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## ARTICLES

### Double Reasonableness and the Fourth Amendment

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## INTRODUCTION

Legal doctrine is replete with reasonableness tests.<sup>1</sup> In fact, it is unlikely that any area of law lacks a reasonableness test at the center of a core doctrine. The Fourth Amendment is certainly no exception; the textual prohibition of unreasonable searches and seizures has led the United States Supreme Court to conclude that the “ultimate touchstone of the Fourth Amendment is reasonableness.”<sup>2</sup> What makes the Fourth Amendment unique, however, is the relatively recent insistence on not one but two tiers of reasonableness review in adjudicating Fourth Amendment claims.<sup>3</sup> Both the substance of the right and the availability of a remedy are currently assessed under overlapping, but distinct, reasonableness tests.<sup>4</sup> Unfortunately, this double reasonableness review does not double the reasonableness of the ultimate results obtained; instead, it has something of the opposite effect. Double reasonableness blurs the lines between right and remedy. Previous scholarship has identified the strong link—or equilibration<sup>5</sup>—between constitutional rights and remedies, but in this Article we go one step further and develop the claim that the content of the right itself is becoming increasingly obscure.<sup>6</sup> The substance of the Fourth Amendment is stuck in a fog of remedial decisions, and double reasonableness is the chief culprit.<sup>7</sup>

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1. See, e.g., Hisham M. Ramadan, *Reconstructing Reasonableness in Criminal Law: Moderate Jury Instructions Proposal*, 29 J. LEGIS. 233, 233 (2003) (“The concept of reasonableness or ‘reasonable person’ has become one of the cornerstones in criminal law. It was introduced into the elements of several offenses and defenses. Some jurisdictions define it as an average, ordinary person who is a representative of the general community, others are silent, and leave it to the jury to define as they desire.”); *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (In tort law, negligence suits require the fact finder to ask, “[W]hat would a ‘reasonable person’ do ‘under the same or similar circumstances.’”).

2. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

3. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 194 (2001) (rejecting a lower court’s analysis conflating the two levels of reasonableness analysis).

4. E.g., *id.* (rejecting the notion that the reasonableness inquiry in an excessive force claim and the qualified immunity inquiry are one and the same).

5. See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 678–79 (1983); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889–99 (1999) (using the term equilibration to describe the symbiotic relationship between rights and remedies); *id.* at 880 (explaining that one cannot seek to understand rights as metaphysically separate and distinct from remedies, but rather one must recognize remedies as the practical manifestation of the right).

6. As Donald Dripps recognized in 1986, there is considerable value in disentangling whether a decision is procedural or substantive. See Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 907 (1986) (distinguishing cases that lose on legal grounds from cases that are merely irreparable).

7. If one recognizes that the very scope of a right’s existence depends on the development and scope of the remedy, then perhaps there is room to argue that identifying the line between right and remedy is of no import. See Levinson, *supra* note 5, at 858 (describing the right and the remedy as “inextricably intertwined”). While we accept the general premise of the equilibration theory—that is, remedies impact rights and vice versa—we do not agree that it is undesirable to

Neither of the Supreme Court's two levels of reasonableness analysis is inevitable or mandated by either the text or history of the Fourth Amendment. In fact, for most of the last half century, substantive Fourth Amendment law was comprised of strong presumptions and predictable rules. Only recently has the substance of Fourth Amendment law shifted away from clear rules toward a reasonableness standard in all contexts. Likewise, for most of its history the exclusionary rule was viewed as an automatic remedy for all Fourth Amendment violations. It has been only in the last decade that this *per se* rule has given way to a neutered balancing test. Accordingly, evidence today will be suppressed in a criminal case only if there is unreasonableness under each inquiry—substantive and remedial.<sup>8</sup> It is now possible to speak of that famous conundrum of reasonable unreasonable searches—those searches that are sufficiently unreasonable that they deprive the defendant of his Fourth Amendment right, but not so unreasonable that any remedy will be forthcoming.<sup>9</sup>

Scholars have examined the shift in the substantive Fourth Amendment from clear rules to a murky reasonableness test,<sup>10</sup> and likewise, the literature has noted the shift from a *per se* exclusionary rule to an amorphous remedial standard,<sup>11</sup> but the combined impact of these two changes taken together has not been substantially addressed. Signifi-

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understand the differences between the right and the remedial scheme. More specifically, we are not arguing a position that we understand to be in tension with the rights equilibration thesis. The recognition that remedies are the way that rights take on their real world form is not inconsistent with an effort to know whether a particular limit derives from the right or the remedy. *See also* David B. Owens, *Fourth Amendment Remedial Equilibration: A Comment on Herring v. United States and Pearson v. Callahan*, 62 STAN. L. REV. 563 (2010).

8. Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?", 94 COLUM. L. REV. 1751 (1994). We deal primarily with the remedy sought by defendants in criminal prosecutions—the suppression of illegally seized evidence from the government's case in chief. There are obviously overlaps between the availability of a remedy in a criminal case and in a suit under § 1983. While focusing on suppression, we discuss these overlaps throughout.

9. Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 93 n.366 (1991) ("[T]he *Leon* exception can be described as applying to reasonable, unreasonable warrant searches.").

10. *See, e.g.*, Sundby, *supra* note 8, at 1766 ("The door has since been flung wide open, as the Court has made clear that the bottom-line Fourth Amendment test is whether the government intrusion is 'reasonable' based upon a balancing of the government's need to engage in the intrusion against the individual's privacy interests. This shift in focus from the Warrant Clause to a generalized reasonableness inquiry, in turn, has changed the nature of Fourth Amendment dialogue by gradually, but inevitably, fostering an increased deference to the government's judgment that the challenged intrusion is needed.").

11. *See, e.g.*, Elizabeth Canter, *A Fourth Amendment Metamorphosis: How Fourth Amendment Remedies and Regulations Facilitated the Expansion of the Threshold Inquiry*, 95 VA. L. REV. 155, 156 (2009) ("[T]he anemia of Fourth Amendment remedies enabled and may have provided some hydraulic pressure toward an expanded Fourth Amendment right.").

cantly, it has gone largely unnoticed that current Fourth Amendment law is the worst of both worlds—it produces a substantive Fourth Amendment corrupted by the fear of a mandatory exclusionary rule that no longer exists. We elaborate on both of these problems in this Article and propose a simple, feasible solution.

Our argument proceeds as follows. In Part I, we detail the gradual erosion of clear substantive rules in the substance of Fourth Amendment law. Although for decades the Court identified in the text and history of the Fourth Amendment a strong presumption in favor of warrants supported by probable cause, it has recently treated this presumption as anything but presumptive. Beginning with *Terry v. Ohio*<sup>12</sup> and continuing to the present, the Court has repeatedly carved exception after exception into the ostensible warrant requirement. In case after case, context after context, the Court has weakened the warrant and probable cause presumptions, replacing them over and over again with totality of the circumstances balancing tests.<sup>13</sup> Today, the Court rarely even pays lip service to the notion that the unreasonable search and seizure clause of the Fourth Amendment is given meaning and substance by the warrant clause. Some of the most important recent Fourth Amendment decisions have in common the striking absence of any reliance on the previous bedrock presumptions of the Fourth Amendment.<sup>14</sup>

Next, in Part II, we turn to the fundamental, yet largely unacknowledged, revolution that the Roberts Court has wreaked upon the exclusionary rule. We demonstrate that, notwithstanding the Court's assertions to the contrary, cost-benefit balancing is a relatively new innovation in the remedial context, one that threatens to render toothless the substance of the Fourth Amendment. The exclusionary rule began its life as a mandate, was weakened by exceptions, and now exists, in the Court's words, "as a last resort." In Part III, we consider the significant problems associated with the existence of the nested reasonableness tests described in the previous two sections. In particular, we identify the dis-

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12. 392 U.S. 1 (1968).

13. Of course, we are far from the first scholars to notice the death of the Court's reliance on the warrant clause to define reasonableness under the Fourth Amendment. See, e.g., Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119 (1989); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 386 (1988) ("Prior to *Camara*, fourth amendment analysis had a relatively high amount of predictability: the Court presumed that a warrant based on probable cause was required before the police could perform a search or arrest. The Court's strong preference for the warrant requirement relegated the amendment's reasonableness clause, which bans 'unreasonable searches and seizures,' to a secondary role.").

14. Cf. The Honorable Kevin Emas & Tamara Pallas, *United States v. Jones: Does Katz Still Have Nine Lives?*, 24 ST. THOMAS L. REV. 116 (2012).

tortions and confusion in current Fourth Amendment doctrine wrought by the double reasonableness framework. We also point out that this confusion and uncertainty have a dramatic and consistent effect on certain constitutional litigants—that is, this confusion and uncertainty dramatically and inevitably favor the government and disfavor those alleging a constitutional violation.

Finally, in Part IV, we propose a solution. Despite the far-ranging scholarly critiques of the weakening of the exclusionary rule, we explain that the recent limits the Court has placed on exclusion could prove to be a tremendous opportunity rather than a cataclysm.<sup>15</sup> Specifically, we argue that the decline of the exclusionary rule as an automatic remedy for a Fourth Amendment violation is an opportunity for the Supreme Court to clear away a substantial amount of underbrush in its *substantive* Fourth Amendment jurisprudence. Fourth Amendment rights and remedies have always been linked; when the exclusionary remedy was perceived as absolute, the scope of the Fourth Amendment right was correspondingly curtailed. Under a system of exclusionary entitlement, the Court was often rightly concerned that an expansive substantive right would lead to the exclusion of probative evidence in an enormous number of cases.<sup>16</sup> As a result, the Court developed a cramped reading of the Fourth Amendment that permits vast intrusions by law enforcement into the privacy of individual citizens in countless contexts and situations. Now that the Court is determined to use the exclusionary rule more judiciously, by contrast, it has created for itself the opportunity and obligation to revisit some of its most important Fourth Amendment cases to repair damage done decades earlier.

In our view, the time is now to lift the Fourth Amendment fog caused by double reasonableness review. The Court's exclusionary rule cases, while frustrating and ill-conceived if viewed in isolation, provide the Court with an opportunity to revisit problematic Fourth Amendment doctrine that was born under a very different remedial regime. Such an approach would allow the Court to adhere to its current view of the exclusionary rule as a remedy of last resort while creating a Fourth Amendment with teeth. The goal is a Fourth Amendment *right* that is

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15. We do not argue that, all things being equal, *Herring* and its progeny were rightly decided. Rather, our point is simply that given the Court's clear intention to create a new exclusionary rule jurisprudence, it should take advantage of the opportunity thus created to revisit some of the worst substantive Fourth Amendment decisions of the last fifty years.

16. The Court's case law during this period reflects a preoccupation with avoiding the harm of letting the guilty go free. *See, e.g.*, *Stone v. Powell*, 428 U.S. 465 (1976) (limiting exclusion was a means of ameliorating the risk that every time the "constable blunders" the guilty go free); *Michigan v. Jackson*, 475 U.S. 625, 637 (1986) (Burger, C.J., concurring) (questioning the exclusionary rule because of its ability to allow "more and more 'criminals to go free because the constable has blundered'").

more substantial and clearly defined, but a *remedy* that remains limited to egregious violations of clear substantive rules.

I. THE FOURTH AMENDMENT: FROM WARRANTS  
TO REASONABLENESS

A. *The Early Years of the Fourth Amendment and the Court's  
Use of Presumptions*

1. THE INSCRUTABILITY OF THE FOURTH AMENDMENT

The Fourth Amendment lacks a *Marbury v. Madison*.<sup>17</sup> In many areas of constitutional law there is a sweeping Marshall-era decision that continues to frame the modern analysis. As Akhil Amar has explained, “[W]e still look to *Marbury v. Madison*; in pondering the puzzle of jurisdiction-stripping, we go back to *Martin v. Hunter’s Lessee*; in reflecting on the scope of Congress’ enumerated powers and related issues of federalism, we re-examine *McCulloch v. Maryland*; in considering vested property rights, we return to *Fletcher v. Peck* and *Dartmouth College v. Woodward*; and so on.”<sup>18</sup> For reasons that have been well documented by others,<sup>19</sup> however, the Marshall Court had little occasion to definitively opine on the Fourth Amendment. The Supreme Court simply did not meaningfully begin to interpret the Fourth Amendment until well into the twentieth century.<sup>20</sup> In fact, the Fourth Amendment was not even incorporated into the Due Process Clause of the Fourteenth

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17. See, e.g., Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1123–24 (1996) (“As a subfield of constitutional law, constitutional criminal procedure stands as an anomaly. In many other areas of constitutional law, major Marshall Court opinions stand out and continue to frame debate both in courts and beyond. In thinking about judicial review and executive power . . . . But no comparable Marshall Court landmarks dot the plain of constitutional criminal procedure.”) (citations omitted); see also Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 212 (2005) (“In a very real sense, pretrial constitutional criminal procedure was essentially nonexistent” in the 19th Century.).

