subpoena and used it in defendant’s trial for manslaughter”).

¹⁷⁷ *Attson*, 900 F.2d at 1429.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1433.

¹⁸⁰ *Blasko*, 2016 WL 11189804, at *15; *see also Inman*, 558 F.3d at 745 (8th Cir. 2009) (relying on *Attson*, 900 F.2d 1427); *United States v. McAllister*, 18 F.3d 1412, 1418 (7th Cir. 1994) (same).

used for criminal investigatory purposes still will not implicate the Fourth Amendment—only purposeful, subjective intent to “elicit a benefit” will do.¹⁸¹

1. Nonpolice emergency responders.

Postpolice, this narrow “subjective intent to elicit a benefit” limitation likely has the most impact on physical triage from EMTs, given their primary, immediate motivation to provide medical care, not investigate for the government. Though there exist “very few cases dealing with the Fourth Amendment’s application in the context of paramedics . . . rendering emergency medical assistance,” limited case law on point seems to confirm as much.¹⁸² For example, in a Sixth Circuit case involving EMT response to a seizure of an epileptic man, the court found “no case authority holding that paramedics answering a 911 emergency request for help engage in a Fourth Amendment ‘seizure’ of the person when restraining the person while trying to render aid.”¹⁸³ In that case, paramedics restrained the man by “using their bodies to apply weight and pressure to [the man’s] head, neck, shoulders, arms, torso and legs” and “[i]n a further effort to . . . protect themselves, they tied his hands and ankles behind his back and continued to apply pressure to [him] while he was in a prone position” until he died.¹⁸⁴ Because the paramedics acted solely to provide medical aid, the Fourth Amendment did not apply to this clearly unreasonable seizure.¹⁸⁵ Absent a Fourth Amendment claim, the court concluded there is no “constitutional liability for the negligence, deliberate indifference, and incompetence” of medical professionals who intended to “render solicited aid in an emergency.”¹⁸⁶

¹⁸¹ See *Attson*, 900 F.2d at 1429.

¹⁸² *Martinez v. City of Los Angeles*, 2021 WL 3206796, at *8 (C.D. Cal. Apr. 10, 2021) (quoting *Haas v. County of El Dorado*, 2012 WL 1414115, at *5 (E.D. Cal. Apr. 23, 2012)).

¹⁸³ *Peete v. Metropolitan Gov’t of Nashville & Davidson Cnty.*, 486 F.3d 217, 219 (6th Cir. 2007); see also *Pena v. Givens*, 637 F. App’x 775, 781 (5th Cir. 2015) (noting that there is no “controlling authority—or a robust consensus of persuasive authority,” suggesting that medical personnel ‘seize’ patients when restraining them in the course of providing treatment” (quoting *Wyatt v. Fletcher*, 718 F.3d 496, 503 (5th Cir. 2013)) (internal citation omitted)).

¹⁸⁴ *Peete*, 486 F.3d at 220 (quoting the complaint).

¹⁸⁵ *Id.* at 222 (concluding that no unreasonable seizure occurred because “the paramedics acted in order to provide medical aid” and did not act “to enforce the law, deter or incarcerate”).

¹⁸⁶ *Id.* at 221.

Three years later, the Sixth Circuit applied the same logic to police responding to a medical emergency, stating that officers, acting in an “emergency-medical-response capacity,” who restrain a citizen in crisis are not subject to the Fourth Amendment.¹⁸⁷ In contrast, officers who respond to a medical 911 call by handling individuals, subduing them, and handcuffing them because they refuse to submit to their verbal commands are subject to the Fourth Amendment, because such command-and-control tactics amount to “a law-enforcement capacity.”¹⁸⁸

This limited precedent appears to suggest that the precise composition and function of postpolice EMTs may prove dispositive in assessing Fourth Amendment applicability. For completely separate EMT entities like CAHOOTS (which operates from a private health clinic and answers and responds to calls without police dispatcher interference)—any search or seizure-like actions seem so institutionally divorced from benefitting a government criminal or administrative investigation that the Fourth Amendment seems inapplicable.¹⁸⁹ Even the discovery of criminal evidence by CAHOOTS personnel later used in a prosecution would likely be deemed incidental or subsidiary to the primary noninvestigative purpose.

This is not to say that EMTs would have any particular motive to provide criminal evidence to police and prosecutors, given their primary motive to provide medical care. But as the limited case law above illustrates, Fourth Amendment threshold questions often involve unreasonable seizures, which do present themselves in the context of emergency medical care. Moreover, one need not speculate too wildly to imagine a rogue EMT, frustrated by daily drug overdose dispatch calls, cooperating with investigators to apprehend suspected opioid distributors.

This concern may be especially salient for civilian EMTs enmeshed with police departments. For example, the Houston Police Department’s Crisis Call Diversion team also is comprised

¹⁸⁷ *McKenna v. Edgell*, 617 F.3d 432, 439–40 (6th Cir. 2010) (concluding that, if the officers acted in a medical-response capacity, then the petitioner’s claim “would amount to a complaint that he received dangerously negligent and invasive medical care,” and further noting that “if any right to be free from such unintentional conduct by medical-emergency responders exists under the Fourth Amendment, it is not clearly established”); *see also* *Estate of Barnwell v. Grigsby*, 801 F. App’x 354, 370 (6th Cir. 2020) (“The evidence clearly indicates that the defendants’ conduct served a medical-emergency function, rather than a law-enforcement function.”).

¹⁸⁸ *McKenna*, 617 F.3d at 444.

¹⁸⁹ *See* CAHOOTS, *supra* note 93.

of civilian medical personnel who respond to 911 calls and dispatch EMTs to emergencies.¹⁹⁰ Similarly, Washington, D.C., “emergency room triage nurses sit alongside 911 dispatchers and can set up medical appointments” in addition to offering emergency response.¹⁹¹ But both the Crisis Call Diversion team and Washington, D.C., response teams remain housed within police departments, rely on police dispatchers to exercise discretion to divert calls away from police, respond in tandem with armed officers, and remain subject to police response on the scene.¹⁹² This lack of independence from police raises questions about the ability of these EMTs to act on motives that are truly free of investigative influence. Yet *Attson* and *Heinrich* suggest that perhaps even these law enforcement–adjacent activities may fall outside Fourth Amendment protection, raising concerns for quasi-abolitionist co-responder models.

One may claim that such co-responder models are not truly postpolice. But one may also fairly assume a potentially lengthy period of transition from total police response to total nonpolice response that includes these mixed models of service delivery. That transition is already underway in many places. It is in these co-responder spaces that unbundling advocates and abolitionists would be wise to recognize the potential erosion of constitutional privacy protections without the added protection from potential penal consequences.

2. Mental health first responders.

A similar reluctance to apply the Fourth Amendment to mental health responders informs the limited case law addressing the issue. Indeed, courts have refused to apply the Fourth Amendment even when the seizure at issue—potentially lengthy involuntary commitment to a mental health facility—“raises concerns that are closely analogous to those implicated by a criminal arrest.”¹⁹³

In *Scott v. Hern*,¹⁹⁴ the Tenth Circuit did not inquire into whether the Fourth Amendment applied to a government psychiatrist’s determination that an individual should receive temporary involuntary treatment at a mental health hospital—possibly

¹⁹⁰ See *Crisis Call Diversion Program*, *supra* note 96.

¹⁹¹ Friedman, *supra* note 10, at 990.

¹⁹² See *id.* at 988–90.

¹⁹³ *Pino*, 75 F.3d at 1468.

¹⁹⁴ 216 F.3d 897 (10th Cir. 2000).

because the decision was motivated by a desire to help an ill patient, not elicit a government investigative benefit.¹⁹⁵ Instead, the court found that such decisions are bound by the Due Process Clause's reasonableness standard preventing arbitrary decisions.¹⁹⁶ Notably, the Tenth Circuit held in cases both before and after *Scott* that the Fourth Amendment applied when the same determinations that had been made by a psychiatrist in *Scott* were instead made by law enforcement.¹⁹⁷ Even though the court acknowledged that mental health evaluations and criminal arrests are “equally intrusive,” the uniform worn by the government actor imposing this intrusion appeared to make all the constitutional difference, a cautionary outcome for a postpolice world.¹⁹⁸

The implications here are far-reaching and troubling. As noted in Part I, mental health emergency response enjoys broad support across ideological lines, with more than 2,700 mental health crisis intervention teams authorized to respond to 911 calls around the country. Intervention teams are often authorized to take actions—including sending individuals in crisis to involuntary civil commitment—that are equally as intrusive as criminal arrests. Yet under current precedent, these actions not only appear to not require probable cause or a warrant but also need not even be adjudged a reasonable seizure under an apparently

¹⁹⁵ *See id.* at 910.

¹⁹⁶ *Id.*

¹⁹⁷ *Meyer v. Bd. of Cnty. Comm'rs of Harper Cty.*, 482 F.3d 1232, 1239 (10th Cir. 2007) (holding that police officers' seizure of an individual for an emergency mental health evaluation must be supported by probable cause); *Pino*, 75 F.3d at 1468 (“Because a seizure of a person for an emergency mental health evaluation raises concerns that are closely analogous to those implicated by a criminal arrest, and both are equally intrusive, we conclude that the ‘probable cause’ standard applies here.”).

¹⁹⁸ *Compare Pino*, 75 F.3d at 1468 (applying the Fourth Amendment to police officers seizing a mentally ill person for their own benefit), *with Hern*, 216 F.3d at 910 (holding that a psychiatrist certifying a diagnosis of a mental illness that led to commitment was “objectively reasonable” and thus did not amount to a valid Section 1983 claim brought under the Due Process Clause). The Fifth Circuit reached similar conclusions based on the professional occupation of the government actor and whether the actor was performing duties in an “emergency-medical-response capacity.” *Pena*, 637 F. App'x at 781; *see also id.* (concluding that police officers need probable cause but that mental health responders do not, even though both relied on the same Texas statute authorizing such determinations). *Compare Cantrell v. City of Murphy*, 666 F.3d 911, 923 (5th Cir. 2012) (holding that police officers did not violate the Fourth Amendment because they had probable cause to detain the plaintiff under a Texas law that allowed them to take a mentally ill person into custody if that person poses a substantial risk of harm to themselves or others), *with Pena*, 637 F. App'x at 780 (finding that psychiatric technicians were entitled to qualified immunity for restraining the decedent because no controlling authority established that their conduct amounted to a seizure under the Fourth Amendment).

inapplicable Fourth Amendment. That courts have required probable cause for police to take the exact same action, motivated presumably by the mental health of the affected individual, shows just how seriously courts take this type of government intrusion, even if the intrusion is motivated by medical and not investigative reasons.

By no means am I arguing that mental health responders should not respond to crisis calls. Clearly, individuals suffering mental crises would be far better served (and likely remain safer) with a trained unarmed clinician by their side rather than an armed crimefighter trained in force and law. But failing to subject these intrusive decisions to any Fourth Amendment scrutiny risks authorizing criminal prosecutions of mentally ill individuals resulting from arbitrary, discriminatory, or even secretly prosecution-friendly actions of overzealous mental health responders.

