

# Michigan Law Review

---

Volume 116 | Issue 8

---

2018

## Fourth Amendment Fairness

Richard M. Re  
*UCLA School of Law*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Fourth Amendment Commons](#), and the [Public Law and Legal Theory Commons](#)

---

### Recommended Citation

Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409 (2018).  
Available at: <https://repository.law.umich.edu/mlr/vol116/iss8/4>

<https://doi.org/10.36644/mlr.116.8.fourth>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## FOURTH AMENDMENT FAIRNESS

Richard M. Re\*

*Fourth Amendment doctrine is attentive to a wide range of interests, including security, informational privacy, and dignity. How should courts reconcile these competing concerns when deciding which searches and seizures are “unreasonable”? Current doctrine typically answers this question by pointing to interest aggregation: the various interests at stake are added up, placed on figurative scales, and compared, with the goal of promoting overall social welfare. But interest aggregation is disconnected from many settled doctrinal rules and leads to results that are unfair for individuals. The main alternative is originalism; but historical sources themselves suggest that the Fourth Amendment calls for new moral reasoning.*

*This Article argues that the Fourth Amendment’s prohibition on “unreasonable searches and seizures” is best understood, at least in large part, as a requirement that police investigation be fair in the sense of being authorized by principles that no rights holder could reasonably reject. This approach is inspired by “contractualist” moral philosophy and has several advantages. It tracks widely held moral intuitions, comports with the Fourth Amendment’s historical meaning, and resonates with underappreciated currents in extant case law. In attending to the perspectives of individuals, contractualism generates rights that are not subject to interest aggregation. At the same time, contractualism suggests a principled way to address new Fourth Amendment questions, consistent with courts’ institutional role.*

*A contractualist approach to Fourth Amendment fairness suggests many ways to refine or reform current doctrine. In terms of refinements, the contractualist approach gives moral content to the notion of “individualized suspicion” by showing when searches and seizures can be justified by a principle of individual responsibility. Contractualism also draws attention to other justifying principles, such as a protection principle, and so explains how and when suspicionless searches and seizures are reasonable. Finally, the contractualist approach identifies areas where current Fourth Amendment doctrine is decidedly unfair and ripe for reform, such as when courts limit rights to avoid diffuse litigation costs, overemphasize “reasonable expectations of privacy,” and ignore the unreasonableness of racial discrimination.*

---

\* Assistant Professor of Law, UCLA School of Law. I am grateful to Will Baude, Jane Bambauer, Kiel Brennan-Marquez, Devon Carbado, Beth Colgan, Ryan Doerfler, Sharon Dolovich, Antony Duff, Kristen Eichensehr, David Enoch, Dan Epps, Dov Fox, Philip Hammersley, Barbara Herman, Marty Lederman, Wayne Logan, Tracey Meares, Steve Munzer, Alice Ristroph, Joanna Schwartz, Seana Shiffrin, Mila Sohoni, Chris Slobogin, Becca Stone, Lior Strahilevitz, Larry Solum, the editors of the *Michigan Law Review*, and participants in the UCLA Criminal Justice Faculty Workshop, the Georgetown Constitutional Law Colloquium, the William and Mary School of Law faculty workshop, and the San Diego School of Law faculty workshop. Errors are fairly attributed to the author alone.

## TABLE OF CONTENTS

INTRODUCTION . . . . .	1410
I. FORMS OF FAIRNESS . . . . .	1415
A. <i>History</i> . . . . .	1415
B. <i>Interest Aggregation</i> . . . . .	1417
C. <i>Contractualism</i> . . . . .	1419
II. SOURCES OF FAIRNESS . . . . .	1425
A. <i>Responsibility</i> . . . . .	1425
B. <i>Protection</i> . . . . .	1436
C. <i>Consent</i> . . . . .	1445
D. <i>Curiosity</i> . . . . .	1447
E. <i>Helpfulness</i> . . . . .	1451
III. SOURCES OF UNFAIRNESS . . . . .	1454
A. <i>Excessive Burdens</i> . . . . .	1454
B. <i>Collateral Burdens</i> . . . . .	1457
C. <i>Invidious Criteria</i> . . . . .	1460
CONCLUSION . . . . .	1463

## INTRODUCTION

Does the Fourth Amendment have a first principle?<sup>1</sup> Consider the following scenario, which is inspired by real events:

To detect, deter, and prosecute terrorists, the federal government develops a surveillance program that uses cell-site location records to monitor the public movements of almost everyone in major cities.<sup>2</sup> A computer program then mines the resulting population data to identify suspects for additional police investigation.<sup>3</sup> The program considers whether people are of Arab descent, treating that factor as a reason for carrying out extra investigation.<sup>4</sup>

This scenario raises many interconnected Fourth Amendment issues. The government is pursuing an important antiterrorism interest. It is using an algorithm to draw inferences from a large amount of arguably nonprivate

1. I focus here on the Reasonableness Clause. 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 . . .”). On the Warrant Clause, see *infra* note 112 and accompanying text.

2. See *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (2017); Monte Reel, *Secret Cameras Record Baltimore’s Every Move from Above*, BLOOMBERG BUSINESSWEEK (Aug. 23, 2016), <https://www.bloomberg.com/features/2016-baltimore-secret-surveillance/> [<https://perma.cc/7MHY-9RLA>].

3. See Brian Kelly, *St. Louis County Crime Prediction Program Marks One Year*, CBS ST. LOUIS (Dec. 21, 2016, 5:00 AM), <http://stlouis.cbslocal.com/2016/12/21/st-louis-county-crime-prediction-program-marks-one-year/> [<https://perma.cc/53SG-ZX2N>].

4. See Anshel Pfeffer, *In Israel, Racial Profiling Doesn’t Warrant Debate or Apologies*, HAARETZ (Sept. 20, 2016, 7:20 PM), <https://www.haaretz.com/israel-news/1.743291> [<https://perma.cc/7KLY-Y9M8>].

information. And it is drawing racial categorizations. Competing concerns include security, privacy, and equality. What principle can fairly balance these interests and thereby disclose whether the scenario involves “unreasonable searches and seizures”?<sup>5</sup> What does it mean to say that something is constitutionally “unreasonable,” anyway?<sup>6</sup> Scholarship and case law suggest three types of answer.

The first way to give meaning to “unreasonable searches and seizures” involves recourse to history. The Supreme Court has said that the Fourth Amendment secures, “at a minimum,” those rights protected by law at the founding.<sup>7</sup> The meaning of “unreasonable searches and seizures” is thus partly frozen in time. But that ostensibly historical approach is itself historically dubious. In using open-ended language and referring to the ever-evolving common law notion of reasonableness, the Fourth Amendment established a broad principle, rather than codifying any fixed set or version of eighteenth-century doctrines.<sup>8</sup> Moreover, it is hard to credit the idea that founding-era law alone could answer the challenges posed by new social and technological circumstances. In the face of new challenges, the only feasible approach is to extract a principle from the Fourth Amendment and reason based on it. The Court itself has recognized as much in framing history as establishing only a “minimum” level of protection—not a maximum.<sup>9</sup> And in several cases involving new technologies, even the Court’s originalist jurists have joined opinions that endeavored to reason about reasonableness.<sup>10</sup> In short, recourse to history only defers the hard, unavoidable question of just what makes a search or seizure “unreasonable.”

The second way to identify unreasonable searches and seizures is to engage in some form of interest aggregation. Alas, the Court is not rigorous or consistent in its use of interest aggregation. For instance, the Court is unclear what interests count or how they are to be compared. As a result, commentators have variously glossed this aspect of the Court’s methodology as a crude form of utilitarianism or cost–benefit analysis.<sup>11</sup> For present purposes,

---

5. See U.S. CONST. amend. IV. Additional rights may flow from the Reasonableness Clause’s apparently prophylactic use of “secure.”

6. See generally Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61 (2017) (noting different conceptions).

7. *United States v. Jones*, 565 U.S. 400, 411 (2012) (emphasis omitted).

8. See *infra* Section I.A.

9. See *Jones*, 565 U.S. at 411.

10. See, e.g., *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (engaging in interest aggregation due to a lack of “more precise guidance from the founding era”).

11. E.g., Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 219 (“The Supreme Court’s Fourth Amendment jurisprudence, which balances interests by fits and starts, could be described as ‘clunky utilitarianism.’”); Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 U. PA. L. REV. 591, 623 (2016) (“The general reasonableness standard . . . is a thinly disguised cost–benefit analysis.”); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1180–81 (1988) (“[T]he Court has evaluated an increasing range of search and seizure issues on this ad hoc basis, according to a utilitarian cost-benefit balancing calculus.”); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth*

however, the key is that the Court is often prepared to ascertain unreasonableness by adding up benefits and costs and choosing the legal option that is most likely to maximize overall welfare. For example, the Court routinely rejects proposed Fourth Amendment rules because they would generate costly litigation.<sup>12</sup> These decisions assume that the propriety of searches and seizures can be assessed based on the aggregate costs and benefits to society at large.

Interest aggregation is problematic for several reasons. First, it conflicts with widely held intuitions about the nature of Fourth Amendment rights. For an interest aggregator, individual rights must sometimes be set aside for the sake of social welfare. But the Fourth Amendment is often thought to protect individuals from unfair burdens, even when those burdens are net beneficial to society at large. Second, Fourth Amendment doctrine is characterized by principles, like the individualized suspicion requirement, that are in tension with interest aggregation and seem instead to have a deontological foundation. Finally, interest aggregation puts the judiciary in a weak institutional posture and so tilts the scales of justice toward the government.<sup>13</sup> To find Fourth Amendment violations, judges engaged in interest aggregation must either question the government's relatively expert view on issues of social policy, or else conjure fears of governmental overreach. Either approach places the courts in the uncomfortable position of assuming the worst about the elected branches.<sup>14</sup>

---

*Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 62 (1988) (“The reasonableness requirement suggests that individual searches be evaluated according to the standards imposed by act utilitarianism.”); Ronald F. Wright, Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1141, 1141 n.73 (1984) (discussing act and rule utilitarianism in the Fourth Amendment context).

12. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 305–06 (1999) (delineating the Fourth Amendment search authority based in part on a feared “bog of litigation,” noting that “[w]hen balancing the competing interests, our determinations of ‘reasonableness’ under the Fourth Amendment must take account of these practical realities”); *United States v. Watson*, 423 U.S. 411, 423 (1976) (fashioning a warrant exception and worrying of “endless litigation”).

13. Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 1 (2013) (“[W]hen a court considers a balance of privacy interests against a government’s interest in effective law enforcement, the government wins almost every time.”); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 296–97 (2011) (balancing “systematically favors the government”); see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 965 (1987) (“Balancing has been a vehicle primarily for weakening earlier categorical doctrines restricting governmental power to search and seize.”); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855 (1994) (“[J]udgments couched in terms of ‘reasonableness’ slide very easily into the familiar constitutional rubric of ‘rational basis’ review . . . .”); Wasserstrom & Seidman, *supra* note 11, at 63 (“[O]nce the [Fourth] [A]mendment is reduced to a requirement that utilities be aggregated, it loses much of its force as a technique for standing outside of normal politics.”); Wright, *supra* note 11, at 1140 (“[A] Fourth Amendment jurisprudence that provides for minimum protections cannot ground itself in act utilitarianism or balancing.”).

14. Cf. *United States v. Kincade*, 379 F.3d 813, 835 (9th Cir. 2004) (en banc) (plurality opinion) (criticizing a dissenting opinion for “its alarmist tone and obligatory reference to George Orwell’s 1984”).

That leaves the third way of identifying “unreasonable searches and seizures”—namely, to argue from deontological moral principles.<sup>15</sup> This Article advances a version of that third approach by arguing that contractualist moral principles should inform judicial application of the Fourth Amendment’s Reasonableness Clause. Taking inspiration from T.M. Scanlon’s influential theory of moral permissibility,<sup>16</sup> this Article contends that a search or seizure is unreasonable when any principle that permitted it would be one that a Fourth Amendment rights holder could reasonably reject. Thus, competing interests are compared on a person-to-person basis, rather than summed. This contractualist approach to Fourth Amendment fairness is linked to reasonableness because both concepts are concerned with interpersonal justifiability. When a principle of conduct is fair or reasonable, people can understand and respect the reasons behind it, even if the consequences are to their own personal detriment.<sup>17</sup> That approach is at odds with interest aggregation. Oftentimes, an action that is net beneficial to society at large might impose severe burdens on individuals and so be rejected as unfair.<sup>18</sup> Contractualism thus draws our attention away from tallies of abstract interests and toward the perspective of the disadvantaged. More broadly, contractualism provides a way to justify and explore the intuition that the Fourth Amendment affords strong individual rights, even against aggregated interests.

Already, courts and litigants engage in theoretically thin moral reasoning when they engage in interest aggregation or raise deontological arguments within the interstices of extant doctrine. This Article aims to surface and refine those latent strands of moral reasoning. But precisely because it rests on a moral theory, a contractualist Fourth Amendment has certain limitations. While contractualist reasoning can often tell decisionmakers which empirical questions to ask, it cannot reveal how to resolve disputed

---

15. For Fourth Amendment work that draws on deontological claims, see, for example, Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 *STAN. L. REV.* 987 (2014); Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 *COLUM. L. REV.* 1456 (1996); Scott E. Sundby, *“Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 *COLUM. L. REV.* 1751 (1994).

16. On Scanlon’s view, “an action is impermissible if any principle that permitted it would be one that someone could reasonably reject.” T.M. SCANLON, *MORAL DIMENSIONS* 99 (2008) [hereinafter SCANLON, *MORAL DIMENSIONS*]; see also T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 153 (1998) [hereinafter SCANLON, *WHAT WE OWE*]. In adapting contractualist reasoning to the Fourth Amendment, this Article goes beyond (and conceivably against) Scanlon’s own views.

17. Cf. Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 *YALE L.J.F.* 525, 526–27 (2014) (“[T]he primary factor that people consider when they are deciding whether they feel a decision is legitimate and ought to be accepted is whether or not they believe that the authorities involved made their decision through a fair procedure . . .”).

18. Classic examples include forced gladiatorial combat for mass entertainment. See also *infra* text accompanying note 68.

points of fact. So whenever relevant empirical issues turn out to be contested, a contractualist Fourth Amendment will be as well. Moreover, contractualism is itself a contested view within philosophy, and some legal scholars plausibly doubt that any one theory of the Fourth Amendment can be entirely satisfactory.<sup>19</sup> Yet contractualism can be useful for interpreters who consider history and interest aggregation. Even if the Fourth Amendment has no one master principle,<sup>20</sup> contractualist reasoning can still operate within Fourth Amendment doctrine, surfacing unfairness that would otherwise be overlooked or brushed aside.<sup>21</sup>

Greater attention to contractualist reasoning would have many implications, including for the scenario outlined at the start of this Article. For example, the approach advanced here suggests a basic distinction between prosecuting crime and protecting individuals. When justifying searches or seizures to pursue prosecutorial interests, the government generally relies on a principle of responsibility and so cannot fairly use population-based (as opposed to individualized) inferences.<sup>22</sup> That conclusion not only undermines judicial decisions that rely on an individual's presence in a "high crime area," but also establishes certain limits on "big data policing."<sup>23</sup> By contrast, searches and seizures justified on preventive grounds rest on a protective principle that does allow consideration of population-based traits—but only if the relevant burdens are properly distributed throughout society.<sup>24</sup> Contractualism also suggests that the Court has erred by: truncating Fourth Amendment rights based on diffuse litigation costs,<sup>25</sup> interposing "reasonable expectations of privacy" as a common prerequisite for Fourth Amendment protection,<sup>26</sup> and denying that invidious racial discrimination contravenes the Fourth Amendment.<sup>27</sup>

The argument proceeds in three parts. Part I makes the case for a contractualist approach to the Fourth Amendment. Parts II and III then respectively deploy a contractualist framework to identify basic principles governing when police act fairly and unfairly.

---

19. See Wasserstrom & Seidman, *supra* note 11, at 59 (citing THOMAS NAGEL, *THE VIEW FROM NOWHERE* 27 (1986)).

20. See Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998) (challenging the view that the Fourth Amendment has a master precept).

21. Some philosophers similarly argue that, despite its useful insights, contractualism cannot supply a complete account of moral permissibility. *E.g.*, Johann Frick, *Contractualism and Social Risk*, 43 PHIL. & PUB. AFF. 175, 220 (2015).

22. See *infra* Section II.A.

23. See *infra* text accompanying notes 126–127.

24. See *infra* Section II.B.

25. See *infra* Section I.C.

26. See *infra* Section II.D.

27. See *infra* Section III.C.

## I. FORMS OF FAIRNESS

As used here, “fairness” is the demand that decisionmakers justify their treatment of individuals, particularly when assigning burdens. As applied to the Fourth Amendment, fairness calls for an account of why police are justified in imposing two kinds of burdens: “searches” and “seizures.” This Part critically discusses well-recognized approaches grounded in history and interest aggregation before outlining a new, third option inspired by contractualist thought.<sup>28</sup>

## A. History

The Supreme Court and many commentators have suggested that historical practices give content to the bar on “unreasonable searches and seizures.”<sup>29</sup> On this view, the Reasonableness Clause at least sometimes demands the same “degree of protection” that the founders achieved via common law rules pertaining to “searches and seizures.”<sup>30</sup>

The threshold difficulty with historical approaches is a familiar one: centuries-old answers do not often respond to present-day questions, as even historically oriented justices recognize.<sup>31</sup> But there is a deeper problem with primarily relying on history in Fourth Amendment cases: historical sources themselves suggest that the Fourth Amendment calls for new moral reasoning.<sup>32</sup> To wit, founding-era sources define “reasonable” as “agreeable to reason” or “just.”<sup>33</sup> And if the text’s reference to “unreasonable searches

---

28. The idea that morality and law are necessarily intermingled is perhaps most closely associated with Dworkin’s theory of legal reasoning in terms of fit and justification. See RONALD DWORKIN, *LAW’S EMPIRE* (1986). But a legal positivist can likewise attend to moral considerations, particularly when resolving cases of legal underdeterminacy. See H.L.A. HART, *THE CONCEPT OF LAW* 204–05 (2d ed. 1994). Notably, no less authority than Chief Justice Marshall used moral principles to resolve legal uncertainty. See *Marbury v. Madison*, 5 (1 Cranch) U.S. 137, 180 (1803) (emphasizing how “immoral” the Oath Clause would be, absent judicial review).