18. Amar, *supra* note 17, at 1123–24.

19. Nathan D. Haynor, *Criminal Law: Fly-By-Night Law Enforcement: The Minnesota Supreme Court Considers the Fourth Amendment as a Separate and Independent Basis of Suppression for the Statutorily Invalid Nighttime Search in State v. Jackson*, 35 WM. MITCHELL L. REV. 652, 658 (2009) (“Not until 1886 did the Supreme Court decide the first important Fourth Amendment case.”).

20. See, e.g., David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1728–29 (“In important respects modern criminal procedure law can be traced back to the 1920s and 1930s. It was in these . . . decades that the Court, largely as a result of Prohibition, began to confront the kinds of search-and-seizure issues that have come to constitute such a large part of criminal procedure law—electronic surveillance, automobile searches, the uses of informants. More importantly, it was during the interwar period that the Supreme Court first applied the federal Constitution to overturn state criminal convictions—a pivotal move, because law enforcement in the United States was and remains chiefly a responsibility of state and local governments.”).

Amendment—and thus did not become applicable to the states—until 1949 when the Court decided *Wolf v. Colorado*.<sup>21</sup>

Although the Court's Fourth Amendment jurisprudence lacks a temporal *Marbury*—insofar as the seminal Fourth Amendment decisions date mostly from the second half of the twentieth century—its constellation is not without a few fixed stars.<sup>22</sup> *Katz v. United States*<sup>23</sup> is in many ways the Fourth Amendment's substantive *Marbury*. From 1967 until very recently, nearly every seminal Fourth Amendment decision uttered the required talismanic phrases from *Katz v. United States*<sup>24</sup>—including the core holding that the Fourth Amendment is implicated whenever government officials intruded upon a reasonable expectation of privacy.<sup>25</sup> Simply put, for nearly half a century *Katz* was the starting point for all Fourth Amendment analysis.<sup>26</sup>

In *Katz* and other seminal Fourth Amendment cases, the Court was obliged to deal with an inherent tension between the Fourth Amendment's two principal clauses: the reasonableness clause<sup>27</sup> and the warrant clause.<sup>28</sup> The relationship between the two is almost entirely inscrutable; the text itself simply does little to guide the Court in reading the two clauses together.<sup>29</sup> The Court addressed this ambiguity through the use of presumptions. In *Katz*, the Court made it clear that even thoroughly reasonable searches based on individualized suspicion generally violate the Constitution in the absence of a warrant; the Court identified

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21. 338 U.S. 25 (1949).

22. *See, e.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

23. 389 U.S. 347 (1967).

24. Including phrases like, “reasonable expectation of privacy” and “knowingly exposes to the public.”

25. *See, e.g., id.* at 361 (Harlan, J., concurring).

26. *Katz* is a seminal decision insofar as it addresses three key Fourth Amendment questions: (1) When has a search occurred; (2) What is required in order for a search to be lawful; and (3) If a search is unlawful, what is the remedy. *Id.* The question of whether a search has occurred is increasingly unconcerned with the Katzian reasonable expectation of privacy test. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945 (2012); *Florida v. Jardines*, 133 S. Ct. 1409 (2013). The question of whether a warrant and probable cause are required has been substantially eroded as developed in the remainder of this section. And the question of whether a remedy is automatic has been fundamentally altered as discussed in the next section.

27. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

28. *Id.* (“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

29. *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 571 (2004) (Thomas, J., dissenting) (“The precise relationship between the Amendment’s Warrant Clause and Unreasonableness Clause is unclear.”).

in the Constitution a requirement that an impartial judicial officer be “interposed between citizen and police.”<sup>30</sup> *Katz* thus recognized that, except in certain limited circumstances, the reasonableness clause was only satisfied when the state showed that it had procured a warrant supported by probable cause.<sup>31</sup> Even in the rare circumstances—principally exigent circumstances—when the Court was willing to suspend the warrant requirement, it held that searches or seizures were presumptively unconstitutional in the absence of probable cause.<sup>32</sup>

## 2. THE WARRANT AND PROBABLE CAUSE PRESUMPTIONS

### a. *The Presumption in Favor of Warrants*

In an oft-quoted passage from *Katz*, the Court explained that searches “without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few spe-

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30. *Katz*, 389 U.S. at 357 (quoting *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963)).

31. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (“The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”); see also *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) (“Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable. Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.”); *Payton v. New York*, 445 U.S. 573, 589–90 (1980) (“The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home—a zone that finds its roots in clear and specific constitutional terms: ‘The right of the people to be secure in their . . . houses . . . shall not be violated.’ That language unequivocally establishes the proposition that ‘[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’ In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”) (citations omitted).

32. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 398 (finding exigent circumstances rendered warrantless police entry of a home reasonable because the officers observed an altercation between juveniles and adults in the home, and one of the individuals was badly injured); *Illinois v. McArthur*, 531 U.S. 326, 331 (2001) (preventing the defendant from entering his home for two hours while police obtained a search warrant was reasonable because the officers believed that the defendant had marijuana hidden under a sofa cushion). The Court upheld the police seizure because it “involve[d] a plausible claim of specially pressing or urgent law enforcement need, i.e., ‘exigent circumstances.’” *Id.*; *United States v. Place*, 462 U.S. 696 (1983) (finding reasonable suspicion justifies brief detention of luggage pending further investigation); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298–99 (1967) (finding the police acted reasonably when they entered a home that an armed robber had entered). “The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.” *Id.* at 298.



cifically established and well-delineated exceptions.”<sup>33</sup> To be sure, in drafting the Fourth Amendment the founders were reacting in large part against the issuance of general warrants which permitted wide-spread searches for seditious materials.<sup>34</sup> The general warrant was one of the great scourges from which the Bill of Rights was intended to protect citizens of the new republic. Notwithstanding the misuse of warrants in colonial America, however, there is good reason to see the requirement of prior judicial scrutiny as an important bulwark against the untrammelled discretion of the officer in the field. A warrant provides the citizen with assurance that he is not subject to the whim of the officer in the field and has not been singled out for personal or impermissible reasons.<sup>35</sup> It is a testament to the fact that a neutral third party, trained in

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33. *Katz*, 389 U.S. at 357.

34. *See, e.g., Payton*, 445 U.S. at 589–90 (“It is familiar history that indiscriminate searches and seizures conducted under the authority of ‘general warrants’ were the immediate evils that motivated the framing and adoption of the Fourth Amendment.”); *Stanford v. Texas*, 379 U.S. 476, 510 (1965) (“Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws.”); *see also* The Honorable M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 912 (2005) (“The immediate aim of the Fourth Amendment was to ban general warrants and writs of assistance. To this end the Amendment’s Warrant Clause requires that a warrant ‘particularly describ[e] the place to be searched, and the persons or things to be seized.’”); Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U.L. REV. 53, 77–78 (1996):

The general writs and the Parliamentary statutes that underlay them, as many of you will no doubt recall, authorized customs officers—without probable cause, or individualized suspicion—to break and enter houses, shops, and “any . . . other place” in search of uncustomed goods. Such a regime seems offensive on several counts. First, it provided next to no guidance constraining the discretion of officers, thus inviting discrimination against government enemies and favoritism towards friends. Second, it authorized intrusions into houses—the most private buildings imaginable. Third, the writ of assistance scheme theoretically authorized customs officers to commandeer—to dragoon, or impress—ordinary passersby to aid them in their invasions. This “assistance” power added a vague and possibly tyrannical new layer of bodily intrusion and unchecked discretion into the system. Finally, the objects of the search—relatively innocent “uncustomed” goods like tea and sugar—were not nearly so compelling as stolen goods, at least in a town, like colonial Boston, where customs evasion and tax evasion were practically a way of life, implicating a good many otherwise law-abiding folk.

35. *See, e.g., United States v. Grubbs*, 547 U.S. 90, 98–99 (2006) (“[N]either the Fourth Amendment nor Federal Rules of Criminal Procedure 41” requires the executing officer to “present the property owner with a copy of the warrant before conducting his search.”); *Walter v. United States*, 447 U.S. 649, 658 n.10 (1980) (“The inability to serve a warrant on the owner of the property to be searched does not make the execution of the warrant unlawful.”); *see also Groh v. Ramirez*, 540 U.S. 551, 562 n.5 (2004) (“Quite obviously, in some circumstances—a surreptitious search by means of a wiretap, for example, or the search of empty or abandoned premises—it will be impracticable or imprudent for the officers to show the warrant in advance.”).

the law's requirements,<sup>36</sup> has confirmed the officer's subjective belief that there is probable cause to search or seize the defendant.<sup>37</sup> As the Court stated in a pre-*Katz* decision, "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."<sup>38</sup>

b. *The Probable Cause Requirement*

During this period, even when the Court held that the Fourth Amendment's warrant requirement did not apply, it invoked a similarly absolute, if less protective, rule: the probable cause requirement. That is, even where the Court concluded that the reasonableness clause did not require a warrant, it nonetheless required probable cause as an essential prerequisite to governmental searches and seizures. The most obvious example is for arrests made in public. While the Court was willing to dispense with the warrant requirement for these cases, it still required the officers to demonstrate that they had probable cause to arrest.<sup>39</sup> Building on both common law tradition and common sense, the Court reasoned that requiring an arrest warrant for officers making arrests in public places was not necessary to satisfy the requirement of reasonableness. Probable cause, however, remained in place as an important protection against law-enforcement overreaching.

But this is only the most obvious example. Others abounded. For example, searches and seizures may be conducted in the absence of a

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36. *But see* *Shadwick v. City of Tampa*, 407 U.S. 345 (1972) (holding that a magistrate need not be a lawyer).

37. *See* Margaret R. Sweeney, *United States v. Woodrum, Beware Taxicab Passengers, Your Individual Rights Are Being Diminished*, 28 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 123, 129 (2002) ("The warrant requirement mandates that police officers submit a signed affidavit to a neutral judge or magistrate requesting a warrant. The warrant will only be issued upon a showing of probable cause. The officer's mere subjective belief that probable cause exists will not be enough to secure a warrant.").

38. *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.") (citations omitted). That same year, in another case, the Court put the matter even more starkly:

The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

*McDonald v. United States*, 335 U.S. 451, 455-56 (1948).

39. *See, e.g., Draper v. United States*, 358 U.S. 307 (1959).

warrant when exigent circumstances are present, but only so long as probable cause is demonstrated.<sup>40</sup> Evidence discovered in plain view can be seized without a warrant, but only so long as the officer has probable cause to believe that it is contraband.<sup>41</sup> Automobiles may be searched, even when there is no true exigency exception to the warrant, but only so long as those searches are conducted with probable cause.<sup>42</sup>

Underlying all of these decisions is the Court's acknowledgement that a formal warrant requirement is often inconsistent with modern policing. In addition, it was clear to the Court that, even at early common law, there were instances where an officer could make an arrest in public without a warrant or could seize property that was clearly contraband.<sup>43</sup> There are thus both practical and historical considerations that lend support to a reading of the Fourth Amendment that permits some searches and seizures to be conducted based on probable cause even in the absence of a warrant.

By contrast, the textual basis for the probable cause presumption is considerably less robust than that of the warrant presumption. The probable cause requirement appears only in the warrant clause; it would seem, therefore, to be relevant only to determining whether a warrant was properly issued and should have no bearing on the reasonableness of non-warranted searches. Nonetheless, the probable cause requirement has emerged as an important part of the Supreme Court's jurisprudence,

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40. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (stating that citizens have the general "right to be free from warrantless searches of [their] home[s] unless the searching officers have probable cause *and* there are exigent circumstances") (emphasis added).

41. *Arizona v. Hicks*, 480 U.S. 321 (1987).

42. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) ("In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Carroll v. United States* holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.") (citation omitted); *see also* *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) ("Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon 'probable cause' to believe that a violation of the law has occurred.") (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973)).