Again, this risk seems at its zenith in transitional co-responder models like San Diego's PERT, where trained psychiatric personnel ride with police to respond to incidents.¹⁹⁹ The current or former police officers involved in these programs have received additional training and ostensibly take off their criminal investigation hat in favor of providing mental health services.²⁰⁰ This level of enmeshment with the carceral state—employment by the police department, reliance on officers for response and transportation, and professional overlap—creates serious questions about the ability of these professionals to make noninvestigative medical decisions free of criminal investigative motives. But as *Scott* and other cases suggest, if psychiatric-trained officers take off their police uniform and don a clinician's garb, that costume change may also change the intent of the seizure for constitutional purposes.

Abolitionists have long been skeptical of enmeshed co-responder models for this very reason. Because the close working relationships between police, in-house mental health counselors, and agencies like child welfare services have expanded the carceral net, many activists envision a broader independent agency

¹⁹⁹ See *P.E.R.T.*, *supra* note 102.

²⁰⁰ See *id.*; see also UNIV. OF CINCINNATI CTR. FOR POLICE RSCH. & POL'Y, ASSESSING THE IMPACT OF CO-RESPONDER TEAM PROGRAMS: A REVIEW OF RESEARCH 19 (2021), <https://perma.cc/PA5E-VRBN> (evaluating the efficacy of co-responder models).

role where communities protect and heal their own without interference from the administrative state.²⁰¹ Here, hopeful pilot programs in Denver, Louisville, and elsewhere can begin to address these issues on a subconstitutional level—that is, through internal protocols and municipal regulations that regulate the actions of such teams. In Louisville, a mobile mental health response team of “DOVE delegates” has the option of responding “alongside or instead of a uniformed police officer to some 911 calls.”²⁰² In Denver, the Support Team Assistance Response program authorizes dispatchers to redirect 911 calls to mobile two-person teams (a medic and a clinician) for “community members who are experiencing problems related to mental health” and other social welfare issues.²⁰³ These responders operate independently of police and thus appear to have noninvestigative intentions. Of course, these noninvestigative intentions cut both ways. Divorcing responders from police lessens the likelihood of a carceral response. It also eliminates any ability to challenge the introduction of criminal evidence found by these responders—incidentally or intentionally—because the Fourth Amendment’s exclusionary rule will not apply to their noninvestigative conduct.

3. Violence interrupters and other private entities.

Unlike EMTs and crisis intervention teams, most of whom remain government employees, many violence interrupters operate privately and independently of government (including police) influence.²⁰⁴ They also are conceived solely as a nonincarcerative alternative to the police.²⁰⁵ However, as their name implies, violence interrupters are also more likely to confront the type of violent criminal activity for which an armed police response may be most appropriate.²⁰⁶ This combination—explicit distance from

²⁰¹ See Bell, *supra* note 4, at 2147; Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 635 (2016) (“[D]rug courts may have incentivized police and prosecutors to expand the number of individuals processed within the system for drug offenses due to the well-meaning belief that the justice system would offer better treatment.”).

²⁰² Darcy Costello, *Emergency Calls with No Police Response? Louisville Gets Ready to Make It Happen*, COURIER J. (Oct. 13, 2021), <https://perma.cc/Y3RP-UNB2>.

²⁰³ Grace Hauck, *Denver Successfully Sent Mental Health Professionals, Not Police, to Hundreds of Calls*, USA TODAY (Feb. 6, 2021), <https://perma.cc/M9HW-JRM6>.

²⁰⁴ See Yang, *supra* note 5, at 1105; Gimbel & Muhammad, *supra* note 10, at 1514.

²⁰⁵ Gimbel & Muhammad, *supra* note 10, at 1530–33.

²⁰⁶ *Id.* at 1511 (describing how violence interrupters are often proactively deployed to “possible ‘trigger situations’—events like the release of a shooter from prison, the anniversary of a conflagration, or even a party bringing together rivals—that carry a high potential for violent outbreaks”).

government investigative motives while rushing headlong into potentially violent criminal situations—presents tricky theoretical issues for postpolice Fourth Amendment applicability.

While reliance on private entities like violence-interrupter programs may align with Davis's reimagined criminal justice that removes government involvement entirely,²⁰⁷ it also likely removes the actions of these entities from any Fourth Amendment scrutiny. The Fourth Amendment threshold becomes more difficult to cross when a private actor engages in noncriminal investigative conduct that yields evidence of criminal wrongdoing. In these cases, a private party must act "as an 'instrument or agent' of the state in effecting a search or seizure [before the] [F]ourth [A]mendment" is implicated."²⁰⁸ A private party acts as an "instrument or agent" only when (1) the government knew and acquiesced to the challenged conduct, *and* (2) the party performing the search intended to help the government in an investigative capacity.²⁰⁹

For example, in *United States v. Walther*,²¹⁰ a private airline employee routinely reported suspicious packages to Drug Enforcement Administration (DEA) agents in exchange for a monetary reward.²¹¹ The DEA registered the employee as an informant and paid him \$800 for providing it with information on eleven occasions.²¹² The Ninth Circuit found that both prongs had been met, as evidenced by the government's registration of the airline employee as an informant and the employee's expectation of remuneration in exchange for information.²¹³

The Ninth Circuit reached a different result in *United States v. Kline*,²¹⁴ where a private Canadian citizen used "Trojan Horse" virus software to illegally search the defendant's computer so he

²⁰⁷ See Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, HISTORY IS A WEAPON, <https://perma.cc/8ZL3-S82B>.

²⁰⁸ *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)).

²⁰⁹ *Walther*, 652 F.2d at 792; *United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994); *United States v. Souza*, 223 F.3d 1197, 1201 (10th Cir. 2000) ("Both prongs must be satisfied before the private search may be deemed a government search.")

²¹⁰ 652 F.2d 788 (9th Cir. 1981).

²¹¹ *Id.* at 790.

²¹² *Id.*

²¹³ See *id.* at 792–93.

²¹⁴ 112 F. App'x 562 (9th Cir. 2004).

could obtain evidence of child pornography to turn over to the police.²¹⁵ The Ninth Circuit distinguished *Kline* from *Walther*, finding that because “no law enforcement agency knew of [the] search of Kline’s computer prior to the search,” the Fourth Amendment did not apply.²¹⁶

Similarly, the Fourth Amendment does not apply if the private party has a “legitimate independent motivation” in conducting a search, even if the government knows about the search and hopes to obtain evidence as a result of it.²¹⁷ In *United States v. Howard*,²¹⁸ two defendants allegedly burned a residence with the intent to claim the insurance proceeds.²¹⁹ Investigators for both the police and the private insurance company searched for evidence of arson, and the two investigators worked together during the investigation.²²⁰ However, because “the intent of the private party conducting the search” was “to determine the liability of the insurance company” and was “entirely independent of the government’s intent to collect evidence for use in a criminal prosecution,” the Fourth Amendment did not apply to the insurance investigator’s search.²²¹

The actions of private violence interrupters, therefore, cannot implicate the Fourth Amendment unless they both hope to help the police make arrests and the police know about and agree to the help beforehand. As currently constituted, there is little evidence to suggest that violence interrupter programs suffer from this sort of backroom cooperation. But in a future postpolice world, where the majority of current officers are laid off and replaced with violence interrupters and other nonpolice entities, one may assume at least some of these former officers will find attractive a role designed to address and prevent violent crime.

²¹⁵ See *id.* at 564.

²¹⁶ *Id.* (“A private person cannot act unilaterally as an agent or instrument of the state; there must be some degree of governmental knowledge and acquiescence.” (quoting *United States v. Sherwin*, 539 F.2d 1, 6 (9th Cir. 1976)).

²¹⁷ *Reed*, 15 F.3d at 931–32 (quoting *Walther*, 652 F.2d at 791–92); see also *United States v. Chukwubike*, 956 F.2d 209, 212 (9th Cir. 1992); *In re Kerlo*, 311 B.R. 256, 265 (Bankr. C.D. Cal. 2004) (finding that a private bankruptcy trustee did not have a criminal investigative purpose when she enlisted federal marshals to assemble the assets of the estate).

²¹⁸ 752 F.2d 220 (6th Cir. 1985), *rev’d on other grounds* 770 F.2d 57 (6th Cir. 1985) (en banc).

²¹⁹ *Id.* at 222.

²²⁰ *Id.* at 227.

²²¹ *Id.* at 227–28; cf. *United States v. Hardin*, 539 F.3d 404, 417–20 (6th Cir. 2008) (holding that the Fourth Amendment applied to an apartment manager who entered an apartment to verify the presence of a suspect at the request of police).

And to the extent this postpolice world retains a small traditional police force limited specifically to violent crime, the situation would be ripe for precisely the type of expanded carceral cooperation abolitionists hope to eliminate. Sufficient evidence of a coordinated instrument or agent relationship as in *Walther* may subject such cooperation to Fourth Amendment scrutiny; anything less may simply fall outside the amendment's orbit.

The implications of the "instrument or agent" doctrine extend beyond violence interrupters, of course. Some abolitionist proposals specifically reject all public interference. For example, in 2015, Critical Resistance Oakland started the "Anti-Policing Healthworkers Cohort" comprised of private health care providers who "create[] alternatives to calling the police" during health emergencies by providing "basic training on how to respond to common health care issues like high blood pressure and more advanced 'skills, such as CPR and treating gun shot or stabbing wounds.'"²²² The group creates "no call" plans to divert health care providers away from dialing 911 and provides "Know Your Options" workshops to "empower people to address a health situation while minimizing police contact."²²³

This wide-ranging program contemplates privatizing EMTs, mental health first responders, social workers, and violence interrupters. And while the institutional purpose is explicitly noncarceral and noninvestigative by nature, an individual member of the cohort acting alone likely has carte blanche to contact police after "treating gun shot or stabbing wounds"²²⁴ without any Fourth Amendment recourse for the citizen. Whether any possibility of Fourth Amendment applicability remains in this and similar situations likely depends on the long-term entanglement of law enforcement with these private nonpolice entities, an issue addressed in the next section.

²²² Akbar, *supra* note 5, at 1835–37 (quoting Candice Bernd, *Community Groups Work to Provide Emergency Medical Alternatives, Separate from Police*, TRUTHOUT (Sept. 14, 2015), <https://perma.cc/SKS8-VG4D>); *The Oakland POWER Projects*, CRITICAL RESISTANCE (Spring 2017), <https://perma.cc/PMG2-6KUZ>.

²²³ *The Oakland POWER Projects*, CRITICAL RESISTANCE (Spring 2017), <https://perma.cc/PMG2-6KUZ>.

²²⁴ Akbar, *supra* note 5, at 1837 (quoting Candice Bernd, *Community Groups Work to Provide Emergency Medical Alternatives, Separate from Police*, TRUTHOUT (Sept. 14, 2015), <https://perma.cc/SKS8-VG4D>).