29. See U.S. CONST. amend. IV; *United States v. Jones*, 565 U.S. 400, 411 (2012) (“What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted.”); see also *infra* note 34 (collecting historically oriented scholars).

30. See *Jones*, 565 U.S. at 411.

31. See, e.g., *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (Scalia, J., concurring); *Virginia v. Moore*, 553 U.S. 164, 171 (2008) (“When history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness ‘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.’” (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))).

32. See generally David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1780 & n.251 (2000) (“The term ‘unreasonable,’ moreover, almost always meant in the late-eighteenth-century what it means today: contrary to sound judgment, inappropriate, or excessive.”).

33. E.g., 2 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (London, W. Strahan 3d ed. 1765) (1755) (unreasonable defined in part as “[n]ot agreeable to reason”); 2 THOMAS SHERIDAN, *A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE* (London, Dodsley et

and seizures” incorporated broad common law principles,<sup>34</sup> then it also incorporated comparably broad moral concepts.<sup>35</sup> So unlike constitutional provisions that reflect specific judgments or implicate narrow values,<sup>36</sup> the Reasonableness Clause is plausibly read as an invitation for judicial reflection on the fairness of searches and seizures. Common law cases support that conclusion, since they frequently considered how search-and-seizure principles would affect third parties.<sup>37</sup> Moreover, we will see that the Reasonableness Clause’s evident concern with reason-giving resonates with contractualism, which focuses on the justifiability of one’s actions to other persons.<sup>38</sup> Thus, there is a straightforward case for at least considering contractualist insights on moral permissibility when implementing the Reasonableness Clause.

The Fourth Amendment’s intellectual context also suggests that historically minded interpreters should undertake moral reasoning and, where possible, learn from moral philosophers. The common law was prized at the founding not because it axiomatically defined reasonableness, but rather because it was the *product* of reasonableness or, more exactly, the product of “artificial reason.”<sup>39</sup> In referring to unreasonable searches and seizures, the

---

al. 1780) (defining reasonable in part as “just, rational, agreeable to reason”); see Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1273–74 (2016); Sklansky, *supra* note 32, at 1780 n.252. Johnson gives an example from Swift that emphasizes reason’s objectivity: “A law may be *reasonable* in itself, although a man does not allow it, or does not know the reason of the lawgivers.” JOHNSON, *supra*.

34. For different views on how the common law should inform Fourth Amendment reasonableness, see Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 ST. JOHN’S L. REV. 1097, 1118, 1120–21 (1998) (advancing a framework based in part on “common sense reasonableness”); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 686–93 (1999); and Donohue, *supra* note 33, at 1273–75. Analogous questions arise under other provisions. E.g., Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History’s Lessons for the Constitutionality of Wartime Military Tribunals*, 105 GEO. L.J. 1529, 1591 (2017) (discussing the relationship between the common law and the Sixth Amendment jury trial right).

35. See, e.g., Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 799 (1999) (noting that American jurists “follow[ed] the lead of eighteenth-century British judges, especially Blackstone and Lord Mansfield, in emphasizing the power of the courts to interpret the common law in accord with equity, reason, and good sense”).

36. By way of illustration, the Fourth Amendment’s prohibition on “unreasonable searches and seizures” is both more flexible than the Confrontation Clause’s fixed rule and more ambitious than the Cruel and Unusual Punishment Clause’s minimalist standard. See U.S. CONST. amends. VI, VIII.

37. See, e.g., *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 498 (KB) (noting that the defendants’ proposed rule “may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject”).

38. See *infra* Section I.C.

39. Historical understandings of the common law are contested and complex. See Donohue, *supra* note 33, at 1270 & n.513 (“[D]isagreement marks the precise source of such reason (for example, custom, natural law, or Continental precepts.)”; see also Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 609 (2009) (“A decision that had

Fourth Amendment invoked the principles and aspirations that underlay the common law—not the established common law rules that happened to exist at that time. What Justice Antonin Scalia said of modern antitrust law is also true of the Fourth Amendment’s reference to unreasonableness: “It invokes the common law itself, and not merely the static content that the common law had assigned to the term” at any historical moment.<sup>40</sup>

So even without dictating adherence to any specific moral philosophy, the Fourth Amendment contemplates that *some* moral theory will inevitably come to bear. And if moral philosophy can shed new light on what qualifies as “agreeable to reason” or “just,”<sup>41</sup> then judges who implement those insights can at least plausibly claim to fulfill the Fourth Amendment’s original meaning.<sup>42</sup>

### B. Interest Aggregation

When “balancing the need to search against the invasion which the search entails,” the Court often assesses “the need to search” by adding up the overall effects of any given search-and-seizure rule.<sup>43</sup> This is interest aggregation: instead of focusing on the distinctive perspectives of individuals, the Court sums up costs and benefits, assessing “unreasonable searches and seizures” from the impersonal standpoint of a social planner. Interest aggregation is thus rights conferring only in the weak sense that it creates a *procedural* right to judicial review of the political branches’ policy judgments. Scholars have glossed the Court’s methodology as a kind of utilitarianism or cost–benefit analysis.<sup>44</sup> But Fourth Amendment interest aggregation is hardly rigorous. The Court does not explain how to measure, sum, and compare diverse interests. Nor is it clear whether the Court’s goal is to make searches and seizures net beneficial or optimal. Regardless, interest aggregation, however specified, has three interrelated problems.<sup>45</sup>

---

‘reason’ or ‘right reason’ was ‘fitting’ in a dual sense, both consistent with customary precedent, and expressive of a morally correct outcome.”); Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1 (2003); Sklansky, *supra* note 32, at 1782–93 (discussing common law and the Fourth Amendment).

40. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (Scalia, J.); *see also id.* (noting the Sherman Act’s “dynamic potential”).

41. *See supra* note 33 and accompanying text (collecting sources).

42. The argument here could thus be viewed as consistent with some forms of originalism. *See, e.g.,* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015).

43. *Camara v. Mun. Court*, 387 U.S. 523, 534–37 (1967). The idea of “balancing the need to search against the invasion which the search entails,” *id.* at 537, could be implemented in a contractualist way by evaluating interests person-to-person, *see infra* Section I.C.

44. *See supra* note 11 (collecting sources).

45. Some scholars sometimes criticize courts for failing to tally all the nongovernmental interests at stake and thereby doing bad interest aggregation. *See, e.g.,* Thomas K. Clancy, *The Fourth Amendment as a Collective Right*, 43 TEX. TECH L. REV. 255, 277–78, 292–94 (2010) (reading *Atwater* in this way). But the concern here is with the very goal of conditioning Fourth Amendment rights on an aggregative analysis.

The first problem is that interest aggregation allows individual interests to be sacrificed for the sake of diffuse aggregated benefits, despite widespread intuitions that the Fourth Amendment is a source of strong individual rights. In many contexts, interest aggregation generates results that are morally objectionable, such as when an individual suffers a severe personal burden to avert relatively small burdens for many people.<sup>46</sup> That basic form of unfairness is a pervasive challenge for Fourth Amendment law, as this Article will go on to show. For now, however, a simple example will suffice. Imagine that police decide to deter neighborhood shoplifting by arbitrarily singling out a pedestrian, loudly treating him as a suspect, and subjecting him to an embarrassing or harmful full-body search. That tactic could in principle yield a net increase in social welfare—if the cumulative benefits of deterring shoplifters outweighed the harm to the unfortunate individual. A defender of interest aggregation might challenge the relevant empirics,<sup>47</sup> but that kind of defense would only sidestep the deeper point: even if interest aggregation clearly favored making an example out of an arbitrarily chosen person, that tactic would be unjustified from the perspective of the individual and therefore unfair.

The second problem is closely related: interest aggregation cannot easily explain foundational and intuitively attractive features of current Fourth Amendment doctrine.<sup>48</sup> Perhaps the most salient example is the general requirement of individualized suspicion.<sup>49</sup> While there are important exceptions to this requirement, the Fourth Amendment frequently prohibits police from searching or seizing an individual unless the police have substantial reason to believe that the specific search or seizure will turn up evidence of a crime.<sup>50</sup> That requirement is in tension with interest aggregation: as the shoplifting example above illustrates, searches can advance aggregate social interests even when there is no reasonable belief that evidence will be uncovered.<sup>51</sup> The Court's skepticism of suspicionless searches and seizures seems rooted in the intuition that there is a personal *right* at stake. Interest aggregation does not reason in that deontological register.

---

46. See *infra* text accompanying note 68.

47. Cf. Kerr, *supra* note 11, at 608 (arguing that suspicion requirements often cause police to internalize negative externalities).

48. On nonaggregative themes, see David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1111 (2014) (noting arguments “that privacy matters either for non-consequentialist reasons, usually pertaining to the deontological value of dignity, or because of the harms suffered by people whose privacy is not respected”); see also Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 770 & n.25 (2012) (collecting cases).

49. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (“A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”); *United States v. Paetsch*, 782 F.3d 1162, 1168–69 (10th Cir. 2015).

50. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 749 (2011) (Ginsburg, J., concurring in the judgment) (collecting cases using the phrase “individualized suspicion”).

51. See Wasserstrom & Seidman, *supra* note 11, at 62 (citing Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 74–75) (“Neither the warrant nor the probable cause requirement is fully compatible with this [utilitarian] standard. For example,

The final problem with interest aggregation is that it places the judiciary in a weak institutional position vis-à-vis the other branches and so may lead to unduly weak enforcement of Fourth Amendment rights. This basic concern is often framed as a criticism of Fourth Amendment balancing as such: courts seem to privilege governmental interests over the individual interests of persons who are searched or seized.<sup>52</sup> Interest aggregation threatens to exacerbate this form of governmental favoritism. Because it calls for consideration of overall social well-being, interest aggregation blurs with conventional policy planning—which is the traditional province of the political branches. When it comes to wide-ranging assessments of policy consequences, courts lack the expertise and broad fact-finding abilities typically enjoyed by the political branches. Fourth Amendment interest aggregation is also politically problematic, both because overt judicial policymaking is arguably illegitimate and because courts generally lack the political branches' ability to claim democratic support. Moreover, all these difficulties are at their apogee in the law enforcement and national security cases where the Fourth Amendment operates. Thus, interest aggregation suggests that courts will tread lightly when reviewing searches and seizures approved by the political branches. Put more sharply, courts that view their role in terms of interest aggregation will tend to underprotect Fourth Amendment rights.

So while it is more adaptable than historical approaches and consistent with significant aspects of current doctrine, the Court's professed interest aggregation ultimately offers a problematic basis for Fourth Amendment doctrine. Even if more sophisticated aggregative theories could mitigate the problems identified above, it is worthwhile to pursue another, more direct solution—namely, the possibility that a deontological approach might better account for our moral intuitions regarding “unreasonable searches and seizures.”

### C. Contractualism

A contractualist approach to Fourth Amendment fairness would require that search-and-seizure principles be immune to reasonable rejection by any affected rights holder.<sup>53</sup> This approach is opposed to interest aggregation: under contractualism, individual interests are compared on a person-to-person basis, rather than summed.

The intuition underlying contractualism is that conduct should be based on principles that are fair in the sense of being reasonably justifiable

---

searches on less than probable cause might maximize utility if the value of the evidence, discounted by the improbability of finding it, outweighs the privacy costs associated with the search.”).

52. See *supra* note 13 (collecting sources).

53. See *supra* note 16. The main text focuses on reasonable rejections by rights holders based on the doctrinal assumption that the Fourth Amendment protects only “the people.” U.S. CONSR. amend. IV; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (limiting Fourth Amendment protections to “the people”).

to each individual.<sup>54</sup> Of course, moral principles will not in fact receive universal assent, in part because people often unfairly insist on maximizing their own interests, no matter the cost to others. The morally relevant task, however is to identify when it is *reasonable* to reject a search-and-seizure principle. A reasonable rejection must rest on the kinds of interests that people generally have, such as their safety,<sup>55</sup> and must have the goal of achieving agreement on terms of mutual justifiability.<sup>56</sup> That basic demand precludes rejections based on spite or negotiation strategy. Further, a search for mutual justifiability requires that each person's grounds for rejection be compared with other individuals' countervailing reasons.<sup>57</sup> So instead of adding up all benefits and burdens across persons, contractualism calls for a series of one-to-one comparisons: each person asserts her own interests, and the competing individual interests are then compared.<sup>58</sup> All other things being equal, contractualism privileges those individuals who have the greatest personal interests at stake. Finally, reasonable rejections are directed at *principles* of conduct, as opposed to one-off actions.<sup>59</sup> Rejections must therefore account for how the principle at issue affects the rejecting individual over the course of her whole life.<sup>60</sup> Thus, an individual could not reasonably accept a principle today based on its long-term benefits, but then opportunistically reject it on occasions when it proves personally burdensome.<sup>61</sup>

A contractualist approach would call for a fundamental perspectival re-orientation in Fourth Amendment thinking. A slew of Supreme Court precedents suggest that the ultimate question under the Fourth Amendment is whether *an officer* is reasonable in performing the search or seizure at

---

54. The main text adapts Scanlon's view that "an action is impermissible if any principle that permitted it would be one that someone could reasonably reject." SCANLON, MORAL DIMENSIONS, *supra* note 16, at 99; *see also* SCANLON, WHAT WE OWE, *supra* note 16, at 153.

55. *See* SCANLON, WHAT WE OWE, *supra* note 16, at 204 (discussing "generic" reasons).

56. *See id.* at 213–17.

57. *See id.*

58. Contractualism complicates the distinction between individual and "collective" Fourth Amendment rights. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974); *see also* DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE 155–56 (2017) (characterizing the Fourth Amendment as a "collective right"). Contractualism is individualist in that it focuses on the perspectives of individuals, but also collective in that it considers the perspectives of all rights holders. So contractualism does not limit consideration to any single officer or suspect, but neither does it attend to "the people" as a whole." GRAY, *supra* at 155–56.

59. *See supra* note 54.

60. Thus, contractualism calls for "intrapersonal aggregation," or aggregation "within each person's life." SCANLON, WHAT WE OWE, *supra* note 16, at 237.

61. Relatedly, contractualism's weighing of individual interests accounts for the ex ante probability (or improbability) that an individual will suffer any given burden. *See infra* note 143 (discussing "ex ante contractualism").

issue.<sup>62</sup> That framing expressly adopts the “standpoint”<sup>63</sup> or “perspective” of the officer “on the scene,”<sup>64</sup> rather than the perspective of any other person, such as persons who are subject to future searches or seizures.<sup>65</sup> This officer-oriented approach to Fourth Amendment reasonableness resembles the remedial doctrine of qualified immunity, which is avowedly designed to protect reasonable officers from personal liability for unconstitutional searches and seizures.<sup>66</sup> Yet the evident similarity between Fourth Amendment law and qualified immunity jurisprudence should give us pause, for the first question posed by the Fourth Amendment’s prohibition on “unreasonable searches and seizures” is *not* whether the officer should ultimately be held liable for damages. Nor is the goal of the Fourth Amendment to find the outer limits of what some subset of “reasonable officers” would tolerate. Rather, the key Fourth Amendment question is—or should be—whether police actions are morally acceptable to rights holders, especially people who bear the burdens of searches or seizures.<sup>67</sup>

Scanlon provides a now-famous example of how contractualism diverges from interest aggregation. Imagine that the only way to broadcast a thrilling sports match to millions of viewers is to allow an unfortunate engineer (the victim of an industrial accident) to be painfully electrocuted throughout the event.<sup>68</sup> Interest aggregation would presumably favor a principle allowing the broadcast, at least under some circumstances: if we add up

---

62. See, e.g., *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (“The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.” (emphasis added)); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” (emphasis added)).

63. See *Ornelas*, 517 U.S. at 696.

64. See *Graham*, 490 U.S. at 396.

65. For critical perspectives on the Court’s use of Fourth Amendment perspective, see Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 677 (1998); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 968–69 (2002); Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71 (2007); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1229 (1983); and Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 187 (2008). See also *infra* note 67.

66. See, e.g., *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

67. See JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 195 (Quid Pro Books, 4th ed. 2011) (1966) (“[B]ehavior that seems reasonable to the police because of the character of the neighborhood is seen by the honest citizen in it as irresponsible and unreasonable. About her, more errors will necessarily be made under a reasonableness standard.”). While ultimately concerned with the perspectives of rights holders, a fairness analysis can generate requirements that police exercise due care, given information available to them. See, e.g., *infra* Section I.A.