43. Amar, *supra* note 34, at 56 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*292) ("[An officer] may, without warrant, arrest anyone for a breach of the peace, committed in his view, and carry him before a justice of the peace. And, in case of felony actually committed, or a dangerous wounding whereby felony is likely to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors."). *But see* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 639 (1999) ("[T]he recognition of probable cause alone as a justification for a warrantless arrest marked a drastic departure from the common-law regime familiar to the Framers.").

even in those cases in which it was determined that a warrant was not necessary.

### 3. RETREAT FROM THE PRESUMPTIONS

The Court's expression of a warrant requirement was controversial from the beginning.<sup>44</sup> To say that the Constitution expresses a preference for warrants, Professor Amar and others have argued, is inconsistent not merely with the text of the Amendment itself but with founding era experiences and practice.<sup>45</sup> The Founders were no fans of warrants and likely saw them as a pernicious tool, permitting agents of the Crown to search, unfettered and without consequence.<sup>46</sup>

Perhaps, then, it is not surprising that as time went on the Court increasingly distanced itself from the strong warrant presumption of *Katz*, instead riddling the presumption with exception after exception. In 2004, Justice Thomas accurately captured the state of Fourth Amendment law: “[O]ur cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they

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44. *See, e.g.*, *United States v. Rabinowitz*, 339 U.S. 56, 79 (1950) (Frankfurter, J., dissenting) (“If the exception of search without a warrant incidental to a legal arrest is extended beyond the person and his physical extension, search throughout the house necessarily follows.”). *But see* Davies, *supra* note 43, at 551 (“A number of the historical commentaries on the Fourth Amendment have either favored or rejected a warrant requirement. However, none have supported their answer with persuasive historical evidence. If one turns to the historical sources themselves, the mystery initially deepens: the participants in the historical controversies that stimulated the framing of the Fourth Amendment simply did not discuss when a warrant was required. Odd as it may seem, the Framers simply were not troubled by the most salient issue in the modern debate.”).

45. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 771–72, 773 (1994) (“The Framers did not exalt warrants, for a warrant was issued ex parte by a government official on the imperial payroll and had the purpose and effect of precluding any common law trespass suit the aggrieved target might try to bring before a local jury after the search or seizure occurred. . . . Even when a judge issued a warrant, revolutionary Americans greeted the event with foreboding.”); Henry F. Fradella et al., *Quantifying Katz: Empirically Measuring “Reasonable Expectations of Privacy” in the Fourth Amendment Context*, 38 AM. J. CRIM. L. 289, 326–27 (2011) (“Although the British people were victims of . . . encroachments, American colonists were even more susceptible to unreasonable searches and seizures because colonial magistrates were obliged to authorize general warrants requested by crown officers based on nothing more than mere suspicion. After the American Revolution, the Founders’ disgust for abuses of general warrants (that were unsworn, unsupported by any particularized suspicion, and lacked any degree of specificity with regard to the person or place to be searched or the item(s) to be seized) led them first to adopt requirements for warrant specificity based on sworn, particularized suspicion or probable cause in the charters or declaration of rights of several of the new states and, later, in the text of the Fourth Amendment.”).

46. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012) (quoting *United States v. Leon*, 468 U.S. 897, 922–23 (1984)) (“Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in ‘objective good faith.’”). If the court finds that the officer acted in an objectively reasonable manner, he or she will likely be immune from a suit of trespass or any kind of personal liability. *See also* *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

are not.”<sup>47</sup> Justice Scalia writing for a majority of the Court in *Kyllo v. United States* openly mocked the warrant requirement:

One might think that . . . examining the portion of a house that is in plain public view, while it is a “search” despite the absence of trespass, is not an “unreasonable” one under the Fourth Amendment. But in fact we have held that visual observation is no “search” at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional.<sup>48</sup>

By the early 2000s, the requirement of a warrant had become a requirement in name only. In fact, one study calculated that warranted searches account for only a tiny fraction of the total number of searches conducted by law enforcement.<sup>49</sup>

Like the warrant requirement, the probable cause rule has also become riddled with exceptions over the years.<sup>50</sup> Beginning in *Terry v. Ohio* and continuing for decades thereafter, the Supreme Court has held that some searches can be done based on either the lesser standard of reasonable suspicion—one that does not appear in the Constitution and has not been defined with great care by the Court—or based on something even less. Today, probable cause is the baseline test for all searches and seizures—warranted or not—except when it is not: students can be searched at school based upon reasonable suspicion,<sup>51</sup> police may detain and search suspects based on reasonable suspicion,<sup>52</sup> and those arrested may be searched—even strip searched—without any suspicion whatsoever.<sup>53</sup>

Over time the Court has thus riddled with exceptions both of its iconic presumptions—warrants and probable cause—to such an extent that it has begun to discard them altogether. As we document more fully

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47. *Groh v. Ramirez*, 540 U.S. 551, 572–73 (Thomas, J., dissenting) (“That is, our cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not.”). For Justice Thomas as for Justice Scalia, the bottom line determination in every case is whether the search that was conducted was reasonable.

48. 533 U.S. 27, 32 (2001) (citations omitted).

49. Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 Nw. U. L. REV. 1609, 1666 (2012) (estimating that just over 1% of the total number of searches conducted by law enforcement are conducted with a search warrant).

50. For Scalia, the warrant and the probable cause requirements are a distraction from the true test for a search or seizure under the Fourth Amendment—whether the law enforcement activity would have been seen as reasonable at the time of the founding. *See, e.g.*, *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., dissenting) (“In my view, the path out of this confusion should be sought by returning to the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded.”).

51. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

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

53. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012); *see also Maryland v. King*, 133 S. Ct. 1958 (2013) (permitting DNA testing of arrestee without any suspicion of additional crimes).

in the next section, the Court has largely replaced its presumptions with a totality of the circumstances reasonableness test. What is more, the Court did so without explicitly announcing any change in doctrine.

But it is important to remember that not all reasonableness tests are created equal. After all, following *Katz*, the Court used its presumptions—the warrant requirement and the probable cause requirement—to give content to the Fourth Amendment’s own textual reasonableness requirement. That is, in most instances, reasonableness meant a warrant supported by probable cause; in some instances, it merely meant probable cause; in others, it meant something less. But used in this manner, reasonableness took its meaning from the text and interpretation of the Amendment itself—this could be called Fourth Amendment reasonableness.

By contrast, as we shall demonstrate, the reasonableness test now employed by the Court is one almost entirely free of content. When detached from the text of the Fourth Amendment—from the presumptions that defined the Fourth Amendment for so much of the twentieth century—the reasonableness concept loses any inherent meaning it might once have had. Today, what the Court means by reasonableness is an unbounded totality of the circumstances balancing in which the rectitude of government conduct is inevitably evaluated on a case-by-case basis. In the next subsection, we trace through how this doctrinal transformation has taken place in a number of different, unrelated contexts, demonstrating that it lacks any clear, easily applied, objective rules.

### B. *The Spread of Reasonableness Across the Fourth Amendment*

In context after context, the criminal procedure decisions of the Burger and Rehnquist Courts abandoned the clear rules of probable cause and a warrant in favor of an increasingly free-wheeling form of reasonableness balancing. In this subsection, we trace that development across a decidedly non-exhaustive set of contexts and doctrines.

#### 1. INVESTIGATIVE STOPS

In both *Terry v. Ohio* decided in 1967 and *Camara v. Superior Court* decided the following year, the Court extended the Fourth Amendment to encompass encounters that could easily have been excluded from its coverage—relatively minor criminal investigations and non-criminal, administrative investigations.<sup>54</sup> In doing so, however,

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54. See, e.g., *Terry*, 392 U.S. at 16 (“There is some suggestion in the use of such terms as ‘stop’ and ‘frisk’ that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a ‘search’ or ‘seizure’ within the meaning of the Constitution. We emphatically reject this notion.”) (citations omitted).

the Court created a conundrum. If the warrant and probable cause presumptions were to apply in all of these situations, law enforcement might be impractically hamstrung. So, beginning in *Terry* and continuing in the years to come, the Court began formulating exceptions to these requirements to accommodate the fact that the Fourth Amendment now applied expansively. In doing so, the Court increasingly came to rely on a reasonableness inquiry focused largely on the good intentions of the officers.

*Terry* signaled the Court's increased willingness to consider practical realities when defining the appropriate scope of the Fourth Amendment. Responding to the difficulties and ambiguities inherent in police-suspect interaction, the Court in 1968 held for the first time that some searches and seizures could be done in the absence of both probable cause and a warrant.<sup>55</sup> The *Terry* decision begins by stating, in a single paragraph and with almost no analysis, that the warrant and probable cause presumptions do not apply to the conduct at issue and that the propriety of the stop and frisk in the case should be determined solely under the reasonableness clause:

[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.<sup>56</sup>

Only Justice Douglas dissented from the holding in *Terry*. He would have adhered to the probable cause requirement for the arrest at issue, though apparently not the warrant requirement.<sup>57</sup> He criticized the majority for authorizing the officer on the street to engage in searches—those done upon less than probable cause—that no magistrate could authorize.<sup>58</sup> Justice Marshall, almost two decades later, would reiterate that the seemingly benign reasonableness test prescribed in *Terry* is dangerously incompatible with liberty: “To those who rank zealous law enforcement above all other values, it may be tempting to divorce

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55. Exigent circumstances was a recognized exception prior to *Terry*; however, probable cause was required for exigent circumstances searches or seizures: There must be probable cause to believe there is an exigency, and probable cause that there is some evidence of a crime or an emergency.

56. *Id.* at 20.

57. *Id.* at 37 (Douglas, J., dissenting).

58. *Id.* at 36, 39 (“Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can ‘seize’ and ‘search’ him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.”).

*Terry* from its rationales and merge the two prongs of *Terry* into the single requirement that the police act reasonably under the circumstances when they stop and investigate on less than probable cause.”<sup>59</sup>

## 2. THE SPECIAL NEEDS DOCTRINE

Perhaps no area of Fourth Amendment doctrine provides greater evidence for the ascendancy of reasonableness balancing than the special needs doctrine. This doctrine, based on the principle that a lesser showing should be necessary when the government searches for non-criminal enforcement purposes, today governs an enormous amount of conduct, from searches at schools and airports, to drug testing on the job and in schools, to road-side sobriety tests and many more.

The Court began its foray into the special needs doctrine in *Camara v. Municipal Court*<sup>60</sup> in 1967—just a year before *Terry* was decided. In *Camara*, the Court was asked to pass on the constitutionality of a warrantless housing inspection of Camara’s property.<sup>61</sup> The Court held that even though the search was conducted by health and safety officials rather than police officers investigating a crime, the conduct was governed by both the probable cause and warrant presumptions.<sup>62</sup> However, the Court, having stated this orthodoxy, almost immediately struck a retreat from it. It held that a warrant in this context could be supported by “area probable cause,” an idea unknown in the Fourth Amendment before or since.<sup>63</sup> The area probable cause test had more to do with procedural regularity—with making sure that the officers conducting the search had been authorized by *statute* to do so—than with any kind of individualized suspicion. So while the Court nominally adhered to the warrant and probable cause requirements in *Camara*, it was obligated to redefine these concepts almost entirely to do so.

But maintaining two definitions of probable cause could not be sustained. In the years that followed, the Court found it easier to relax the strict requirement of a warrant supported by probable cause than to tinker with what each of these terms mean in various contexts. In this way, *Terry* has proven far more influential than *Camara*.<sup>64</sup> While the

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59. *United States v. Sharpe*, 470 U.S. 675, 691 (1985) (Marshall, J., concurring). It is worth noting that Marshall begins his opinion by reminding the reader that *Terry* was a narrow exception to the probable cause requirement.

60. 387 U.S. 523 (1967).

61. *Id.* at 525.

62. *Id.* at 540.

63. *See, e.g.*, Note, *The Fourth Amendment and Housing Inspections*, 77 *Yale L. J.* 521, 522 (1968) (In *Camara*, “[t]he Court went on to give its blessing to a new species of ‘area probable cause’ for housing inspection warrants—a standard requiring a substantially lesser showing than that needed to justify a criminal search warrant.”).

64. Sundby, *supra* note 13, at 395 (“Building upon *Camara*, the Court’s decision in *Terry v.*



Supreme Court could have made probable cause a contextual issue, with the definition of the required probability changing from search to search and from context to context, it instead retreated from its one-size-fits-all approach to what the Fourth Amendment mandates. Out went probable cause and in came a more flexible approach based on reasonableness.