C. Fourth Amendment Standards: Mixed Motives

Even when a noncriminal investigation crosses the Fourth Amendment threshold, less rigorous standards govern whether the investigation violates the amendment. Criminal investigations typically must be preceded by probable cause and a warrant absent a “well-delineated” exception, but noncriminal investigations must only be “reasonable” under the circumstances.²²⁵ So-called mixed-motive investigations animated by both criminal and noncriminal purposes represent difficult line drawing problems for the Court. Where that line is drawn has significant implications for postpolice entities.

The analysis again begins with *Camara*. While *Camara* extended the Fourth Amendment’s reach to nonpolice government actors for the first time, it also applied a relaxed reasonableness standard never before employed in Fourth Amendment jurisprudence.²²⁶ The Court attempted to adhere to the Constitution’s text by requiring probable cause for the government housing inspector to enter private dwellings, but in doing so it invented a new form of probable cause (“administrative probable cause”)—that only required the search to be reasonable.²²⁷ No individualized suspicion was necessary; instead, the Court found that probable cause in such noncriminal cases required only a balancing test in which “the need to search [is weighed] against the invasion which the search entails.”²²⁸

Since *Camara*, the Court has upheld regulatory schemes involving significant intrusions into a person’s privacy—including intimate family details discovered in the sanctity of the home—without a warrant, probable cause, or individualized suspicion.²²⁹ For example, in *Wyman v. James*,²³⁰ the Court upheld a system of

²²⁵ DRESSLER, *supra* note 14, 293–94; *see also* Mitchell v. Wisconsin, 139 S. Ct. 2525, 2543 (2019) (Sotomayor, J., dissenting).

²²⁶ Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 399 (1988).

²²⁷ Donna Mussio, Comment, *Drawing the Line Between Administrative and Criminal Searches: Defining the “Object of the Search” in Environmental Inspections*, 18 B.C. ENVTL. AFF. L. REV. 185, 191–92 (1990); Sundby, *supra* note 226, at 399 (“[T]he problem lies with the Court’s decision to bring the reasonableness balancing test into [F]ourth [A]mendment analysis through the portal of probable cause.”); *Camara*, 387 U.S. at 538–39.

²²⁸ *Camara*, 387 U.S. at 537; *see also* Sundby, *supra* note 226, at 392–93 (“[T]he *Camara* majority redefined probable cause: rather than requiring individualized suspicion, probable cause was recast as standing for a broader concept of reasonableness based on a weighing of the governmental and individual interests.”).

²²⁹ *See* *Wyman v. James*, 400 U.S. 309, 318 (1971).

²³⁰ 400 U.S. 309 (1971).

welfare case worker home visits that required welfare recipients to admit a government worker into their home for interview and inspection or lose eligibility for benefits.²³¹ *Wyman* has been extended to other social welfare home inspections, including child welfare, custody, and general wellness checks on both welfare recipients residing in homes and in unhoused environments.²³² Indeed, so long as the purpose of the investigation is noncriminal in nature, searches of probationers' homes, government offices, and government employees' blood and urine are permitted under the Fourth Amendment without any individualized suspicion of wrongdoing; the scheme itself need only be reasonable under the circumstances.²³³

Given this far more limited application of the Fourth Amendment to noncriminal investigations, drawing the line between criminal and noncriminal is critical. This line drawing exercise has proven nearly impossible to justify in mixed motive cases. For example, in *New York v. Burger*,²³⁴ police officers entered a junkyard without probable cause or individualized suspicion and asked to inspect the business license and "police book," a record of automobiles and parts on the premises.²³⁵ When the owner conceded that he had neither, the officers searched the junkyard, found stolen vehicles, and arrested the owner.²³⁶ The Court upheld the search of the junkyard and the seizure of the stolen vehicles as part of an administrative special needs search.²³⁷

²³¹ *See id.* at 313–14.

²³² *See, e.g.,* *Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 921(9th Cir. 2006) (relying on *Wyman* to uphold a San Diego public assistance program that required all prospective welfare beneficiaries to undergo in-home interviews and walk throughs or be denied benefits); *Wildauer v. Frederick Cnty.*, 993 F.2d 369, 372 (4th Cir. 1993) (rejecting a Fourth Amendment claim where workers from the county department of social services entered a woman's home to inspect it and examine her children, because "investigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context").

²³³ *See, e.g.,* *Griffin*, 483 U.S. at 873 (finding that the administrative needs of the probation system justify suspicionless searches of probationers' homes); *T.L.O.*, 469 U.S. at 340 (finding that the reasonableness standard governs searches of students' persons and effects by public school authorities); *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (using the reasonableness test for work-related searches of employees' offices by a government employer); *Skinner*, 489 U.S. at 624, 631 (finding that neither probable cause nor individualized suspicion was necessary for mandatory drug testing of railway employees).

²³⁴ 482 U.S. 691 (1987).

²³⁵ *Id.* at 694–95.

²³⁶ *Id.* at 695–96.

²³⁷ *Id.* at 702.

This holding appears unjustifiable to the extent the criminal-noncriminal distinction controls when and how the Fourth Amendment applies. Once the junkyard owner admitted that he was in violation of New York regulations requiring a license and police book, the “administrative search” had ended; any further investigation of the junkyard itself “took on the obvious cast of a police effort to uncover evidence of criminal activity.”²³⁸ However, the Court did not focus on the motives of the specific officers in the case, but rather on the fact that the administrative regulations themselves were not “designed to gather evidence to enable convictions under the penal laws.”²³⁹ The Court explained that the regulations, and thus the police search undertaken pursuant to them, had “different subsidiary purposes and prescribe[d] different methods of addressing the problem.”²⁴⁰ This focus on administrative intent and not officer intent has troubling implications for postpolice entities.

1. Civilian traffic enforcement.

Much like the noncriminal regulations for junkyards in *Burger*, abolitionist proposals to empower traffic monitors contemplate administrative regulations that are not designed to gather evidence to enable convictions under the penal laws. The objective of these proposals is precisely the opposite, even if evidence of criminal wrongdoing may be uncovered during a traffic stop. Because the traffic agency itself has a stated noncriminal purpose and prescribes different noncriminal investigatory methods of addressing criminal roadway behavior, traditional Fourth Amendment requirements of individualized suspicion, probable cause, and warrants will not apply, even if the line between criminal investigatory and noncriminal investigatory motives blurs during the course of a search.

Take one example. A traffic monitor, pursuant to regulation, pulls over a vehicle for failing to signal before changing lanes. During the stop, the monitor exceeds regulatory authority and

²³⁸ DRESSLER, *supra* note 14, at 296.

²³⁹ *Burger*, 482 U.S. at 715; *see also* *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001) (reasoning that the discovery of evidence in *Burger* was “merely incidental to the purposes of the administrative search”); *cf.* Tracey Maclin, *Is Obtaining an Arrestee’s DNA a Valid Special Needs Search Under the Fourth Amendment?*, 33 J.L. MED. & ETHICS 102, 170, 177 (2005) (arguing that *Burger* should “not fall into the special needs category” because the logic of the decision gives police incentives to pursue criminal law objectives through civil administrative schemes).

²⁴⁰ *Burger*, 482 U.S. at 712.

searches the vehicle and occupants. During the search, the monitor finds evidence of illegal drug and firearm possession, which is later used in a criminal prosecution.

In this example, a court is far more likely to find the primary purpose of the government search to be noncriminal investigatory than in *Burger*. In *Burger*, police officers themselves conducted the search of a junkyard, and did so *after* the purpose of their administrative visit had ceased.²⁴¹ In contrast, in this example, a nonpolice government actor whose sole existence is owed to the noncriminal objectives of abolitionist lawmakers conducted a search of a vehicle during the course of administrative duties.²⁴² Thus, the search yielding the evidence will likely be upheld even without any individualized suspicion or probable cause to search the vehicle.

Arguably, in a postpolice world, traffic monitors will be limited by positive regulation from investigating and reporting criminal activity, thus invalidating any such search.²⁴³ Woods has proposed subconstitutional postpolice checks prohibiting nonpolice agencies from searching for or pursuing criminal evidence.²⁴⁴ These positive regulations would thus solve the problem of mixed penal and nonpenal motives, because these nonpolice entities may not have penal motives as a matter of positive law.

This may solve the problem as a matter of administrative regulation because traffic monitors would be regulatorily proscribed from conducting searches and seizures. But positive regulations would not solve the Fourth Amendment problem—namely, that the Fourth Amendment does not constrain actors whose actions are not primarily motivated by a criminal investigatory purpose. As the Supreme Court explained in *Virginia v. Moore*,²⁴⁵ a government actor's violation of a subconstitutional state law or regulation will not invalidate a search or seizure if that activity was otherwise constitutional.²⁴⁶ In *Moore*, an officer pulled over a motorist for a minor driving offense, which under Virginia law

²⁴¹ *Id.* at 695.

²⁴² Most special needs cases “have involved searches conducted by persons other than police officers, which has made it easier for the Court to conclude that a special need, beyond ordinary criminal law enforcement, justified the special rule.” DRESSLER, *supra* note 14, at 308.

²⁴³ *Cf.* Woods, *supra* note 10, at 1495.

²⁴⁴ *See id.* at 1495–96.

²⁴⁵ 553 U.S. 164 (2008).

²⁴⁶ *See id.* at 174.

authorized the officer to issue only a citation.²⁴⁷ Ignoring this restriction, the officer arrested the driver and conducted a search of the car incident to the arrest, which turned up evidence later used in a criminal prosecution.²⁴⁸ A unanimous Court upheld the search, finding the arrest and subsequent search permissible under the Fourth Amendment, regardless of whatever constitutional restrictions may have otherwise prohibited the search.²⁴⁹

The Court doubled down on this approach two years later in *City of Ontario v. Quon*.²⁵⁰ Quon was a police officer who argued that his supervisors' review of his private text messages on a police department beeper violated the Fourth Amendment, because the search violated the Stored Communications Act of 1986.²⁵¹ The Court found that an "otherwise reasonable search" could not be "rendered unreasonable" under the Fourth Amendment through violation of a statutory safeguard.²⁵²

Thus, criminal evidence seized by a traffic monitor in violation of state or local law preventing such searches may nonetheless be introduced in a criminal prosecution so long as the search was justified under the Fourth Amendment. And given that non-police traffic monitors have a primary nonpenal purpose in conducting their activities, these searches likely will be upheld regardless of the lack of probable cause, just as in the junkyard search in *Burger*.²⁵³ Indeed, if we are to take *Burger* at its word, it should not matter that an *individual* rogue traffic monitor had criminal investigative motives. The *programmatic* purpose of the traffic agency was noncriminal. While the defendant may have civil legal recourse for violation of state or local law, after *Moore's*

²⁴⁷ *Id.* at 166–67.

²⁴⁸ *See id.*

²⁴⁹ *Id.* at 178; *see also* Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471, 501 (2018) ("As the unanimous decision in *Moore* indicates, the modern assumption is that Fourth Amendment standards generally operate independently of statutory grants of or limits on the power to search or seize.").

²⁵⁰ 560 U.S. 746 (2010).

²⁵¹ *Id.* at 750–53.