68. SCANLON, *WHAT WE OWE*, *supra* note 16, at 235.

the interests of enough happy viewers, their aggregated interests will eventually outweigh the interests of the engineer. Yet that result is intuitively objectionable, and contractualism helps to explain why. The engineer's individual interests in being saved from excruciating pain is very large, whereas each audience member has only a relatively small entertainment interest in continuing to see the match.<sup>69</sup> Because contractualism calls for directly comparing those individual objections, rather than summing them up, the engineer could reasonably reject a principle that allowed for his electrocution. In this way, contractualism respects the separateness of persons—that is, the irreducible experiences and claims of each person.<sup>70</sup>

To illustrate how a court might implement Fourth Amendment contractualism, consider the Court's 5–4 decision in *Atwater v. City of Lago Vista*, where the plaintiff had been arrested, separated from her children, and jailed—all for driving without a seatbelt, an offense punishable only by a \$50 fine.<sup>71</sup> The plaintiff argued that her arrest yielded substantial social costs and no benefits.<sup>72</sup> The Court appeared to agree, at least on the facts of that case.<sup>73</sup> In the Court's view, however, “a reasonable Fourth Amendment balance” should “credit the government's side with an essential interest in readily administrable rules.”<sup>74</sup> The plaintiff's proposal would yield inadequate guidance in other cases and so “would guarantee increased litigation over many of the arrests that would occur.”<sup>75</sup> Based largely on these diffuse third-party litigation costs, the Court found that interest aggregation favored the government.<sup>76</sup>

A Fourth Amendment contractualist would reason about this scenario in a different way. The first step is to propose a principle that would authorize the actions at issue. Consider Principle X, which approximates the legal holding adopted in *Atwater*: “When a police officer has good reason to believe that an individual has committed a fine-only offense, the officer may arrest that individual, even if the arrest harms the suspect and third-parties.”<sup>77</sup> The next step is to determine whether Principle X is subject to reasonable rejection. A prospective arrestee could object to Principle X because it would expose her to severe personal burdens. Moreover, the children of

---

69. See *id.* at 235.

70. See generally JOHN RAWLS, A THEORY OF JUSTICE 23–24 (rev. ed. 1999). Rawls's theory of justice is focused on the “basic structure” of society. By comparison, Scanlon's contractualism is concerned with interpersonal ethics and so is more readily applied to Fourth Amendment questions.

71. 532 U.S. 318 (2001).

72. See *Atwater*, 532 U.S. at 345–47. *Atwater* also raised a historical argument. *Id.* at 326–27.

73. See *id.* at 346–47 (“If we were to derive a rule exclusively to address the uncontested facts of this case, *Atwater* might well prevail . . . [Her] claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.”).

74. *Id.* at 347.

75. See *id.* at 350.

76. *Id.* at 350–51 & n.21.

77. See *id.* at 354.

prospective arrestees could raise a similar objection. Thus, many individuals have a strong personal basis for rejecting Principle X. And it is hard to see how any other individual would have any reasonable basis for insisting on Principle X, particularly because rejecting the principle would preserve ample means of enforcing compliance with the law, such as by issuing a ticket. Given this person-to-person comparison of individual interests, Principle X can reasonably be rejected. Searches and seizures that rely on Principle X are thus unfair and unreasonable.<sup>78</sup>

But what about the Court's argument that a ruling for *Atwater* would substantially increase litigation costs?<sup>79</sup> Even if the Court's dire assessment of litigation costs were correct, the Court's decision would still be unfair to people like the plaintiff and her children. Again, contractualism asks whether any rights holder has an individual reason to insist on Principle X that is stronger than another rights holder's reason for rejecting the principle. Here, no actual individual experiences the welfare maximization of the Court's interest aggregation. Perhaps a multitude of affected individuals would experience a modest reduction in their expected litigation costs—a significant benefit, to be sure, but one that pales in comparison to the personal burdens imposed on the *Atwater* plaintiff, her children, and people like them. Thus, the Court's interest aggregation cannot save Principle X from reasonable rejection. A defender of *Atwater* might argue that some other search-and-seizure principle is both immune to reasonable rejection and supportive of the arrest in *Atwater*. That new candidate principle would then have to be tested, yielding an iterative process of moral reasoning. But once a decisionmaker is satisfied that no search-and-seizure principle both authorizes the conduct at issue and is immune to reasonable rejection, then the underlying conduct should be deemed unfair as well as unreasonable for Fourth Amendment purposes.

Because of its perspectival shift, contractualism helpfully prevents the most burdened individuals from being lost in the shuffle.<sup>80</sup> By contrast, interest aggregation creates the possibility that large aggregate benefits could swamp any countervailing individual interests. We have already seen an important example of this point: interest aggregation objectionably leaves open the possibility of imposing concentrated burdens on an arbitrarily selected individual who is made an example of, in order to achieve diffuse benefits in

---

78. Mitch Berman has insightfully argued that while *Atwater* purported to decide what is “unreasonable” under the Fourth Amendment, it is better viewed as establishing a “decision rule” that governs how to go about ascertaining unreasonableness. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 108–13 (2004). Berman notes that “*per se* analysis seems inconsistent with the very concept of reasonableness.” *Id.* at 110. However, “*per se*” or rule-like Fourth Amendment principles may themselves be reasonable and fair, as discerned via contractualist analysis.

79. See *id.* at 311 (discussing *Atwater*, 532 U.S. at 350).

80. See T.M. SCANLON, *Contractualism and Utilitarianism*, in *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 124, 145 (2003) (“Under contractualism, when we consider a principle our attention is naturally directed first to those who would do worst under it.”).

the form of crime reduction.<sup>81</sup> But there are many other examples. As we will see, Fourth Amendment contractualism is committed to avoiding search-and-seizure burdens that may be net beneficial to society but are nonetheless unfair because they are disproportionately focused on certain individuals, such as members of disfavored racial groups or the poor.<sup>82</sup>

Some readers may worry that a contractualist analysis would place unrealistic burdens on police by requiring them to imagine and then balance the competing interests of an indefinite number of rights holders. But the appropriate analysis for a court is not necessarily the same as what police would or should do in the field. Courts often craft operational rules based on deeper normative inquiries that no official would ever perform.<sup>83</sup> Likewise, a contractualist approach to the Fourth Amendment can inform familiar legal standards like probable cause without demanding that police engage in the same first-principles moral reasoning. Contractualism's perspectival shift is also consistent with the imaginative demands routinely placed on courts. Judges must often strive to place themselves in the shoes of diverse people affected by the law. And that means attending to unfamiliar perspectives—a duty aided by the judicial process and diversity on the bench.<sup>84</sup> Heuristics can also facilitate contractualist reasoning about Fourth Amendment rights, such as viewing the legal issue from a suspect's perspective.<sup>85</sup>

Readers may also be understandably hesitant about extending a moral theory like contractualism to the Fourth Amendment—particularly when scholars have forcefully argued that interest aggregation better explains at least some important moral intuitions.<sup>86</sup> But even if contractualism has important limitations,<sup>87</sup> it can still shed light on Fourth Amendment questions by drawing attention to moral intuitions that might otherwise go unappreciated. Moreover, contractualist reasoning is particularly well suited to

---

81. See *supra* text accompanying note 47.

82. See *infra* text accompanying notes 104, 189; *infra* Section III.C.

83. Almost any major Fourth Amendment ruling supplies an example. *E.g.*, *Riley v. California*, 134 S. Ct. 2473 (2014); *Berman*, *supra* note 78. Note that, as the above discussion of *Atwater* illustrates, any tradeoffs involved in making “administrable” Fourth Amendment rules should themselves be reviewed under a contractualist analysis.

84. See, *e.g.*, RICHARD A. POSNER, *HOW JUDGES THINK* 115–17 (2008); Joy Milligan, Note, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206 (2006).

85. See also *supra* note 80 (explaining that contractualism naturally draws attention to the most burdened individuals). For a recent example, see Transcript of Oral Argument at 28, *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) (No. 15–1485) (viewing the legal issue “from the point of view of the reasonable partygoer” rather than only “through the eyes of the officer”).

86. See, *e.g.*, Barbara H. Fried, *Can Contractualism Save Us from Aggregation?*, 16 J. ETHICS 39 (2012); *infra* note 183. For example, Frick imagines a scenario where either one mine worker can be saved from certain death, or the working conditions of one thousand miners can be improved such that twenty statistical lives will be saved. Frick, *supra* note 21, at 218–19.

87. Somewhat similarly, Frick concludes that contractualism, though illuminating, cannot capture all wrong-making properties of actions. Frick, *supra* note 21, at 220 (discussing a similar thought in 3 DEREK PARFIT, *ON WHAT MATTERS* 368–70 (2011)).

analysis of “unreasonable” searches and seizures. Even if interest aggregation is both moral and constitutional in many areas of policymaking, individualist considerations and interpersonal justifiability are thought to have unusual force when Fourth Amendment rights are at stake. As we will see, contractualism’s focus on the perspectives of individuals allows it to respect the “separateness of persons,” honor deontological undercurrents in Fourth Amendment doctrine, and assign courts a traditional rights-enforcing role distinct from the political branches’ frequent pursuit of aggregate interests. To bear out those claims, however, we need to apply contractualist reasoning to search-and-seizure questions and see how it fits. The next Part begins that work by using contractualist reasoning to derive several morally grounded search-and-seizure principles.

## II. SOURCES OF FAIRNESS

Many dilemmas in Fourth Amendment law stem from a failure to disentangle the different justifications that can give rise to fair Fourth Amendment searches and seizures. For example, courts frequently use the same doctrinal concepts—such as “probable cause,” “exigency,” and “reasonable suspicion”—not only for searches and seizures that endeavor to identify crimes for purposes of prosecution, but also for police actions that are forward looking in that they seek to avoid threatened harm. But the moral issues posed by these different justifications are fundamentally different. Any effort to understand Fourth Amendment fairness must therefore look beneath the doctrinal categories and tease apart different moral justifications for searches and seizures.

This Part explores five separate kinds of justification that are critically relevant to the Fourth Amendment: responsibility, protection, consent, curiosity, and helpfulness.<sup>88</sup> These principles identify conditions that presumptively give rise to fair searches and seizures. Each principle can apply independent of the others, and more than one may apply in a single case. However, the principles in themselves are not conclusive of reasonableness. Even when sources of fairness apply, additional moral considerations might nonetheless render searches and seizures unfair—a topic to be explored in more detail in Part III.

### A. Responsibility

After exercising due care in concluding that an individual is responsible for a crime, the police are generally justified in imposing search-and-seizure

---

88. Even nuanced treatments tend to distill the government’s justificatory interests into binaries. See, e.g., Barry Friedman & Cynthia Benin Stein, *Redefining What’s “Reasonable”: The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 286 (2016) (“Policing has a binary nature to it—a division both natural and intuitive. When policing agencies police, they do one of two things: (1) they investigate, and (2) they seek, in a programmatic or regulatory way, to curb a social problem.”).

burdens that effectuate the individual's punishment. This intuitive idea is the "principle of responsibility."

Contractualism makes room for the widespread deontological intuition that personal choices are relevant to responsibility and, therefore, to the burdens that can fairly be placed on individuals.<sup>89</sup> Scanlon's main example involves a community project to remove hazardous waste: the project advances diffuse public health interests, but bystanders who encounter the waste while it is in transit might be severely injured.<sup>90</sup> The bystanders could accordingly object to a principle that would expose them to such a serious harm. To address that objection, the community warns people to stay away from the vehicles conveying the waste. That public announcement would undermine the bystanders' reasonable ability to object to the project. Assuming that all due warnings issue, then bystanders would have an adequate opportunity to choose appropriately and avoid harm. Anyone who nonetheless approached the vehicles would be responsible for his injuries and so could not reasonably reject a principle allowing the project.<sup>91</sup>

This example illustrates a broader point about how responsibility operates within contractualist reasoning. As Scanlon puts it: "[I]f a person has had an opportunity to avoid a loss by choosing appropriately, then this diminishes the complaint that he or she could make against a principle permitting others to act in ways that lead to that loss's occurring."<sup>92</sup> A finding of responsibility can thus justify the imposition of concentrated burdens that are necessary to advance diffuse interests. Scanlon himself argues that an individual's choice to violate a justified criminal law can undermine his ability to reject principles of punishment, thereby rendering the resulting punishments fair.<sup>93</sup>

Building on Scanlon's brief account of criminal law, we might imagine that someone violates a law against driving with an expired license. Is it unfair to punish that individual, such as by imposing a fine? Put in contractualist terms, could the driver reasonably reject Principle Y, which authorizes punishment for driving with an expired license? There is reason to think the answer is no. Many drivers could reasonably insist on having a

---

89. SCANLON, *WHAT WE OWE*, *supra* note 16, at 294. Scanlon is at pains not to rely on a "forfeiture" approach rooted in voluntariness or retribution. *See id.* at 251–56. Scanlon instead grounds the idea of responsibility in "the Value of Choice," or the personal interest in having the opportunity to make choices that affect oneself. *See id.* at 263–67.

90. *Id.* at 256–58.

91. *Id.* at 259. On Scanlon's "Value of Choice" account, an opportunity to choose is "just another means through which the likelihood of injury is reduced." *Id.* at 257. Thus, responsibility can sometimes obtain even when there is no "conscious decision to 'take the risk,'" such as if someone in the main-text example approached the dangerous vehicles because they "failed to hear about the danger" or "simply forgot." *Id.* at 257–59.

92. *Id.* at 294; *see id.* at 263–64 (discussing the justifiability of criminal punishments that advance an "important social goal").

93. *See id.* at 265 ("A person who knowingly and intentionally violates a justifiable law lays down his or her right not to suffer the prescribed punishment: that is to say, such a person has no legitimate complaint against having this penalty inflicted.").

licensing scheme as a means of promoting safety and other interests. And if the driver had an opportunity to avoid punishment by choosing appropriately—a key assumption—then he would have only a diminished basis for objecting based on his own punishment.<sup>94</sup> By contrast, punishment would be unfair if drivers had not been afforded notice of the renewal requirement or if there were no practicable way for an individual to renew his license. This link between choice and punishment helps to explain why strict liability offenses are relatively difficult to justify: by eliminating mens rea elements, strict liability offenses diminish individuals' opportunity to avoid punishment by choosing appropriately—that is, by making lawful choices.<sup>95</sup> So either another justificatory principle must come into play or else some other form of responsibility must be found, such as a decision to join a line of work with notice of its special burdens.<sup>96</sup>

But how is the government to know when an individual is responsible for a crime? That practical difficulty creates the need for an auxiliary principle: the idea of due care. In general, punitive principles that depend on a finding of personal responsibility require safeguards to protect people who are not responsible and to encourage lawfulness. Return to Principle Y. As we have seen, fines for driving without a license are justifiable; but a punitive principle that afforded drivers no reliable adjudicatory process could reasonably be rejected by innocent people placed at risk of suffering unjustified burdens. To avoid that objection, Principle Y requires safeguards—such as notice, due process, and a presumption of innocence—that “enhance the value of choice as a protection.”<sup>97</sup> When in place, the safeguards empower people to avoid punishment by choosing to abide by the law. Because those safeguards are imperfect, some drivers will still suffer fines even when they are not responsible for having an expired license. But demanding perfection would in practice preclude all punishment and so could itself be reasonably rejected by people with an interest in the licensing system that the punishments support. Fairness thus demands that safeguards for the innocent be adequate after considering all relevant perspectives. In other words, the government's finding that an individual is responsible for a crime can be fair only if based on due care.<sup>98</sup>

---

94. We will see that searches and seizures can be justified by the protection principle even when the burdened party is not responsible. See *infra* Section II.B. If police know that a bomb has been slipped into a passenger's luggage, for example, the passenger can fairly be searched even if she is concededly innocent of any wrongdoing.

95. Cf. SCANLON, WHAT WE OWE, *supra* note 16, at 266 (noting that punishment for “morally unobjectionable activities” is “more difficult to justify”).

96. See *id.* (suggesting the possibility that “just [ ] going into the milk business . . . involves laying down one's (legal) right not to be penalized in the event that the milk one sells turns out to be impure even though one has not been negligent”).

97. *Id.* at 264 (specifically noting “due process” and notice, among other things).

98. *Id.* (discussing these “safeguards”).

The contractualist reasoning that supports criminal punishments can be extended to investigation.<sup>99</sup> Consider Principle Z, which would authorize investigative detentions where police have concluded, based on due care, that a suspect is engaged in a bank robbery. A bank robber would have an obvious interest in rejecting this principle to avoid the severe personal burdens of punishment, but the robber's responsibility would undermine that basis for reasonable rejection: had the robber chosen appropriately, his risk of being burdened would greatly decline. Moreover, other individuals have a strong interest in bringing bank robbers to justice. Given that comparison of individual interests, bank robbers could not reasonably reject Principle Z based on their admittedly high risk of suffering investigative burdens.

What about people who are innocent of bank robbery? Could they reasonably reject Principle Z? On the one hand, innocent individuals would have an interest in rejecting the principle, since even investigation that exhibits due care will sometimes be misdirected. The most diligent investigators can make mistakes, and people can be wrongly identified or simply turn up in the wrong place at the wrong time. So Principle Z creates a risk that at least some innocent individuals will be erroneously stopped on suspicion of being responsible for bank robbery. On the other hand, innocent individuals also have an interest in bringing bank robbers to justice, including for reasons of safety, and Principle Z promotes those interests.<sup>100</sup> Which of these conflicting individual interests should prevail? The idea of responsibility alone cannot answer that question, since we are focused now on the innocent—that is, on people who are not responsible for crime.

At this point, we must turn to the auxiliary principle of due care: when does an investigative principle primarily founded on responsibility feature adequate safeguards to protect the innocent from police error? To answer that question, contractualism calls for weighing the individual interests in holding wrongdoers responsible against individual interests in avoiding the burdens that stem from fruitless searches and seizures. By insisting on a relatively demanding standard of due care, individuals who abide by the law can reduce their odds of suffering investigative burdens. And once potential suspects face a sufficiently small risk of suffering those burdens, individuals

---

99. Police investigation could be viewed as the pre-trial stage of the criminal process—a view that accords with the tendency to refer to Fourth Amendment law as a part of “criminal procedure.” See Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1894–97 (2014); see also *United States v. Jacobsen*, 466 U.S. 109, 123 n.23 (1984) (citing Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983)).

100. I assume that police seek to enforce criminal laws that are justified. See *supra* text accompanying note 93 (outlining a contractualist argument for criminal law). But when criminal enforcement is unjustified, the principle of responsibility would not justify searches and seizures to prosecute those crimes. For a Rawlsian account of legitimate criminal punishment, see Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 314 (2004) (“If the exercise of state power in a liberal democracy is to be legitimate, that is, it must be justifiable in terms that all members of society subject to that power would accept as just and fair.”), and *id.* at 386–89 (objecting to certain forms of punishment for “non-serious offenses”).

who benefit from law enforcement can reasonably insist on preserving the police's investigative powers. So just as the innocent can reasonably reject trial principles that expose them to an undue risk of being convicted, the innocent can also reasonably reject investigative principles that expose them to an undue risk of being searched or seized.