As the issues surrounding non-criminal searches recurred time and again, the Court developed a new doctrine, dubbed the special needs doctrine by Justice Blackmun in his concurrence in *New Jersey v. T.L.O.*<sup>65</sup> In special needs cases, the government interest in conducting a search is balanced against the privacy interest of the individual implicated by the search. The Court has used this doctrine to uphold suspicionless drug testing of railway workers,<sup>66</sup> Treasury employees,<sup>67</sup> high school students engaged in extracurricular activities,<sup>68</sup> searches of school children and their belongings based on reasonable suspicion,<sup>69</sup> and checkpoints for illegal immigrants<sup>70</sup> and drunk driving<sup>71</sup> (but not drugs)<sup>72</sup>; among many, many others.

In the early special needs cases, the Supreme Court was careful to emphasize that the special needs doctrine was a narrow exception to the general warrant requirement.<sup>73</sup> In case after case, context after context,

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*Ohio* provided reasonableness an even greater role as an independent factor in fourth amendment analysis.”).

65. 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (“Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”).

66. *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602 (1989).

67. *Nat’l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

68. *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2002).

69. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

70. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

71. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

72. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

73. *See, e.g., Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995) (“Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant. Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either. A search unsupported by probable cause can be constitutional, we have said, ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’” (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987))) (internal quotation marks omitted); *Von Raab*, 489 U.S. at 665–66 (“While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause . . . our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of

the Court upheld searches and seizures conducted with neither probable cause nor a warrant but was always careful to describe these cases as unusual. Sincere or not, the Court paid lip service to the warrant and probable cause presumptions in these cases, repeating that reasonableness, at least in the run-of-the-mill case, is defined by true probable cause and a warrant. The special needs cases were, at least on paper, special.

By 2006, however, it had become clear that the Court's lip service to the traditional reading of the Fourth Amendment was little more than that. In *Samson v. California*,<sup>74</sup> the Supreme Court began its analysis of the constitutionality of a suspicionless search of a parolee thusly:

[U]nder our general Fourth Amendment approach we “examin[e] the totality of the circumstances” to determine whether a search is reasonable within the meaning of the Fourth Amendment. Whether a search is reasonable “is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”<sup>75</sup>

The *Samson* Court does not even cabin its decision in the language of special needs; it does not view suspicionless searches as unusual, let alone presumptively unconstitutional. By contrast, it describes balancing of intrusiveness against government interest as application of “general Fourth Amendment principles.”<sup>76</sup> Such an approach was predicted years

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individualized suspicion in the particular context.”); *Edmond*, 531 U.S. at 54 (Rehnquist, C.J., dissenting) (“The ‘special needs’ doctrine, which has been used to uphold certain suspicionless searches performed for reasons unrelated to law enforcement, is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing.”) (internal citation omitted); *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 624 (1989) (“In *limited circumstances*, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.”) (emphasis added); *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (“When such ‘special needs’—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.”); *O’Connor v. Ortega*, 480 U.S. 709, 741 (1987) (“[O]nly when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the court turn to a ‘balancing’ test to formulate a standard of reasonableness for this context.”).

74. 547 U.S. 843 (2006).

75. *Id.* at 848 (quoting *United States v. Knights*, 534 U.S. 112, 118–19 (2001)). Earlier cases have cleared the way for this understanding of the special needs cases. *See, e.g., T.L.O.*, 469 U.S. at 333 (beginning legal analysis with the following sentence: “In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment’s prohibition on unreasonable searches and seizures applies to searches conducted by public school officials.”).

76. *Samson*, 547 U.S. at 852 n.3 (2006).

earlier by Justice Blackmun, who feared that because the reasonableness clause is not self-defining, the Fourth Amendment would lose concrete meaning if untethered from the warrant and probable cause requirements.<sup>77</sup> In *New Jersey v. T.L.O.*, for example, Blackmun cautioned that “the Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause,”<sup>78</sup> and expressed concern over the trend by which “the balancing test is the rule rather than the exception.”<sup>79</sup> Picking up Justice Blackmun’s cause, Justice Stevens’ *Samson* dissent calls the Court’s rewriting of the Fourth Amendment here “an unprecedented curtailment of liberty.”<sup>80</sup> But the Court pushed ahead undaunted.<sup>81</sup>

### 3. CONSENT

Consent is the exception to the warrant or probable cause requirements most commonly invoked by law enforcement.<sup>82</sup> A staggering percentage of all warrantless searches are based on consent, and consent has

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77. As the special needs doctrine was metastasizing across the Fourth Amendment, a number of Justices sounded the alarm. For example, in his concurrence in *New Jersey v. T.L.O.*, Justice Blackmun calls the Court to task for omitting a crucial step in its analysis:

I believe the Court omits a crucial step in its analysis of whether a school search must be based upon probable cause. The Court correctly states that we have recognized limited exceptions to the probable cause requirement “[w]here a careful balancing of governmental and private interests suggests that the public interest is best served” by a lesser standard. I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment’s Warrant and Probable-Cause Clause, only when we were confronted with “a special law enforcement need for greater flexibility.”

469 U.S. 325, 351 (1985) (quoting *Florida v. Royer*, 460 U.S. 491, 514 (1983)). Similarly, in his dissent in *Katz v. United States*, Justice Black argues against a fundamental shift away from the text of the Fourth Amendment and toward the vague reasonable expectation of privacy test:

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against *unreasonable* searches and seizures as one to protect an individual’s privacy. By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. . . . Thus, by arbitrarily substituting the Court’s language, designed to protect privacy, for the Constitution’s language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court’s broadest concept of privacy.

389 U.S. 347, 373 (1967).

78. *T.L.O.*, 469 U.S. at 351.

79. *Id.* at 352.

80. *Samson*, 547 U.S. at 857.

81. See *infra* Part II.B.

82. Ric Simmons, *Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding*

emerged as yet another area in which reasonableness defines the content of the Fourth Amendment. Under current Supreme Court doctrine, the validity of consent as an exception to the warrant requirement turns on two basic inquiries: the voluntariness of the consent and the authority of the person who consents over the property searched. Under the Court's current view of the Fourth Amendment, both of these inquiries are fundamentally questions of reasonableness.

Consent is invalid if it is made out of fear, confusion, or is not otherwise voluntary.<sup>83</sup> In *Schneckloth v. Bustamonte*,<sup>84</sup> the Supreme Court refused to require police warnings regarding one's right to refuse consent<sup>85</sup> and instead held that the voluntariness of one's consent is to be determined by a totality of the circumstances balancing.<sup>86</sup> The Court explained, "It would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of [waiver]" provided in other contexts.<sup>87</sup> In short, "[v]oluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."<sup>88</sup> The dissent had difficulty hiding its disgust with this approach.<sup>89</sup>

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*the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.").

83. See, e.g., *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

84. 412 U.S. 218 (1973).

85. *Id.* at 227. The obvious parallel here is to the warnings the Court had mandated several years earlier in *Miranda v. Arizona*. If these warnings were a necessary prophylactic to ensure the full enforcement of the privilege against self-incrimination, then surely similar warnings should be required to facilitate the enforcement of the right to be free from unreasonable searches and seizures.

86. *Id.* at 249. For the dissenters, the majority's approach was hopelessly flawed. The voluntariness inquiry of the self-incrimination cases was simply the wrong tool for the job. ("[T]his case deals not with 'coercion,' but with 'consent,' a subtly different concept to which different standards have been applied in the past. Freedom from coercion is a substantive right, guaranteed by the Fifth and Fourteenth Amendments. Consent, however, is a mechanism by which substantive requirements, otherwise applicable, are avoided. In the context of the Fourth Amendment, the relevant substantive requirements are that searches be conducted only after evidence justifying them has been submitted to an impartial magistrate for a determination of probable cause."). *Id.* at 282.

87. *Id.* at 245.

88. *Id.* at 248–49.

89. *Id.* at 277 (Brennan, J., dissenting) ("The Court holds today that an individual can effectively waive this right even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of his privacy would be constitutionally prohibited. It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence. In my view, the Court's conclusion is supported neither by 'linguistics,' nor by 'epistemology,' nor, indeed, by 'common sense.'"); *Id.* at 277 (Marshall, J., dissenting) ("[T]oday the Court reaches the curious result that

The question of who has the authority to consent is also increasingly determined by a reasonableness inquiry. In *United States v. Matlock*<sup>90</sup> the Supreme Court held:

When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.<sup>91</sup>

In *Matlock*, the Court held that consent obtained from a co-tenant was not unreasonable even though the defendant was himself already handcuffed and in the back of a police car at the time the consent was given by his girlfriend.<sup>92</sup> Although this might have been an efficient choice, Justice Douglas argued in dissent that this is not what is required by the Constitution. Citing three cases from 1948, Justice Douglas indicated his belief that a warrant based upon probable cause, not reasonableness, had historically been required before any search of a private home had been upheld by the Supreme Court.<sup>93</sup> For Douglas, *Matlock* constituted a significant departure from precedent, an untethering of the Fourth Amendment from its text and history.<sup>94</sup>

A similar but distinguishable set of facts forced the Court to return to the issue a few years later. In *Illinois v. Rodriguez*, consent was given by the defendant's ex-girlfriend who had previously—but no longer—shared an apartment with the defendant.<sup>95</sup> The Court emphasized two facts about the case. First, it stressed that as a factual matter, the ex-girlfriend did not have common authority and control over the premises such that she was authorized to consent to their search.<sup>96</sup> Second, it con-

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one can choose to relinquish a constitutional right—the right to be free of unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search.”); *Id.* at 290 (Marshall, J., dissenting) (“It is regrettable that the obsession with validating searches like that conducted in this case, so evident in the Court’s hyperbole, has obscured the Court’s vision of how the Fourth Amendment was designed to govern the relationship between police and citizen in our society.”).

90. 415 U.S. 164 (1974).

91. *Id.* at 171.

92. *Id.* at 166. Interestingly, later cases would make clear that if *Matlock* had been present (as opposed to restrained nearby), his refusal to consent would have trumped his girlfriend’s consent. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (finding that the consent of an occupant of a home was invalid in the face of a present, objecting co-resident). Perhaps it was no accident, then, that the officers did not seek consent until *Matlock* was safely ensconced in the car nearby.

93. *Matlock*, 415 U.S. at 183–87 (Douglas, J., dissenting).

94. Justice Brennan, joined by Justice Marshall, also dissented, on the basis of his dissent in *Schnecko*. In *Schnecko*, Justices Brennan and Marshall would have required the government to demonstrate that the defendant was aware of his right to withhold consent. 412 U.S. at 277.

95. 497 U.S. 177, 179 (1990).

96. *Id.* at 181–82.

cluded that the officers reasonably believed that she was so authorized.<sup>97</sup> The Court held that the Fourth Amendment was not violated on these facts because the officers behaved reasonably in obtaining consent from someone they believed was authorized to give it.<sup>98</sup> While, unlike in *Matlock*, they did not receive consent from someone actually authorized to give it, the officers reasonably believed that they had consent and that reasonable belief was sufficient to satisfy the Fourth Amendment.<sup>99</sup>

The dissent—taken up this time by Justice Marshall—lamented the distance the Court had travelled from its presumption in favor of warrants supported by probable cause: “The baseline for the reasonableness of a search or seizure in the home is the presence of a warrant.”<sup>100</sup> Justice Marshall argued that even if the Court was not willing to reach the conclusion that in the absence of exigency consent searches were inherently unconstitutional, it should at least put upon the government the risk that the consent obtained was imperfect. That is, the government should be able to proceed without a warrant, but at the risk of having evidence excluded if it is later determined that the consent obtained was faulty. But the Court’s majority clearly disagreed. For the majority, the central focus was on the good will of the officers rather than the accuracy of their assessment of the situation. This exclusive focus on the reasonableness of police conduct—in a way unmoored from the specific requirements and text of the Fourth Amendment—would come to typify the Fourth Amendment approach of the last twenty-five years.

#### 4. CONCLUSION

We have discussed three examples of the spread of unbounded reasonableness throughout the Fourth Amendment here, but we could have added many others. In fact, all indications are that the Supreme Court is not just accelerating its use of groundless reasonableness, but that totality of the circumstances balancing has become the new normal in Fourth Amendment adjudication.