²⁵² *Id.* at 764; *see also* Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1080 (2016) ("*Quon* follows in a long line of cases rejecting the idea that a violation of statute or agency protocol can undermine or cut against a finding of Fourth Amendment reasonableness.").

²⁵³ *See Edmond*, 531 U.S. at 45–46 (distinguishing cases like *Whren*, where the Court found the subjective motivations of individual officers irrelevant to the Fourth Amendment, from cases involving sobriety checkpoints where the government's programmatic objective is relevant).

rejection of subconstitutional safeguards, such recourse will do little to protect the defendant in a criminal trial.²⁵⁴

One might claim that comparing police officers searching a junkyard in *Burger* to traffic monitors is inapt, because *Burger* involved a suspicionless programmatic search, whereas the traffic monitor conducted a search pursuant to at least some minimum quantum of individualized suspicion—failure to signal. But pursuant to the primary and subsidiary purpose rationale in *Burger*, this individualized suspicion of a nonpenal regulation may evolve into suspicion of criminality and a subsequent search and seizure of criminal evidence without implicating the Fourth Amendment’s probable cause or warrant requirements.²⁵⁵ Because the primary purpose of the traffic monitor was noncriminal investigatory, the penal consequences of even a suspicionless vehicle search are merely ancillary, at least for Fourth Amendment purposes.

2. Social workers.

The nature of social work regularly implicates mixed-motive issues. Social workers address long-term welfare issues often closely related to criminal activity—drug use, child abuse, domestic violence—that blurs the line between penal and nonpenal motives for these individuals.

This close relation to criminal activity also helps explain social workers’ long close working relationship with police, as well as the distrust many marginalized communities have of social workers.²⁵⁶ Social workers enter family residences to conduct child

²⁵⁴ Litigants who fail to assert a Fourth Amendment claim may still proceed with substantive Due Process claims under the Fifth or Fourteenth Amendment. However, those claims will be assessed under an incredibly deferential “conscience shocking” standard. See *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 252 (2d Cir. 2001).

²⁵⁵ See *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976) (sustaining the admission of evidence found when police impounded an automobile for multiple parking violations and found marijuana in the glovebox during an inventory search designed to catalogue the car’s contents for safekeeping); *Cady v. Dombrowski*, 413 U.S. 433, 446 (1973) (affirming the admission of criminal evidence found when police conducted a warrantless search of an out-of-state policeman’s automobile following an accident, to find and safeguard his service revolver for safety reasons).

²⁵⁶ For a source describing the “deeply problematic” role that social workers have played in fostering this distrust, see Mia Sato, *Social Workers Are Rejecting Calls for Them to Replace Police*, THE APPEAL (Aug. 20, 2020), <https://perma.cc/NP4M-ZVUZ> (“For years, Native children were taken from their families and enrolled in boarding schools . . . in an ‘assimilation’ effort. . . . Black children are overrepresented in foster care and Black parents’ parental rights are terminated at higher rates than their white counterparts.”).

welfare visits, mediate domestic disputes, and provide drug abuse counseling. But under *Burger*, a social worker who begins a home visit and searches the home for nonpenal purposes may very well seize evidence of a crime (and later report it to police) without probable cause or a warrant because that penal purpose was subsidiary to the primary purpose of delivering social services.

It is precisely this overlap between social work and criminal investigation that makes *Burger* dangerous precedent for abolitionists. It also explains why so many social workers themselves reject recent calls for increased social worker–police co-responder models, such as those from the National Alliance for Social Work (NASW).²⁵⁷ Responding to the NASW’s proposal to increase collaboration with law enforcement, one social worker explained that: “This alliance of police and social work can be harmful in . . . communities of color. If we’re already fearing the police and then we’re also going to fear those who are supposed to be helping us because they’re connected to the police.” Another social worker added that: “Social workers cannot build trust with people if we respond to a crisis accompanied by police. Police come armed with tasers, guns, and batons, prepared to deploy violence and punishment. Social workers show up with a willingness to listen, engage, and help heal.”²⁵⁸

This lack of trust threatens to erode the effectiveness of abolitionist public safety actors even in the absence of criminal activity. Police officers regularly describe widespread lack of trust from the community as a primary reason why they cannot effectively respond to noncriminal public welfare calls.²⁵⁹ Much of this distrust stems from community fear—particularly from Black and Latinx communities—that armed officers may inflict unlawful force during the course of providing “welfare” to these individuals.²⁶⁰ But that distrust also stems from a recognition that

²⁵⁷ See Nina Chamlou, *Defund the Police*, AFFORDABLE COLLEGES (Sept. 16, 2022), <https://perma.cc/R6AR-BG23>.

²⁵⁸ *Id.*

²⁵⁹ Cf. Nina Agrawal, *Majority of Police in the U.S. Say Their Jobs Have Gotten Harder*, L.A. TIMES (Jan. 11, 2017), <https://perma.cc/CJN2-L9NQ> (“[T]hree-quarters of officers said that relations with the black community had become more tense and they were now less willing to stop and question suspects and to use force when necessary.”); DEPT. OF JUST., IMPORTANCE OF POLICE-COMMUNITY RELATIONSHIPS AND RESOURCES FOR FURTHER READING 1 (2015) <https://perma.cc/KW87-Y7JU> (“Strong relationships of mutual trust between police agencies and the communities they serve are critical to maintaining public safety.”).

²⁶⁰ Fields, *supra* note 43, at 970 (stating that the fear of police creates a “powerful disincentive for black people to call the police in almost any situation except when their

officers always have the ability and desire to “ferret out crime,” find evidence, and arrest criminals.²⁶¹ If the actors replacing police have even greater powers to discover and respond to crime without the bother of Fourth Amendment restrictions, one wonders how social workers who rely on a foundation of trust can make the kinds of inroads police abolitionists promise. As one social worker union explained in an open letter challenging the NASW, “[i]f all we do is replace police with social workers without eliminating these carceral aspects of social work, we will simply subject vulnerable people to cops by a different name.”²⁶²

The few courts directly addressing social workers and the Fourth Amendment seem sympathetic to this concern, at least formally. In contrast with EMTs and mental health first responders, courts have been more willing to “hold that the Fourth Amendment does in fact govern a social worker’s” activities.²⁶³ Many lower courts have repeated the refrain that “[t]here is no ‘social worker’ exception to the Fourth Amendment.”²⁶⁴ However, these cases almost invariably apply the less rigorous reasonableness standard, even for intrusive activities like sensitive in-school interviews with children, in-home visits, and even involuntary seizures of children.²⁶⁵

lives depend on it.”(quoting Vesla Mae Weaver, *Why White People Keep Calling the Cops on Black Americans*, VOX (May 29, 2018), <https://perma.cc/KQ6R-6ZJV>); Jens Manuel Krogstad, *Latino Confidence in Local Police Lower than Among Whites*, PEW RSCH. CTR. (Aug. 28, 2014), <https://perma.cc/7WVJ-2A5V> (finding that only 45% of Hispanic respondents “say they have a great deal or fair amount of confidence in local police not to use excessive force on suspects,” compared to 74% of whites).

²⁶¹ *United States v. Matlock*, 415 U.S. 164, 185 (1974) (Douglas, J., dissenting) (“In their understandable zeal to ferret out crime . . . officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed.”).

²⁶² *Social Service Workers United-Chicago*, *supra* note 137.

²⁶³ *Schulkers v. Kammer*, 955 F.3d 520, 549 (6th Cir. 2020).

²⁶⁴ *Doe v. Woodard*, 912 F.3d 1278, 1290 (10th Cir. 2019) (quoting *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1205 (10th Cir. 2003)); *Andrews v. Hickman Cnty.*, 700 F.3d 845, 864 (6th Cir. 2012) (Sutton, J., concurring in part and in the judgment); *Michael C. v. Gresbach*, 526 F.3d 1008, 1014 (7th Cir. 2008) (quoting *Jones v. Hunt*, 410 F.3d 1221, 1225 (10th Cir. 2005)).

²⁶⁵ *See, e.g., Doe v. Bagan*, 41 F.3d 571, 576–77 (10th Cir. 1994) (dismissing the plaintiffs’ Fourth Amendment claim against social workers for subjecting a child to “a painful and intrusive test”); *see also Woodard*, 912 F.3d at 1306 (Briscoe, J., concurring in part, dissenting in part) (analogizing in-school investigation of child abuse to “a school administrator investigating the distribution of medications on campus”).

Child abuse investigations present an especially vexing problem, where an overriding purpose may be child safety but the investigation almost always implicates criminal wrongdoing.²⁶⁶ “Protecting children often differs from solving crimes.”²⁶⁷ Yet, “protecting a child’s welfare and removing her from an abusive home [often cannot] be sufficiently divorced from the purposes of general [criminal] law enforcement.”²⁶⁸

There exists relatively “little case law about how the Fourth Amendment applies in the context of child abuse” investigations by social workers.²⁶⁹ Early cases simply granted qualified immunity to social workers because no Fourth Amendment protection against suspicionless seizures of children by social workers was “clearly established.”²⁷⁰ The Supreme Court “has never held that a social worker’s warrantless in-school interview [or seizure] of a child pursuant to a child abuse investigation violates the Fourth Amendment,”²⁷¹ and lower courts have split over whether such activities implicate traditional Fourth Amendment requirements or more relaxed special needs rules.²⁷² The Sixth Circuit summarized the challenge eloquently, observing that “how to balance the

²⁶⁶ See *Roe v. Tex. Dep’t of Protective & Reg. Servs.*, 299 F.3d 395, 407 (5th Cir. 2002) (“Texas law describes social workers’ investigations as a tool both for gathering evidence for criminal convictions and for protecting the welfare of the child.”).

²⁶⁷ *Kovacic v. Cuyahoga Cnty. Dep’t of Children and Family Servs.*, 724 F.3d 687, 705 (6th Cir. 2013) (Sutton, J., dissenting).

²⁶⁸ *Smith v. Tex. Dep’t of Family and Protective Servs. Child Protective Servs.*, 2009 WL 2998202, at *9 (W.D. Tex. 2009).

²⁶⁹ *Kovacic*, 724 F.3d at 705 (Sutton, J., dissenting).

²⁷⁰ See *Jordan v. Murphy*, 145 F. App’x 513, 518 n.4 (6th Cir. 2005) (granting qualified immunity in part because of the dearth of case law on the issue); *Andrews*, 700 F.3d at 861 (calling *Jordan* “the only case from our court that bears on the issue of whether the reasonable social worker . . . would have known that her conduct violated clearly established law” under the Fourth Amendment).

²⁷¹ *Schulkers*, 955 F.3d at 534 (6th Cir. 2020). In 2011, the Supreme Court granted certiorari on this issue, but its opinion did not reach the merits due to mootness. See *Camreta v. Greene*, 563 U.S. 692, 698 (2011); *Greene v. Camreta*, 588 F.3d 1011, 1022–23 (9th Cir. 2009) (finding that a child-protection agency’s decision to seize and interrogate a child at school without a warrant violated the Fourth Amendment); see also Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 TUL. L. REV. 353, 356 (2012).