We can identify some general features of due care. A principle requiring certainty of guilt would place an impossible burden on police, and so could reasonably be rejected by individuals who depend on law enforcement.<sup>101</sup> At the opposite extreme, innocent individuals could reasonably reject principles that exposed them to a high risk of suffering burdens. Examples include principles allowing police to attribute responsibility based on no evidence at all or when all available evidence indicates that someone else is exclusively responsible.<sup>102</sup> Relatedly, the principle of responsibility would not allow police to pursue diffuse benefits by making an example of an arbitrarily selected individual, as interest aggregation might allow.<sup>103</sup> Beyond those general points, the practical content of “due care” will necessarily vary based on the circumstances. Again, a contractualist approach must consider diverse perspectives and competing interests. Therefore, due care must safeguard the interests of individuals who are disproportionately likely to experience investigative burdens.<sup>104</sup> This analysis is also attentive to whether any given principle would create a risk of imposing burdens based on innocent conduct that individuals regularly have reason to undertake, such as residing in dorms, wearing jackets or attending parties.<sup>105</sup>

---

101. See *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (“To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials . . .”). Perfect knowledge of an apparent bank robber’s responsibility may well be impossible even after trial. See *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (noting the “beyond a reasonable doubt” standard).

102. This conclusion addresses a classic law school hypothetical: if police know only that a suspect retreated into one of several indistinguishable apartments, can they forcibly enter them all to find the suspect? Not fairly—at least, not unless a protective interest is at play. See *infra* Section II.B; see also JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 203–04 (6th ed. 2017); Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*, 73 *LAW & CONTEMP. PROBS.*, Summer 2010, at 69, 76 (reflecting on “whether a one-in-three probability is sufficient to make up probable cause”); Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 *U. MICH. J.L. REFORM* 465, 497 (1984) (finding probable cause for all of ten suspects, where an unknown one among them is known to be an offender).

103. See *supra* text accompanying note 47 (explaining this point).

104. See Christopher Slobogin, *Government Dragnets*, 73 *LAW & CONTEMP. PROBS.*, Summer 2010, at 107, 124–25 (“[I]magine you are a Mexican American in Southern California who is subjected to document checks on major highways far from the border, or . . . an inner-city resident subject to routine checkpoint stops as you walk around your own neighborhood, or an Arab American who is tracked on camera . . . because a data-mining program indicates that you fit a terrorist profile.” (footnote omitted)); see also *supra* note 67 (noting this feature of contractualism); *infra* Section III.C (on invidious discrimination).

105. See Richard M. Re, *DC v. Wesby and Fourth Amendment Perspective*, *PRAWFSBLAWG* (Nov. 2, 2017, 12:19 PM), <http://prawfsblawg.blogspot.com/prawfsblawg/2017/11/dc-v-wesby-and-fourth-amendment-perspective.html> [<https://perma.cc/GX3T-NRZW>] (parties); *infra* text accompanying notes 121 (dorms) and 130 (jackets).

The Fourth Amendment can be viewed as a means of achieving the due care that fairness demands of police. Take the probable cause requirement. Courts and commentators struggle to express that test in probabilistic terms,<sup>106</sup> and there is authority, as well as thoughtful scholarship, discouraging use of probabilistic reasoning at all.<sup>107</sup> To this day, the case law rests on the normatively laden maxim that probable cause is sufficient information “to warrant a man of reasonable caution in the belief that an offense has been or is being committed.”<sup>108</sup> Contractualism helps to explain why the probable cause standard is hard to quantify: it reflects an adaptive ethical principle rather than a fixed statistical threshold. In other words, police have sufficient confidence of individual responsibility when they act pursuant to principles of due care that no individual could reasonably reject. Again, the appropriate level of confidence may vary depending on the risk of misidentifying the responsible party and the personal interests advanced by identifying violators of the law at issue.<sup>109</sup> The warrant rule is also relevant.<sup>110</sup> Because they require judicial approval, warrants curb police discretion and reduce the risk to innocent people that police will incorrectly find individual responsibility.<sup>111</sup> If warrants are key to preventing police from wrongly assigning responsibility, then potential suspects could reasonably reject search-and-seizure principles that lack a warrant rule or similar safeguard of due care.<sup>112</sup>

The principle of responsibility also helps to explain and justify the general requirement of individualized suspicion, which seems to defy basic

---

106. See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.”); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 39 (1991) (arguing that probable cause is “somewhat lower” than a preponderance).

107. See *supra* note 106; see also Orin Kerr, *Why Courts Should Not Quantify Probable Cause*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* 131 (Michael Klarman et al. eds., 2012).

108. *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (cleaned up); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009) (same); see also *Florida v. Harris*, 568 U.S. 237, 243 (2013) (similar); *Carroll v. United States*, 267 U.S. 132, 162 (1925); *Locke v. United States*, 11 U.S. (7 Cranch) 339, 342 (1813) (similar).

109. See, e.g., *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (applying a lower suspicion standard for less intrusive police actions).

110. E.g., *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (warrant rule).

111. See *Johnson v. United States*, 333 U.S. 10, 14 (1948); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932); see also William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 884 (1991).

112. For more on reasonableness and warrants, see *infra* text accompanying notes 166, 275. These points accord with the view that the Warrant Clause simply precludes warrants without probable cause, without requiring them. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 771 (1994).

probabilistic reasoning.<sup>113</sup> Jane Bambauer gives a helpful example.<sup>114</sup> Imagine that police have reliable statistics that most residents in a college dorm possess illegal substances of one kind or another. Would the police then have probable cause to search the entire dorm?<sup>115</sup> The conventional answer is no, because probable cause is thought to require not just a likelihood of finding evidence but also “individualized” or “particularized” suspicion.<sup>116</sup> But what could this added requirement mean? All inferences in specific cases are based on generalizations derived from other experiences.<sup>117</sup> So at least some probabilistic evidence seems critical to every reasonable belief. And, in the dorm hypothetical, it is entirely probable that each individual search would uncover contraband. Further, the dorm-wide search might seem desirable, at least for a proponent of interest aggregation: if a single search is socially beneficial when it is likely to bear fruit, then police could plausibly maximize social welfare by conducting as many of those searches as possible. So, why would eminently “probable” cause to suspect guilt generate an unreasonable search?

The key is to remember that the principle of responsibility safeguards the innocent by assigning burdens based on whether individuals have had an opportunity to choose appropriately. And that goal is not served by authorizing searches and seizures on grounds that afford the innocent no opportunity to choose. That insight calls for differentiating among types of admittedly probative evidence, since even inferences based on accurate statistics may not give individuals an opportunity to avoid investigative burdens by choosing appropriately. In general, individual choice has no role, and the principle of responsibility accordingly does not apply, when an individual’s responsibility is inferred entirely based on population-based evidence—that is, evidence that would be unaffected by whether any given

---

113. See CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 40 (2007); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 842 (2011) (“When courts find (or do not find) ‘individualized suspicion,’ they are in fact merely using a substitute term for the idea of probable cause, a term that itself was never properly defined.”); see also Kiel Brennan-Marquez, “*Plausible Cause*”: *Explanatory Standards in the Age of Powerful Machines*, 70 VAND. L. REV. 1249, 1278 (2017) (surveying the field).

114. See Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461, 462 (2015) (adapting Orin Kerr’s hypothetical).

115. Jane Bambauer insightfully suggests that the Fourth Amendment “minimize” what she terms “hassle,” or “the chance that an innocent person will experience a search or seizure.” Bambauer, *supra* note 114, at 461. But it is often fair to distribute search-and-seizure burdens widely, thereby increasing “hassle,” or the odds that innocent people are burdened. As we will see, for example, police might undertake special-needs searches that equally affect large groups. See *infra* Section II.B. Or police might increase the overall odds of experiencing an unsuccessful search by ratcheting up enforcement in response to a crime wave. See *infra* Section II.B. Contractualism thus illuminates *when* to minimize hassle—and when not to.

116. E.g., *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (“Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.”). Because *Ybarra* states that there was no reason to suspect the defendant, *id.* at 90, it does not clearly answer Bambauer’s hypothetical.

117. See FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* (2003).

individual made a morally relevant choice.<sup>118</sup> By contrast, individuals are afforded an opportunity to choose appropriately insofar as they are burdened based on individualized suspicion. In other contexts, this basic idea has been discussed as “counterfactual sensitivity to the truth.”<sup>119</sup>

To flesh out how individualized suspicion respects individual choice, contrast two scenarios in which police prepare to search a dorm room based on an inference of guilt:

*Dorm Search 1:* Police are correct 80% of the time when detecting illegal narcotics based on odors emanating from dorm rooms. Smelling narcotics near a particular dorm room, police conclude that the occupant is guilty.

In this scenario, it is quite likely—but not guaranteed—that the occupant of the dorm room possesses contraband and so is guilty of a crime. So there is a strong argument that the police have probable cause. For present purposes, however, the key point is that the likelihood that police would observe the evidence depends in large part on whether the room’s occupant has chosen to engage in a crime. *If the occupant did not possess illegal narcotics, then the police probably would not smell the narcotics.*<sup>120</sup> Thus, the police’s grounds for suspicion are sensitive to whether the occupant is responsible for a crime.

Now consider a second dorm search scenario that harks back to Bambauer’s original example. Here, unlike in Dorm Search 1, police rely on population-based evidence of wrongdoing:

*Dorm Search 2:* Research reveals an 80% likelihood that the occupant of any given dorm room possesses illegal narcotics. Knowing this, police approach one of the dorm rooms and conclude that the occupant is guilty.

---

118. This claim is concerned with the burdens that can be justified by the principle of responsibility and so is not a blanket objection to statistical evidence. Cf. ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 90–100 (2005) (defending a “principle of maximal individualization”); Lea Brilmayer & Lewis Kornhauser, *Review: Quantitative Methods and Legal Decisions*, 46 U. CHI. L. REV. 116, 149 (1978) (considering that “use of statistics” might generally deny “litigants their rights to be treated as individuals”). For example, population-based evidence may be relevant to protection or exoneration.

119. See David Enoch & Talia Fisher, *Sense and “Sensitivity”: Epistemic and Instrumental Approaches to Statistical Evidence*, 67 STAN. L. REV. 557, 557, 573–75 (2015) (cleaned up) (describing sensitivity as “the requirement that a belief be counterfactually sensitive to the truth”). Take the famous “Blue Bus” hypothetical: if a bus is known to have caused a tort, and 70% of local buses are owned by “Blue Bus Company,” is it appropriate to find liability for that company under a preponderance standard? The challenge is to reconcile the intuitive answer—“No”—with the intuition that an eye witness reporting a blue bus with the same 70% confidence could support liability. See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1331 (1971); see also Enoch & Fisher, *supra* at 559–60. The main text suggests a solution: Only the eyewitness report exhibits sensitivity: if the tortious bus were actually red, then the eyewitness would probably have reported a red bus. By contrast, whether the tortious bus was blue or red would not affect the population-based statistics.

120. See Enoch & Fisher, *supra* note 119, at 582–83.

Here too, the dorm occupant's guilt is quite likely, and it is therefore plausible to conclude that probable cause is present. But unlike in the first scenario, the police in Dorm Search 2 are relying on information and inferences that in no way depend on whether any individual occupant of the dorm has chosen to commit a crime. *If the dorm room's occupant did not possess illegal narcotics, then the overall dorm statistics would remain unchanged (or virtually unchanged).*<sup>121</sup> Thus, the evidentiary factors that give rise to the police's suspicion are insensitive to whether the occupant has chosen appropriately.<sup>122</sup>

To be clear, the dorm occupants in both scenarios face the same burdens and are equally likely to be guilty of wrongdoing. Yet the principles that would authorize these searches will have very different implications for innocent residents. A principle that allows use of individualized evidence, as in Dorm Search 1, would honor the value of choice by giving each dorm occupant an *ex ante* opportunity to choose lawfulness, in which case the odds that police would (erroneously) detect narcotics in any given room would be 20%. Under that principle, an innocent occupant would face a relatively limited risk of being subjected to fruitless searches. By contrast, a principle that allows use of population-based statistics, as in Dorm Search 2, would not afford the occupant an opportunity to reduce her risk of being searched. Even if the occupant chose not to possess narcotics, police (or a judge) would be certain to face the same statistics and find probable cause.

These examples illustrate that anyone who chooses lawfulness has a strong interest in demanding that police act only based on “wrong-dependent” evidence—that is, evidence that is counterfactually sensitive to an individual's wrongdoing, rather than a population's.<sup>123</sup> That is why searches predicated on population-based statistics can be unfair to the innocent. This conclusion does not dispute that a principle authorizing Dorm Search 2 may be socially beneficial and therefore supported by interest aggregation. Instead, the point is that any innocent occupant of the dorm would have a substantial interest in opposing investigative principles that authorized use of the population-based statistics. So, barring a countervailing individual interest,<sup>124</sup> innocent individuals can reasonably reject investigative principles that would impose burdens based on “wrong-independent” evidence, such

---

121. See *id.* at 575 (discussing the Blue Bus hypothetical).

122. The nature of the government's knowledge could give rise to additional objections, apart from the objection in the main text. For example, the police research could be inadequately reliable or transparent. Here, however, I assume that the police have an adequate basis for their population-based knowledge.

123. Enoch and Fisher do not argue from fairness, but instead claim that sensitivity should often be legally relevant in view of its implications for personal incentives. See Enoch & Fisher, *supra* note 119, at 581–83 (generalizing an account put forward by Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1228–89 (2001)). There is a common thread here: insensitive inferences are indifferent to personal choice, a characteristic that is then separately relevant *both* to incentives (Enoch and Fisher's point) *and* to fairness (my point).

124. Sections II.B–E explore this possibility by discussing the limited permissibility of suspicionless investigative principles, including during emergencies.

as population-based evidence, even when that evidence is probative of guilt. This conclusion implicates many issues in Fourth Amendment law.

Start with presence in a high crime neighborhood. Courts have controversially held that police have greater reason to suspect an individual of wrongdoing when the individual is present in a “high crime area.”<sup>125</sup> Critics argue that police and courts are unreliable or discriminatory in identifying high crime areas.<sup>126</sup> But the principle of responsibility usually renders those concerns moot: when police action is justified by the goal of prosecuting offenders, police cannot fairly rely on presence in a high crime area, a population-based inference that exemplifies wrong independence.

Similar reasoning bears on many forms of “big data” policing,<sup>127</sup> whereby population information reveals predictive correlations regarding individuals.<sup>128</sup> Imagine that data analytics based on surveillance cameras showed that young adult men wearing jackets in a certain neighborhood are often engaged in crime. Further imagine that an officer claimed, based on those statistics, that he has “reasonable suspicion” as to any person fitting that description.<sup>129</sup> This search policy involves wrong-independent traits: because the inference of guilt is population-based, young adult men who wear jackets in the area would lack an opportunity to avoid searches by choosing lawfulness.<sup>130</sup> Whether or not those individuals choose to commit a crime will not change the fact that they would be subject to arrest. And that significant burden could often support a reasonable rejection. Thus, a stop would not be justified by the principle of responsibility.<sup>131</sup>

---

125. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (treating presence in a “high crime area” as a key factor supporting reasonable suspicion).

126. Andrew Guthrie Ferguson, *Predictive Policing and Reasonable Suspicion*, 62 EMORY L.J. 259, 302–03, 302 n.259 (2012) (collecting sources critical of a “high crime area” factor).

127. See ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING* 126–27 (2017) (discussing the possibility that the individualized suspicion requirement might prompt courts to resist certain big data policing techniques); Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327 (2015); Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35 (2014); Michael L. Rich, *Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment*, 164 U. PA. L. REV. 871 (2016) (analyzing “Automated Suspicion Algorithms” under existing Fourth Amendment doctrine).

128. See generally VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* (2013).

129. See Ferguson, *supra* note 126.

130. The imagined principle targets a population defined in part by participation in an activity that individuals have an interest in regularly performing without exposing themselves to searches and seizures. Thus, it would be unpersuasive to defend the principle on the ground that local young adult men could abstain from wearing jackets—much as it would have been unpersuasive to defend the police action in *Dorm Search 2* on the ground that students could choose not to live in a dorm.

131. Kiel Brennan-Marquez has insightfully distinguished predictive probability and explanatory plausibility, suggesting that the Fourth Amendment should focus on the latter. See Brennan-Marquez, *supra* note 113. However, predictive probability alone can sometimes justify protective action. See *infra* Section II.B. Further, moral intuitions regarding responsibility are better explained by wrong dependence than explanatory plausibility. Imagine that police:

By comparison, no similar problem arises when police use new technologies to generate highly specific suspect descriptions and so find particularized responsibility.<sup>132</sup> For example, a surveillance system might detect that a young adult man wearing a jacket has left the site of a reported robbery. If a nearby police officer were informed of those recent events and then saw someone fitting the description, she might fairly stop the suspect. In this new hypothetical, the suspect description is the same as in the “big data” scenario above, yet the information is now being used in a way that is wrong dependent: if the suspect did not engage in a robbery, then the odds that the officer would observe a person fitting the suspect’s description would greatly decline. So a principle that allowed stops only based on individualized suspicion would substantially reduce innocent people’s ex ante odds of suffering investigative burdens. Once that risk is adequately reduced, individuals with interests in law enforcement—such as potential robbery victims—could reasonably insist on a principle that would allow the investigative stop.