As we noted above, in *Samson v. California* the Court began its analysis without reference to warrants, probable cause, or special needs, stating simply that reasonableness is the ultimate test of the validity of a search or seizure.<sup>101</sup> Indeed, the Court did not so much as cite the *Katz* decision in elaborating on the application of the Fourth Amendment.<sup>102</sup> The last seven years have made abundantly clear that *Samson* was not

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97. *Id.* at 182.

98. *Id.* at 183.

99. *Id.*

100. *Id.* at 190 (Marshall, J., dissenting).

101. See *supra* notes 74–81 and accompanying text.

102. *Samson v. California*, 547 U.S. 843, 848 (2006) (“Under our general Fourth Amendment

simply a one-off decision. For example, in 2012, in *Florence v. Board of Chosen Freeholders*, the Court evaluated a jail's policy of strip-searching all those admitted.<sup>103</sup> The Court began its Fourth Amendment analysis with a discussion of the difficulties of running a jail before even turning, in the next section, to what it saw as the ultimate question presented: "[W]hether undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband."<sup>104</sup> The fact that the searches were supported by neither probable cause nor a warrant was not deemed remarkable by the Court.

Similarly, in 2013, in *Maryland v. King*,<sup>105</sup> the Court, in determining the constitutionality of a suspicionless, warrantless buccal swab to obtain DNA evidence from a detainee, addressed the Fourth Amendment question thusly:

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred "some quantum of individualized suspicion . . . [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion."<sup>106</sup>

In short, not only does the Court no longer cite the cases that established the warrant and probable cause requirements—nor the cases that held that exceptions to the warrant and probable cause presumptions were narrow and few—instead it explicitly states that there is "no irreducible requirement" before a search can be conducted. What began as a requirement and then became a presumption, has now been almost fully discarded.

## II. THE EXCLUSIONARY REMEDY: FROM AUTOMATIC TO UNLIKELY

The previous section traced the evolution of the Fourth Amendment from clear, definitive rules to an ungrounded reasonableness balancing

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approach we examin[e] the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment.") (internal citations omitted).

103. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1510 (2012).

104. *Id.* at 1512.

105. 133 S. Ct. 1958 (2013).

106. *Id.* at 1969 (internal citation omitted). Moreover, even where the Court rules against the government, its most prominent recent decisions look for ways to put distance between *Katz* and the modern Fourth Amendment. In both *U.S. v. Jones* and *Florida v. Jardines*, the Court held that a search had occurred; however, it did not rely on the *Katz* framework, and it did not even decide whether a warrant or probable cause were required to conduct such searches. See *United States v. Jones*, 132 S. Ct. 945 (2012); *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

test. This section demonstrates that the Fourth Amendment's exclusionary rule has followed a remarkably similar path from certainty to obscurity. After tracing this history, we discuss the pernicious effect this double transformation has wrought on both individual liberties and the stability and predictability of Fourth Amendment doctrine.

#### A. *A Blanket Rule*

The exclusionary rule entered the Supreme Court's arsenal in 1914 in *Weeks v. United States*.<sup>107</sup> In that case, the Court held for the first time that evidence seized in violation of the Fourth Amendment must be excluded at trial.<sup>108</sup> The Court's language invoking this remedy for a violation of the Fourth Amendment was categorical:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.<sup>109</sup>

When the exclusionary rule was made mandatory in state court prosecutions in *Mapp v. Ohio* in 1961, the Court made clear that exclusion applied with exactly the same force against the states that it did against the federal government, that is, categorically:

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving . . . .<sup>110</sup>

Thus, just twelve years after the Fourth Amendment was first applied to the states,<sup>111</sup> the Court applied the exclusionary rule to the states and applied it with the same categorical power that it had in the Federal Courts.<sup>112</sup>

Indeed, for many years, the Court treated the exclusionary rule as a necessary adjunct of the Fourth Amendment. This is evident from many of the Court's seminal mid-century criminal procedure decisions. For

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107. 232 U.S. 383 (1914). Technically, there appear to be prior cases suggesting that exclusion was appropriate, but there was no analysis or discussion of the exclusionary rule in these earlier cases. *See, e.g.*, *Boyd v. United States*, 116 U.S. 616 (1886) (concluding that the illegally seized materials could not be used at the defendant's trial).

108. *Weeks*, 232 U.S. at 398.

109. *Id.* at 393.

110. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

111. *Wolf v. Colorado*, 338 U.S. 25 (1949).

112. *Mapp*, 367 U.S. at 655.



example in *Whiteley v. Warden*, the entirety of the Court's exclusionary rule analysis was the following: "[P]etitioner's arrest violated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from his trial, *Mapp v. Ohio*, 367 U. S. 643 (1961)."<sup>113</sup> Similarly in *Katz v. United States*, the Court took as orthodoxy that all evidence illegally seized could not be used by the government in its case in chief: "The government agents here ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment' . . . . Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed."<sup>114</sup> The possibility that a conviction could stand that was based in part on illegally seized evidence seems not even to have occurred to the Court.<sup>115</sup>

### B. *A Familiar Tale: From Rule to Presumption to Balancing*

Over time, however, the Court would begin to carve exceptions into the edifice of the exclusionary rule. In direct parallel to the changes taking place in substantive Fourth Amendment doctrine during this time, the Court continued to recognize exclusion as a rule but now saw it as a rule that came with a number of exceptions. For example, the Court concluded that the exclusionary rule could only be invoked by those who could demonstrate a violation of their own rights as opposed to another's rights. In *Rakas v. Illinois*<sup>116</sup> the Court refused to consider the substance of Rakas' challenge to the search of a car in which he was a passenger. Because Rakas had neither a possessory nor a property interest in the car searched, the Court reasoned, he was not entitled to challenge its search.<sup>117</sup> Although *Rakas* has been critiqued as needlessly re-importing property law notions into the Fourth Amendment calculus,<sup>118</sup>

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113. *Whiteley v. Warden*, 401 U.S. 560, 568 (1971).

114. *Katz v. United States*, 389 U.S. 347, 359 (1967) (internal citations omitted).

115. *Id.* This quotation also proves too much. The Court did not say, though it might have, that the conviction below would be permitted to stand if it was shown that the admission of the tainted evidence was harmless error.

116. 439 U.S. 128 (1978).

117. *Id.* at 148.

118. *See, e.g., id.* at 156 (White, J., dissenting) ("The Court today holds that the Fourth Amendment protects property, not people . . . ."); Note, *Supreme Court, 1978 Term: 1. Legitimate Expectation of Privacy against Unreasonable Searches*, 93 HARV. L. REV. 171, 178 (1979) ("In the name of developing the *Katz* 'privacy' test, the *Rakas* Court has instead revived the centrality of property and possession by explicitly investing only the owner/possessor with a clear 'legitimate expectation.'"); Courtney E. Walsh, *Surveillance Technology and the Loss of Something a Lot Like Privacy: An Examination of the "Mosaic Theory" and the Limits of the Fourth Amendment*, 24 ST. THOMAS L. REV. 169, 190 (2012) ("[I]n *Rakas v. Illinois*, the Court explicitly reintroduced notions of property law into the Fourth Amendment in order to determine the presence of an objective expectation of privacy. Meaning that, despite being couched in the

the general principle—that exclusion is only available to one whose own rights have been violated—is relatively unremarkable. It weakens the exclusionary rule, but it does little to take away from its status as a rule; exclusion is still required whenever a criminal defendant can demonstrate that her own constitutional rights were violated.<sup>119</sup>

Until recently, however, the biggest hole the Supreme Court has carved out of the exclusionary rule—one that threatens to swallow all of the others—is good faith reliance. It began in *United States v. Leon*<sup>120</sup> with good faith reliance on a facially valid warrant. There, the Court held that the warrant issued by the magistrate after an exhaustive investigation was invalid because it was not supported by probable cause.<sup>121</sup> However, the Court went on to hold that exclusion was unwarranted because it would not serve any deterrent purpose.<sup>122</sup> Because the exclusionary rule exists primarily to deter police misconduct, the Court reasoned, and because the only misconduct was the issuance of a warrant without probable cause by a neutral magistrate, exclusion would not have a deterrent effect.<sup>123</sup> One might quarrel with the *Leon* rule, but at the very least, it must be recognized as a rule that entrenched the Fourth Amendment preference for warrants. If officers obtained a facially valid warrant from a neutral magistrate, then they had done all the Fourth Amendment could ask of them. Later cases extended good faith reliance to include reliance on a statute later held to be unconstitutional<sup>124</sup> and to reliance on a judicial clerk's error.<sup>125</sup> Again, the Court focused on the fact that the officers had attempted to comply with the dictates of the Constitution.

For all of the exceptions and limitations that the Supreme Court placed on the exclusionary rule in the fifty years after *Mapp*, until recently it generally treated exclusion as at least a default rule and as

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normative language of privacy from *Katz*, the debate has since more closely resembled the one from the *Olmstead* era—an assessment of the ability to control and exclude observation premised upon established notions of property law.”).

119. “Standing” is not the only judicially created loophole to the exclusionary rule, of course. Another major weakening of the exclusionary rule is the admission of illegally seized evidence for impeachment. The reason for this exception is that the deterrent rationale that justifies exclusion is weakened by the extra layer of uncertainty; the Court thought it unlikely that an officer would illegally seize evidence, knowing it could not be used in the government's case-in-chief in the hopes that it will keep a defendant from perjuring himself on the stand. Similarly, the Supreme Court held that illegally seized evidence was admissible in non-criminal proceedings. *See, e.g.*, *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation hearings); *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury proceedings).

120. *United States v. Leon*, 468 U.S. 897 (1984).

121. *Id.* at 898.

122. *Id.* at 916–17.

123. *Id.* at 916.

124. *Illinois v. Krull*, 480 U.S. 340 (1987).

125. *Arizona v. Evans*, 514 U.S. 1 (1995).

something akin to a barely rebuttable presumption. In 2006, however, the same year that *Samson v. California* was decided, the Supreme Court decided *Hudson v. Michigan*, which was in many ways the most important criminal procedure decision of the last twenty-five years.<sup>126</sup> In *Hudson*, the Court fundamentally changed the relationship between the Fourth Amendment and the exclusionary rule, albeit in dicta. No longer was exclusion the rule, subject to a few, narrowly circumscribed exceptions. Rather, exclusion was now, in the Court's words, the remedy of last resort.<sup>127</sup>

The *Hudson* Court's assault on the exclusionary rule was multifaceted. The first part of the Court's opinion held that the evidence obtained in the case did not derive from a Fourth Amendment violation and therefore need not be excluded.<sup>128</sup> Although the Court had long recognized that the Fourth Amendment generally requires officers to knock and announce before executing a search warrant at a home,<sup>129</sup> and although the officers had failed to do so in this case, the Court reasoned that exclusion was not necessary because the failure to knock and announce had not led to the discovery of the contested evidence:

In this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house.<sup>130</sup>

More broadly, the Court stressed that exclusion is not an available remedy where the evidence obtained is unrelated to the particular Fourth Amendment protection in question. As the Court explained: "Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable."<sup>131</sup> The

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126. See, e.g., Henry F. Fradella & Alice H. Choi, *Evaluating Hudson v. Michigan and Its Impact on the Fourth Amendment and the Exclusionary Rule*, 44 No. 5 CRIM. L. BULL. 10 (2008) ("The U.S. Supreme Court case *Hudson v. Michigan*, decided in 2006, has had a huge impact on Fourth Amendment jurisprudence. *Hudson* has practically eviscerated the knock-and-announce rule. More significantly, by reframing the causation and the cost/benefit balancing tests of the exclusionary rule, *Hudson* has emasculated the exclusionary rule."); Arnold H. Loewy, *The Fourth Amendment: History, Purpose, and Remedies*, 43 TEX. TECH L. REV. 1, 9 (2010) ("*Hudson v. Michigan* is a case we should view with alarm. . . . [T]he problem in *Hudson* was not upholding *Hudson*'s conviction, but rather how the Court upheld it (by modifying the exclusionary rule) and, even more importantly, why the Court chose to modify the rule."); see also Christopher D. Totten, *The Exclusionary Rule After Hudson v. Michigan: Mourning the Death of the Knock and Announce Rule*, 46 No. 5 CRIM. L. BULL. 843, 897 (2010).

127. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) ("Suppression of evidence . . . has always been our last resort, not our first impulse.")