²⁷² See *Gates*, 537 F.3d at 424 (finding that the special needs exception did not apply because the need to enter the house “was not divorced from the state’s general interest in law enforcement”) *Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003) (finding that entering a home to prevent child abuse is not a “special need that renders the warrant requirement impracticable”); *Mabe v. San Bernardino Cnty., Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101, 1108 (9th Cir. 2001) (declining to exclude social worker home visits from the warrant requirement); *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1010 (7th Cir. 2000)

safety of children from irreversible harm against the unforgettable harm of removing children from their family” creates “what all can agree is a difficult issue” for the “state of Fourth Amendment law.”²⁷³ How courts address this difficult issue moving forward may critically affect the relationship between postpolice social workers and the citizens they serve.

D. Extensive Entanglement of Law Enforcement

While mixed motives alone appear unlikely to jeopardize a postpolice special needs claim, noncriminal searches conducted with “extensive entanglement of law enforcement” may trigger the heightened requirements of probable cause and a warrant.²⁷⁴ Extensive entanglement refers in general to scenarios where nonpolice actors engaged in otherwise noncriminal administrative activities do so with sufficient support, planning, or execution from law enforcement to render the administrative activity vulnerable to becoming an avenue for ordinary criminal investigation. For example, where police play critical roles in the administrative search function, have access to the results of the search, or exercise control over the development and implementation of administrative policies, courts regularly find such extensive entanglement “indistinguishable from the general interest in crime control.”²⁷⁵

How a court might view the entanglement issue for a nonpolice entity whose very existence reflects a rejection of traditional law enforcement purposes remains to be seen. That contrast alone intuitively suggests no entanglement issues. But at least three possible theories exist through which to envision the issue differently: (1) an “institutional purpose” theory, (2) a “programmatic practice” theory, and (3) a “personnel overlap” theory. These theories, which both find support in the limited case law concerning extensive entanglement and reflect the unique ways in which police and nonpolice functions may overlap in a new look nonpolice public safety apparatus, provide important lenses through which future courts may apply the extensive entanglement doctrine to a world without (or with fewer) police.

(same); *Bagan*, 41 F.3d at 574 n.3 (applying a relaxed reasonableness standard in evaluating whether a ten-minute interview of a minor conducted by a social worker at the minor’s school constituted a seizure for purposes of the Fourth Amendment).

²⁷³ *Kovacic*, 724 F.3d at 705 (Sutton, J., dissenting).

²⁷⁴ *Ferguson*, 532 U.S. at 83 n.20.

²⁷⁵ *Id.* at 81 (quoting *Edmond*, 531 U.S. at 44).

1. Institutional purpose theory.

For most extensive entanglement cases, “the purpose for a search has been the most important factor in deciding whether the search serves a legitimate special need unrelated to law enforcement, or instead ‘is ultimately indistinguishable from the general interest in crime control.’”²⁷⁶ In *Ferguson v. City of Charleston*,²⁷⁷ a state hospital implemented a policy to identify pregnant patients suspected of drug abuse that allowed staff members to test patients without their consent and report positive drug tests to the police.²⁷⁸ When ten patients sued on Fourth Amendment grounds, the federal appellate court upheld the warrantless, suspicionless searches as falling under the special needs exception.²⁷⁹

The Supreme Court reversed. While the Court recognized that “the ultimate goal of the program may well have been to get the women in question into substance abuse treatment,” the immediate objective of the searches “was to generate evidence *for law enforcement purposes* in order to reach that goal.”²⁸⁰ Given that the institutional “purpose of the Charleston program [] was to use the threat of arrest and prosecution in order to force women into treatment,” this “extensive involvement of law enforcement officials” made the policy “indistinguishable from general crime control.”²⁸¹ As a result, traditional probable cause and warrant requirements applied.²⁸²

The Court contrasted this result with a scenario where “state hospital employees, like other citizens, may have a duty to provide law enforcement officials with evidence of criminal conduct acquired in the course of routine treatment.”²⁸³ In the postpolice

²⁷⁶ Maclin, *supra* note 239, at 178 (quoting *Ferguson*, 532 U.S. at 81). Professor Tracey Maclin notes that “no one factor has been controlling or outcome determinative. . . . But the result in *Ferguson* strongly suggests that the ‘purpose’ factor is a ‘first among equals’ in the calculus.” *Id.* at 179.

²⁷⁷ 532 U.S. 67 (2001).

²⁷⁸ *See id.* at 70–71.

²⁷⁹ *Id.* at 73–74.

²⁸⁰ *Id.* at 82–83 (emphasis in original).

²⁸¹ *Id.* at 84.

²⁸² *Ferguson*, 532 U.S. at 86.

²⁸³ *See id.* at 78 n.13 (citing Brief for American Public Health Association as Amicus Curiae 6, 17–19) ; *cf. The Supreme Court 2000 Term: Leading Cases*, 115 HARV. L. REV. 306, 335 (2001):

In *Ferguson*, the Court refused to address the question whether it is an unconstitutional search when a doctor gives the police information about a patient’s wrongdoing. The Court’s reticence suggests that there is still a good deal of room

context, a nonpolice EMT or traffic monitor who investigates an incident with a clear primary noncriminal purpose may nonetheless be authorized (or required depending on local law) to report criminal conduct they inadvertently discover without running afoul of the special needs exception.

Other precedent seems to compel this conclusion. The *Ferguson* Court contrasted four other drug testing cases that fell within the special needs exception primarily because those cases involved randomized testing to determine “eligibility for a particular benefit” such as government assistance or employment promotion.²⁸⁴ In those cases, the institutional policy enacted neither contemplated nor permitted the sharing of test results with law enforcement.²⁸⁵ But when the results of those tests eventually became part of a criminal investigation and prosecution, they were not suppressed on Fourth Amendment grounds even if their disclosure otherwise might have violated programmatic regulation.²⁸⁶ Here again, subconstitutional positive law attempting to limit carceral consequences proves ineffective in addressing the concern of a criminal defendant seeking suppression of evidence.

On this last point, institutional purpose may prove inapplicable to postpolice entities altogether. Postpolice institutional purpose is as much about the rejection of police and the carceral state as it is about public safety or service delivery. One alternative way to envision this institutional purpose prong, however, would be for courts to assess whether the purpose of an agency is tied to investigating activity that remains formally criminal but unlikely to be prosecuted as a practical matter in a post-policing world. Civilian traffic enforcers have an institutional purpose closely tied to investigating at least citable conduct, if not more serious criminal vehicle offenses. Likewise, much postpolice social work will continue to involve investigating not just the needs of citizens but the nefarious actions of persons limiting the fulfillment of those needs. Those individualized investigations of neglect, abuse, or fraud remain closely tied to historically criminal

for law enforcement authorities to work together with local doctors and nurses in finding and prosecuting pregnant cocaine users: For example, a city might simply require health workers to report and turn over any evidence that a maternity patient is using cocaine.

²⁸⁴ See *Ferguson*, 532 U.S. at 78.

²⁸⁵ *Id.* (“In the previous four cases . . . there were protections against the dissemination of the results to third parties.”).

²⁸⁶ *Cf. id.* at 79 (“In each of those earlier cases, the ‘special need’ . . . was one divorced from the State’s general interest in law enforcement.”).

conduct, and the risk that the investigations may lead to a traditionally sanctionable (if not carceral) response, ought to trigger the traditional strictures of the Fourth Amendment regardless of the postpolice decriminalization landscape.

2. Programmatic practice theory.

Whether nonpolice agencies have impermissibly extensive entanglement with law enforcement also should depend on whether the programmatic practice of the agency invites a criminal investigation, regardless of the stated or actual purpose. Important considerations here include law enforcement's access to a nonpolice entity's records and the likelihood of a law enforcement action in the event criminal activity is discovered.

In analyzing early special needs cases, Professor Tracey Maclin identified law enforcement access as “[a]nother important factor for determining whether a suspicionless search will be upheld.”²⁸⁷ The *Ferguson* Court noted that this case was different from other suspicionless drug testing schemes that survived constitutional challenge “[b]ecause the hospital [sought] to justify its authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients.”²⁸⁸ But in *Ferguson*, “[t]he fact that positive test results were turned over to the police . . . provide[d] an affirmative reason for enforcing the Fourth Amendment’s strictures.”²⁸⁹

The likelihood of a penal response to a program’s practice also factors into the extensive entanglement question. For example, in *Edmond v. City of Indianapolis*,²⁹⁰ the Court struck down a suspicionless program in which officers stopped cars at a checkpoint, requested the driver’s license and registration, conducted a non-invasive visual inspection of the vehicle, and led a narcotics-detection dog around the vehicle’s interior.²⁹¹ The stated purpose was to “interdict[] illegal narcotics” and prevent the distribution of dangerous narcotics into the city, a purpose theoretically divorced from making arrests.²⁹² But in practice, motorists found to

²⁸⁷ Maclin, *supra* note 239, at 179.

²⁸⁸ *Ferguson*, 532 U.S. at 77.

²⁸⁹ *Id.* at 68–69; *see also* Gupta-Kagan, *supra* note 271, at 389 (“If the hospital had created a policy to turn positive drug tests over to child protection authorities [instead of police] . . . and if the child protection authorities removed the children, the [special needs] doctrine . . . does not suggest a Fourth Amendment violation would have occurred.”).

²⁹⁰ 531 U.S. 32 (2000).

²⁹¹ *Id.* at 34–35.

²⁹² *Id.* at 40.

have illegal narcotics in their possession were arrested and prosecuted.²⁹³ Moreover, about half of all motorists arrested as a part of the program were charged with non-drug-related offenses.²⁹⁴ The Court contrasted this type of randomized stop with border checkpoints, where both the primary purpose and practical effect of such checkpoints was to enforce administrative immigration law, not criminal law.²⁹⁵

Application of this programmatic practice theory prong to postpolice entities ought to be limited to a practical analysis of agency outcomes in their investigations. How frequently do traffic monitors uncover evidence leading to an arrest, either overall or in the course of conducting specific duties? How often do violence interrupters refer individuals to law enforcement and assist with the prosecution? In short, this theory would look beyond the intent of the entity as articulated by regulation to the practical penal impact on the citizens the entity serves.

3. Personnel overlap theory.

Finally, courts often find extensive entanglement when there is “substantial law enforcement involvement in the [search] policy from its inception.”²⁹⁶ That factor featured prominently in *Ferguson*, where law enforcement not only received the results of drug tests but were involved “at every stage of the policy.”²⁹⁷ Likewise, the drug interdiction program in *Edmond* was executed solely by highway patrol officers, a fact which distinguished it from administrative border checkpoints and other civil administrative programs carried out by civil administrative personnel.²⁹⁸

In the EMT context, the involvement of police in seizing an individual may subject the action to traditional Fourth Amendment requirements, even if the officer responds to a medical emergency and restrains an individual with the ostensible intent to

²⁹³ *Id.* at 35.