These points also bear on the unfairness of racial profiling. Imagine that police observe a robust statistical correlation between being a member of an identifiable racial group and committing some crime. That population-based correlation would be wrong independent, since whether a particular person chooses to be a criminal has no significant bearing on whether her racial group tends to commit crime.<sup>133</sup> Thus, a population-based correlation could not fairly contribute to the belief that a specific individual is responsible for crime.<sup>134</sup> Yet that conclusion is consistent with at least some use of

---

(i) use big data algorithms to infer from population trends who is a likely speeder, and (ii) use radar guns to directly observe speeding. The principle of responsibility would reject the algorithm as wrong independent, whereas the radar gun would be wrong dependent. Brennan-Marquez attempts to distinguish the examples on a different ground. In his view, the algorithms fail a plausibility test whereas the radar gun passes, so long as police using the gun can consider “surrounding facts” to evaluate its reliability in any given case. See Brennan-Marquez, *supra* note 113, at 1273. But these tools’ predictive accuracy is what makes it plausible to believe their outputs. Thus, both the algorithm and the radar gun generate plausible inferences that a suspect is speeding. And people operating both the algorithm and the radar gun will consider surrounding facts only in the rare event that those facts cast doubt on the predictive accuracy of the tool being used.

132. Whether a police officer’s belief is accurate may fairly be informed by “hit rate” statistics—so long as the ultimate issue of responsibility rests on individualized suspicion. Cf. Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 958 (2009) (arguing for consideration of hit rates but also arguing against undue emphasis on “individuation”).

133. See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 159–60 (1997) (“With race-based police stops, many adversely affected people of color maintain that they are *innocent* victims of a policy that penalizes them for the misconduct of others who also happen to be colored.”); see also Andrew E. Taslitz, *What Is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*, LAW & CONTEMP. PROBS., Summer 2010, at 145, 146.

134. *But see* United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (allowing consideration of “apparent Mexican ancestry”). As noted in the main text, this argument applies only to searches predicated on responsibility. For a per se argument against invidious racial discrimination, see *infra* Section III.C.

race when making particularized suspect identifications.<sup>135</sup> When a reliable witness describes a specific offender, including the offender's race, the racial description is wrong dependent: if the suspect did not commit the crime in question, then the odds that someone of the suspect's racial group would be observed committing the crime would indeed decline. Thus, individualized suspect descriptions that take account of race can sometimes contribute to a finding of responsibility.<sup>136</sup>

So while some commentators believe that "individualized" or "particularized" suspicion are vapid notions,<sup>137</sup> those doctrinal terms can and should be assigned a valuable meaning, rooted in the notion of wrong dependence. Moreover, these basic fairness intuitions will become increasingly important as new, more sophisticated investigative methods will likely enable police to meet any probabilistic standard of suspicion with population-based inferences, thereby rendering a nonindividuated "probable cause" standard toothless.<sup>138</sup>

### B. Protection

Search-and-seizure burdens are usually permissible when they protect individuals from suffering greater harms. This forward-looking protection principle fundamentally differs from the backward-looking principle of responsibility discussed in the last Section.<sup>139</sup>

As we have seen, contractualism is not blind to consequences but instead demands that interest assessments are undertaken on a person-to-person basis.<sup>140</sup> So when there is a choice between some persons suffering a burden and other persons suffering a greater burden, fairness tends to favor

---

135. Race-based suspect descriptions are not without controversy. See generally R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1083–85 (2001) (noting widespread scholarly tolerance for race-based suspect descriptions before criticizing them); see also Dov Fox, *The Second Generation of Racial Profiling*, 38 AM. J. CRIM. L. 49, 76 (2010) (arguing for "a transition from racial identifiers to phenotypic ones").

136. Of course, fairness would still demand that police exhibit due care and have an appropriate level of confidence when attributing responsibility based on a suspect description. See *supra* text accompanying note 108. Thus, a race-based suspect description could not fairly support a race-based dragnet. Cf. *Brown v. City of Oneonta*, 221 F.3d 329, 334 (2d Cir. 2000) (discussing such a dragnet). And, in Section III.C, we will see that even wrong-dependent consideration of race can be morally objectionable, such as when it reflects systematic racial bias.

137. See *supra* note 113 and accompanying text.

138. Cf. Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514 (2010) (arguing that, in a digital environment, police usually have either probable cause or no evidence, making probabilistic suspicion standards irrelevant).

139. See Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 265 (distinguishing between "law enforcement intrusions" and "police intrusions to protect life and property or to serve other important community caretaking purposes," and arguing that the latter calls for "a distinct Fourth Amendment approach").

140. See *supra* Section I.C.

avoidance of the greater burden.<sup>141</sup> Critically, this result follows not from interest aggregation, but rather from considering person-to-person reasonable objections. Imagine that someone on a bus is known to be a contract killer on the way to a hit, but police do not know just who it is. Could police fairly stop the bus and search its passengers for weapons? Yes. The criminal's would-be victim would face a serious prospect of severe injury (or worse) and so could reasonably reject a principle that would bar a search of the bus. By contrast, the bus's passengers would face a far smaller individual burden and so would have no reasonable grounds for rejecting a principle that allowed the bus search.<sup>142</sup> Thus, the protection principle supports the bus search, even though most affected people are known to be innocent.

Similar logic applies when police face substantial uncertainty and so must act on incomplete information. As in the context of responsibility, the challenges of uncertainty call for a requirement of due care: when applying the protection principle, police must diligently assess the relative risks faced by various parties. And once that empirical issue is resolved, fairness further requires consideration of reasonable rejections, accounting for all information available to the relevant parties at the time of each search or seizure. So when considering grounds for rejection, any personal benefits or burdens should be discounted by their improbability.<sup>143</sup> For example, someone who faces a miniscule risk of harm under a given search-and-seizure principle has a weaker basis for rejection than another individual who faces certain and substantial personal harm under the same principle.

Hence the protection principle: police may generally impose the burdens attending searches and seizures when they have exercised due care in concluding that their actions will protect an individual from substantially greater burdens. This principle makes it easy to affirm the "exigency" and "public safety" doctrines, which allow for searches or seizures when police reasonably believe that doing so is necessary to respond to an emergency.<sup>144</sup> As the Court has put it, "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."<sup>145</sup>

---

141. See SCANLON, WHAT WE OWE, *supra* note 16, at 232–35 ("[I]n a case in which we must choose between saving one person and saving two, a principle that did not recognize the presence of the second person on the latter side as making a moral difference, counting in favor of saving that group, could reasonably be rejected.").

142. See *id.* at 232. An interest aggregator would presumably reach the same result here, at least if we assume that the cost of the prevented crime outweighed the smaller harms endured by the searched persons.

143. See Frick, *supra* note 21, at 205–06 (proposing "stage-wise ex ante contractualism" that aims to remedy defects in Scanlon's categorically "ex post" approach); T.M. Scanlon, *Reply to Zofia Stemplowska*, 10 J. MORAL PHIL. 508, 510 (2013) (calling his own original insistence on "ex post" analysis "a mistake" and citing Frick); see also Fried, *supra* note 86 (criticizing Scanlon's original ex post approach).

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

145. *Id.* The Court cast this point as an argument for an exigency exception to the warrant requirement. See *id.*

The protection principle also indicates that “transsubstantive” standards of suspicion—that is, suspicion standards that are insensitive to the gravity of the alleged crime—are often inappropriate when police are responding to emergencies.<sup>146</sup> Fourth Amendment doctrine sometimes shows some sensitivity to this point.<sup>147</sup> For instance, the Court has reserved whether police may undertake a stop when they have “reasonable suspicion” as to a completed minor offense, as opposed to an ongoing or serious crime.<sup>148</sup> But because the Court has not distinguished between responsibility and protection, it has suggested that lower standards of suspicion may be appropriate for felonies, even when protection is not at issue.<sup>149</sup> The best way to understand this still-muddled doctrine is that the Court intuitively wants police to apply a different and sometimes-lower standard of suspicion when they are protecting against serious personal threats.

On reflection, hypotheticals used to discredit transsubstantive Fourth Amendment doctrines usually involve a specific threat to an individual and so implicate the protection principle. Take Justice Jackson’s well-known dissent in *Brinegar v. United States*:

[I]f we are to make judicial exceptions to the Fourth Amendment . . . it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and indiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious

---

146. See Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1 (2011) (criticizing Fourth Amendment transsubstantivity); William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 869–70 (2001) (same).

147. A salient exception is *Welsh v. Wisconsin*, which held that police required a warrant before entering a home for the reason of preserving evidence related to a “noncriminal, traffic offense.” 466 U.S. 740, 753 (1984). At times, *Welsh* flirted with saying that the privacy intrusion outweighed the government’s interest in prosecuting such a minor crime. But the Court’s holding simply required a warrant, and the presence of a warrant doesn’t change the government’s asserted interest. See Silas J. Wasserstrom, *The Court’s Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 133–34 (1989) (making this point while observing that *Welsh* is “not a model of judicial craftsmanship”). *Welsh*’s suggestion that the outcome depended on the “gravity” of the offense, 466 U.S. at 753, could be viewed as an indirect way to account for whether the protection principle applied.

148. See *Navarette v. California*, 134 S. Ct. 1683, 1690 n.2 (2014) (“[W]e need not address under what circumstances a stop is justified by the need to investigate completed criminal activity.” (citing *United States v. Hensley*, 469 U.S. 221 (1985))).

149. See *United States v. Hensley*, 469 U.S. 221, 229 (1985) (“Particularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible.” (emphasis added)).

crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.<sup>150</sup>

In this passage, Jackson looks favorably on a roadblock to save a recently kidnapped child while grimacing at similar roadblocks to catch bootleggers. From the standpoint of fairness, the first search is primarily defensible based on protection, and the second on responsibility. Yet Jackson conflates these possible justifications. At the outset, he speaks in terms of a single variable, “the gravity of the offense.”<sup>151</sup> He then accepts the doctrinal premise that a single standard governs both of these situations, namely “probable cause.” Finally, he runs together protection and responsibility in positing that, in the kidnapping scenario, the roadblock would be “the only way to save a threatened life *and* detect a vicious crime.”<sup>152</sup> Commentators have followed suit.<sup>153</sup>

A contractualist Fourth Amendment can accommodate the most compelling aspect of Jackson’s reasoning while simultaneously recognizing that the “gravity of the offense” generally matters only when a protective interest is at stake. The key, again, is to tease responsibility and protection apart. In Jackson’s kidnaping example, the overwhelming majority of people stopped at the police checkpoint would have had no opportunity to avoid investigative burdens by choosing appropriately. Even if each individual driver chose appropriately, she would still be subject to being stopped and searched at the checkpoint. Thus, the police could not reasonably impose investigative burdens on those drivers based on a principle of responsibility.<sup>154</sup> However, the interests of the abducted child outweigh the burden of being briefly searched. Amid Jackson’s reasoning is the critical claim that the roadblock would be “the only way”—and, he should have further demanded, a reasonably effective way—“to save a threatened life.”<sup>155</sup> Thus, the people stopped could not reasonably reject a principle allowing the roadblock, but the abductee could reasonably insist on it.

This use of the protection principle is attractively self-limiting: police exercising due care could view the roadblock as a valid application of the protection principle only by finding it to be both necessary and effective. As time goes on or the search’s geographic area expands, a once-fair roadblock would turn into a fishing expedition. And an innocent driver could reasonably reject a principle that authorized searches and seizures that had no realistic chance of effectively protecting victims. The point at which a protective

---

150. *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting). For dicta to similar effect, see *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

151. *Brinegar*, 338 U.S. at 183 (Jackson, J., dissenting).

152. *Id.* (emphasis added).

153. For example, Akhil Amar drew on Jackson’s passage when arguing that “serious crimes *and* serious needs can justify more serious searches and seizures”—a statement that seems not to require a protective interest. Amar, *supra* note 112, at 802 (emphasis added).

154. See *supra* Section II.A.

155. *Brinegar*, 338 U.S. at 183 (Jackson, J., dissenting).

search becomes an impermissible dragnet will be partly determined by empirics, but fairness dictates the relevant inquiry: suspicionless searches are generally fair so long as the probability-discounted benefits to protected individuals exceed the burdens imposed on innocent individuals.

Similar reasoning provides a plausible basis for cases that permit personal burdens based on “reasonable suspicion,” which is a level of suspicion less than probable cause.<sup>156</sup> In many contexts, it is hard to discern whether or why the “reasonable suspicion” test is different than “probable cause.”<sup>157</sup> Fairness suggests an answer: a lower standard should apply in certain cases where the protection principle justifies police action. A protective “reasonable suspicion” standard would thus diverge from responsibility-based searches and seizures in two key respects. First, protective justifications are concerned with “suspicion” regarding protective needs, not criminality as such (though the two may often coincide). Second, a protective action can be fair even when police lack any reasonable belief that they are searching or seizing people who are guilty of crime, so long as police believe that their conduct is a necessary and effective way to avert harm.

Imagine for example that police have learned that a hostage is being held in one of three apartment rooms. The principle of responsibility cannot justify entry into the rooms unless police reasonably believe that an individual occupant is guilty of a crime.<sup>158</sup> But the hostage could reasonably reject principles that would prevent entry—and for reasons analogous to those in Jackson’s hypothetical. Where due care suggests that protective efforts are both necessary and effective, and no individual can raise a comparable person-to-person objection, police need not believe that the people being searched and seized are responsible for crime. The key fairness question, instead, is whether the police believe that a search or seizure is a necessary and effective “way to save a threatened life.”<sup>159</sup>

Take the seminal case *Terry v. Ohio*, where a police officer observed individuals repeatedly walking back and forth in front of a store, apparently “casing a job.”<sup>160</sup> Even assuming the officer did not reasonably believe that the suspects were already guilty of a crime, there would still be a reasonable basis for stopping the suspects if doing so was a necessary and effective way to avert the greater harm of their future conduct.<sup>161</sup> And a frisk might then

---

156. *E.g.*, *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014); *Terry v. Ohio*, 392 U.S. 1, 28 (1968).

157. *See* Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 656 (2009) (“[T]he Court seems to have adopted a ‘we know it when we see it’ attitude, taking the position that probable cause is a more demanding standard than reasonable suspicion in some amorphous, ineffable way.”).

158. *See supra* note 102 and accompanying text.

159. *Brinegar*, 338 U.S. at 183 (Jackson, J., dissenting).

160. 392 U.S. at 6.

161. *See Terry*, 392 U.S. at 24 (noting “the need for law enforcement officers to protect themselves and other prospective victims of violence”).

be justified by the officer's own interests in protection, provided a reasonable belief that the suspects posed a danger.<sup>162</sup> The Court engaged in interest aggregation,<sup>163</sup> but person-to-person would yield essentially the same outcome—without opening the door to broader curtailments of individual rights.

Similar protection-based logic should also inform the scope of the warrant presumption. We have seen that the warrant presumption is a safeguard that protects innocent suspects from police error.<sup>164</sup> But the delay of obtaining a warrant sometimes threatens personal interests, such as when entry into a house might prevent a violent crime. Recognizing those scenarios, potential crime victims could reasonably reject a principle that prevented police from taking appropriate protective action. Thus, interpersonal comparisons support a principle allowing warrantless searches to protect individuals.<sup>165</sup> Importantly, this conclusion is markedly narrower than current doctrine, which draws no distinction between “exigencies” involving threats to individuals as opposed to evidence destruction.<sup>166</sup> By contrast, the protection principle supports warrantless entry only to defend individuals from harm.

Finally, the protection principle supplies a framework for resolving the so-called “special-needs” cases, in which the government undertakes programmatic searches without individualized suspicion and for reasons other than “the general interest in crime control.”<sup>167</sup>

On its face, the special-needs doctrine seems like an exception to basic principles of Fourth Amendment law. Whereas many Fourth Amendment cases, historical sources, and commentators support a strict requirement of individualized suspicion,<sup>168</sup> the special-needs cases allow for suspicionless searches and seizures. The Court claims that these measures are critical to achieving governmental interests, such as reducing teenage drug use.<sup>169</sup> But the government often has interests that are achievable only, or much more

---

162. *Id.* at 23–24.

163. *Id.* at 20–21.

164. *See supra* text accompanying note 111.

165. *See Georgia v. Randolph*, 547 U.S. 103, 118 (2006).

166. *See, e.g., Kentucky v. King*, 563 U.S. 452, 460 (2011) (collecting cases).

167. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32, 39–40 (2000) (distinguishing *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

168. *See, e.g., Thomas K. Clancy, The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 530 (1995) (“The framers believed individualized suspicion to be an inherent component of the concept of reasonableness.”); Taslitz, *supra* note 133.

169. *E.g., Acton*, 515 U.S. at 661 (“Deterring drug use by our Nation’s schoolchildren” implicates a special need); *see also Skinner v. Ry. Labor Execs.’ Ass’n.*, 489 U.S. 602, 620 (1989) (“The Government’s interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, likewise presents “special needs” beyond normal law enforcement . . . .”) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987)).

effectively, by dispensing with individualized suspicion.<sup>170</sup> To prevent the special-needs exception from devouring the individualized-suspicion rule, the Court finds special needs only when the government's interest is distinct from "crime detection"<sup>171</sup> and "the general interest in crime control."<sup>172</sup>

Yet the doctrine's aversion to "the general interest in crime control" is uncomfortably ad hoc. Even in cases that involve general crime control, the Court frequently asserts that the Fourth Amendment calls for balancing competing interests.<sup>173</sup> And if that is so, then why *shouldn't* crime detection be a basis for programmatic searches and seizures? Reducing crime is, after all, a very important interest. Moreover, the Court's special-needs cases have entertained a wide range of governmental interests, many of which seem hard to distinguish from general crime control.<sup>174</sup> National security cases underscore the point. In recent years, some courts have suggested that programmatic searches and seizures can be upheld under the special-needs doctrine, on the theory that those efforts advance the government's interests in objectives arguably related to preventing terrorism. And because terrorism can arise in so many forms and contexts, the special-needs doctrine plausibly supports wide-ranging suspicionless searches and seizures—such as the National Security Agency's telephonic metadata program.<sup>175</sup>

The Court's failure to distinguish special needs from general crime control can be viewed as a symptom of a deeper theoretical problem. Once life-and-death policy objectives are admitted into the Court's interest aggregation, those issues will tend to outweigh *any* other interests, leaving little room for Fourth Amendment rights.<sup>176</sup> Again, the most obvious version of this problem involves terrorism or national security. But a similar problem pertains to many other life-and-death interests, such as teenage drug use.<sup>177</sup> Once a court accepts that there is a serious risk of student deaths, interest aggregation would seem to favor any maximally curative response, regardless of its distributional or individualized implications. Yet the Court has closely examined the details of programmatic search policies and considered a variety of factors separate from, and in tension with, a requirement that the

---

170. *E.g.*, *Maryland v. King*, 569 U.S. 435, 468–70, 469 n.1 (2013) (Scalia, J., dissenting).