128. *Id.* at 594.

129. *Wilson v. Arkansas*, 514 U.S. 927 (1995).

130. *Hudson*, 547 U.S. at 592.

131. *Id.* at 594.

knock and announce requirement, as the Court rightly noted, protects dignitary harms, not evidentiary ones.<sup>132</sup> Because the rule is designed primarily to allow the target of the search the opportunity to get out of bed or put on clothing before encountering the officers,<sup>133</sup> the Court reasoned, the illegal discovery of evidence when there is a failure to knock and announce is attenuated from or unrelated to the Fourth Amendment protection at issue.<sup>134</sup>

Having provided a compelling and sufficient reason not to exclude evidence from the case, the Court could obviously have stopped.<sup>135</sup> It did not do so, however. The next section of the Court's opinion stated that the exclusionary rule was and always had been a remedy of last resort rather than a first impulse.<sup>136</sup> Although this statement of the law benefits from a colorful turn of phrase, it is, as we have already seen, demonstrably wrong. Others have documented the Orwellian revisionist history of this aspect of *Hudson*—Oceania has always been at war with Eurasia.<sup>137</sup> Rather than being a last resort, for nearly all of its life, the exclusionary rule has been seen as the logical consequence of a Fourth Amendment violation.

Much as *Samson* marked a new normal for substantive Fourth Amendment analysis, it immediately became clear *Hudson* was the Court's new model for exclusionary rule analysis. Indeed, *Hudson* marks the beginning of the end of exclusionary rule absolutism. Three years later, in *Herring v. United States*,<sup>138</sup> the Court reiterated the assertion that exclusion was a remedy of last resort and, for the first time,

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132. *Id.*

133. A more interesting question is presented when the officers are armed with an arrest warrant but not a search warrant. The officers are entitled to arrest an individual at her own home with just an arrest warrant—by contrast they must also have a search warrant if they wish to arrest a defendant at a third party's home. But, if an individual chooses to leave the home and surrender to the police, the officers are entitled neither to enter the home nor to search it incident to arrest.

134. *Id.* at 593. Of course, by such logic, one could never suppress evidence obtained during an illegal seizure because the prohibition on unreasonable seizures protects freedom of movement rather than privacy.

135. The irony here is that the Court dismisses the language of *Mapp* stating that evidence seized in violation of the Constitution is inadmissible in the state courts is dicta. The language quoted by the Court, however, is the holding of *Mapp*—that the exclusionary rule applies with equal force in state and federal prosecutions. To call this dicta is to say that everything but the actual holding—that the evidence obtained from *Mapp*'s home should be suppressed is dicta. This is of course nonsense. The very point of announcing rules—a point the Court often trumpets—is to create precedent on which actors can rely. Under the Court's apparent view of precedent and dicta, all rules are dicta because they are unnecessary to the holding (the evidence is inadmissible in *this* case).

136. *Id.* at 591.

137. See GEORGE ORWELL, 1984 34 (Signet Classic 1950) (“Oceania was at war with Eurasia; therefore Oceania had always been at war with Eurasia.”).

138. 555 U.S. 135 (2009).

held that an officer's good faith reliance *on another police official's* mistake would prevent application of the exclusionary rule.<sup>139</sup> In *Herring*, the arresting officer believed that there was a warrant outstanding for the defendant's arrest and checked with clerks both in his county and an adjoining one to determine if that was correct.<sup>140</sup> The neighboring county's clerk affirmed the presence of a warrant, though in reality the warrant had earlier been withdrawn and appears to have been improperly issued in the first place.<sup>141</sup> *Herring* was nonetheless arrested, and methamphetamine and a pistol were found in his truck.<sup>142</sup> Explicitly wedding the appropriateness of exclusion to a balancing test considering the officer's culpability, the Court reasoned that because the case involved only isolated negligence on the part of the officers maintaining the warrants database, deterrence was unlikely to be effective.<sup>143</sup>

It seems almost unfair at this point to critique the logic of *Herring*—that negligent conduct cannot be deterred through sanctions. As the dissent pointed out, our entire tort system is based on the concept that negligent conduct—even blameless conduct—can be discouraged through the prospect of civil liability.<sup>144</sup> Nonetheless, just as the content of the Fourth Amendment right has shifted from rigid rules to an assessment of the reasonableness of the officer's conduct, in *Herring*, exclusion was deemed inappropriate because the officer was acting reasonably. *Herring*, then, represents a monumental shift in the Court's approach to the exclusionary rule. When *Herring* was itself extended two years later by *Davis v. United States*,<sup>145</sup> the Roberts Court's transformation of the exclusionary rule was complete. In *Davis* the Court held that a search that violated *Arizona v. Gant*<sup>146</sup>—a case decided after *Davis* was arrested but before his case was final on appeal—violated the Fourth Amendment but did not warrant exclusion.<sup>147</sup> The Court rea-

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139. *Id.* at 144–46.

140. *Id.* at 137.

141. *Id.*; see Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 466 n.14 (2009) (establishing that the uncontradicted testimony in the record established that the warrant was improperly issued).

142. *Herring*, 555 U.S. at 137–38.

143. *Id.* at 145.

144. *Id.* at 153 (Ginsberg, J., dissenting) (“The exclusionary rule, the Court suggests, is capable of only marginal deterrence when the misconduct at issue is merely careless, not intentional or reckless. The suggestion runs counter to a foundational premise of tort law—that liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care.”).

145. 131 S. Ct. 2419 (2011).

146. 556 U.S. 332 (2009). In *Gant*, the Court limited the search incident to arrest authorized in *New York v. Belton*, 453 U.S. 454 (1981) to those situations in which “the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Gant*, 556 U.S. at 343.

147. *Davis*, 131 S. Ct. at 2431–32.

soned that although there was no question that the officers had violated Davis' Fourth Amendment rights, they were not acting unreasonably—they were following the law as it was then understood—and thus, exclusion was not warranted.<sup>148</sup>

Taken together, *Hudson*, *Herring*, and *Davis* represent a fundamental reworking of the exclusionary rule. This doctrinal shift is the Roberts Court's most lasting contribution to the field of criminal procedure. Whereas the exclusionary remedy was treated as obvious and automatic in *Katz*, it is treated today as an extraordinary remedy to be reserved for cases of extreme officer culpability. The officers in *Katz*, no less than the officers in *Davis*, were celebrated by the Court for having acted reasonably under existing law,<sup>149</sup> yet exclusion was deemed necessary in *Katz* and dismissively rejected in *Davis*. Far from a hard and fast rule, or even a presumption subject to certain, limited exceptions, the exclusionary rule now requires a fact-specific inquiry into the culpability of the officer, and where an officer was acting reasonably, even when the Fourth Amendment was violated, exclusion is not permitted.<sup>150</sup>

### III. UNDERSTANDING THE PROBLEM WITH DOUBLE REASONABLENESS

There are at least three problems with the overlapping reasonableness tests that currently dominate Fourth Amendment adjudication. First, the system breeds confusion and a conflation between rights and remedies—the two are inextricably linked, and clarity and precision regarding the limits of each are necessarily lost as a result. Second, the current application of the reasonableness doctrine is selective and tends to skew in favor of government conduct at the expense of individual liberty. And third, the double reasonableness analysis reflects a view of substantive Fourth Amendment rights that is unnecessarily constrained—in many cases the right was cabined to avoid a disruptive remedy at a time when exclusion was a virtual certainty. In short, current doctrine is both unclear and skewed by the dissolution and convergence of both substantive and remedial Fourth Amendment law.

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148. *Id.* at 2428–29. See Cathy Herasimchuk, *Fifth Circuit Survey: June 1994–May 1995 Criminal Procedure*, 27 TEX. TECH L. REV. 685, 694 (1996) (“The general legal principle, however, is that ‘new’ legal rules apply retroactively to all cases pending on direct appeal at the time the new rule is announced unless the new rule’s retroactive application has already been specifically settled by other precedent.”).

149. See *Katz*, 389 U.S. at 352–53 (noting that the officers were not acting in a manner that was inconsistent with prior decisions of the Supreme Court such as *Olmstead*).

150. Andrew G. Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, FLA. L. REV. 36–37 (forthcoming) (observing that the new, culpability-focused exclusionary rule regime will require suppression hearings to be expanded so as to allow for, among other things, defense inquiries into the officer’s level of culpability based on training and experience).

### A. Conflating Rights and Remedies

When a reasonableness test is subjected to a second level of reasonableness review confusion is virtually certain. The Fourth Amendment is no exception. To get a sense of just how ungrounded the Supreme Court's Fourth Amendment jurisprudence is at the moment, it is useful to reflect on how difficult it can be in a given case even to determine whether the Court is considering the merits of a constitutional claim or whether it is deciding the defendant's entitlement to a remedy.

Consider again, the Court's seminal decision in *Herring v. United States*. In *Herring*, the defendant was wrongly arrested when a warrant check by patrol officers erroneously returned an outstanding warrant for the defendant; in fact, the warrant in question had been recalled far earlier and remained on the books through the negligence of a clerk in the police department.<sup>151</sup> The Supreme Court concluded that the exclusionary remedy was not justified because the arresting officer had not acted unreasonably in relying on the assurance that the defendant was subject to arrest.<sup>152</sup> That is to say, because the arresting officer reasonably relied on an administrator's erroneous conclusion that there was an outstanding warrant, the officer lacked any individual culpability and exclusion was not warranted. Furthermore, because the police clerk's mistake was an example of ordinary negligence rather than systemic negligence, the Court found that the costs of exclusion would outweigh any benefit.<sup>153</sup>

But if, as the Court now tells us, "the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" <sup>154</sup> then the Court might just as easily have concluded that there was no constitutional violation in this case at all. To say that the officer acted reasonably in relying on the existence of a warrant is to say *both* that there was no violation and that there was no intentional misconduct to deter through exclusion.<sup>155</sup> Determining why the Supreme Court focused a priori on the remedy rather than the right is impossible; perhaps it was whim or caprice, perhaps the remedial question was more interesting to the Court, or perhaps no one on the Court noticed that the same analysis applied to both questions.<sup>156</sup>

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151. *Herring*, 555 U.S. at 137–38.

152. *Id.* at 137.

153. *Id.* at 141.

154. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

155. See, e.g., Bernadette Turi Romano, *Is the New Standard for the Fourth Amendment Particularity Requirement in Obscenity Cases "I Know it when I Seize it?"*, 39 SYRACUSE L. REV. 1113, 1135 (1988) ("To say that an officer should act 'reasonably' in seizing materials is wholly subjective, and thus, completely undermines the constitutional mandate of particularity."); see also Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security*, 22 HASTINGS CONST. L. Q. 623, 691–92 (1995).

156. Certiorari was granted on the question of whether suppression was required on the facts of

As should be clear by now, we think this conflation is problematic. Perhaps the most obvious problems involve the so-called right-remedy gap in constitutional law<sup>157</sup>—that is, the disconnect between the promise of substantive rights and the limited availability of a remedy for a demonstrated violation of a right.<sup>158</sup> Whether one celebrates or objects to the tension between an idealized vision of the right and its practical application, there is substantial value in being able to distinguish one from the other—the right from the remedy.<sup>159</sup> In a case like *Herring*, for example, we cannot say with confidence, nor does the Court, that there was in fact a violation of the Fourth Amendment. Indeed, those well-versed in the Fourth Amendment might disagree about whether there was a constitutional injury in that case.

Such ambiguity is problematic even for those who recognize a relaxed remedial scheme as a necessary corollary to a robust set of rights. As one commentator has explained:

The absolute language of rights helps protect rights from being obliterated by competing concerns. Rights rhetoric fosters a love of liberty that makes a system of individual rights effective. It promotes the recognition of the corresponding rights of others and of new areas of our common life that ought to be made more free. Above all, it helps to lift our national spirits, pointing out our highest aspirations and supplying the glue that bonds us as a people.<sup>160</sup>

If the right *qua* right is to serve civic purposes even when pragmatically constrained by limited remedies,<sup>161</sup> of course, then at the very least we must know what the contours of that right are. That is to say, even accepting that there must be a gulf between the right as promised and the right in practical application to encourage the Court to say what the law is, the current system of Fourth Amendment adjudication makes it

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the case, 2007 WL 3045540. However, the question of whether the Fourth Amendment was violated is a threshold question in the exclusionary rule analysis, and the government had not conceded a Fourth Amendment violation in this case.