²⁹⁴ *Id.*

²⁹⁵ *Edmond*, 531 U.S. at 38 (“We noted at the outset . . . the ‘formidable law enforcement problems’ posed by the northbound tide of illegal entrants into the United States.” (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 551–54 (1976))). The *Edmond* Court contrasted these “general crime control ends,” *id.* at 43, with the sobriety checkpoint in *Sitz* and its “obvious connection between the imperative of highway safety and the law enforcement practice at issue,” *id.* at 39.

²⁹⁶ See *Maclin*, *supra* note 239, at 180 n.242 (quoting *Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring in judgment)).

²⁹⁷ *Ferguson*, 532 U.S. at 84.

²⁹⁸ See *Edmond*, 531 U.S. at 44.

provide medical aid purposes.²⁹⁹ For example, in *McKenna v. Edgell*,³⁰⁰ police responded to a call requesting assistance for a man having a seizure; the officers handcuffed the man.³⁰¹ The court rejected the officer's qualified immunity defense, emphasizing that the officers were acting in a "law-enforcement capacity," rather than in a medical capacity.³⁰² In a later case, the Fifth Circuit cited *McKenna* to conclude that, although "whether the Fourth Amendment applies does not turn *solely* on whether the government officials were police officers," a considerable distinction existed between 911 calls handled by officials in a "law-enforcement capacity" versus an "emergency-medical-response capacity."³⁰³ The Seventh Circuit put a finer point on this entanglement issue in *Taylor v. City of Milford*,³⁰⁴ finding that "[i]t was irrelevant 'whether the officers had a law-enforcement or medical-response *intent*; the focus must be on what *role* their actions reveal them to have played."³⁰⁵

The presence of administrative agencies alone will not sanitize a search from traditional Fourth Amendment scrutiny, however. In *Williams v. Commonwealth of Kentucky*,³⁰⁶ the Kentucky Board of Medical Licensure initiated a civil investigation against a medical clinic suspected of trafficking illegal drugs.³⁰⁷ However, a separate active criminal investigation had been ongoing for six months prior to the civil investigation, and the Board of Medical Licensure did not take action until those same criminal investigators filed a formal grievance demanding the initiation of the Board of Medical Licensure's investigation.³⁰⁸ The criminal investigators even supplied the information justifying a warrantless "administrative" raid of the clinic and prepared a list of files to be seized by the Board.³⁰⁹ This extensive entanglement in carrying out an administrative search subjected the raid to traditional

²⁹⁹ See *McKenna*, 617 F.3d at 439–40 (contrasting a case where EMTs violently restrained a man having a seizure with police restraining by use of handcuffs an uncooperative man having a seizure

³⁰⁰ 617 F.3d 432 (6th Cir. 2010).

³⁰¹ See *id.* at 435.

³⁰² *Id.* at 445.

³⁰³ *Pena*, 637 F. App'x at 781 (quoting *McKenna*, 617 F.3d at 439–40).

³⁰⁴ 10 F.4th 800 (7th Cir. 2021).

³⁰⁵ *Id.* at 810 (7th Cir. 2021) (citing *McKenna*, 617 F.3d at 440).

³⁰⁶ 213 S.W.3d 671 (Ky. 2006).

³⁰⁷ *Id.* at 674.

³⁰⁸ *Id.* at 675–77.

³⁰⁹ *Id.* at 677.

Fourth Amendment analysis, even if the Board's investigation had a primarily civil purpose.³¹⁰

Based on this reasoning, the presence of law enforcement in co-responder models could provide a principled basis to subject more nonpolice activity to Fourth Amendment scrutiny, which would have a significant impact. Approximately 30% of the police workforce consists of nonsworn civilian employees, up fourfold from the 1950s.³¹¹ Total abolitionists are naturally skeptical of this approach, as it fails to actually remove armed officers from the public safety response model.³¹² In fact, rather than removing police from the equation, it *adds* more government responders under the policing umbrella. Co-responder models do little, if anything, to meaningfully shrink the policing footprint. At best, this approach seems to rest on the dubious assumption that armed officers will defer to their civilianized counterparts in tense situations that call for a noncarceral response. At worst, it adds more police to situations with vulnerable citizens, creating greater risks for criminal legal entanglement and violence.

Co-responder models represent a transition to true postpolicing, however. This personnel overlap will apply differently in the postpolice context. As currently piloted or theorized, future nonpolice agencies will function as advertised: without police. Thus, there ought not be extensive law enforcement involvement. Instead, a different issue likely will arise: law enforcement personnel overlap. As municipalities defund police departments and reallocate resources to nonpolice agencies fulfilling many of the same functions as former police, one might expect the ranks of these nonpolice agencies to be filled with former officers. One might also expect continued communication, even coordination, between these former cops and what remains of the more limited crime fighting police force. If so, one wonders whether these nonpolice agencies, or at least some faction within them, truly will

³¹⁰ See *id.*

³¹¹ Friedman, *supra* note 10, at 983; see also Robert C. Davis, Mary E. Lombardo, Daniel J. Woods, Christopher Koper & Carl Hawkins, *Civilian Staff in Policing: An Assessment of the 2009 Byrne Civilian Hiring Program* 3 (2013), <https://perma.cc/5NCZ-XMWN>.

³¹² See Celia Goble, *Social Workers to the Rescue?: An Urgent Call for Emergency Response Reform*, 48 FORDHAM URB. L.J. 1021, 1037–43 (2021) (describing social workers' skepticism regarding co-responder models); Elena Gormley, *Social Workers Can't Help People in Crisis by Partnering with Police*, JACOBIN (Apr. 25, 2021), <https://perma.cc/SN6N-2GC6>.

remain divorced from police or instead will simply serve as eyes and ears for the carceral apparatus.

To address this concern, I posit a refined personnel overlap theory which considers the extent of professional ties between law enforcement and the administrative personnel conducting the special needs search or seizure. Postpolice, this analysis might focus on how many nonpolice personnel served previously in law enforcement and what previous actions they have taken to coordinate and cooperate with police, particularly where such coordination violates positive regulations prohibiting such contact.

This theory may prove useful in the current environment as well when a court assesses a civil agency's extensive entanglement. Currently, a number of non-law enforcement government agencies maintain close working relationships with police—child protective services, social workers, immigration administrators—and the overlap in personnel (or revolving door between the agencies) may very well signal an extensive entanglement in a particular setting.³¹³ In this context, personnel overlap may also include greater scrutiny of interagency collaborations and multidisciplinary teams with ostensible noncriminal purposes but co-led by police, prosecutors, corrections officers, government social workers, and nongovernmental agencies.³¹⁴

Such agency collaborations and multidisciplinary teams often fulfill important noncriminal functions with an eye to avoiding penal sanctions where possible, much in alignment with abolitionist purposes.³¹⁵ Personnel overlap theory simply seeks to subject such interagency activities to traditional Fourth Amendment scrutiny when those activities both constitute searches or seizures and sufficiently involve law enforcement such that criminal investigations are inextricably a purpose or practical likely consequence of such activity.

³¹³ See, e.g., *What Is the Domestic Violence High Risk Team Model?*, GEIGER INST. <https://perma.cc/8NGU-4W4T>; *Multi Disciplinary Team*, CHAUTAUQUA CNTY. CHILD ADVOC. PROGRAM, <https://perma.cc/G8SZ-CADR> (describing team devoted to “[t]he investigation of child abuse” with mental health and medical professionals working alongside child protective services, law enforcement, and prosecution)

³¹⁴ *High Risk Team Model*, *supra* note 313 (describing a popular “multidisciplinary team” to address domestic violence issues “led or co-led by a non-governmental domestic violence agency” with “core partners on the team includ[ing] law enforcement, prosecution, probation (or pretrial services if applicable), parole, and corrections”).

³¹⁵ See, e.g., Durham, *supra* note 101. The heavy involvement of criminal legal entities throughout many such teams raises doubts as to any stated noncarceral objectives, however. See *High Risk Team Model*, *supra* note 313.

III. POSTPOLICE FOURTH AMENDMENT REFORM

This Article evaluates Fourth Amendment law in non-law enforcement contexts and charts the implications of applying that law to a world without police. Much of the foregoing discussion has been descriptive rather than prescriptive. The Article has revealed the unintended consequence that police abolition will likely create privacy and liberty risks for citizens subjected to nonpolice entities barely bound by the Fourth Amendment. This final Part addresses that unintended risk with three proposals for Fourth Amendment reform that find support in the text and history of the amendment and that may prove necessary to secure a postpolicing world free from unreasonable searches and seizures.

A. Abolition Subconstitutionalism

Abolitionists propose the creation of new entities whose purposes are nonpenal and whose powers to search or seize are tightly circumscribed by positive state or local law. Yet current Supreme Court precedent deems violations of such subconstitutional positive laws irrelevant to the Fourth Amendment: If a search or seizure is permitted as reasonable under the Fourth Amendment, it does not matter whether the action violated a separate statutory or administrative regulation.³¹⁶ Thus, the Court views “the content of the Fourth Amendment right [as] independent of statutory and administrative mooring.”³¹⁷ Therefore, if a postpolice agent engages in an administratively impermissible but constitutionally permissible search and finds evidence of criminal wrongdoing, what remains of the traditional carceral state—that is, former police officers working in postpolice entities—would have the green light to advance prosecution in direct contravention of the reason the entity was formed.³¹⁸

This view of Fourth Amendment reasonableness merits reconsideration. “Reasonableness, on this view, lacks a structural

³¹⁶ See *supra* Part II.C.1.

³¹⁷ See Renan, *supra* note 252, at 1079 (juxtaposing this view with the Fourth Amendment reasonableness standard as depicted by the special needs doctrine); Kerr, *supra* note 249, at 495 (observing that the Supreme Court has “largely detached statutory law from the Fourth Amendment,” and that “grants or limits on authority are thought to no longer have constitutional relevance”).

³¹⁸ Cf. Note, *Prosecuting in the Police-Less City: Police Abolition’s Impact on Local Prosecutors*, 134 HARV. L. REV. 1859, 1866 (2021) (remarking that “there are good reasons that police abolition will not necessarily mean the end” of “surveillance, investigations, and arrests”).

dimension; it is an exercise of judicial interest balancing devoid of interbranch considerations.”³¹⁹ This blinded judicial supremacy, wherein the Court retains the ultimate authority to determine what actions of the political branches set new constitutional limits, is less justifiable in this narrow Fourth Amendment context for three reasons. First, unlike other amendments promising individual liberties in either absolutist or concrete structural terms,³²⁰ the two most important words in the Fourth Amendment—“[un]reasonable” and “probable”—are inherently flexible, require value and interest balancing, and thus are and should be more adaptable to changing societal standards.³²¹ By retaining absolute jurisdiction over this reasonableness balancing inquiry without any input from the more democratic branches, the Court ignores the need for participatory expression in defining the contours of what an evolving society deems reasonable.³²²

These types of subconstitutional restraints informing the meaning of the Fourth Amendment would serve a needed democratizing function where tensions between liberty and security lie at the heart of both the amendment itself and of society’s age-old struggle with granting sufficient but not overwhelming power to public security forces like police. But given the amendment’s primary purpose of protecting liberties, this subconstitutional approach can only legitimately inform the Fourth Amendment when it expands those protections. Indeed, to hold that subconstitutional influences may also shrink Fourth Amendment protections

³¹⁹ Renan, *supra* note 252, at 1080.