171. *See, e.g.*, *Chandler v. Miller*, 520 U.S. 305, 313–14 (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.").

172. *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001) (quoting *Edmond*, 531 U.S. at 44 (2000)). The Court also glosses "special needs" as needs "beyond normal law enforcement." *Skinner*, 489 U.S. at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987)).

173. *E.g.*, *United States v. Place*, 462 U.S. 696, 703 (1983); *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *see supra* text accompanying notes 71–74.

174. *See supra* note 169 (collecting cases).

175. *See Klayman v. Obama*, 805 F.3d 1148, 1149 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of hearing en banc).

176. *See supra* note 13 (collecting sources).

177. *See supra* note 169 (collecting cases).

program maximize aggregate welfare.<sup>178</sup> Those additional considerations, like the bar on general crime control, are what remain of the Fourth Amendment in special-needs cases. Yet they do not seem to flow from the Court's professed cost-benefit analysis.

A better approach would begin by viewing special-needs cases as instances of programmatic protection.<sup>179</sup> What makes special-needs searches "special" is the presence of a protective interest that is systematic in nature and thus susceptible to programmatic responses. Suspicionless security checks at airports offer a paradigmatic example<sup>180</sup> (and so should not rest on a supposed "border search exception" to Fourth Amendment principles<sup>181</sup>). The protective interest is in preventing terrorists from gaining access to aircraft. Yet any given security check is unlikely to uncover terrorism. Airport security could be working well—indeed, perfectly well—if it completely deterred would-be malefactors and so *never* uncovered evidence of terrorism.<sup>182</sup> Is suspicionless airport screening therefore unfair? No, because many air travelers could reasonably reject a principle that precluded suspicionless airport screening, given the increased risk that terrorism would then pose.<sup>183</sup> These cross-cutting arguments push us toward a more nuanced approach than simply saying that suspicionless airport screenings are categorically either permissible or impermissible.

In general, special-needs searches are justified under the protection principle when two conditions are met.

*First*, police must believe, based on due care, that a program of searches or seizures is a necessary and effective way to protect against severe personal

---

178. See *supra* note 167 (collecting cases).

179. See Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1042 (2016) (drawing a transactional/programmatic distinction).

180. See, e.g., *Chandler v. Miller*, 520 U.S. 305, 323 (1997) ("[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings." (citation omitted)).

181. See, e.g., *United States v. Ramsey*, 431 U.S. 606, 616 (1977). The Court's "right of the sovereign" rationale is not consistent with fairness. Nor is the Court's reliance on the asserted difficulties of policing the border. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 561–64 (1976). Consent could perhaps play some role in justifying border searches, see *infra* Section II.C, but only for persons who have a viable choice not to enter and so can give meaningful consent in this context.

182. See *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 675–76 n.3 (1989) ("When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success.").

183. The argument in the main text relies on protection as opposed to intrapersonal aggregation because some people searched at airports may be one-off travelers who would have little personal interest in future deterrence. Cf. Elizabeth Ashford, *The Demandingness of Scanlon's Contractualism*, 113 ETHICS 273, 289, 298–300 (2003). Those people's objection to suspicionless searches and seizures would then have to be defeated by the personal objections of, for example, long-term air travelers.

harms.<sup>184</sup> Suspicionless searches and seizures impose significant personal burdens; thus, those burdens can be justified on a person-to-person basis only for the sake of avoiding a relatively severe personal harm. This requirement gives content to the doctrinal prohibition on using special-needs searches to pursue “the general interest in crime control” by making clear that speculative or diffuse law-enforcement interests cannot justify suspicionless searches—as would be permissible under interest aggregation.<sup>185</sup> Note that a special-needs program can be protective through deterrence, even if it never turns up evidence of crime. This point reflects the difference between the prospective protection principle and the retrospective principle of responsibility. And because special-needs searches do not depend on responsibility,<sup>186</sup> they may fairly rest on many group generalizations rooted in population-based generalizations, such as that high school students face distinctive safety threats. For the same reason, protective searches and seizure may rely on nonindividualized inferences of guilt, including inferences based on “big data” models.<sup>187</sup>

*Second*, implementation of the program must also comport with fairness. This additional requirement reflects that special-needs searches are not one-off responses to discrete emergencies, but rather deliberately crafted programs that operate over time.<sup>188</sup> The full demands of fairness will naturally be context dependent, but some generally applicable points can be made. Most fundamentally, fair implementation requires that the program’s benefits and burdens are distributed fairly. The government’s protective interest must be pursued fully, and not selectively. For instance, a principle in favor of employing more time-consuming airport screening methods at politically powerless locations, while expending greater resources to facilitate screening at locales of greater political influence, would be subject to reasonable rejection and therefore unfair.<sup>189</sup> Fairness thus complements other checks on systematically skewed law enforcement,<sup>190</sup> including political

---

184. Some special-needs cases fail this requirement and so are best defended, if at all, based on the principle of helpfulness. See *Illinois v. Lidster*, 540 U.S. 419, 425 (2004) (discussing stops “when police simply ask for . . . help”); *infra* Section II.E.

185. Though the Court’s dicta sometimes condones special-needs searches without aducing any evidentiary basis whatsoever, see *supra* note 180, the Court’s holdings tend to demand evidence, see, e.g., *Chandler*, 520 U.S. at 321–22.

186. See *supra* text accompanying note 133.

187. Still, fairness imposes limits. See *infra* Section III.C.

188. See Renan, *supra* note 179; *supra* note 13 (collecting sources).

189. Political process theories can arrive at a similar conclusion. See Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93 (2007); see also Slobogin, *supra* note 104, at 126–43.

190. Cf. Mila Sohoni, *Crackdowns*, 103 *VA. L. REV.* 31 (2017) (arguing for certain constraints on “crackdowns,” which may involve searches and seizures, and rooting that claim partly in the Take Care Clause).

checks on police activities.<sup>191</sup> Once fairly distributed, search-and-seizure burdens can trigger scrutiny and public debate, thereby facilitating judicial evaluation of empirical issues while introducing the possibility that even an admittedly fair program would be defeated politically.

To illustrate these points, consider the D.C. Circuit's decision in *Mills v. District of Columbia*, where police had established neighborhood checkpoints to stop a spree of local drive-by shootings.<sup>192</sup> The court concluded that the checkpoints served only the "general interest in crime control" and so were not a legitimate special-needs program.<sup>193</sup> That analysis wrongly denied the reasonableness of law-enforcement efforts to protect people from violent crime. Instead, the court should have asked how much the checkpoints reduced the risk of drive-by shootings and whether the relevant burdens were equally distributed across neighborhoods facing similar dangers. If the checkpoints were adequately protective and equally distributed, then individuals burdened by the checkpoints could not reasonably reject a principle allowing them, given the arguments that could be raised by people who sought to reduce their risk of being harmed by drive-by shootings.

### C. Consent

Searches and seizures are sometimes justified by consent. Scanlon argues that a general principle in favor of consent can be justified by the "value of choice," or the benefits that come when individuals have control over their own persons and property.<sup>194</sup> In the Fourth Amendment context, for example, individuals might agree to searches and seizures to dispel suspicion or to aid the police in an urgent investigation. The resulting police actions would still impose burdens on the consenting party and require justification. But given the benefits of leaving these kinds of personal choices to individuals, a principle that prevented people from choosing to agree to search-and-seizure burdens could be subject to reasonable rejection.

In practice, however, consent is more complicated. As in the context of responsibility, individuals can reasonably reject investigative principles that lack adequate safeguards.<sup>195</sup> So, for example, a principle that allowed the

---

191. This point links fairness with the extensive and growing literature on linking democratic approval with the constitutionality of governmental surveillance. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015); Dan M. Kahan & Tracey L. Meares, Foreword, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1174 (1998); see also *supra* note 190.

192. 571 F.3d 1304 (D.C. Cir. 2009) (finding a likelihood of success on the merits in reviewing a request for preliminary injunction).

193. See *Mills*, 571 F.3d at 1308–12.

194. See SCANLON, *WHAT WE OWE*, *supra* note 16, at 294; *supra* Section I.C; see also *United States v. Drayton*, 536 U.S. 194, 207 (2002) ("In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own.").

195. See *supra* text accompanying note 98.

police to threaten illegal action to obtain consent could reasonably be rejected, since those threats would undermine the value of choice.<sup>196</sup> And individuals could also reasonably reject investigative principles that allowed police to find consent without exercising due care. A more auspicious principle would authorize investigative burdens where police have determined, based on due care, that an individual has chosen to submit to a search or seizure, rather than simply allowing the police to take other lawful investigative actions. That presumptive justification for searching or seizing is the consent principle.

A contractualist approach can thus acknowledge that a consent-based search is still a search, and a burdensome one at that.<sup>197</sup> And contractualism also suggests a straightforward explanation for why a search or seizure can be predicated on apparent authority.<sup>198</sup> Again, a reasonable principle of consent searches would insist on due care, since a less demanding principle would be subject to reasonable objection. And due care would be present when police have good reason to think that consent has been granted by the proper party, even if they turn out to be wrong.<sup>199</sup> Thus, the Court is right to: (i) view consent-based searches as “searches,” (ii) link consent to the reasonableness of police action, and (iii) allow for consent-based searches where the consent came from someone with only apparent authority, provided that the police exercise due care in arriving at their (incorrect) finding of consent.

But while courts are right on the abstract fundamentals, attention to fairness also draws attention to ways that existing doctrine comes up short. For example, police often misrepresent their encounters with suspects or take advantage of people’s unawareness of their legal right to decline consent.<sup>200</sup> And there is reason to think that the mere presence of inquisitive police can make interviewees feel pressured, even in the absence of an overt

---

196. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (“[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force.”).

197. Justice Thurgood Marshall and others have proposed that consent-based searches are not Fourth Amendment searches at all because consent eliminates an individual’s “expectation of privacy.” See *Illinois v. Rodriguez*, 497 U.S. 177, 189–90 (1990) (Marshall, J., dissenting) (arguing that “third-party consent searches” rest “not on the premise that they are ‘reasonable’ under the Fourth Amendment, but on the premise that a person may voluntarily limit his expectation of privacy by allowing others to exercise authority over his possessions” (citation omitted)). But that view would give the constitutional term “searches” an artificially constricted meaning. When someone invites an officer to conduct a search, a “search” is most certainly what results.

198. See *id.* at 187–89; see also Christo Lassiter, *Consent to Search by Ignorant People*, 39 TEX. TECH L. REV. 1171, 1172 (2007).

199. See *Rodriguez*, 497 U.S. at 185–86 (“[I]n order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.”).

200. See generally *Schneekloth*, 412 U.S. at 249 (“[T]he subject’s knowledge of a right to refuse . . . is not . . . a prerequisite to establishing a voluntary consent.”); *id.* at 277 (Marshall, J., dissenting) (“I would have thought that the capacity to choose necessarily depends upon

threat.<sup>201</sup> As a result, consent may be impossible in many contexts involving police-suspect interactions. At a minimum, the risk of coercion should inform the standard of due care that fairness demands: because an individual could reasonably reject an investigative principle that allowed police to pressure suspects into acquiescence, fairness calls for greater safeguards that address interviewees' vulnerability to coercion and thereby protect the value of choice during interactions with police.

#### D. Curiosity

Fourth Amendment doctrine is confused when it comes to police activities that seem like "searches" and "seizures" but that may lawfully be performed without any suspicion at all. Contractualism suggests a more persuasive framework for addressing these scenarios by directing attention toward settled social practices that reflect competing social interests in both privacy and curiosity. On this view, settled social practices operate not as a prerequisite for Fourth Amendment protection but rather as one type of justification for imposing search-and-seizure burdens. This approach should replace the doctrinal "reasonable expectation of privacy" analysis.<sup>202</sup>

Settled practices are often key to understanding what actions are fair, particularly when various principles of conduct could be adopted without being reasonably rejected by anyone. In these situations, there is moral room for society to adopt any one of a range of practices. Yet it may be important to have a settled practice in place for the sake of coordination and efficiency.<sup>203</sup> So, once a settled practice is established, deviations may require some special justification.<sup>204</sup> Scanlon calls this idea "the Principle of Established Practices."<sup>205</sup>

We can see this principle in many aspects of social life. For instance, there may be no grounds for objecting to a principle of driving on either the right- or left-hand side of the road.<sup>206</sup> If adopted, either rule would be immune to reasonable rejection, since either option would benefit every individual far more than it would harm any individual (if it harmed anyone at

---

knowledge that there is a choice to be made."); Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

201. David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51 (2009); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153.

202. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). See generally Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007) (identifying four distinct models underlying the Court's "reasonable expectations of privacy" analysis).

203. See generally DAVID K. LEWIS, CONVENTION (1969); ANDREI MARMOR, SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW (2009).

204. See SCANLON, WHAT WE OWE, *supra* note 16, at 339 ("[I]f one of these (nonrejectable) principles [of conduct] is generally (it need not be unanimously) accepted in a given community, then it is wrong to violate it simply because this suits one's convenience.").

205. *Id.*

206. Cf. LEWIS, *supra* note 203, at 6.

all). But once there is a settled practice of driving on the right-hand side, drivers would require some special reason to drive on the left-hand side. Reasons for deviating from principles of privacy are likewise sensitive to settled practices.<sup>207</sup> Different societies exhibit varied privacy norms; and many of those norms, if adopted, would be immune to reasonable rejection and therefore fair.<sup>208</sup> But given the practical need to choose one privacy regime, adherence to a settled practice is a presumptive requirement of fairness.

Building on Scanlon's brief account, we might say that privacy norms can be permissive as well as prohibitory and that permissive privacy norms are often rooted in what might broadly be called "the value of curiosity." In many situations, learning information about someone imposes burdens on that individual but is nonetheless justified. To get along in everyday life, people need to know about one another, and we frequently obtain that critical information nonconsensually. We ask around about the new kid on the block, Google basic information about prospective coworkers, and visit archives to research the biographies of public figures. These situations all involve the genus curiosity, though the species—personal, professional, or political—varies with the circumstances. So long as the principle of curiosity leaves a sufficient zone of personal privacy, no individual can reasonably demand that privacy take a specific shape. But when exactly should curiosity bow to privacy and other interests? This question does not allow for a single, universal answer because there are many reasonable ways of balancing the competing interests in curiosity and privacy. Again, however, *some* reasonable, generally recognized balance should exist so that people can coordinate their behavior accordingly.

So we are not adrift. Given settled social practices, some forms of curiosity are recognizably unobjectionable while others are highly objectionable, with zones of indeterminacy in between. To continue the foregoing examples, asking about people, Googling them, and conducting archival research are all generally viewed as permissible courses of action—not because there is no privacy interest at stake, but rather because those actions conform with settled social practices that are generally justified by the value of curiosity. And because they generally authorize the curiosity not just of police officers but also of private persons, these settled social practices shed light on the accepted limits of privacy. To be clear, these practices play a strictly limited role, in that they resolve otherwise underdetermined fairness issues.<sup>209</sup> So any settled practice can itself be unreasonable, if the principle that would permit it could reasonably be rejected. For example, we will see that invidious search-and-seizure criteria are categorically unreasonable.<sup>210</sup> A settled practice of invidious searches and seizures would thus be unreasonable, even if viewed as a settled practice.

---

207. See SCANLON, WHAT WE OWE, *supra* note 16, at 339.

208. Privacy practices can be justified by dignitary and other personal interests. See *id.* at 340.

209. See *id.* at 339.

210. See *infra* Section III.C.

This focus on settled practices is preferable to the “reasonable expectation of privacy” analysis that, under current doctrine, often operates as a prerequisite for Fourth Amendment reasonableness analysis.<sup>211</sup> For example, when following a suspect on open roads, doctrine maintains that police have undertaken no “search” at all, on the theory that they have not impinged on a “reasonable expectation of privacy.”<sup>212</sup> But under any normal use of language, the police are engaged in “searches” whenever they seek information.<sup>213</sup> And people who are trailed even briefly on open roads do suffer an infringement of real and often significant privacy interests.<sup>214</sup> A better approach would begin by conceding what is linguistically obvious: trailing someone on open roads is a “search” within that word’s normal meaning. The harder question is whether such a search is “unreasonable,” which depends on whether it accords with principles that can reasonably be rejected. On the one hand, a potential target of police surveillance might seek to reject a principle allowing for open-road surveillance because it would intrude on her privacy interests. On the other hand, a potential beneficiary of this surveillance might point to its crime-stopping potential. Given this clash of facially reasonable arguments, we should investigate whether the search in question accords with settled social practices.

The goal here would be to identify an actual social practice relating to privacy or its absence.<sup>215</sup> It would not suffice to show with polls that most people would prefer one practice over another.<sup>216</sup> After all, people might want established practices to change. Moreover, laws applicable to private parties will often be relevant to identifying settled practices, but they cannot control whether those practices either exist or are reasonable.<sup>217</sup> For example, the conduct that currently qualifies as illegal “stalking” was contrary to

---

211. See *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring); Kerr, *supra* note 202. Amusingly, recent decisions pretend that the *Katz* Court adopted this standard, instead of Justice Harlan. *E.g.*, *Florida v. Jardines*, 569 U.S. 1, 10 (2013) (asking about “the ‘reasonable expectation of privacy’ described in *Katz*”—and never so much as mentioning Harlan’s name).