157. See, e.g., John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 *YALE L.J.* 87, 87–88 (1999); Gewirtz, *supra* note 5, at 587.

158. J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 *CALIF. L. REV.* 277, 278 (2010) (“Rights lead dual lives, much like Dr. Jekyll and Mr. Hyde. Perhaps the Jekyll is the right’s luminous place in our rhetoric and the Hyde is the right as it exists on the streets.”).

159. Most of the debate to date has been about how to address the space between rights and remedies. See *id.* at 279 (“Although the two camps differ over whether the solution is to tamp down the rhetoric or ramp up the practice of rights, they agree that rhetoric and practice must be forced into alignment.”). Increasingly, it is important to try and understand how to distinguish the right from the remedy.

160. *Id.*

161. *Id.*



impossible to know what the right entails. The line between right and remedy is blurred to the point of indeterminacy.

Stated differently, the overlapping nature of Fourth Amendment rights and remedies threatens to envelope the area of law in a doctrinal fog. If the right were subject to fixed, rigid rules and the remedy were automatic, courts would be forced to expound with specificity on the content and scope of the right. If the right were rigid and fixed, but the remedy were rare and subject to balancing, then perhaps few defendants will obtain a remedy, but the content of the right would be clear, and later plaintiffs would be more likely to prevail. But where both the remedy and the right are both governed by reasonableness balancing inquiries, there is no substantive clarity and little chance of remedial recovery.

Moreover, in a framework governed by two tiers of reasonableness tests, the law will develop, at best, slowly and haphazardly. If in a given case the challenged official conduct is not squarely prohibited by previous case law, then it is unlikely that the exclusionary rule (or civil relief) would be available.<sup>162</sup> In most such instances the question of the existence of a right is rendered irrelevant by the fact that no remedy will be available in the absence of clearly established law. In short, the culpability assessments that have become commonplace at both the right and the remedy stage preclude clarity.

And while confusion and opacity are bad enough on their own, it should be noted that the burden of this lack of clarity is born entirely by those asserting violations by law enforcement. While officers in the field would no doubt prefer to have clear rules to govern their conduct, they

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162. See, e.g., Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 528 (2007) (“If the Fourth Amendment simply asked whether police behavior were ‘reasonable,’ the police would have little way to know ex ante whether the evidence they collected would end up being suppressed.”); Jeffrey R. Gittins, *Excluding the Exclusionary Rule: Extending the Rationale of Hudson v. Michigan to Evidence Seized During Unauthorized Nighttime Searches*, BYU L. REV. 451, 451 (2007) (“In 1914, the United States Supreme Court first introduced the exclusionary rule. Under this rule, evidence obtained pursuant to an unreasonable search and seizure under Fourth Amendment standards cannot be used in subsequent criminal trials. Since that time, courts struggled to determine when application of the exclusionary rule was the correct remedy for a Fourth Amendment violation. One such struggle concerned the ‘knock-and-announce’ rule, which requires law enforcement officials to announce their identity and purpose before forcibly entering a private residence to execute a warrant. Although the Supreme Court held that a violation of the knock-and-announce rule was a factor in determining the reasonableness of a search, the Court did not clarify whether or not the exclusionary rule should apply to such violations. The result was that some courts suppressed evidence obtained in knock-and-announce violation cases, while other courts did not. Finally, in 2006, the Court clarified the issue in *Hudson v. Michigan*.”); Richard E. Hillary, II, *Arizona v. Evans and the Good Faith Exception to the Exclusionary Rule: The Exception is Swallowing the Rule*, 27 U. TOL. L. REV. 473, 503 (1996) (“*Evans* represents a further deterioration of the Fourth Amendment rights of the American people. The utilization of ever-increasing technological advances in law enforcement should have caused the Court to implement appropriate safeguards in the use of these advances.”).

are in many ways protected by a lack of substantive clarity. So long as the substance of a right is unclear, evidence will not be suppressed; an officer working in the face of a murky rule will inevitably be found to have behaved reasonably. Similarly, under current qualified immunity doctrine, a lack of clarity with regard to the substance of a right protects the officer from civil suits as well.<sup>163</sup>

### B. Reasonable Distortion of Doctrine

The overlapping reasonableness tests described above have distorted the Fourth Amendment in two important ways. First, the Court has engaged in a very selective application of baseline reasonableness that, in many instances, serves as a one-way ratchet that limits, but never expands, Fourth Amendment rights. Second, there is a path-dependency to substantive Fourth Amendment doctrine—many of the Court's rules were created at a time when exclusion was an absolute remedy. The specter of automatic exclusion colored substantive doctrine and has created a set of harsh rules that no longer make sense in light of the fact that exclusion is now, in the Court's words, a last resort rather than a first impulse.

#### 1. REASONABLENESS AS A ONE-WAY RATCHET

For all of the Court's talk of reasonableness and balancing, there are also times when it continues to fall back onto rules and presumptions as a way of limiting individual rights. That is, in cases where a reasonableness rule would actually benefit a criminal defendant, the Court is often reluctant to engage in balancing and has tended to prefer stability and predictability of rigid rules. This seemingly selective application of an untethered reasonableness balancing calls out for doctrinal reform.

Take, for example, the Supreme Court's decision in *Atwater v. City of Lago Vista*.<sup>164</sup> *Atwater* involved a civil action brought by Gail Atwater against Lago Vista, Texas and police officer Bart Turek.<sup>165</sup> Turek had arrested Atwater after he noticed her driving without a

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163. See, e.g., Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 862 n.356 (2004) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) ("When the state of the law is unclear, law enforcement officers are generally protected from civil suits by the doctrine of qualified immunity."); Michael N. Levy, *The Price of Fame: Should Law Enforcement Officers who Permit Camera Crews to Film the Execution of a Warrant in a Private Home be Held Liable for Civil Damages?*, 92 NW. U. L. REV. 1153, 1172 (1998) ("Qualified immunity . . . protects officials if the law was not clearly established or if it was objectively reasonable that the specific official did not know the law in question was clearly established at the time of the incident in question.").

164. 532 U.S. 318 (2001).

165. *Id.* at 323–25.

seatbelt on herself or her two young passengers.<sup>166</sup> Although driving without a seatbelt and failing to belt younger passengers was a misdemeanor punishable only with up to a \$50 fine, Officer Turek arrested Atwater and had her taken to the police station for booking, where she spent about one hour in a jail cell before being taken before a magistrate and released on \$310 bond.<sup>167</sup>

Atwater subsequently sued the officer as well as the city and the chief of police, arguing that it was unreasonable to arrest a citizen for an offense for which she could not be jailed if convicted.<sup>168</sup> After cataloguing hundreds of years of Anglo-American precedent and tradition, the Court concluded that history weighed in favor of permitting full custodial arrest even for non-violent misdemeanors.<sup>169</sup> The Court then turned to Atwater's next argument: "[W]hen historical practice fails to speak conclusively to a Fourth Amendment claim, courts must strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness."<sup>170</sup> The Court agreed that if it were merely engaging in balancing the government interests here against the intrusion on the individual, Atwater would prevail on her claim.<sup>171</sup> However, the Court stated that it has "traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."<sup>172</sup> The Court opted for a simple approach: An arrest is valid if it is made on the basis of probable cause to believe that an infraction had occurred. The Court thus enforced the probable cause standard in a case where it was clear that an analysis of the reasonableness of the official conduct would cut against the government conduct.

The Court would take this argument to its logical, if extreme, conclusion in *Virginia v. Moore*,<sup>173</sup> decided seven years later. In *Moore*, the officer cited the defendant for driving with a suspended license and arrested him.<sup>174</sup> A search incident to that arrest revealed crack cocaine

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166. *Id.* at 323–24.

167. *Id.*

168. *Id.* at 325.

169. *Id.* at 327–40.

170. *Id.* at 321.

171. *Id.* at 346–47 ("In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.").

172. *Id.* at 347.

173. 553 U.S. 164 (2008).

174. *Id.* at 166–67.

and a large amount of cash.<sup>175</sup> It later became clear that under Virginia law, the officer was not entitled to arrest Moore for this offense; the code permitted only the issuance of a citation.<sup>176</sup> While Texas law had been silent on the question of whether Atwater should be cited or arrested, Virginia law was clear: Moore should have been issued a citation and released.<sup>177</sup> Furthermore, under the Court's previous decision in *Knowles v. Iowa*,<sup>178</sup> an officer is not permitted to conduct a search incident to citation.

Justice Scalia, writing for the Court, found that the incriminating evidence obtained from Moore after his arrest was admissible in federal court: "In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable."<sup>179</sup> The Court went on to say that the decision was clearer in this case than it had been in *Atwater*: "Incorporating state-law arrest limitations into the Constitution would produce a constitutional regime no less vague and unpredictable than the one we rejected in *Atwater*. The constitutional standard would be only as easy to apply as the underlying state law, and state law can be complicated indeed."<sup>180</sup> In other words, even when a state has prohibited arrest for a particular infraction, such an arrest is constitutional under federal law so long as it is supported by probable cause.

Perhaps the most important recent example of the Court preferring fixed rules over general reasonableness assessments—such as assessment of whether the officer acted unreasonably under the circumstances—is *Whren v. United States*.<sup>181</sup> In *Whren*, the Court refused to prohibit racial profiling under the Fourth Amendment by rejecting a rule that would have asked "whether a police officer, acting reasonably, would have made the stop for the reason given."<sup>182</sup> In the case, the officer, working drug interdiction in the middle of the night in an unmarked police car, pulled over the defendant for making a right turn without signaling.<sup>183</sup> When the officer approached the car, he observed what he believed to be crack cocaine in the defendant's hands and arrested him.<sup>184</sup> The defendant argued that the traffic stop was pretextual

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175. *Id.* at 167.

176. *Id.*

177. *Id.* at 168.

178. 525 U.S. 113, 118–19 (1998).

179. *Moore*, 553 U.S. at 171.

180. *Id.* at 175.

181. 517 U.S. 806 (1996).

182. *Id.* at 810.

183. *Id.* at 808.

184. *Id.* at 808–09.

and that a reasonable officer would not have stopped him for such a minor traffic infraction.<sup>185</sup> Rejecting the defendant's request for an inquiry into whether a reasonable officer would have made the same traffic stop, the Court wrote that "police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable . . . ."<sup>186</sup> In other words, the general reasonableness of the officer's conduct is not at issue when fixed, predictable rules like probable cause can be readily applied.

A final example will suffice, although others abound. In *Oliver v. United States*,<sup>187</sup> the Court was asked to consider an application of the open fields doctrine. In *Oliver*, drug enforcement officials trespassed on Oliver's property, walking past "No Trespassing" signs and not leaving when asked to do so by the property owner.<sup>188</sup> They eventually found marijuana growing more than a mile from Oliver's house and charged him with manufacturing a controlled substance in violation of federal law.<sup>189</sup> Although the officers were not armed with a warrant—or, presumably, probable cause—the Court upheld the search, holding that real property outside the home and its curtilage is not protected by the Fourth Amendment.<sup>190</sup> Because such property is not used for the intimate activities with which the home is associated, the Court reasoned, it is not entitled to the protections of the home provided by the Amendment.<sup>191</sup> The Court's reasoning was both textual and practical. It cited the text of the Amendment in concluding that open fields are not among the "persons, houses, papers, and effects" explicitly protected by the text of the Fourth Amendment.<sup>192</sup> And it reasoned that, as a practical matter, people simply do not treat their open fields in a manner consistent with a reasonable expectation of privacy.<sup>193</sup>

Oliver countered that while the Court's analysis of how people use their open fields is generally correct, he should be permitted to demonstrate that *he* had a reasonable expectation of privacy in the area

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185. *Id.* at 809.

186. *Id.* at 815.

187. 466 U.S. 170, 173 (1984).

188. *Id.* at 173.

189. *Id.*

190. *Id.* at 176 (quoting *Hester v. United States*, 265 U.S. 57, 59 (1924)) ("[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law.").

191. *Oliver*, 466 U.S. at 180.

192. *Id.* at 176–77.

193. *Id.* at 179.

searched by the trespassing officers.<sup>194</sup> The Court rejected his argument for case-by-case adjudication:

This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances. The ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority; it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced.<sup>195</sup>

Again, the Court prioritized predictability above a balancing, case-by-case approach.