³²⁰ See, e.g., U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”); U.S. CONST. amend. II (“[T]he right . . . to . . . bear Arms, shall not be infringed.”); U.S. CONST. amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself.”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

³²¹ See Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1865 (2002) (“[C]hanging times and changing circumstances seriously undermined the presuppositions and expectations regarding the drafting and adoption of the search and seizure provision.”); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994) (“[T]he construction of the Fourth Amendment’s ‘reasonableness’ clause should properly change over time to accommodate constitutional purposes more general than the Framers’ specific intentions.”).

³²² Compare this blinded supremacy with the Court’s Eighth Amendment jurisprudence, which defines a “cruel and unusual punishment[]” by determining the “evolving standards of decency that mark the progress of a maturing society” with reference to “legislative judgment[s]” about punishment. *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958); *Enmund v. Florida*, 485 U.S. 782, 793 (1982)).

might seem an unwise, if not terrifying, injection of quasi-departmentalism into an amendment charged with protecting citizens from police abuses. What if a new generation of “tough on crime” politicians sweep statehouses across the country and enact Orwellian laws granting police broad surveillance powers anathema to traditional Fourth Amendment privacy interests? Should these new laws inform what constitutes a reasonable police practice? Certainly not.

Instead, I propose that Fourth Amendment jurisprudence should be influenced by subconstitutional constraints only when state and local governments *raise* the constitutional floor and provide greater rights to citizens through positive law.³²³ When state and local governments seek to provide greater rights by restricting the very actions triggering the Fourth Amendment—search and seizure—the democratic expression that such activity violates the privacy and liberty interests of their citizens ought to inform the courts in their reasonableness analyses. At a minimum, a finding that a search or seizure was *actually illegal* should be relevant to determining whether it was constitutionally reasonable.³²⁴

This approach has its critics. One scholar has posited that if the Court “mandates exclusion [of evidence] for [actions] that violate subconstitutional law,” then the legislative body that enacted the subconstitutional law “could very well respond to the Court’s pro-defendant decision by repealing arrest limitations.”³²⁵ The state of Virginia made this very argument in *Moore*, claiming that extending the exclusionary rule to arrests legal under the Fourth Amendment but illegal under statutory law “would ultimately discourage state legislatures from enacting measures . . . that benefit the public at large.”³²⁶ Justice Ruth Bader Ginsburg disagreed, stating in a concurrence that “today’s decision . . . does not put States to an all-or-nothing choice A State may accord

³²³ See Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 220 (2017) (stating that reference to nonconstitutional data points may allow “Fourth Amendment doctrine [to] be resuscitated, making the constitutional floor ‘higher’ and more informative”).

³²⁴ William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1858–59 (2016) (observing the “constitutionally unexceptional” proposition that Fourth Amendment protections might “vary from place to place” depending on a locality’s positive law limitations (quoting *Virginia v. Moore*, 553 U.S. 164, 176 (2008))).

³²⁵ Luke M. Milligan, *Congressional End-Run: The Ignored Constraint on Judicial Review*, 45 GA. L. REV. 211, 264 (2010).

³²⁶ Petition for Writ of Certiorari, *Virginia v. Moore* (2008), No. 06-1082, at *19.

protection against arrest beyond what the Fourth Amendment requires, yet restrict the remedies available when police . . . [violate] the extra protection state law orders.”³²⁷

Perhaps this concern about legislative “end-runs” has salience in our current criminal legal system.³²⁸ But it ultimately speaks to political dialogue and strategy, not to legal right. Moreover, in a truly postpolice space where enough abolitionist lawmakers have created nonpolice agencies governed by nonpolice administrative regulations, this sort of transformative constitutional rulemaking likely is less susceptible to legislative backlash if the judicial branch merely confirms what nonpolice regulations aspire to accomplish: greater protections between citizens and the carceral state. This reality reflects the third reason why blinded judicial supremacy over Fourth Amendment reasonableness requires revision in the narrow context of abolition. If the political branches, through democratic expression, enact subconstitutional checks that not only expand the rights of citizens but usher in a wholesale transformation of the idea of government power in policing and public safety, the Court would be remiss not to respond to this clear democratic desire to raise the constitutional floor.³²⁹ An amendment designed and defined for two centuries to apply primarily to police in criminal investigations should require a reconsideration of what is reasonable when that primary purpose largely ceases to exist.³³⁰

³²⁷ *Moore*, 553 U.S. at 180 (Ginsburg, J., concurring); cf. Alexis Karteron, *When Stop and Frisk Comes Home: Policing Public and Patrolled Housing*, 69 CASE W. RES. L. REV. 669, 727 (2019) (“Some state statutes already ban such arrests explicitly, but it is more common for states to attempt decriminalization by mandating that fines are the appropriate penalty *Virginia v. Moore* makes clear that merely limiting the punishment options will not necessarily thwart arrests.”).

³²⁸ Milligan, *supra* note 325, at 263; cf. Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1071 (2017) (arguing that subconstitutional checks have become critical to criminal legal process because “the lack of structural constitutional checks in criminal law has led to constitutional dysfunction”).

³²⁹ See *United States v. Graham*, 824 F.3d 421, 440 (4th Cir. 2016) (Wilkinson, J., concurring) (arguing that deference to congressional action “balanc[ing] the need for a new investigatory technique against the undesirable consequences of any intrusion” is a sound “tradition . . . [that] reflects . . . the value of having democratic backing behind Fourth Amendment balancing” (quoting *Dalia v. United States*, 441 U.S. 238, 264 (1979) (Stevens, J., dissenting))); Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 415 (2018) (“Fourth Amendment doctrine should not be frozen in amber, oblivious to evolving public preferences as expressed in local democratic or administrative processes.”).

³³⁰ Doing so would also accord with historic understandings of Fourth Amendment analysis. See Kerr, *supra* note 249, at 495 (“[T]he Fourth Amendment generally required affirmative authorization, either granted by statute or common law, to make a search or seizure constitutional. This concept has been forgotten.”).

One may also fairly wonder whether this approach really solves the problem of protecting Fourth Amendment rights, given the relative impotence of the Fourth Amendment to provide meaningful relief in the face of an ever-expanding qualified immunity doctrine. After all, redefining what constitutes an unreasonable search or seizure only helps in a tangible sense if one can vindicate violations of the right. But while police (and presumably, alternate responders) may remain shielded from civil liability, the more immediate Fourth Amendment remedy of exclusion of illegally obtained evidence remains intact. While abolition subconstitutionalism may not solve the problem of doomed 42 U.S.C. § 1983 civil rights lawsuits, it can provide a greater, more justifiable path towards suppression of evidence obtained in violation of positive state or local law.

B. Abolition Endogeneity

The foregoing discussion of subconstitutional checks contemplates alterations to the constitutional landscape in individual settings. A single person subjected to a subconstitutionally illegal search should be able to successfully suppress evidence found during that search precisely because an officer violated that jurisdiction's positive law. A related but broader alteration animates my second postpolice Fourth Amendment reform proposal: abolitionist legal endogeneity, by which I mean the ability of broadly adopted subconstitutional policies for law enforcement or alternate-responder agencies to permanently raise the constitutional floor for reasonableness, not just in an individual case, but definitionally.

This endogenous approach seems similar to abolition subconstitutionalism in that both approaches allow for subconstitutional rulemaking to inform the Fourth Amendment reasonableness inquiry. But while these two theories share the same basic dynamic, they are different in both application and magnitude. Abolition subconstitutionalism requires a reasonableness reevaluation in individual circumstances where a government actor has violated a specific subconstitutional provision—i.e., where the actor has engaged in some specific illegal behavior. Endogeneity, in contrast, allows the courts to redefine reasonableness based on broadly adopted internal policies concerning search and seizure activity to reflect this majoritarian change, even if in an individual case a public actor has not violated positive law.

An important illustration of this endogeneity in practice exists in Fourth Amendment use of force cases. In *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, Professor Osagie Obasogie and Zachary Newman examined how police department policies regarding use of force did not respond or adhere to Court restrictions on use of force, but instead informed and drove the Court's interpretation of what constitutes "excessive force."³³¹ Rather than the traditional exogenous or "top-down" view of constitutional law we have come to expect—the Court announces the constitutional rule and the political branches work within that rule—Obasogie and Newman demonstrated "the *structural and doctrinal pathways* through which the administrative preferences of police departments can *become constitutional law* in a 'bottom-up,' or endogenous fashion."³³²

Understandably, these findings were designed to shock and "open up" "new avenues" for legal reform.³³³ Police defining for themselves what amount of force is legally permitted evokes images of wolves guarding the henhouse. But this legal endogeneity fits more naturally in a constitutional provision like the Fourth Amendment, where inherently ambiguous law leads organizations to respond "by creating a variety of policies . . . designed to symbolize attention to law."³³⁴ Fourth Amendment use of force doctrine fits this ambiguous mold, as the Court requires only that force be "reasonable" given the "totality of the circumstances," a fact-intensive inquiry" expressly devoid of a single bright-line rule.³³⁵ Courts' deference to police to fill in the blanks on what constitutes reasonable force has proven farcical from a jurisprudential standpoint,³³⁶ not to mention deadly with outsized discriminatory effects.³³⁷

³³¹ Obasogie & Newman, *supra* note 21, at 1288–89.

³³² *Id.* at 1289.

³³³ *Id.* at 1297.

³³⁴ *Id.* at 1315 (citing LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 12 (2016)).

³³⁵ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

³³⁶ Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 *GEO. L.J.* 1, 42–43 (2013) (demonstrating that the Supreme Court sides with prosecutors 80% of the time when it is "balancing" and that it largely prioritizes effective law enforcement over citizen privacy when it comes to the Fourth Amendment).

³³⁷ The racial underpinnings of this farce have been well documented. *See, e.g.*, Tracey Maclin, *Race and the Fourth Amendment*, 51 *VAND L. REV.* 333, 338 (1998) (charting the inexorable link between race and the Court's use of force jurisprudence); Devon Carbado,

I do not defend the Court's utter unwillingness to sanction egregious and unwarranted use of force by police, and I have written extensively about this stain on the Court elsewhere.³³⁸ However, the Fourth Amendment's text does naturally lend itself to a certain type of defensible legal endogeneity when the subconstitutional stakeholders raise rather than lower the constitutional floor.