212. See *United States v. Knotts*, 460 U.S. 276, 281, 285 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”).

213. See, *e.g.*, *Search*, n., OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/174307> [<https://perma.cc/HG9N-LPMG>] (collecting broad uses of “search” dating back centuries); see also Amar, *supra* note 112, at 768 (“[T]he Court has played word games, insisting that sunglasses or naked-eye searches are not really searches.”).

214. Critics often emphasize long-term GPS surveillance’s ability to observe trips to visit treatment centers or lovers, *e.g.*, *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), but short-term observation can do the same.

215. *Cf.* *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (reserving whether a search rule should apply only where “the technology in question is not in general public use”).

216. For leading poll-based approaches, see Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 SUP. CT. REV. 205 (2015); SLOBOGIN, *supra* note 113, at 108–16.

217. Positive law reflects myriad policy and political considerations and so does not reliably reflect Fourth Amendment fairness. See *Georgia v. Randolph*, 547 U.S. 103, 120–21 (2006); Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 318 (2016); see also Sherry F.

settled social practices even before there were anti-stalking laws.<sup>218</sup> And if the law one day granted an unlimited easement for strangers to enter into one another's homes,<sup>219</sup> that legal change would not in itself mean that entering private homes had become a settled practice, much less a reasonable one. Again, settled practices influence the contractualist analysis only when they cannot be reasonably rejected. That requirement allows contractualist reasoning about settled social practices to avoid the circularity problem that bedevils "reasonable expectations of privacy" analysis.<sup>220</sup>

Settled practices provide an attractive basis for many foundational applications of the "reasonable expectations of privacy" standard. For instance, it seems safe to posit that settled social practices are consistent with anybody—even police—pursuing their curiosity by asking around about unfamiliar people or observing the goings on at a city intersection. Moreover, there is no apparent reason why a search-and-seizure principle allowing for those modes of investigation could be reasonably rejected. Quite the contrary, striking the balance between privacy and curiosity by allowing for those practices seems unlikely to impose significant net burdens on anyone. Thus, those investigative acts are generally permissible—as current doctrine maintains. Similar reasoning might support case law that attends to professional practices when securing individual privacy in public workplaces.<sup>221</sup>

By contrast, no settled social practices involve one person indulging his curiosity by engaging in long-term observations of another specific individual. Quite the contrary, most forms of long-term, covert observation are rare and socially unacceptable, even if the observations pertain to someone's movement in public, and that conclusion finds added support in (but does not depend on) criminal stalking prohibitions. Attention to settled practices thus accords with the relatively forward-looking application of the *Katz* test elaborated in separate opinions in *United States v. Jones*.<sup>222</sup> Under those

---

Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 123 (2002) (focusing on "the transgression of a legal or social norm"). *But see* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1877 (2016) ("Under the positive law model," Fourth Amendment issues should be resolved "by looking to underlying rules of property and agency law").

218. By contrast, a strict "positive law model" would not view stalking behavior as cause for Fourth Amendment concern until and unless it is rendered unlawful for private parties. *See* Baude & Stern, *supra* note 217.

219. *See Re, supra* note 217, at 330–31 (raising this hypothetical).

220. *See, e.g.,* Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1524 n.63 (2010) (collecting sources). *But see* Matthew B. Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747 (2017). Kugler and Strahilevitz show that public expectations regarding privacy are sticky, despite legal changes; but they do not disprove a "weak" version of the circularity problem. *Id.*

221. *See O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) ("Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures . . .").

222. *See United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring); *id.* at 427–29 (Alito, J., concurring in the judgment).

opinions, police would have to adduce some justification besides mere curiosity to use a GPS tracker to monitor a suspect on open roads for several weeks. Note, however, that the *Jones* opinions treated this issue as a question about whether a “search” had occurred. By contrast, the argument from settled practices adduced here would give “search” its normal meaning and focus instead on whether police have reasonably justified their conduct.

Attention to settled practices also provides attractive results where the “expectation of privacy” doctrine currently stumbles. Imagine for example that police convince an informant to wear a wire when having incriminating conversations with a suspect. This scenario goes well beyond common gossip and finds no support in settled social practices. Secret listening devices exist but are rarely used, generally frowned upon, and often even illegal.<sup>223</sup> The upshot is that the value of curiosity cannot support the police actions in the imagined scenario. So, for the use of a listening device to be fair, there must be some other justification, such as an argument that the intruded-on parties are reasonably believed to be responsible for crimes. Alas, the Court reached the opposite conclusion: based on the “third-party doctrine,” the Court believes that individuals lose their “reasonable expectation of privacy” in information “voluntarily conveyed” to a third party.<sup>224</sup> Fairness, by contrast, calls for attention to social practices—and so can tell the difference between gossip and professional spying.

#### E. *Helpfulness*

The law of searches and seizures encompasses subpoenas and other orders to disclose evidence of crime, including crime by third parties. Those commonplace orders implicate a final basis for searches and seizures: the principle of helpfulness.

Morality sometimes requires that people assist one another. We have already seen a version of this point in connection with the protection principle and emergency situations.<sup>225</sup> But moral duties of assistance extend beyond emergencies. As Scanlon notes, if he had “a piece of information that would be of great help to” someone, then it “would surely be wrong of me to fail (simply out of indifference) to give her this information when there is no compelling reason not to do so.”<sup>226</sup> Scanlon calls this intuitive idea “the Principle of Helpfulness.”<sup>227</sup> Note that the principle of helpfulness requires a large asymmetry in competing interests: the help must be highly valuable to the beneficiary and only negligibly harmful to the benefactor. By contrast, a

---

223. *E.g.*, CAL. PENAL CODE § 632 (West 2017).

224. *See* United States v. Miller, 425 U.S. 435, 442 (1976); United States v. White, 401 U.S. 745, 750–52 (1971) (plurality opinion); *see also infra* text accompanying notes 237–239 (discussing cell site locational data).

225. *See supra* text accompanying note 150.

226. SCANLON, WHAT WE OWE, *supra* note 16, at 224.

227. *Id.*

principle that would require greater assistance might be susceptible to reasonable rejection by the would-be benefactor, who would have reason to place limits on the claims of others. Thus, the principle of helpfulness is weak, in that it creates only limited obligations.

Duties of helpfulness also exist in the law enforcement context. Let us assume that enforcement of the criminal law is to be regarded as morally justified.<sup>228</sup> Members of the public would then have reason to reject any principle that would allow purely obstructionist withholding of information that would assist the government in investigating a crime. So when the government requests information that might be pertinent to an investigation and can easily be disclosed, the recipient will often have a duty, rooted in fairness, to provide that information.

These conclusions substantially accord with existing doctrine.<sup>229</sup> When called upon, individuals usually have a legal obligation to disclose useful evidence to the government, provided both that the information is relevant to a legitimate investigative goal and that compliance is not “unreasonably burdensome.”<sup>230</sup> Moreover, courts and scholars often defend this practice partly on the ground that disclosure of relevant evidence generally does not impose a severe burden—or, at least, that it imposes much less of a burden than a police search or seizure.<sup>231</sup> So, at a relatively high level of abstraction, subpoena law resonates with the principle of helpfulness.

Still, the limitations built into the principle of helpfulness draw attention to two potential grounds for defeating the general duty of helpfulness. Alas, current case law is inadequately attentive to the first of these grounds—and almost oblivious to the second. The principle of helpfulness thus suggests areas for reform.

First, the burden of complying with a demand for information could be so large as to make any principle authorizing such requests subject to reasonable rejection.<sup>232</sup> Fourth Amendment law on this topic has become toothless, and the most salient recent litigation in this vein has consequently focused on statutory grounds, rather than the Fourth Amendment. A recent example is the “Apple v. FBI litigation,” in which the government obtained a

---

228. See *supra* text accompanying notes 93, 100 (discussing this assumption, its possible justifications, and some of its implications).

229. See generally *United States v. Nixon*, 418 U.S. 683, 709 (1974) (“[T]he public . . . has a right to every man’s evidence,” with certain exceptions for privilege. (omission in original) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972))); *Warden v. Hayden*, 387 U.S. 294, 306 (1967) (abandoning the mere evidence rule).

230. See *See v. City of Seattle*, 387 U.S. 541, 544 (1967) (“It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.”).

231. See Louis Michael Seidman, Response, *The Problems with Privacy’s Problem*, 93 MICH. L. REV. 1079, 1092 (1995) (arguing that subpoenas are “self-searches” that “involve no violence, no disruption, no public humiliation or embarrassment”). More plausibly, a “self-search” usually involves *much less* disruption, humiliation, and embarrassment.

232. See *See*, 387 U.S. at 544–45.

court order directing that Apple design a means of defeating its own product's encryption.<sup>233</sup> Apple contended that, if it created a program capable of penetrating the encryption on one of its devices, that same program would lie around like a loaded gun, endangering the security of myriad Apple products owned and relied on by other individuals.<sup>234</sup> That argument, if empirically sound, might yield a reasonable basis for consumers to reject the government's investigative principle.<sup>235</sup> The case mooted out before setting any precedent, but all parties overwhelmingly argued based on a "reasonableness" requirement in the All Writs Act, rather than the Fourth Amendment.<sup>236</sup> A fairness-based approach would locate that debate in the Constitution, rather than in statutory law entirely within the control of Congress.

Second—and even more importantly—a principle requiring information disclosure could be subject to reasonable rejection insofar as it imposed burdens on persons with an interest in the information's confidentiality. Take orders for disclosure of historical cell-site location information, which (at the time of this writing) the Court is now reviewing in *Carpenter v. United States*.<sup>237</sup> Because locational information is often highly revealing, particularly when disclosed in large quantities, cell phone users have a strong interest in rejecting principles that would allow the government an unlimited ability to demand the information. Thus, the relatively weak principle of helpfulness could not justify these disclosure orders. A stronger principle would have to be brought to bear. For example, the principle of responsibility might apply if police had a reasonable belief that the burdened party is responsible for a crime.<sup>238</sup>

Current doctrine often ignores this second limitation based on the third-party doctrine, which holds that individuals lack a reasonable expectation of privacy in confidential information that is "voluntarily conveyed" to a third party, including when the third party is a colleague, a bank, or a

---

233. See Arash Khamooshi, *Breaking Down Apple's iPhone Fight with the U.S. Government*, N.Y. TIMES (Mar. 21, 2016), <http://www.nytimes.com/interactive/2016/03/03/technology/apple-iphone-fbi-fight-explained.html?r=0> (on file with the *Michigan Law Review*) (primary documents).

234. See *id.*

235. I assume, consistent with Scanlon's writings, that only natural persons can raise reasonable rejections. Thus, Apple itself cannot raise a reasonable objection based on its own interests in avoiding compliance. However, Apple and other corporations may be able to raise the Fourth Amendment rights of its customers. See *Singleton v. Wulff*, 428 U.S. 106, 114–16 (1976) (discussing third-party standing).

236. See 28 U.S.C. § 1651 (2012); Khamooshi, *supra* note 233.

237. *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (2017).

238. Statutory law allows for disclosure based on a broader standard: "reasonable grounds to believe" that the data is "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d) (2012); see also *infra* text accompanying note 269 (discussing collateral burdens associated with wiretaps and the like).

telecom.<sup>239</sup> The government thus has legal authority to compel the disclosure of the confidential information. The third-party doctrine is often viewed as highly objectionable,<sup>240</sup> and the various principles of fairness put forward in this Part help to explain why. As we have seen, a search or seizure that discloses information about an individual is a burden requiring justification. But in third-party cases, there is generally no consent to disclose confidential information.<sup>241</sup> Moreover, there is no settled social practice of coercing the disclosure of confidences—and even if there were, it would itself be subject to reasonable rejection. Finally, we have just seen that the principle of helpfulness cannot justify searches or seizures that impose significant burdens. So the coerced disclosures authorized by the third-party doctrine are unfair, barring the application of a stronger justificatory principle, such as the principle of responsibility or the protection principle.<sup>242</sup>

\* \* \*

The above principles supply a nonexhaustive, overlapping set of reasons for conducting searches and seizures. But those reasons are only part of the story, since they are both limited in scope and sometimes defeated by other moral considerations. The next Part accordingly turns away from the sources of Fourth Amendment fairness and focuses instead on sources of unfairness.

### III. SOURCES OF UNFAIRNESS

The last Part identified situations where searches and seizures are often fair. It is now time to address situations where, notwithstanding the general principles of fairness discussed above, searches and seizures are nonetheless unfair.

#### A. Excessive Burdens

The principles outlined in Part II all have built-in limitations that must be observed. Where those justificatory limitations are exceeded, searches and seizures impose excessive burdens—and are unfair. For example, we have

---

239. See, e.g., *United States v. Miller*, 425 U.S. 435, 442–43 (1976) (“[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”); *Carpenter*, 819 F.3d at 889.

240. See, e.g., SLOBOGIN, *supra* note 113, at 152–54; Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009) (collecting sources). *But see* Kerr, *supra* (defending the third-party doctrine).

241. See *supra* note 239 (quoting *Miller*). Terms of service that afford confidentiality often acknowledge the need to comply with disclosures ordered by law. See, e.g., *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 613 (5th Cir. 2013) (applying the third-party doctrine in part because “subscribers’ contractual terms of service and providers’ privacy policies . . . make clear that providers will turn over these records to government officials if served with a court order”). But the fairness of those orders is the very point at issue—and so requires separate justification.

242. See *supra* text accompanying note 238.

seen that the consent principle is bounded by the terms of consent and so cannot justify additional burdens.

Similar justificatory limits are visible in cases involving the “plain view” doctrine. Take *Arizona v. Hicks*,<sup>243</sup> where police entered an apartment for reasons of exigency, noticed some stereo equipment, and moved the equipment to observe its serial number.<sup>244</sup> One question was whether the police required a justification specifically to manipulate the stereo equipment and observe the serial number.<sup>245</sup> The Court held that the police had “exposed to view concealed portions of the apartment or its contents” and so “did produce a new invasion of respondent’s privacy,” which accordingly required justification.<sup>246</sup> On that narrow point, the Court was correct. Moving the equipment occasioned a “new invasion of respondent’s privacy,” yielding a distinctive personal burden beyond what was reasonably necessary to investigate the exigency.<sup>247</sup> So, to be fair, that search required some justification.

The limitations on the principle of responsibility have more complex implications. As we have seen, many searches and seizures draw moral force from the government’s punitive goals: if the criminal laws are properly justified, then it is generally fair for the government to make reasonable efforts to identify, detain, and prosecute people who are reasonably believed to be responsible for crime.<sup>248</sup> But that logic has a built-in limitation: it does not authorize police to impose burdens that exceed what is reasonably necessary to effectuate criminal punishment. When police rely on the principle of responsibility, prospective suspects can reasonably object to principles that would allow gratuitous search-and-seizure burdens, or that would create burdens in excess of the maximum lawful penalty for the suspected crime. For example, someone responsible for jaywalking could fairly be stopped and fined, but not held overnight or subjected to a body-cavity search.

For a more interesting example, consider *Winston v. Lee*, where the police sought to surgically remove a bullet reasonably believed to be lodged inside a suspect.<sup>249</sup> That scenario implicated the principle of responsibility, since the police had reason to believe that the suspect had committed a crime. Yet a principle that would allow for investigative surgeries could reasonably be rejected, due to the bodily intrusion and health risks involved.<sup>250</sup>

---

243. 480 U.S. 321 (1987) (applying “plain view” doctrine).

244. *Hicks*, 480 U.S. at 323.

245. *See id.* at 324.

246. *Id.* at 325.

247. *Id.*

248. On the justifiability of criminal laws, *see supra* note 100 and accompanying text (discussing contractualist thought on this subject).

249. 470 U.S. 753 (1985).

250. *See Winston*, 470 U.S. at 761, 766 (discussing “bodily integrity” and “medical risks” as factors).

The Court purported to reach this conclusion through interest aggregation,<sup>251</sup> but a fairness analysis is more apt. The wrongness of demanding the invasive and dangerous surgery did not depend on whether the surgery would be net beneficial to society, as an interest aggregator might argue. Rather, the procedure's wrongness flowed from the severe harms imposed on an individual where no other individual had a comparably strong basis for demanding the procedure. But investigative surgeries are not categorically unfair. If the item to be extracted were a bomb, for instance, a protective justification might render the extraction fair, despite the suspect's personal interests.

Current doctrine sometimes reflects the limitations of multiple search-and-seizure principles. The "excessive force" doctrine supplies a good example.<sup>252</sup> Under this line of cases, police have a Fourth Amendment duty to limit the physical harmfulness of their actions, even when they have ample justification to seize someone.<sup>253</sup> Consider *Tennessee v. Garner*, where police used lethal force to prevent a suspected burglar's escape.<sup>254</sup> The common law had granted a broad privilege for force against an escaping felon; but, as the Court noted, felonies were historically linked to capital punishment.<sup>255</sup> The Court accordingly found that that rule would be "distorted" if applied to relatively venial felonies that were punishable only by terms of imprisonment.<sup>256</sup> That reasoning reflected the limitations of the principle of responsibility: killing a suspect is a patently excessive means of prosecuting crimes that are not even punishable by death.

But uses of force also implicate the protection principle, and courts have considered its limitations in tandem with limits on the principle of responsibility. In *Graham v. Connor*, the Court endorsed "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."<sup>257</sup> Because it references apparently diffuse "governmental interests," *Graham* seems open to interest aggregation;<sup>258</sup> however, the most persuasive aspects of *Graham* accord with contractualist principles of fairness.<sup>259</sup> As we have

---

251. See *id.* at 760 ("The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure.").

252. See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014).

253. See *id.* This line of Fourth Amendment cases is limited to "seizures," but blurs into a closely related area of substantive due process—which may also implicate fairness. See *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998).