We have no quarrel with the Court's concern in these cases for the predictability that comes from hard and fast rules. There is no question that rules, as opposed to standards, lend predictability to both law enforcement officers and members of the public—that is, in fact, one of the central theses of this Article. By contrast, focusing on reasonableness, subjective good faith, or other individualized and case-specific factors reduces clarity and adds uncertainty. But the Court's approach to the reasonableness standards in the Fourth Amendment context operates as a one-way ratchet. When a criminal defendant seeks a hard and fast rule—a warrant requirement, a requirement that officers obtain consent from a person actually authorized to give it, a requirement that officers inform a suspect of her right to refuse consent, et cetera—the Court repeatedly opts for the flexibility of totality of the circumstances reasonableness tests. When, by contrast, the defendant argues that the particularities of his case should be taken into account, the Court almost inevitably finds comfort in the stability and predictability of hard and fast rules.<sup>196</sup>

As we demonstrate in the next section, the Court's reticence to find in favor of criminal defendants might have been defensible at a time when the exclusionary rule operated as a complete bar to the introduction of illegally seized evidence at a defendant's criminal trial. The cost of finding government conduct to violate the Constitution during this period was extremely high and likely operated as a powerful deterrent to the Court. Today, by contrast, exclusion does not follow logically from

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194. *Id.* at 181.

195. *Id.* at 181–82 (internal citations omitted).

196. A good example of this is the search incident to arrest doctrine. The driving rationale for the doctrine is the risk that a defendant will destroy evidence or access a weapon while he is being arrested. *See Chimel v. California*, 395 U.S. 752, 753 (1969). However, the Court has applied these exigencies in a generalizing way such that the individual characteristics of the defendant—how fast he is, for example—make no difference as to the scope of the permissible search. Moreover, the search incident to arrest is often automatic, or close to it, even if there is no risk of destruction or danger. *See Arizona v. Gant*, 556 U.S. 332, 351 (2009) (recognizing officers' right to search for evidence of the crime of arrest without probable cause).

every finding of a constitutional violation; instead, the Court has emphasized that it is the rare exception rather than the rule.<sup>197</sup>

## 2. PATH DEPENDENCY: A FOURTH AMENDMENT BORN FROM A ROBUST EXCLUSIONARY RULE

The second and perhaps more salient doctrinal distortion relates to the relatively recent diminution of the exclusionary rule. As explained above, much of the Court's Fourth Amendment doctrine was born at a time when the exclusionary remedy was virtually automatic. During this period, Fourth Amendment doctrine was necessarily shaped by the certainty and severity of the exclusionary remedy. In a related context, Anthony Amsterdam has described this effect by noting that when courts regard the remedial medicine as too strong, they tend to prefer the disease.<sup>198</sup> There is good reason to believe that the Supreme Court, in developing the Fourth Amendment as we know it today, felt compelled to dilute its doctrine in order to avoid the strong medicine of exclusion. Moreover, a certain path-dependence characterizes the Court's current Fourth Amendment cases. The Fourth Amendment rules in place today might not be the ones the Court would craft were it writing on a blank slate; current doctrine is in many ways a vestige of a Court concerned about the prospect of automatic exclusion.

Today's Fourth Amendment, then, is the worst of both worlds—the exclusionary remedy has been eviscerated but the right continues to be applied as though a robust remedial framework were in place. We have a substantive doctrine that has developed and continues to develop as though there is an ever-present threat of exclusion and a remedial regime that has evolved such that exclusion is now extremely unlikely. The resulting double-reasonableness produces an unpredictable right and a most unlikely remedy.

## IV. A WAY HOME: RETURNING FOURTH AMENDMENT DOCTRINE TO CLEAR RULES

There is a solution to what we describe as an untenable status quo. The current Fourth Amendment, as almost anyone who gives it a careful read seems to agree, is in a state of embarrassing disarray.<sup>199</sup> It neither

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197. *Herring v. United States*, 555 U.S. 135, 141 (“[T]he benefits of deterrence must outweigh the costs.”).

198. Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 *STAN. L. REV.* 525, 543 (1975) (“[D]ismissal [with prejudice] as a remedy has the sole effect of making judges almost universally prefer the disease.”).

199. *See, e.g.*, Sundby, *supra* note 13, at 383 (quoting *Chapman v. United States*, 365 U.S. 610, 618 (1961)) (Frankfurter, J., concurring) (“In its fourth amendment jurisprudence, the United States Supreme Court has struggled continually, and unsuccessfully, to develop a coherent

protects individuals from intrusions by government actors *nor* gives well-meaning government officials a sense of what conduct is permitted and what conduct is not. In short, the Fourth Amendment, as imagined by the current Supreme Court, is weak, unclear, and ineffective at vindicating rights. The right is opaque and the remedy essentially nonexistent.

But all is not lost. The Court's move in *Hudson v. Michigan* toward an exclusionary rule governed by balancing in every case has the unexpected advantage of lowering the cost of finding a constitutional violation.<sup>200</sup> Exclusion is now only applied when it "pays its own way," and cases like *Herring* have focused the Court's attention in this inquiry on the culpability or malfeasance of the arresting officer. If his conduct is not particularly egregious, then the balancing is unlikely to weigh in favor of suppression.<sup>201</sup> Accordingly, as cases like *Davis* demonstrate, when the Court makes a novel rule of Fourth Amendment law, it will refuse to exclude evidence both in the case creating the rule and in any other case already under way. While this development has largely been seen as a denial of the exclusionary rule's promise, we see this new remedial framework as providing the Court with an opportunity to go back and revisit some of its most problematic substantive Fourth Amendment decisions at a very low cost. The twin goals of clarity and predictability are sufficiently important in the context of police searches and seizures that the Court should take advantage of this opportunity.

Doing so involves two steps. First, it is essential that the Court firmly embrace a merits-first order-of-decision-making in the exclusionary rule context. That is, in these cases the Supreme Court should address the merits of a Fourth Amendment claim before turning to the question of whether the evidence obtained may be used in the Government's case in chief. In its exclusionary rule cases, the Court has expressed agnosticism regarding whether the merits of a constitutional question should be reached even when the Court ultimately concludes that the exclusionary remedy is unavailable.<sup>202</sup> In our view, consistent doctrinal development requires a merits-first approach in most, if not all,

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analytical framework. Indeed, the Court has admitted its fourth amendment shortcomings, confessing that "[t]he course of true law pertaining to searches and seizures . . . has not—to put it mildly—run smooth[ly]."; Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 134 (1992) ("[T]he Supreme Court, in its zeal to ensure efficient and effective government service delivery, has taken the Fourth Amendment perilously close to incomprehensible disarray.").

200. See Jeffries, *supra* note 157, at 106.

201. *Herring*, 555 U.S. at 147–48.

202. *Illinois v. Krull*, 480 U.S. 340, 353–54 (1987) (denying relief under the good faith exception does not "preclude review of the constitutionality of the search or seizure"); see also *United States v. Leon*, 468 U.S. 897, 924 (1984); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 849 (2005).



criminal cases<sup>203</sup> regardless of whether the suppression remedy is ultimately deemed inapplicable. That is to say, the doctrinal fog cannot be lifted if the Court resolves the exclusionary question before the merits question. Because exclusion is now a last resort, analyzing the remedial entitlement first will end the Court's inquiry in the vast majority of cases.<sup>204</sup> If the remedy is evaluated first, the Court will only very rarely create any substantive law at all.

The need for merits-first adjudication has been urged in previous scholarship, particularly in the context of constitutional tort litigation.<sup>205</sup> The importance of avoiding constitutional stagnation by spurring constitutional merits decisions was explained by the Supreme Court in *Saucier v. Katz*:

In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether [the remedy was unavailable].<sup>206</sup>

In 2009 the Court moved away from mandating merits-first adjudication in civil rights litigation. It overruled *Saucier* in *Pearson v. Callahan* and returned the ordinal question to the lower courts.<sup>207</sup> In doing so, however, the Court actually made the case for imposing a merits-first rule in criminal cases. It rationalized its reversal of *Saucier* in part by noting that "constitutional issues" would not become frozen in time because many of the same issues also arise in, among other contexts, "criminal cases."<sup>208</sup> If this promise of alternate tracks for adjudicating

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203. In cases where the constitutional claim is clearly frivolous or cannot be supported by the facts in the record, a merits-first adjudication is unnecessary. See Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, 16 GEO. MASON L. REV. 53 (2008).

204. A rigid requirement of merits-first adjudication was rejected in the context of constitutional tort litigation. See *Pearson v. Callahan*, 555 U.S. 223 (2009). But *Pearson* itself references criminal cases as a viable, alternative forum for developing Fourth Amendment law. *Id.* at 233. See also, e.g., Kamin, *supra* note 203, at 95; Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687 (2011).

205. We acknowledge that previous scholarship has found that merits-first adjudications do not necessarily result in the creation of more, or more robust, rights. Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 671, 702–07 (2009). However, we think the need for clarity as to the right is of sufficient importance as to justify such an approach in the realm of criminal cases.

206. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

207. 555 U.S. 223, 235.

208. *Id.* at 242.

Fourth Amendment rights is to be real rather than hollow, federal courts must adopt a merits-first order-of-decision-making in criminal cases.

In addition to adjudicating the merits even when a remedy may not ultimately be available, the Court should take the relatively costless opportunity to revisit existing doctrine. Presently, there are strands of Fourth Amendment law that insist that the warrant and probable cause presumptions continue to govern, others that treat reasonableness as the paramount question, and still others that emphasize trespass as the quintessential Fourth Amendment question. Through a merits-first order-of-decision-making combined with a relatively muted exclusionary rule, the Court could effectively re-invent Fourth Amendment doctrine without requiring any current or previous convictions to be placed into jeopardy.

One approach—the one we have hinted at throughout this Article—would be for the Court to return to a reading of the Fourth Amendment that resembles the one it used *Katz v. United States* and its immediate progeny. In particular, the relaxing of the exclusionary rule is an opportunity for the Court to return to the clarity and simplicity of the warrant and probable cause presumptions that governed Fourth Amendment adjudication for much of the second half of the twentieth century. By returning to these presumptions—by reinvigorating and clarifying the substance of the Fourth Amendment—the Court would have a relatively costless opportunity to return the Fourth Amendment to predictable, easily-applied rules, which would provide guidance to both law enforcement and citizens.

In this way the dizzying pattern of overlapping reasonableness inquiries could be avoided. Reasonableness in the form of balancing focused on the culpability of the officer will continue to govern the question of remedy, but predictable rules predicated on the warrant and probable cause presumptions would play a more central role in defining the substance of the right. In a world of strong constitutional presumptions and an exclusionary rule focused on officer culpability, substantive rules would develop and evolve while the short-term, immediate impact on the criminal justice system would be minimal. Specifically, as the Court reworks the Fourth Amendment, it will find new violations of the Fourth Amendment; official conduct that was previously permitted will now be prohibited. But in these cases, the evidence obtained would likely not be excluded because the officers were not on notice that their conduct violated the Constitution. Only later, once the fog had lifted and the contours of the Fourth Amendment have become clear, would evidence be excluded. When the law is clear and officers violate it nonethe-

less, they will trigger exclusion even under the Court's current, cramped interpretation of the exclusionary rule.

#### CONCLUSION

In *United States v. Leon*, the first chink in the exclusionary rule's once-impenetrable armor, Justice Brennan's dissent contained a powerful warning to his brethren: "[T]he language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect. It creates an illusion of technical precision and ineluctability."<sup>209</sup> If reasonableness and cost/benefit balancing has had a narcotic effect on the Court, then this Article serves as the Court's intervention. The narcotic effect of reasonableness balancing has caused the Court to turn its back on many of its core Fourth Amendment principles. We encourage the Court to take the opportunity presented by its current remedial framework to return to a more grounded, predictable, and rule-based conception of the substance of Fourth Amendment rights.

The Court has previously articulated predictability and clarity as important principles in the search and seizure context. The limited scope of the exclusionary rule now provides the Court with an opportunity and an incentive to reintegrate these concepts into substantive Fourth Amendment doctrine at zero cost to current and pending convictions. Doctrinal stagnation is avoided but convictions are not jeopardized. Our approach makes a virtue of a vice: It takes the potentially devastating diminution in the power of the exclusionary rule and turns it into an opportunity for the Supreme Court to fix what nearly everyone agrees is broken.

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209. *United States v. Leon*, 468 U.S. 897, 929 (1984) (Brennan, J., dissenting).