Such subconstitutional rulemaking has begun to inform lower courts' Fourth Amendment reasonableness inquiry on use of force, even if unintentionally. Organizations like the Police Executive Research Forum (PERF) have adopted a range of tactical decision-making practices for officers in use of force situations, "including de-escalation, emphasizing that they seem to take police departments to 'a higher standard than the legal requirements'" set forth by the Court.³³⁹ But while some dismiss the Court's Fourth Amendment doctrine as "disconnect[ed from] sound police practices,"³⁴⁰ PERF's subconstitutional approach may be having a constitutional impact. For example, because "courts have been more sensitive to the importance of police tactics" in assessing excessive force claims, the fact that verbal "warnings before using force ha[ve become] far more systematic" across departments has inclined courts to find unreasonable uses of force where verbal warnings could have been but were not given.³⁴¹ The systematizing of pre-force warnings owes much to the work of organizations like PERF.³⁴²

Blue-on-Black Violence: A Provisional Model of Some of the Causes, 104 GEO. L.J. 1479, 1483–84 (2016) (same).

³³⁸ See Fields, *supra* note 44, at 114–24.

³³⁹ Garrett & Stoughton, *supra* note 323, at 220; see also POLICE EXEC. RSCH. F. (PERF), USE OF FORCE: TAKING POLICING TO A HIGHER STANDARD (Jan. 29, 2016), <https://perma.cc/M232-SEPQ>.

³⁴⁰ Garrett & Stoughton, *supra* note 323, at 219 ("One response to the apparent disconnect between sound police practices and Fourth Amendment doctrine is to dismiss court-made law as out of date and ill advised.")

³⁴¹ *Id.* at 296; see also *Mattos v. Agarano*, 661 F.3d 433, 451 (9th Cir. 2011) (en banc) (finding that an officer's failure to warn before deploying a TASER "pushe[d] this use of force far beyond the pale" and was "constitutionally excessive"); *Floyd v. City of Detroit*, 518 F.3d 398, 409 (6th Cir. 2008) (noting in finding a constitutional violation that officers shot the plaintiff "without (1) announcing themselves as police officers, (2) ordering him to surrender, or (3) pausing to determine whether he was actually armed"); *Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007) ("[T]he absence of any warning" before the officer used her TASER "makes the circumstances of this case especially troubling.")

³⁴² Garrett & Stoughton, *supra* note 323, at 298.

Similarly, industry experts instruct officers to “train[] on how to avoid getting into [a] predicament in the first place,”³⁴³ rather than focusing solely on the exact moment force may be needed. This approach marks another floor-raising departure from the Court’s current jurisprudence, which instructs courts to consider reasonableness only at the moment force is used.³⁴⁴ As courts respond to this unconstitutional move, more have become willing to hear expert testimony from officers opining on whether the force used by an officer was not just reasonable, but *necessary*. This type of judicial movement in response to unconstitutional floor-raising is hopeful, justified, and relevant to abolitionists.

Abolitionists represent perhaps the far extreme of a movement seeking to raise the Fourth Amendment’s constitutional floor, as their entire purpose in police abolition is to remove the violent and penal aspects of public safety entirely. Part of that approach involves strictly limiting through positive law the ability to do the very things triggering Fourth Amendment review. In that context, abolitionist organizations responding to ambiguous Fourth Amendment reasonableness doctrine are creating policies and programs in legal compliance with the Fourth Amendment, a clear exercise in legal endogeneity.

But the inquiry should not end there. As these abolitionist rules become sufficiently widespread that they represent a common democratic consensus about the proper role of government intrusion in public safety, this endogenous approach to Fourth Amendment reasonableness should begin to inform and shape the Court’s interest-balancing analysis as well. Courts cannot justify having embraced unilateral police protocols that granted police greater legal protections by lowering the constitutional floor for the rest of us.³⁴⁵ But they can justify recent reliance on police self-governance in restricting what amounts to reasonable use of force as an exercise in constitutional floor-raising. So courts can and should recognize when the values underlying the Fourth Amendment have been so redefined by society at large, through

³⁴³ *Zuchel v. City of Denver*, 997 F.2d 730, 739 (10th Cir. 1993) (citing expert testimony on de-escalation best practices).

³⁴⁴ *Graham*, 490 U.S. at 396; James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, in *VIOLENT TRANSACTIONS: THE LIMITS OF PERSONALITY* 217–18 (Anne Campbell & John J. Gibbs eds., 1986) (describing the “split-second syndrome” infecting reasonable use of force inquiries).

³⁴⁵ See Obasogie & Newman, *supra* note 21, at 1315–30 (critiquing Fourth Amendment legal endogeneity).

its democratic institutions, to expand constitutional guarantees. A postpolice world provides an opportunity to do so.

C. Objective Intrusion Theory

A significant hurdle remains. Subconstitutional rules governing postpolice entities cannot have a constitutional floor-raising impact if the Court continues to find the Fourth Amendment largely irrelevant to these noncriminal special needs agencies. Rules governing civilian traffic monitors cannot inform Fourth Amendment analysis if the Fourth Amendment does not apply to them. Thus, a more capacious reimagining of Fourth Amendment thresholds in noncriminal investigations is needed to give full efficacy and expression to abolitionist rulemaking.

To do so, I propose an “objective intrusion theory” of Fourth Amendment applicability that focuses on the objective intrusion into a citizen’s privacy or liberty interest rather than on the uniform worn by the government actor engaged in the intrusion. This theory redirects the threshold inquiry away from the subjective motivations of the government actor and toward the target who deserves the constitutional privacy and autonomy protections afforded by the Fourth Amendment. For example, instead of assessing Fourth Amendment applicability by divining the subjective intent of a government doctor in nonconsensually drawing blood from a suspect, objective intrusion theory would assess whether nonconsensual blood draws amount to a “search” of a citizen, plainly understood.

This approach has intuitive appeal in resolving some of the Fourth Amendment’s thorniest applications. Courts have refused to apply the Fourth Amendment at all to some deeply invasive nonconsensual government searches and seizures—including blood draws, surgical intrusions,³⁴⁶ involuntary commitment,³⁴⁷ and lethal restraints³⁴⁸—simply because the action was not subjectively motivated by a desire to investigate a crime.³⁴⁹ These decisions rest on arbitrary line drawing justified by questionable factors like primary versus secondary subjective intent and the formal role or uniform worn by the actor, none of which has any ability to protect the promise enshrined in the Fourth

³⁴⁶ See *supra* note 176.

³⁴⁷ See *supra* note 193.

³⁴⁸ See *supra* note 299.

³⁴⁹ See *supra* notes 183–185.

Amendment.³⁵⁰ By removing the guesswork of intent, courts can more easily and consistently apply the Fourth Amendment.

This approach also accords with the original purpose of the Fourth Amendment, as reflected in early special needs cases.³⁵¹ As the Court recognized in extending the amendment's reach to searches of employers for OSHA violations, "[i]f the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards."³⁵² As a result, "[t]he focus of the Amendment is [] on the security of the person, not the identity of the searcher or the purpose of the search."³⁵³ Indeed, while the Framers may have envisioned constables executing writs of assistance for the Crown when drafting the Fourth Amendment, their overriding concern in adopting the Bill of Rights was one of preventing unwarranted intrusion from all government actors, not just police.³⁵⁴ That the Framers likely could not have envisioned today's sprawling, vast administrative state that subjects Americans to regular, suspicionless searches should not work against application of the Fourth Amendment to these entities when their activities plainly implicate the amendment's reasonableness clause.³⁵⁵

Objective intrusion theory thus resolves the threshold question in favor of broad Fourth Amendment scrutiny. It does not, however, resolve the "expansion of the reasonableness balancing

³⁵⁰ Cf. Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1927 (2014) (describing how the theory of "constitutional promise-keeping" is "rooted in history" and "recognize[s] that background facts change and that the Constitution should keep pace").

³⁵¹ Cf. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1328 (2016); *id.* at 1193 (charting the history of the Fourth Amendment and concluding that "[t]he proper way to understand the Fourth Amendment is as a prohibition on general search and seizure authorities and a requirement for specific warrants" (emphasis in original)).

³⁵² *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312–13 (1978).

³⁵³ *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1206 (10th Cir. 2003).

³⁵⁴ See Thomas McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 89–90 (1998) (observing that Madison considered the Fourth Amendment necessary for "restraining" the state governments as well).

³⁵⁵ See Renan, *supra* note 252, at 1041 ("[A]dministrative policies decide, in practice, the scope and bounds of the power to search. This may not [have been] the Framers' vision, but it is increasingly what search and seizure looks like on the ground."); cf. Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1123 (2002) ("[R]obust Fourth Amendment protection need not be inconsistent with the administrative state, as a significant portion of modern administrative regulation concerns business and commercial activities which lack Fourth Amendment rights equivalent to those guaranteed to individuals.").

test [in special needs cases] without proper justification or limits.”³⁵⁶ The expansion of the Fourth Amendment to noncriminal searches, beginning with *Camara*, “has proven to be something of a Faustian pact. The decisions allowed the [F]ourth [A]mendment’s scope to extend to [noncriminal] activities . . . , but in the process [these decisions] significantly undermined the role of probable cause” in the analysis.³⁵⁷ The solution cannot be as simple as a return to the “monolithic” Fourth Amendment, however, where probable cause dominates every inquiry; if “a warrant based on probable cause was required every time the [F]ourth [A]mendment applied, the Court would hesitate to bring [non-criminal] government activities under the amendment out of concern for frustrating important government needs.”³⁵⁸

Here, this Article’s contributions may work together to resolve this Faustian pact. By subjecting a broader swath of mixed-motive investigations and investigations that are excessively entangled with law enforcement to probable cause and warrant requirements, courts can apply traditional Fourth Amendment guardrails to criminal investigations masquerading as something more benign. For those truly noncriminal investigations subject to a lower reasonableness standard, courts can look to the sub-constitutional statutes and regulations governing these noncriminal activities to inform a strengthened and more principled reasonableness inquiry. And over time, as police are replaced with nonpolice administrative agencies, objective intrusion theory can ensure that constitutional checks remain to protect citizens from unwarranted privacy and liberty intrusions from the new look public safety.³⁵⁹

CONCLUSION

This Article sought to accomplish three objectives. First, Part I catalogued recent comprehensive and detailed abolitionist proposals to replace traditional police with unarmed nonpolice

³⁵⁶ Sundby, *supra* note 226, at 385.

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 415–16.

³⁵⁹ Here, it is important to remember that objective intrusion theory—or any lens expanding the applicability of the Fourth Amendment—does not automatically undermine the reasonableness requirement of the Fourth Amendment. Large swaths of entirely legitimate government conduct may objectively intrude upon the privacy or liberty interests of private citizens. Objective intrusion theory requires simply that such conduct be subjected to Fourth Amendment inquiry to determine if the conduct was reasonable; it does not require that all such conduct be deemed unreasonable on its face.

agencies. That Part also contextualized these proposals by discussing the various strands of semipermanent and permanent abolitionist thought animating them. Second, Part II provided the first examination of current Fourth Amendment doctrine to these burgeoning postpolice agencies and explored the troubling implications of nonpolice public safety entities operating largely free of the amendment's search and seizure restrictions. Third, Part III charted a logical and necessary path for postpolice Fourth Amendment reforms that both reflects the underlying purpose of the amendment's reasonableness function and provides sufficient legal scaffolding to ensure continued protection of privacy and liberty interests for all citizens in a future world without police.