254. 471 U.S. 1, 3–4 (1985).

255. See *Garner*, 471 U.S. at 12–14, 13 n.11.

256. See *id.* at 14–15.

257. 490 U.S. 386, 396 (1989) (quoting *Garner*, 471 U.S. at 8).

258. See *Graham*, 490 U.S. at 396.

259. Cf. Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U. L. Rev. 1119, 1124 (2008) (noting the need for "deontic constraints" as to police violence and ultimately arguing for an imminence, necessity, and proportionality inquiry).

seen, the principle of responsibility would not generally support the infliction of severe injuries or death. Nor would the protection principle typically support the infliction of severe burdens on suspects, given that fleeing suspects do not normally threaten other individuals. A contractualist approach to fairness would thus clarify the proper means of accounting for the factors listed in *Graham*, particularly “the severity of the crime at issue,” and “whether the suspect poses an immediate threat to the safety of the officers or others.”<sup>260</sup>

### B. Collateral Burdens

Current doctrine often assumes that police should have the lawful ability to access any evidence or offenders that they can reliably locate, particularly when they have a warrant.<sup>261</sup> But that premise is too broad to be fair, since innocent individuals can reasonably reject principles that categorically sacrifice their personal interests for the sake of diffuse social goals, such as prosecuting crime.<sup>262</sup> Fairness thus directs our attention to the “collateral burdens” imposed by police. To flesh out this point, we must again dismantle doctrinal categories and interrogate the moral justifications that come to bear in different cases.

The principle of responsibility sometimes offers a basis for searching or seizing suspects in ways that also burden third parties. For instance, ordering one suspect to disclose information about another can be justified, if the second person is also reasonably suspected of a crime, such as complicity.<sup>263</sup> Historically, Fourth Amendment doctrine may have attended to this point via the “mere evidence” rule,<sup>264</sup> which permitted searches only where the police had cause to believe that they would discover the fruits of crime, instrumentalities of crime, or contraband.<sup>265</sup> The mere evidence rule is often characterized as a product of the nineteenth-century focus on property rights.<sup>266</sup> But it also played an underappreciated role in promoting fairness, since criminal fruits, instrumentalities, and contraband tend to be in the possession of persons who are themselves engaged in, and responsible for,

---

260. *Graham*, 490 U.S. at 396. The third listed *Graham* factor, “whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight,” *id.*, should be relevant only to the extent that it indirectly feeds into the factors identified in the main text.

261. See *supra* note 229.

262. See *supra* text accompanying note 70.

263. See *supra* Section II.A.

264. On the expansion and demise of the rule, see Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 587–94 (1996), Donohue, *supra* note 33, at 1308–14, Donald A. Dripps, “Dearest Property”: Digital Evidence and the History of Private “Papers” as Special Objects of Search and Seizure, 103 J. CRIM. L. & CRIMINOLOGY 49, 50–53, 83–107 (2013), and Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 166–74 (2012).

265. See, e.g., *Gouled v. United States*, 255 U.S. 298, 309 (1921). The Court abandoned the mere evidence rule in *Warden v. Hayden*, 387 U.S. 294 (1967).

266. See, e.g., Cloud, *supra* note 264, at 593.

criminal activity. Echoes of the old rule persist in cases that emphasize whether there is reason to believe that contraband is present, as opposed to mere evidence of someone else's unrelated offense.<sup>267</sup> These cases exhibit a troubling "guilt by association" assumption that could be dispelled by directly addressing third-party responsibility on a case-by-case basis.<sup>268</sup>

Other searches and seizures impose substantial burdens on third parties who are not suspected of any crime. Take wiretaps that reveal intimate conversations with the suspect's law-abiding family, or subpoenas to suspected businesses that would disclose intimate details about both suspected and unsuspected customers.<sup>269</sup> In some cases, these incidental burdens are justifiable under one of the principles discussed above in Part II. For instance, burdens on nonsuspect third parties could be justifiable under the protection principle, if the burdens were necessary and effective at reducing a specific risk of violent crime.<sup>270</sup> And relatively small collateral burdens could be justified by the principle of helpfulness.<sup>271</sup> Sometimes, however, no fair principle would justify the collateral burdens placed on nonsuspect third parties. Current doctrine is largely uninterested in that fairness deficit.<sup>272</sup>

But if current Fourth Amendment doctrine is insufficiently attentive to collateral burdens, some vitally important statutes, like the minimization requirements for Title III wiretaps, have squarely addressed them.<sup>273</sup> Courts should recognize that, when it comes to nonsuspect third parties, the Fourth Amendment itself demands similar efforts at minimization.<sup>274</sup> Again, contractualist reasoning points the way. A principle that prohibited all searches or seizures that burdened nonsuspect third parties would objectionably preclude protective law enforcement, including by encouraging dangerous criminals to surround themselves with innocent parties as "investigative shields." A more auspicious principle would require police to minimize their

---

267. See *Michigan v. Summers*, 452 U.S. 692, 701 (1981) ("Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband."); see also *Muehler v. Mena*, 544 U.S. 93, 98 (2005) (applying the *Summers* "contraband" rule); *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (similar); *Wyoming v. Houghton*, 526 U.S. 295, 297 (1999) (similar).

268. See Tracey Maclin, *The Pringle Case's New Notion of Probable Cause: An Assault on Di Re and the Fourth Amendment*, 2003-2004 CATO SUP. CT. REV. 395, 395-97.

269. See, e.g., *United States v. Miller*, 425 U.S. 435, 443 (1976).

270. See *supra* Section II.B. This logic might justify some FISA orders under, for example, 50 U.S.C. § 1861 (2012).

271. See *supra* Section II.E.

272. See generally *Zurcher v. Stanford Daily*, 436 U.S. 547, 553-55 (1978) (rejecting special protection for nonsuspects); *United States v. Nixon*, 418 U.S. 683, 713 (1974).

273. See, e.g., 18 U.S.C. § 2518(5) (2012); cf. *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976) (noting the importance of "care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy").

274. Courts sometimes controversially incorporate minimization concepts into the Fourth Amendment. See *United States v. Mohamud*, 843 F.3d 420, 441-44 (9th Cir. 2016); Orin Kerr, *The Surprisingly Weak Reasoning of Mohamud*, LAWFARE (Dec. 23, 2016, 7:30 AM), <https://www.lawfareblog.com/surprisingly-weak-reasoning-mohamud> [https://perma.cc/6MNE-FAWT] (criticizing *Mohamud* on doctrinal grounds).

intrusions on nonsuspected third parties to the extent possible consistent with due care. The idea here is to attend to the interests of bystanders who are, in effect, caught up in the investigative melee.

For a doctrinally salient example of how a targeted search can burden innocent third parties, consider searches of one person's home based on a desire to arrest a suspect who happens to be there. The Court has recognized that this scenario poses a special problem, in that the Fourth Amendment must attend to the "interests" and, yes, even the "perspective" of the nonsuspect homeowner:

In sum, two distinct interests were implicated by the search at issue here— [the suspect's] interest in being free from an unreasonable seizure and [the host's] interest in being free from an unreasonable search of his home. Because the arrest warrant for [the suspect] addressed only the former interest, the search of [the host's] home was no more reasonable from [his] perspective than it would have been if conducted in the absence of any warrant.<sup>275</sup>

The Court's solution to the problem of third-party burdens was simply to require a third-party warrant: police may search a third party's home upon convincing a judge that a wanted offender can be found there.<sup>276</sup> But while warrants may be "reliable" gauges of suspicion and so may reduce the risk of "abuse" by police officers,<sup>277</sup> a warrant alone does not adequately respect the interests of innocent third parties who happen to have criminal suspects (or relevant evidence) in their homes.<sup>278</sup> The mere fact that a suspect is in someone's home—even if proven—does not necessarily make it fair to enter and search that home.

Fairness suggests that more is required: rather than simply convincing a magistrate that the suspect (or evidence) is present in a third party's dwelling, the police should have to *justify* any search or seizure burdening the third party. The police could meet this burden by: (i) showing that the host has himself committed a relevant crime, such as harboring a fugitive, thereby triggering the principle of responsibility; (ii) asking the host for permission to enter, as allowed by the principle of consent; (iii) demonstrating that unconsented entry is necessary for protection; or (iv) directing the host to ask that the suspect leave, thereby effectuating a disclosure pursuant to the principle of helpfulness. What police cannot fairly do is ignore the interests of third parties whose homes happen to contain suspects or evidence.

---

275. *Steagald v. United States*, 451 U.S. 204, 216 (1981); *see also id.* at 213 (emphasizing the need "to protect [the third party's] privacy interest in being free from an unreasonable invasion and search of his home").

276. *See id.* at 213–15.

277. *See id.* at 213 (reasoning that "judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant").

278. *See* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1680–81 (1998).

### C. Invidious Criteria

Even principles that are *prima facie* fair may have to bow in the face of unusually strong grounds for rejection. The most intuitive and practically important cases involve invidious, group-based search-and-seizure criteria and so engender objectionable systematic effects. When present, these invidious criteria render unfair what would otherwise be permissible searches and seizures. Thus, all the principles of fairness discussed so far remain incomplete, until combined with a principle prohibiting use of invidious investigative criteria.

But first, let's step back. We have seen that fairness sometimes demands that police have certain reasons for action when they undertake searches and seizures. However, police can act reasonably without being motivated by the considerations that make their conduct reasonable. For example, contractalism generally does not require that police correctly discern which legal theories render their conduct reasonable.<sup>279</sup> We might imagine a police officer who thinks, "I see someone driving over the speed limit, so I will pull him over with the goal of addressing an imminent threat to public safety." This officer might be wrong that the protection principle justifies a stop in this instance, given the improbability of future harm. Nonetheless, the officer would have observed an offense and so could have reasonable grounds to act based on the principle of responsibility. The officer's mistaken thought processes might justify criticizing the officer or holding her accountable. But requiring that the officer correctly glean the proper basis for her actions would not afford innocent persons any greater protection, and insistence on police perfection would create windfalls for wrongdoers. This default indifference to police motivation aligns with the case law, which focuses on objectively available reasons for action.<sup>280</sup>

Yet some motives are invidious, such that any principle allowing for them would be subject to reasonable rejection. The most obvious example is racial animus—that is, a belief that certain racial groups are in some respect different from others and so should, as a group, be subjected to greater search-and-seizure burdens. We have already seen a related point—namely, that population-based racial profiles are wrong independent and therefore cannot support searches and seizures pursuant to the principle of responsibility.<sup>281</sup> But that analysis was concerned only with showing the limits of when the principle of responsibility applies. The question here is both

---

279. See SCANLON, *MORAL DIMENSIONS*, *supra* note 16, at 52 (focusing on "what it is reasonable for the agent to believe in the situation"); SCANLON, *WHAT WE OWE*, *supra* note 16, at 219–20.

280. See, e.g., *Scott v. United States*, 436 U.S. 128, 138 (1978) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." (discussing *United States v. Robinson*, 414 U.S. 218 (1973))). The key doctrinal exception pertains to "programmatic searches." See *supra* text accompanying note 167.

281. See *supra* text accompanying note 118.

deeper and broader: where responsibility or some other justificatory principle admittedly does apply, do search-and-seizure principles nonetheless generate unfairness when they allow for police action predicated on views of racial difference?

The answer is yes: a principle that allows for searches and seizures based on a general view of racial differences would be subject to reasonable rejection, since it would compel members of socially disfavored racial groups to suffer systematically greater burdens relative to other groups. This claim rests on the idea that race differences are distinctive (though not unique) in that they implicate and exacerbate broader historical and social patterns of discrimination. As Scanlon has argued, “individual acts of discrimination on certain grounds,” including racial differences, “become impermissible because they support and maintain” broader social practices of unfair discrimination.<sup>282</sup> And “[n]o one can be asked to accept a society that marks them out as inferior.”<sup>283</sup> Racial criteria are thus invidious—and subject to reasonable rejection—in a way that many other modes of group differentiation, such as differential treatment for children or for one’s friends, generally are not. Scanlon also identifies a second basis for reasonable rejection of racialized criteria: because of race’s distinctive social meaning, a race-conscious search-and-seizure criterion would communicate a message of group inferiority, and that message might itself inflict an unjustified harm on affected persons.<sup>284</sup> These two related grounds for reasonable rejection are what make racial generalizations an invidious and unfair basis for conducting searches and seizures.

To illustrate how the prohibition on invidious criteria should constrain police justifications, imagine an officer who observes many vehicles violating criminal traffic laws but chooses to stop only drivers of a single racial group.<sup>285</sup> A principle that authorized that course of action would find some initial support in notions of responsibility, since the detained individuals would reasonably be suspected of criminal wrongdoing. Yet the officer’s action would still be unfair. Again, a principle that tolerated such race-based criteria for assigning investigative burdens would be subject to reasonable rejection by any individual who would consequently experience the adverse effects of a racial caste system. That compounding of preexisting discriminatory patterns is what makes racism an invidious mode of assigning personal burdens and a basis for reasonable rejection. By contrast, a principle that allowed police to follow enforcement priorities or choose among offenders via a lottery could be fair.<sup>286</sup> So would a principle that demanded that all offenders be stopped.<sup>287</sup>

---

282. SCANLON, MORAL DIMENSIONS, *supra* note 16, at 73.

283. *Id.*

284. *Id.* at 74. These concerns do not apply to some race-based criteria. *See id.*

285. *See, e.g.,* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 336 n.19 (1998) (discussing “the offense of DWB, driving while black” (cleaned up)).

286. *See* Harcourt & Meares, *supra* note 113 (defending randomization).

287. *See* KENNEDY, *supra* note 133, at 159–61.

The idea that the Fourth Amendment should prohibit racially motivated law enforcement contradicts *Whren v. United States*.<sup>288</sup> There, black defendants argued in part “that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car’s occupants.”<sup>289</sup> A unanimous Court responded that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”<sup>290</sup> But intentional discrimination can surely violate more than one legal rule at a time. And, on its face, the language of the Fourth Amendment seems to bar racist searches and seizures—the epitome of “unreasonable” police behavior. That intuition, we have now seen, is borne out by contractualist considerations of fairness.

By drawing attention to this point and incorporating it into a broader theory of the Fourth Amendment, contractualist reasoning opens up new doctrinal approaches to racial discrimination in law enforcement. Once informed by considerations of fairness, the Fourth Amendment can afford greater or different protections against governmental racism than the more broadly applicable Equal Protection Clause.<sup>291</sup> Assume that the Court is correct to hold, or will not change its mind, that pure disparate impact claims should not be cognizable under the Equal Protection Clause.<sup>292</sup> Even so, evidence of systematic disparate impact in criminal investigation would sometimes demonstrate unfairness and so generate Fourth Amendment violations. Again, we have seen that fairness attends to the perspectives of any reasonable objector, not just to the perspective of police.<sup>293</sup> Thus, a principle allowing for systematically disadvantaging a racial or other group can be a basis for reasonable rejection, even if no individual police officer has acted in a morally blameworthy fashion.<sup>294</sup> That point bears repeating: when a racial group suffers systematically disproportionate burdens, there are grounds for reasonable rejection even if no individual police officer is blameworthy.

Some might argue that the foregoing reasoning should lead to more radical results, since invidious criteria are always operative in the criminal justice system as it currently exists. For instance, implicit bias might systematically skew enforcement decisions to the disadvantage of certain racial groups, and historical discrimination might echo through time in ways that

---

288. 517 U.S. 806, 813 (1996).

289. *Whren*, 517 U.S. at 810.

290. *Id.* at 813.

291. U.S. CONST. amend. XIV, § 1 (constraining state laws generally).

292. See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

293. See *supra* Section I.C. Again, “searches” and “seizures”—not police—can be found “unreasonable” under the Fourth Amendment.

294. See Carbado, *supra* note 65, at 1031 (“[T]he Supreme Court’s conceptualization of racial profiling as a problem of motivation or conscious racial intentionality, rather than as a material harm that affects a person’s privacy and sense of security, positions racial profiling beyond the doctrinal reach of the Fourth Amendment.”).

likewise burden certain groups more than others.<sup>295</sup> Given these concerns, are all principles authorizing searches and seizures necessarily subject to reasonable rejection and therefore unfair? No, because to object to all principles allowing for any searches and seizures would itself be unreasonable: given the important role of the criminal justice system, many individuals could reasonably reject principles that would debilitate or preclude police investigation.<sup>296</sup>

Yet the systemic concerns just noted are critically relevant to whether search-and-seizure principles are subject to reasonable rejection. To accommodate those concerns, the Fourth Amendment should require that police engage safeguards that minimize the effects of background social facts, including racial discrimination, that generate unfairness.<sup>297</sup> For instance, non-emergency searches and seizures might be deemed reasonable only if the relevant police department has undergone implicit bias training and recorded information about its discretionary actions for later judicial review.<sup>298</sup> To the extent that these or other policies have lasting and cumulative effects, a Fourth Amendment of fairness would mark out a path toward greater racial equality.

#### CONCLUSION

Contractualism offers a useful, deontological way to reason about reasonableness. Drawing on that philosophical approach, this Article has outlined a number of principles that describe the basic features of Fourth Amendment fairness. But all of these principles are necessarily tentative and incomplete. Precisely because it is a mode of reasoning, Fourth Amendment contractualism does not insist on any fixed code of rules, so much as invite continued engagement of our moral powers.

---

295. See L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 *IND. L.J.* 1143, 1147 (2012) (discussing implicit bias and police discretion).

296. See SCANLON, *WHAT WE OWE*, *supra* note 16, at 236 (noting that it is not reasonable to eliminate all possible harm, given the need for some risky action).

297. See Richardson, *supra* note 295, at 1172–77.

298. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013).